

SUBMISSION

Consequences of termination of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS)

from

**Timor Sea Justice Forum NSW
(TIMFO)**

10 March 2017

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Submission of the Timor Sea Justice Forum NSW (TIMFO)

The Timor Sea Justice Forum NSW welcomes the opportunity to make a submission on the termination of the CMATS Treaty. (See Appendix 1 for comment on the National Interest Analysis (NIA) provided as material relevant to matter.)

The Forum would be very pleased to have the opportunity of a representative appearing in person and giving evidence.

1. Background

The CMATS Treaty was negotiated between 2004-2007. It dealt with the resources of the Great Sunrise area, the majority of which lies in a disputed area, with the remainder in the Joint Petroleum Development Area (JPDA) which is governed by the Timor Sea Treaty of 2002. Because the area lies partly in a disputed area (82%) and partly in the JPDA (18%), it was decided that the CMATS Treaty was necessary to treat the fields as a single entity. See Appendix 3 for map.

In 2012-2013 the Timorese government alleged that the negotiations over CMATS had been compromised because of Australian espionage. It was alleged that listening devices had been installed in the Timorese Prime Minister's office in conjunction with an AusAid program through which Australia was assisting Timor-Leste to rehabilitate its infrastructure after the violence during the Indonesian military's withdrawal in 1999.

As a result of the allegations, Timor-Leste declared the Treaty null and void and took Australia to Court in The Hague. Subsequently, Timor-Leste reiterated its requests for formal discussions with Australia over the finalisation of the maritime border, but Australia refused.¹

Following the spying allegations, and in order to pursue a fair and permanent border, Timor-Leste had no option but to invoke compulsory conciliation under the United Nations Convention on the Law of the Sea (UNCLOS), and Timor-Leste and Australia are now involved in that process. CMATS provides for termination under certain circumstances, the terms of which have been legally met.² Australia has agreed to the termination, and Timor-Leste has agreed to not proceed with the espionage case against Australia.³

¹ <http://www.smh.com.au/federal-politics/political-news/pm-malcolm-turnbull-disappoints-east-timor-on-talks-on-maritime-boundary-20160301-gn798f.html>

² <http://www.latrobe.edu.au/news/articles/2017/opinion/timor-leste-terminating-maritime-treaty>

³ <http://www.abc.net.au/news/2017-01-24/east-timor-drops-its-spying-case-against-australia/8209400>

2. Overview

The consequences of decisions regarding the termination of the CMATS Treaty are serious and will be long-lasting.

2.1 Consequences of not supporting CMATS termination

First, if the parliamentary committee recommended against termination it would contradict the announced intentions of the Australian government. Such an action would delegitimise Australia's current negotiations in the conciliation commission, and would jeopardise future negotiations. It would show a profound lack of goodwill and good faith, and undermine the confidence building measures that have characterised the deliberations so far.⁴

Not to proceed with the termination of CMATS would reverse the process towards final resolution of the Timor Sea issues. It would prolong the life of a running sore which has influenced Australian decisions detrimental to the Timorese people's welfare and the Australian people's integrity for decades. It would destroy what little regard many have for the capacity of Australian governments to treat smaller and weaker neighbours with dignity and good faith. It would further erode any trust in Australia which the government and people of Timor-Leste may have salvaged up to this point, increasing the already substantial mistrust of Australia in this shameful process.

2.2 Consequences of supporting CMATS termination

Second, however, the termination of the CMATS Treaty is an opportunity for Australia to **move towards redressing historical errors**, to enhance **Australian international standing**, to assist the **economic viability of a small but strategic neighbour**, and to **protect regional security**.

3. History

The history of successive Australian governments' dealings with East Timor is a deeply flawed saga, with the exception of the eventual upholding of Timorese rights at the end of 1999. The matters of the Timor Sea have been closely intertwined with government decisions and actions for decades.

3.1 Timor Sea influence on Australian decisions

Underlying the Australian support of the Indonesian invasion and occupation (1975-1999) existed the ongoing desire to exploit the resources of the Timor Sea in a way that was favourable to and easy for Australia. For example, in 1974 government officials stated:

"Indonesian absorption of Timor makes geopolitical sense. Any other long-term solution would be potentially disruptive of both Indonesia and the region. It would help confirm our seabed agreement with Indonesia. It should induce a greater readiness on Indonesia's part to discuss Indonesia's ocean strategy."⁵

⁴ <https://pca-cpa.org/en/search/?q=Timor-Leste>

⁵ Wendy Way, ed., *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-1976*,

Ambassador Woolcott wrote from Jakarta on 17 August 1975:

