

How Australia Overplayed Its Hand in the Timor Sea

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In 1976, the Australian ambassador to Indonesia wrote that, in deciding whether to support the Timorese people's right to self-determination or to accede to Indonesia's annexation of East Timor, Australia faced a choice between "Wilsonian idealism" and "Kissengerian realism." For reasons having a lot to do with petroleum, Australia decided to go with what it saw as the latter.

Today, the Timor Sea dispute remains unresolved, and it is clear that Australia still hasn't decided to go with the "Wilsonian idealism" option. But if Australia thinks that its strategy has instead been one of "Kissengerian realism," then it is sadly flattering itself. Australia's strategy isn't "realist" – it's petty bullying motivated by a very narrow political economy concern.

The short-term results for Australia have been somewhat favorable, if mixed, but there is reason to doubt whether this strategy will ultimately be in Australia's long-term interests. Australia has spent over forty years pursuing a sovereignty claim that was long ago discarded by international law, and, so far, its reach has continually exceeded its grasp.

I. Australia Overplays its Hand with Indonesia

In the early 1970s, Australia was fighting a losing battle under international law. The law of the sea was beginning to coalesce around the concept of the Exclusive Economic Zone (EEZ), which would grant states a right to exploit the natural resources that were within 200 nautical miles of its shores. Australia, which happens to enjoy extremely long, sloping continental shelves off of its coasts, also wanted recognition for its claim to the resources within the "natural prolongation" of the continental shelf, even where this prolongation extends beyond its 200 mile EEZ.

The rest of the world wasn't buying it. Although Australia did its best to advocate for its continental shelf claims, Australia [was well aware that international law was trending against it](#).

In [1971](#) and [1972](#), Australia entered into seabed boundary treaties with Indonesia. By general consensus, Australia took "[Indonesia to the cleaners](#)" in reaching these agreements, because the resulting treaties largely adhered to the natural prolongation principle endorsed by Australia, resulting in a seabed border that was drawn much closer to Indonesia's shore than to Australia's. Indonesia's acceptance of these borders can be explained by political factors, not legal ones, as it was clear that the natural prolongation principle was becoming rapidly becoming disfavored under international law.

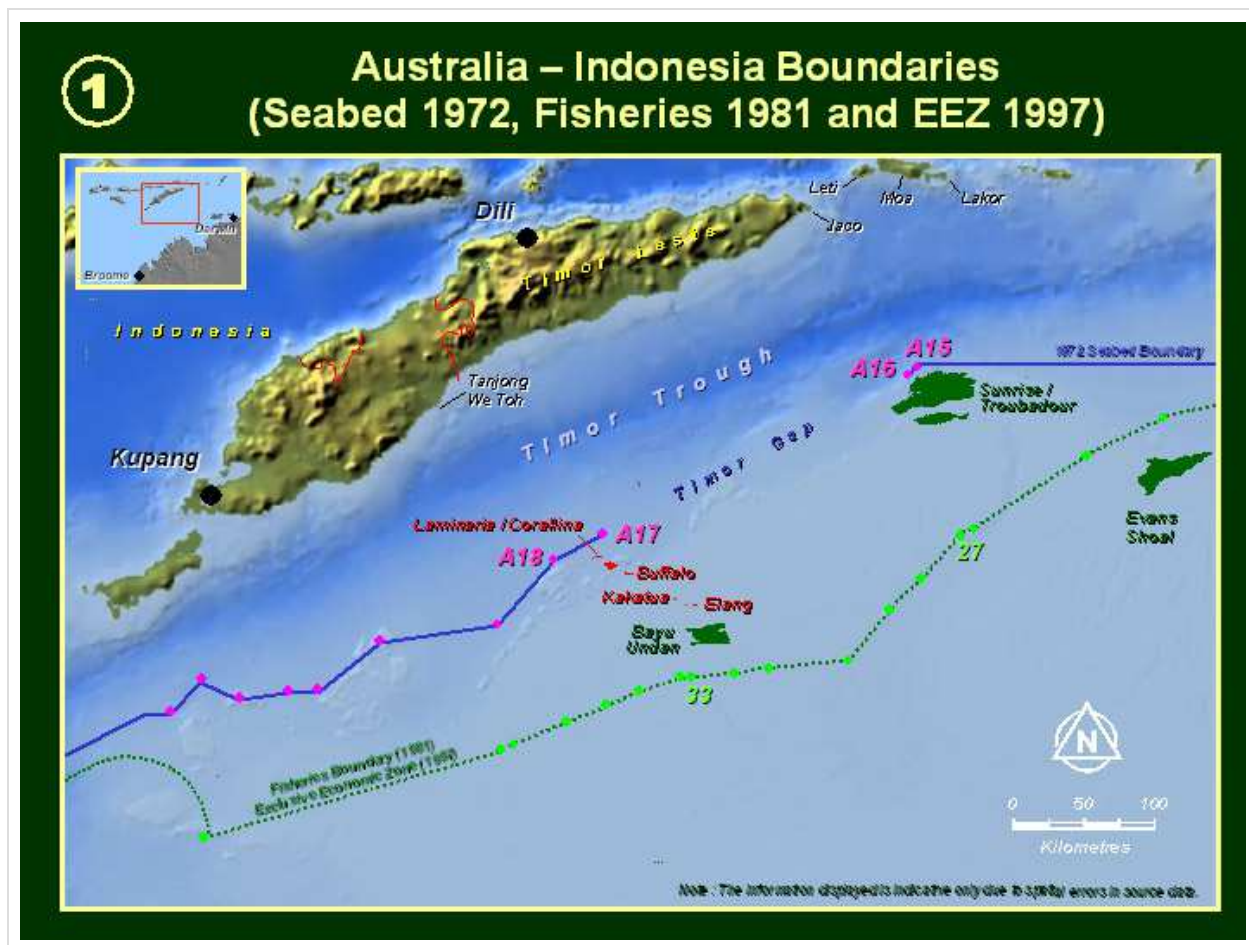
The treaties with Indonesia did not establish the maritime boundary between Australia and Portuguese Timor,

