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(Photo: Jesta Images/Getty)

Timor Sea dispute: progress and prospects as a deal emerges

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Throughout the course of 2017, Australia and Timor-Leste have negotiated in international conciliation proceedings to resolve their protracted disagreements over hydrocarbon resources and maritime boundaries in the Timor Sea.

So far, we know the two countries have reached an agreement on maritime boundaries. This is significant given the history of successive Australian governments seeking a delay. Yet the precise detail of where the boundary will be located has been kept under wraps as talks continue around how to develop the 'shared resource' of the valuable yet undeveloped Greater Sunrise gas field.

The negotiation is being conducted before a panel of experts under a never before invoked dispute resolution process from the UN Convention on the Law of the Sea. This expert panel was to produce a final 'non-binding' set of recommendations. Importantly, however, it appears the two countries have reached agreement through the negotiation rather than waiting

for the final report. Both states have already negotiated the text for a treaty on maritime boundaries.

The agreements may be finalised by the end of the year. It is also becoming clearer that the conditions required for a sustainable deal – agreed maritime boundaries and a plan to develop the resources – are falling into place.

The Past Failure

The challenge is pressing. The previous deal to govern the contested Greater Sunrise field – the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) – was abandoned in January 2017 as part of a ‘good faith’ breakthrough in the proceedings. Timorese politicians had long argued that the CMATS was not fair. Australia had steadfastly supported CMATS, yet agreed to dissolve the agreement in return for Timor-Leste abandoning two international legal proceedings against Australia over espionage claims.

CMATS also failed because it set aside two enduring disagreements: the 2006 deal placed a moratorium on deciding the final maritime boundary and avoided the crucial question of how Greater Sunrise would be developed. Timorese leaders such as Xanana Gusmao and Alfredo Pires wanted a pipeline to carry the gas to an onshore processing plant on Timor-Leste’s south coast as part of an ambitious oil industrialisation strategy. But they could not persuade the venture partners the pipeline was commercially viable. Timorese leaders subsequently reinvigorated the pursuit of maritime boundaries.

Maritime Boundaries

Both sides have maintained a commitment to the confidentiality of negotiations and information has only been made public through carefully worded press releases.

On 1 September, Australia and Timor-Leste announced an agreement on ‘the central elements of a maritime boundary’ in the Timor Sea. It would finalise ‘the legal status of the Greater Sunrise gas field, the establishment of a Special Regime for Greater Sunrise, a pathway to the development of the resource, and the sharing of the resulting revenue’.

While we don’t know yet where the boundaries are located, it seems clear from the press release that Timor-Leste was forced to compromise on its exclusive claim to Greater Sunrise in order to get an agreement on maritime boundaries. This will allow Timor-Leste to claim a moral victory against Australia, even if those maritime boundaries provide negligible material gains from CMATS. A moral victory for Timor-Leste around ‘completing sovereignty’ provides a good foundation for an enduring resolution as it will placate public demands among Timor-Leste’s public and supporters for delimitation.

The Development Plan

Maritime boundaries have been the focal point of public advocacy, but it is the development plan that will be central to the success of the agreement. Historically, it was the inability of Timorese leaders to secure a pipeline to the country’s south coast that ultimately led to the resumption of symbolic maritime boundary claims.

The development plan is being negotiated between Timor-Leste, Australia and the commercial venture partners, headed by Woodside. It seems unlikely Timor’s leaders will get their pipeline but parts of its development plan may be incorporated in the agreement. This will depend upon how wedded Timorese political leaders are to the Tasi Mane project on Timor-Leste’s south coast. The big question is also whether Timor-Leste will win a revenue share greater than 50:50.

For the agreement to be sustainable, both sides will need to consider it fair and mutually beneficial. Yet this is not a sufficient condition, as the Timorese government promoted the CMATS as both fair and mutually beneficial after it was signed.

The other important lesson from the failed CMATS deal is it lacked broad support across political elites in Timor-Leste.

While it was a FRETILIN government that signed the CMATS deal, it was successive Xanana Gusmao-led governments (and later, Dr Rui Araujo) that sought to undo the treaty. Any fresh deal will also need to withstand the test of domestic politics.

This is significant given the current political turmoil in Timor-Leste. The newly re-instated FRETILIN government has been unable to pass its national agenda through parliament. It has been stymied by an opposition led by the chief negotiator in the Timor Sea proceedings, Xanana Gusmao. As long as Gusmao continues to be a part of the negotiations there is a better shot of the agreement being sustainable. If FRETILIN does not pass its agenda a second time, it could set the scene for a constitutional crisis.

Selling The Deal

An important element of any successful international negotiation is to 'sell' the deal to constituents. In this case, the invested audiences are the Timorese public and a small number of Australian-based advocates.

Maritime boundaries will most likely need to be based on the median line to be perceived as fair. But what the 'median line' means is legally ambiguous. If Timor-Leste has given away too much territory in its pursuit of finalising maritime boundaries, civil society advocates may become critical of the agreement, as they were of CMATS for delaying boundary delimitation. The Timor Sea Justice Campaign, for instance, recently tweeted that a boundary following international law would see most, if not all, of Greater Sunrise go to Timor-Leste. This is not necessarily true: the interim eastern lateral line that split Greater Sunrise was originally based on principles of simple equidistance.

In any case, a solution that does not conform broadly to the key principles of UNCLOS may be hard to sell to advocates of Timor-Leste's claims. This is also necessary for Australia as it supports primacy of the so-called 'rules based order' in other regional maritime disputes.

The Importance Of Bilateralism

One positive from this negotiation is while it has been undertaken under the auspices of the UN Compulsory Conciliation (UNCC), using the Permanent Court of Arbitration as a registry, the UNCC itself is not a court. It does not have the power to provide a judgement that is binding on all parties. The primary method of dispute resolution is primarily through bilateral diplomacy assisted by a panel of conciliators.

This means both sides must agree to the terms of the agreements, yet the involvement of the UNCC helps avoid the perception of unfairness that plagued CMATS, particularly after allegations that Australia spied on Timor-Leste's negotiating team in 2004. Avoiding the International Court of Justice or a similar arbitral tribunal also allowed for a quicker resolution. This is particularly important as over 90% of Timor-Leste's state budgets is drawn from oil revenues developed under separate arrangements, which are expected to run out in the early 2020s.

Ultimately, Timor-Leste requires a deal that provides material and symbolic gains in order to justify its risky decision to abandon CMATS. For Australia, the agreement needs to mitigate the reputational harms that have come from its *realpolitik* approach to the issue over four decades, and assist its smaller neighbour deal with short- and medium-term economic development.

An agreement finally appears to be in sight.