"It would seem to me that this Department (Minerals and Energy) might well have an interest in closing the present gap in the agreed sea border and that this could be much more readily negotiated with Indonesia by closing the present gap than with Portugal or independent Portuguese Timor." ⁶

3.2 Timor Gap

Australia speedily bestowed on Indonesia official recognition of sovereignty over Portuguese Timor in 1979 and ten years later divided the resources of the Timor Sea Gap area 50/50 with Indonesia, despite the illegal and unrecognised nature of the annexation. More recently, the desire for maritime resources from the area has moved Australia to continue to pursue claims to resources to which it is not entitled under current international law, e.g. the now depleted Laminaria-Corallina fields.

3.3 Withdrawal from UN instruments

Just two months before the declaration of Timorese independence in 2002, Australia withdrew from the maritime boundary jurisdictions of UNLOS and the International Court of Justice, thus forcing Timor to deal with Australia without recourse to a recognised judicial umpire, and to evade international measures for deciding where boundaries should lie.⁷

4. Australian International Standing

4.1 Recent Statement

Australia's poor record of observing international standards in relation to the Timor Sea is further illustrated currently regarding the South China Sea. Official Australian advice concerning problems in that area is that international standards should be followed. The Foreign Minister has said:

"..we urge the parties, the claimants to resolve their differences peacefully, negotiate as long as the outcome is in accordance with international law, or resort to arbitration as the Philippines did through UNCLOS."⁸

Nevertheless, the Foreign Minister has taken pains to point out that in the matter of the Timor Sea, the findings of the compulsory conciliation, conducted by the Permanent Court of Arbitration of which Australia is a member state, are "non-binding".⁹

See Appendix 2 for further comment involving the "non-binding" nature of the process.

(Canberra: Department of Foreign Affairs and Trade, 2000), 58.

⁶ Way, ed., *Australia and the Indonesian Incorporation of Portuguese Timor*, 314.

⁷ Kim McGrath, "Oil, gas and spy games in the Timor Sea" *The Monthly*, (April 2014), accessed 10 July, 2014.

<http://www.themonthly.com.au/issue/2014/april/1396270800/kim-mcgrath/oil-gas-and-spy-games-timor-sea>

⁸ <http://www.juliebishop.com.au/doorstop-interview-washington-dc-united-states/>

⁹ http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160829c.as

4.2 Risks

If the Australian government was as enthusiastic about observing negotiations and resolutions concerning the Timor Sea as it is about the South China Sea we would be accorded greater respect by other nations in our region, and the world at large. The readiness to appear to cooperate only when it suits leaves Australia vulnerable to accusations of hypocrisy from neighbouring nations, thus reducing trust. There is already enough scepticism about Australia's position, goodwill and intentions concerning the conciliation negotiations. Perhaps government officials do not yet realise the depth of contempt for Australia which remains as a result of the alleged spying, both among Australians and Timorese.

The opportunity now exists for Australia to act as it speaks, and operate according to international norms to finalise the maritime boundary with Timor-Leste.

See Appendix 2 for further comment on the avenues open to Australia to bring this matter to a speedy conclusion.

5. Economy

5.1 Disparity between the two nations

The termination of the CMATS Treaty opens the way for the delimiting of a maritime boundary between Australia and Timor-Leste, a move which will have effects on the economies of both nations. In this regard it is important to consider the relative wealth of both. Timor-Leste is proud of its advancement on the Human Development Index (HDI) to number 133,¹⁰ while Australia is at Number 2. The GDP of Timor-Leste in 2016 was \$4.975 billion dollars while Australia's was \$1,188.764 trillion dollars.¹¹ Obviously, the disparity reflects far more than difference in population (Australia: 23.1 million; Timor-Leste: 1.2 million).

While there is nothing in this matter which should be considered from the point of view of “charity”, the extreme disparity between Australia’s and Timor-Leste’s prospects underlines the importance of a swift and fair resolution.

5.2 Justice

If the setting of a new boundary is done fairly, the Timorese would gain at least the bulk of the resources of the giant Greater Sunrise fields, valued in the range of \$40 billion.

These fields are East Timor’s last remaining natural resource to provide the wealth needed to provide education, health, infrastructure and job creation for future generations of Timorese people. Rather than Australia taking 50% of this wealth (under the 2006 CMATS Agreement) or 80% (under the 2002 Timor Sea Treaty), we should simply agree to a median line border which would ensure that the Timorese received that share Greater Sunrise which is due to them under international law.