however, resulting in the “Timor gap.” Portugal insisted that any maritime boundary between Timor and Australia be drawn along a more equitable division, on a median line that was equidistant between the shores, as provided by not-yet customary international law. The dispute became even more acute in 1974, [Portuguese Timor leased out mining rights in the Timor Sea to a U.S. corporation, for a portion of the seabed expanse lying on Timor’s side of the equidistant line.](#) Australia protested, as it had already leased out that territory itself, to what was then Woodside-Burmah Oil. Although Australia knew its claims to the seabed were disputed, Australia [had made assurances to Woodside-Burmah, and to other corporations with leases in the Timor Sea, that the Australian government would defend its claims to that territory should there ever be any international conflict as to Australia’s title.](#)

So Australia made the deliberate choice not to enter into any conclusive agreements with Portugal concerning its maritime boundaries with what is now Timor-Leste. Rather than accept an equitable seabed division, Australia gambled on a chance to acquire a much more extensive portion of the Timor Sea, by standing by and awaiting a more amenable government to come into power in Timor-Leste.

Describing what Australia did as “standing by” is something of an understatement, in truth. Australia’s involvement in the annexation was not entirely passive acceptance. In the months prior to the invasion, Indonesia had not made East Timor a priority, and, if anything, Indonesia indicated a great deal of ambivalence towards its role in the island’s future. Afterwards, once the invasion had taken place, [Indonesia repeatedly expressed its belief that Australia “green lighted” the takeover of Timor — a claim which Australia would describe as simply a unfortunate misunderstanding on Indonesia’s part.](#) It’s not difficult to see where Indonesia got the impression from. There was an undeniable “nudge nudge, wink wink” quality to the Australian Prime Minister’s pre-invasion statements to Indonesia, such as his announcement that [“an independent Timor would be an unviable state and a potential threat to the area.”](#) (Two years later, the Indonesian Foreign Minister would deny that Australia told Indonesia to go ahead with the invasion – instead, Australia merely told Indonesia that it accepted the invasion was inevitable, so Indonesia [“should do it as quickly as possible.”](#))

Australia had imagined that, once Indonesia was in control, Australia could easily secure a boundary agreement that drew a straight boundary line across the East Timor maritime area, between the very favorable Indonesian-Australian maritime boundaries to the east and west of East Timor:



In the end, the Indonesian annexation of East Timor did not work out as Australia had anticipated. It turned out that Indonesia, although previously so accommodating with its seabed boundaries, was no longer quite so keen on accepting maritime treaties that disproportionately favored Australia. Indonesia resisted Australia's attempts to secure an inequitable seabed delimitation, and it was not until 1991, a full fifteen years after Indonesia's invasion of East Timor, that the Timor Gap Treaty came into effect between Indonesia and Australia.

And then, a mere eight years later, Timor-Leste gained independence after all, and all of Australia's hard work in securing the Timor Gap Treaty was wiped away. The treaty was so blatantly indefensible that Timor-Leste had little difficulty in convincing the world that Timor-Leste, as the successor state, would not be bound by its terms.

II. Australia Overplays Its Hand with Timor-Leste

After Timor-Leste came into existence, Australia was forced to renegotiate the division of the Timor Sea, in order to secure its access to the seabed resources on Timor-Leste's side of the median line. Going into treaty negotiations, Australia had every advantage over Timor-Leste in terms of size, power, infrastructure, capital, and statecraft experience, but Timor-Leste had at least one thing in its favor. While Timor-Leste was weaker than Australia on every other conceivable measure, Timor-Leste had the stronger claim under international law.

