

## The rules of extraction: Australia and the Timor Sea

Posted By [Elisabeth Buchan](#) on October 10, 2016 @ 12:30 pm



On 19 September, Timor-Leste won a minor victory in its ongoing dispute with Australia over rights to resources in the Timor Sea. The UN Conciliation Commission, convened under the Annex V conciliation proceedings of UN Convention of the Law of the Sea (UNCLOS), rejected Australia's bid to block proceedings.

Australia has copped some heavy criticism over the affair. Though the Australian government indicated from the outset that it would challenge the ability of the commission to consider the dispute on the basis of existing agreements governing resource-sharing, Australia has been charged with avoiding international scrutiny. It has been suggested that the cornerstone agreement, the [Treaty of Certain Maritime Arrangements in the Timor Sea](#) <sup>[1]</sup> (CMATS) was negotiated by Australia in bad faith, and [exploited Timor-Leste's relative vulnerability](#) <sup>[2]</sup>. Australia has also been [accused of hypocrisy](#) <sup>[3]</sup> in calling on China to respect the recent Arbitral Tribunal ruling (another UNCLOS dispute settlement mechanism) over the South China Sea (SCS).

There's already a substantial commentary regarding the merits of Timor-Leste's claims (see [here](#) <sup>[4]</sup> and [here](#) <sup>[5]</sup>), or lack thereof ([here](#) <sup>[6]</sup>). Instead, I'll unpack the claim that Australia's conduct is at odds with its position on the SCS arbitration. Two important distinctions apply. First, the procedures invoked by the Philippines and Timor-Leste under UNCLOS are different. Second, while China refused to participate in dispute resolution, Australia was entitled to contest jurisdiction and [stated its willingness to engage constructively](#) <sup>[7]</sup> with proceedings.

Some history is helpful here. Australia's maritime border with Timor-Leste was [determined through negotiation](#) <sup>[8]</sup>. Since Timor-Leste's independence, two major agreements were reached that provide temporary revenue sharing arrangements. The 2002, [Timor Sea Treaty](#) <sup>[9]</sup> established a Joint Petroleum Development Area (JPDA), granting Timor-Leste 90% of resources revenue. The Great

Sunrise gas field (GS) was placed 80% within Australian jurisdiction (from 95% in the previous agreement), and the remaining 20% within the JCPA. In 2006, CMATS saw Australia concede a 50/50 split of GS revenue with Timor-Leste, and established a 50 year moratorium on negotiations.

Australia—like Timor-Leste, The Philippines and China—is party to UNCLOS. Member states must settle disputes peacefully or, failing that, participate in compulsory [dispute settlement procedures](#) <sup>[10]</sup> with binding decisions, subject to certain exceptions. One such exception allows parties to lodge a declaration to exclude sea boundary delimitation (SBD) from dispute resolution, a mechanism both Australia and China have invoked, along with many other states.

The Timor Sea dispute relates to SBD, so Australia could legitimately avoid the mechanisms for making legally-binding determinations on disputes. China can't because the SCS Arbitration doesn't concern SBD. The Philippines instituted proceedings before an Arbitral Tribunal, while Timor-Leste had to settle for a Conciliation Commission.

Both Australia and China have contested the jurisdiction of the Commission/Tribunal to determine their disputes. This has provoked allegations of rebuking the rules-based-order, which for Australia looks pretty hypocritical. But again, the situations are distinct.

China declined to participate in the SCS proceedings and dismissed the '[fatally flawed](#)' <sup>[11]</sup> ruling. Australia pursued its challenge through the procedure provided under UNCLOS, lodging an objection to the [competence of the commission](#) <sup>[12]</sup> on two grounds. First, that CMATS precluded the commission from forcing Australia to conciliation. Second, that the proceedings were inadmissible because it violated the 50 year moratorium established by CMATS.

The Commission rejected both arguments, finding that CMATS wasn't sufficient to avoid compulsory settlement because it lacked an alternate means to settle disputes over maritime boundaries ('[CMATS is an agreement not to resolve such disputes](#)' <sup>[13]</sup>), and subsequent negotiations hadn't produced agreement. The commission also decided that the violation of the moratorium didn't present an admissibility issue, and was for the parties to address elsewhere.

Australia's now obligated under UNCLOS to participate in conciliation proceedings. Australia will defend the boundaries negotiated under CMATS, which are based on an [established legal concept](#) <sup>[14]</sup> that maritime boundaries should reflect the 'natural prolongation' of a state's sub-sea land territory. The principle formed the basis of previous maritime boundaries negotiated with Indonesia in the 70s and 80s. Timor-Leste wants CMATS abandoned, asserting that [negotiations were carried out in 'bad faith](#)' <sup>[15]</sup> due to alleged Australian espionage activity. Instead, it seeks borders to draw based on 'equidistance'—the median line between states.