¹⁰ <http://hdr.undp.org/en/countries/profiles/TLS>

¹¹ <http://statisticstimes.com/economy/countries-by-projected-gdp.php>

5.3 Indonesia

Concerns have been raised in some quarters about Indonesia's rights in regard to the Timor Sea. If Indonesia has problems, then Indonesia has the capacity to address them in appropriate ways. These matters should not be used to prolong or obfuscate the proceedings involving Timor-Leste. Indonesia is not the problem here. The problem has been, and remains, the Australian unwillingness to act fairly in regard to Timor-Leste. The complicated factors involving the lateral boundaries affected by median line delimitation are not insurmountable if good faith and willingness to engage honestly are valued principles.

5.4 Strengthening relationship with Timor-Leste

The termination of the CMATS Treaty allows for Australia to put right our present relationship with the Timorese people. This can be done by immediately negotiating a new border in good faith, finalising it as soon as possible, and ensuring that median line principles prevail as the basis of decisions, alongside observance of all relevant and current United Nations Conventions.

6. Regional Security and Stability

6.1 Economic basis of security

In economic terms, it is in Australia's long-term national interest to have neighbouring nations such as East Timor which are stable politically and whose populations have growing standards of living so the people live in hope and optimism rather than anger and despair. This brings peace to our immediate region.

Moreover, it is to Australia's long-term economic interest to have a growing middle class in neighbouring countries such as East Timor. The people of East Timor can then purchase more of our exports and avail of our services such as tertiary education. A growing and prosperous East Timor is to the benefit of both countries.

6.2 Vacuums tend to be filled

The economic prospects of the Timorese people directly affect regional security and are of concern to Australians given Timor-Leste's geographical proximity. If Australia does not fulfill its obligations as a fair neighbour, there are others which may desire to fill the vacuum.

The contributions of China to the development of Timor-Leste are easily seen. Important government buildings, and now extensive roads are part of the assistance now being given to Timor-Leste. As well as calling on the China to obey international law in the South China Sea, Australia is well advised to consider carefully the influence which that nation already wields in the region, and may wield in the future if Australia pursues policies which alienate neighbours.

6.3. Completion of Australia's border

Nearly two per cent of the Australian border remains incomplete, that is, the section directly opposite the coastline of Timor-Leste. It is interesting that a modern and rich nation such as Australia has not undertaken to finalise its borders. Australians have the right to a complete border. See Appendix 3 for map.

7. Conclusion

In all, the termination of the CMATS Treaty is a crossroads for Australia. Decisions can be made as to the best way of approaching all the attendant problems. The Australian government could choose to operate from a position which interprets "national interest" narrowly and greedily, or it could choose to make decisions which observe both the spirit and the letter of international law and which therefore benefit the most vulnerable.

If the Australian government takes the latter course, Australia would contribute to the development which Timor-Leste has been denied for so long as well as ensuring the prosperity and stability of a very close neighbour whose history is tightly entwined with ours.

The Timor Sea Justice Forum NSW urges the Joint Standing Committee to support the termination of CMATS. This is an important and necessary step towards resolving this long-term difficulty with our poorest neighbour.

We encourage the committee to go further and recommend that the government move as quickly as possible to finalise negotiations for a fair and permanent border with Timor-Leste.

8. Recommendations

- 8.1 That the committee upholds the government's decision to terminate the CMATS Treaty in full**
- 8.2 That the committee urges the government to take all appropriate steps to finalise the maritime boundary between Timor-Leste and Australia**
 - 8.2.1 according to current international law and standards**
 - 8.2.2 using median line principles**
 - 8.2.3 in good faith**
 - 8.2.4 with all possible speed**

The Timor Sea Justice Forum NSW (TIMFO) thanks the Committee for considering our submission. We would welcome the opportunity to appear at a committee hearing.

Appendix 1

Significant inclusion and omission from NIA

It is interesting that the National Interest Analysis (NIA) ¹provided is careful to note that in the Joint Petroleum Development Area (JPDA), 90% of the resources go to Timor-Leste and 10% to Australia. It would be unfortunate if the intention to include that percentage share was to suggest that there was an underlying "generosity" on Australia's part, or that Timor-Leste was receiving the best end of a bargain. In fact, if international standards had been applied in 2002 when the Timor Gap Treaty was re-negotiated as the Timor Sea Treaty covering the JPDA, 100% of the resources would be Timor's. Furthermore, there is no mention of the considerable downstream benefits which Australia gained from the exploitation of Bayu-Undan in the JPDA. Yet between Point 6 and Point 7 of the NIA there is a very large historical Timor Sea gap, that is, there is no mention of the alleged espionage by Australia on the Timorese negotiators involved with the CMATS Treaty. These allegations occasioned Timorese legal challenges, caused Australia well-deserved embarrassment, and contributed to the termination of the CMATS Treaty. The fact that Timor-Leste has withdrawn its legal case against Australia in this regard has done little to remove suspicion from the minds of Australians who are increasingly frustrated and disappointed over successive governments' treatment of our wartime friends.