Australia responded the same way every powerful nation does, when it finds itself on the wrong side of international law in a dispute with a weaker nation: it did everything it could to remove international law from the equation. After years of negotiations – during which Australia’s negotiation strategies included economic blackmail and espionage, and likely bribery as well – Australia eventually succeeded in inducing Timor-Leste to enter into to a series of treaties that eliminated any possible recourse to international law.*

And this strategy made sense. States are encouraged to negotiate with one to resolve disputes regarding the delimitation of their respective EEZs or continental shelves, and there’s nothing wrong in Australia’s hardline strategy in negotiating over the Timor Sea’s petroleum. (Well, nothing wrong with it aside from the whole espionage part, anyway.) UNCLOS provides that the agreements over the division of the seabed boundaries should be reached “on the basis of international law,” but that doesn’t mean that any resulting treaty has to divide the territory in the manner that international law would dictate. States are free to reach treaty terms that, while based on international law, deviate extensively from how the ICJ might have accomplished the territorial division, had the task been given to the ICJ instead.

But in the case of the Timor Sea Treaty, and the International Unitisation Agreement for Greater Sunrise, and the Certain Maritime Arrangements in the Timor Sea Treaty, it looks as if Australia may have grossly overplayed its hand. These treaties were not simply the result of Australia driving a hard bargain over a disputed point of international law – they were the result of a decades-long strategy of coercive bargaining aimed at securing sovereignty over territory to which it had no defensible legal claim.

And the result? Australia’s great prize has been an expensive, uncertain stalemate. It’s been fifteen years since Australia first began to negotiate with Timor-Leste’s emergent government over the division of the Timor Sea, and the Greater Sunrise gas fields are no closer to completion than they were on the day that Timor-Leste voted for independence. And the corporations that hold mining rights in the disputes seabed territories have no more legal certainty today than they had forty years ago, before Indonesia’s annexation of East Timor.

Australia is also now facing proceedings in both the International Court of Justice and the Permanent Court of Arbitration, and there is a non-zero risk that Australia’s treaties with Timor-Leste will be annulled for its bad faith negotiations. Timor-Leste may eventually even succeed in kicking out the existing consortiums and attracting investment from other corners of the world.

And, even if Australia ultimately succeeds in keeping control of the seabed territory and manages to siphon off its percentage of the petroleum revenues, it will have come at the cost of decades of uncertainty and wasted expense. If Australia wins now, will its Timor Sea strategy still provide a net financial benefit to Australia, as compared with what Australia might have obtained under a less extreme strategy? Possibly – only Australia has the numbers to evaluate that. But if nothing else, its profit margin is getting smaller with every year that passes.

III. The Long-Term Interests Served by Australia’s Timor Sea Policy

The Timor Sea maritime delimitation remains unresolved today because Australia has insisted, at every opportunity, that any division of the Timor Sea must be based too much on the relative strength of its political and economic power, and too little on the relative weakness of its legal position.

But the potential benefits for Australia in taking this position just aren't that grand. This was never a situation where Australia risked walking away empty-handed. Any deal that Australia struck with Timor-Leste was always going to wind up with Australia getting a bigger piece of the pie than it was strictly entitled to under international law. But, by attempting to achieve a treaty arrangement that so disproportionately favors Australia over Timor-Leste, and that goes so far beyond what might have been expected based on the parties' initial bargaining positions, Australia ensured that any victory it achieved would be inconclusive.

International law obviously presents a big disadvantage to Australia in its claims to the seabed on Timor-Leste's side of the median line. But even when international law does not favor a state's interests in a particular dispute, it still provides one very significant advantage, to the states on both sides of the conflict: the stability and relative legal certainty that comes from an agreement backed by international law. Legal resolutions have their weaknesses, true, but they are much less subject to future challenges on the basis of changes in political or economic circumstances.

In 1974, if Australia had accepted Portugal's offer to establish a seabed boundary along the median line, there is every reason to believe that the dispute could well have been conclusively resolved then and there, never to be revisited again. Instead, Australia decided to take its chances with Indonesia instead.

In 1999, Australia should have realized that claiming the lion's share of the petroleum in the Timor Sea was no longer a viable strategy. Australia lost the gamble it took before when it refused to deal with Portugal, but instead of trying something different when Timor-Leste gained independence, Australia decided to try the same strategy once again.