If an 'amicable settlement' is not reached within 12 months, it will be for the Commission to form its own conclusions on an appropriate settlement to the dispute. [Jurisprudence](#) <sup>[16]</sup> over the last 30 years has shifted toward the equidistance principle over natural prolongation, but this is not determinative. Other factors, such as the [benefit Timor-Leste has gained](#) <sup>[17]</sup> from recent resource-sharing arrangements, may be taken into account. Though the Commission's conclusions aren't binding (unlike the SCS Arbitration), a finding in favour of the equidistance [principle will be hard for Australia to ignore](#) <sup>[18]</sup>. But it's not certain [Timor-Leste will be better off](#) <sup>[19]</sup>. To secure ownership of Greater Sunrise, the eastern lateral boundary of the JPDA would need to be adjusted in Timor's favour—a harder case to make.

Timor-Leste ([quite reasonably](#) <sup>[20]</sup>) wants certainty over its maritime borders. It's fair to raise questions over the morality of Australia's reluctance to renegotiate, particularly considering Timor-Leste's dependence on Australia. But it's overly simplistic, if not fallacious, to conflate Australia's response with China's. In distinction to China's antipathy to international law, Australia has fulfilled its obligation under UNCLOS, and continues to pursue its claims through the relevant legal channels.

---

**Elisabeth Buchan** is a research intern at ASPI. Image courtesy of the [Australian Department of Defence](#).

---

URL to article: <http://www.aspistrategist.org.au/rules-extraction-australia-timor-sea/>

URLs in this post:

- [1] Treaty of Certain Maritime Arrangements in the Timor Sea: <http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html>
- [2] exploited Timor-Leste's relative vulnerability: <http://www.abc.net.au/news/2016-08-30/east-timor-demands-timor-sea-treaty-torn-up/7797118>
- [3] accused of hypocrisy: <http://www.globaltimes.cn/content/1005032.shtml>
- [4] here: <http://www.lowyinterpreter.org/post/2016/03/09/Timor-Sea-boundary-dispute-Australia-is-out-of-step-with-international-best-practice1.aspx>
- [5] here: <https://viewfromll2.com/2014/03/10/how-australia-overplayed-its-hand-in-the-timor-sea/>
- [6] here: <http://www.lowyinterpreter.org/post/2016/03/03/Timor-Rules-based-order-and-spying.aspx>
- [7] stated its willingness to engage constructively: [http://foreignminister.gov.au/releases/Pages/2016/jb\\_mr\\_160926.aspx](http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160926.aspx)
- [8] determined through negotiation: <http://www.abc.net.au/news/2016-08-28/east-timor-australia-maritime-border-to-be-negotiated-the-hague/7791778>
- [9] Timor Sea Treaty: <http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html>
- [10] dispute settlement procedures: <http://www.austlii.edu.au/au/journals/UQLawJI/2005/7.html>
- [11] 'fatally flawed': <http://www.theaustralian.com.au/opinion/arbitration-on-the-south-china-sea-dispute-is-fatally-flawed/news-story/399a838be578d26ecda1a44a411b4ba2>
- [12] competence of the commission: <https://www.britannica.com/topic/competence-and-jurisdiction>
- [13] CMATS is an agreement not to resolve such disputes: <https://pcacases.com/web/sendAttach/1919>
- [14] established legal concept: <http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5>
- [15] negotiations were carried out in 'bad faith: <http://www.smh.com.au/federal-politics/political-news/east-timor-takes-australia-to-un-over-sea-border-20160411-go39tl.html>
- [16] Jurisprudence: <http://www.austlii.edu.au/au/journals/AURELawJI/2005/60.pdf>
- [17] benefit Timor-Leste has gained: <http://www.sbs.com.au/news/article/2016/09/26/east-timor-sea-conciliation-proceed>
- [18] principle will be hard for Australia to ignore: <http://thediplomat.com/2016/09/the-precedent-setting-timor-leste-and-australia-unclos-case/>
- [19] Timor-Leste will be better off: <http://www.lowyinterpreter.org/post/2016/02/24/East-Timor-maritime-boundary-The-equidistance-principle.aspx>
- [20] quite reasonably: <https://www.eurekastreet.com.au/article.aspx?aeid=36275#.V-yr2Ih9670>

Copyright © 2016 The Strategist. All rights reserved.