It may be argued that spying allegations are irrelevant to this exercise, but then one wonders why there is mention of Timor's share of the aforesaid upstream benefits, which appears equally irrelevant. Both the omission and the inclusion have the effect of putting Australia in a positive light.

Given the history of the way Australia has treated the Timorese people from World War II onwards, any such attempts to enhance positive Australian images and ignore the less positive simply repeat the historical Australian sacrifice of Timor for national gain. They remove from "national interest" anything which involves fairness or integrity.

¹http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS/Treaty_being_considered

Appendix 2

Comment on Articles in Annex V

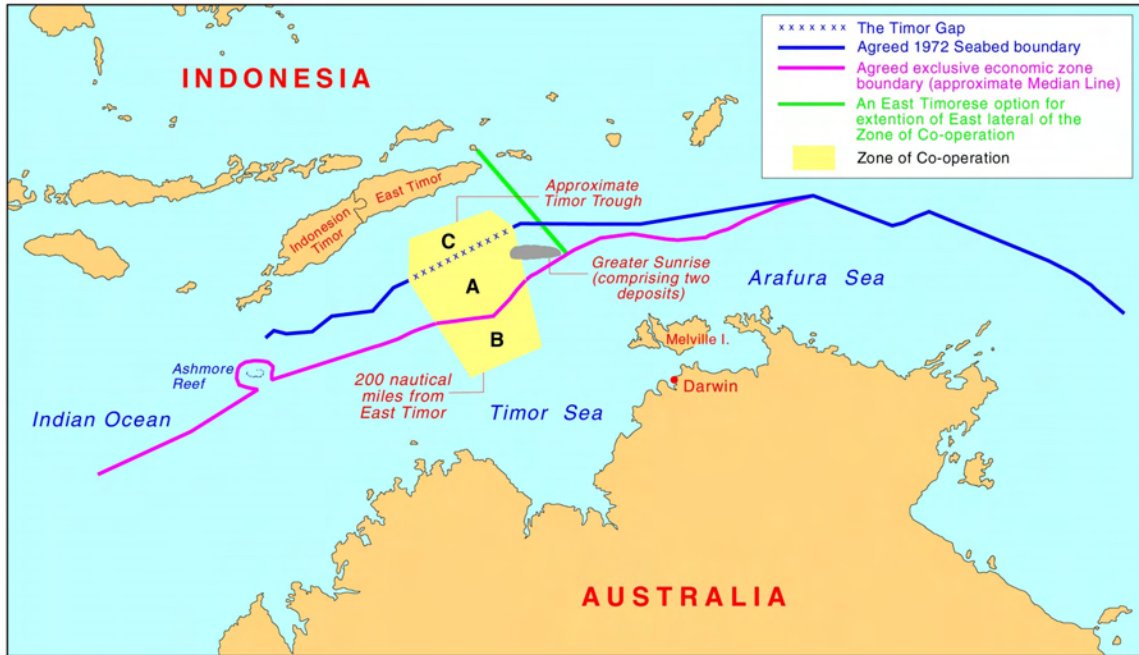
According to the rules of the Conciliation under the Permanent Court of Arbitration, the Australian government could indicate to the Timorese government that it is willing to come to an amicable solution and finalise the Timor Sea question without waiting for the determination of the Compulsory Conciliation.¹ If the Australian government, through the words of the Foreign Minister,² can choose to isolate and emphasise the "non-binding" nature of the findings of the conciliation, as defined in Article 7,³ it could equally well isolate and emphasise the freedom to bring the matter to speedier and friendlier conclusion, granted by the conciliation process in Article 5.

¹ http://www.un.org/depts/los/convention_agreements/texts/unclos/annex5.htm Annex V, Article 5.

² http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160829c.as

³ http://www.un.org/depts/los/convention_agreements/texts/unclos/annex5.htm Annex V, Article 7.

Appendix 3 Maps



<http://www.atns.net.au/objects/Timor.JPG>



http://www.ga.gov.au/_data/assets/image/0013/15142/AMJ_Australia_a0-display.jpg