Hindsight suggests that Australia's better course might have been to secure a treaty that, while still disproportionately favorable to Australia, was not quite as grossly disproportionate as the ones it ultimately obtained. If Australia had taken a more moderate path, and if the Timor Sea Treaty had been slightly more equitable the first time around, then perhaps it would have become a settled part of the legal landscape, avoiding any need to later negotiate the IUA or CMATS, or to engage in the present Hague arbitration and ICJ case brought by Timor-Leste.

But as it stands, the resulting treaties are so peculiarly at odds with customary international law that Timor-Leste doesn't have much to lose by continuing its collateral attacks to the treaties' validity. And whether or not Timor-Leste ultimately succeeds, Australia can't wind the clock back – Australia has already caused the Greater Sunrise fields to remain untapped for 40 years since their discovery.

This is not to say that Australia's Timor Sea strategy has been wholly self-defeating. There have been some significant advantages that Australia has been able to secure for itself, and which it would have lost had it acquiesced to international law at an earlier date. One major upshot for Australia has been the chance to deplete the Laminaria-Corallina gas fields while the legal dispute was unsettled, allowing Australia to retain 100% of the bureaucratic control and tax revenues, while Timor-Leste got 0%. Australia also succeeded in maintaining the lion's share of the bureaucratic control over Bayu-Undan, along with the rest of the petroleum in the JPDA. And, as a bonus, Australia even gets to keep 10% of the profits from the JPDA, too — when international law would have given it 0%.

But Laminaria-Corallina was always a sideshow in terms of total energy resources in the Timor Sea, and while the JPDA arrangement is exceedingly favorable to Australia, in comparison to its actual legal position, Australia still viewed even that as a concession to Timor-Leste, in comparison to the sovereignty claims that Australia championed (but international law ultimately rejected) in 1975.

Perhaps the most important prize for Australia, however, has been preserving Australian corporations' favored status as leaseholders for mining rights in the Timor Sea. If Portugal's median delimitation had prevailed in 1974, then the Bayu-Undan gas fields (and all the rest of the resources in the JPDA) would have gone to Oceanic, and other corporations that were granted leases to those mining rights while Timor was still under Portuguese control. Through Indonesia's annexation of East Timor in 1975, however, all the leases issued by Portugal were effectively annulled. Since then, those same core consortium of companies have been able to maintain their rights to the seabed that Australia originally granted in the 1960s and 1970s. Australia's treaties with Timor-Leste have all contained special provisions ensuring the continuity of Woodside's and ConocoPhillips' existing leases, and, before that, Australia's treaties during the time of Indonesian Timor all came [with sweetheart deals for corporations that held pre-1975 mining rights](#).

So Australia has gained some important outcomes through its Timor Sea strategy. But, has all of that been worth the costs?

Billions of dollars in petroleum is a lot of petroleum, and the oil and gas fields in the Timor Sea are a significant prize. But Timor-Leste is still only one very small country, and the Timor Sea is only one very small sea. (And besides – if it is truly is the tax revenues that Australia is most concerned about losing, then surely it could try and make some of that up by shaving off some of the tax concessions that it has granted to the petroleum consortiums?)

No matter what Australia wins in the Timor Sea, Australia has another foreign policy concern that is much bigger than Timor-Leste could ever be: China.

Because China, too, has made expansive claims to maritime territories, despite the lack of a plausible basis for these claims under international law. And China, like Australia, is also able to assert these territorial claims due to its vastly greater strength and power, relative to its maritime neighbors. And China, like Australia, has pursued [a strategy of eliminating any opportunity for its territorial claims to be challenged before an international tribunal](#).

But Australia's claims in the Timor Sea are chump change, compared to China's claims in the [Nine-Dashed Line](#). *That* is a true example of a realist strategy; Australia's pandering to energy companies doesn't hold a candle to China, when it comes to "Kissengerian realism."

And while Australia's dispute with Timor-Leste carries no risk of escalation, China's claims in the South and East China Seas [pose a serious security threat to everyone in the Pacific](#). Whatever financial benefit Australia ends up obtaining from its claims in Timor-Leste's half of the Timor Sea, would it be enough to offset the cost of any disruption, should China decides to back its own maritime claims up with force?

Australia, by itself, can't stop China's expansionism, of course. But by maintaining its current policy toward

Timor-Leste, [Australia has forfeited its ability advocate for the legal resolution of China's unlawful territorial claims](#). And, more generally, Australia also undermines whatever institutional force that international law might have to help peacefully resolve disputes over maritime territories.

Given those potential costs, is Australia correct in believing its Timor Sea strategy to be a shrewdly realist foreign policy, which serves Australia's long-term national interests by providing a possible opportunity to increase its annual tax revenue by .03%? Or is it a short-sighted economic policy that provides a minimal financial benefit at the cost of harming Australia's broader foreign policy interests?

-Susan

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