

The Joint Standing Committee on Treaties (JSCOT) hearing on review of amendments to the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* (CMATS Treaty), Statement by Professor Clive Schofield, Director of Research, Australian National Centre for Ocean Resources (ANCORS), University of Wollongong (UOW) and Leader of the Sustaining Coastal and Marine Zones research theme, UOW Global Challenges Program.

Objective of the Proposed Amendments

The aim of the proposed amendments is to alter the CMATS treaty prior to its cancellation such there is no possibility of the continuation of CMATS contrary to the agreement of its parties to terminate it. It is my considered view that this is an unfortunate turn of events given that CMATS represents a balanced outcome resulting from an arduous negotiation process that offered significant potential benefits to both Australia and Timor-Leste, in particular a 50:50 sharing of the Greater Sunrise complex of fields. In particular it is difficult to envisage Timor gaining as much as the CMATS was likely to deliver through delimitation negotiations.

Maritime Boundary Delimitation Issues

A key consequence of the termination of the CMATS treaty is that the moratorium on boundary delimitation included in the CMATS treaty is removed. This paves the way for negotiations on a permanent maritime boundary. Such negotiations are highly likely to also involve Indonesia leading to a potentially complex trilateral negotiation that may take a considerable time to resolve.

The termination of the CMATS Treaty will not impact on pre-existing treaties, notably the Australia-Indonesia continental shelf agreements of 1971 and 1972 and the 2002 Timor Sea Treaty which remain in force.

The Role of Natural Prolongation

In achieving the 1971/1972 seabed boundaries Australia argued on the basis of 'natural prolongation' concepts, that is, that the majority of the seabed of the Timor Sea lies on the Australian continental shelf rather than that of Indonesia (or Timor Leste). Such arguments have been largely undermined by the advent of the United Nations Convention on the Law of the Sea (UNCLOS) and particularly the introduction of the 200 nautical mile EEZ. Shortly after UNCLOS was opened for signature in 1982, the ICJ ruled in the Libya-Malta Case of 1985 that for areas within overlapping EEZs, "the geological and geomorphological characteristics of those areas...are completely immaterial". Should Australia continue to base its claims on geophysical factors in negotiations with Timor Leste, it can be anticipated that Timor Leste will mount strong arguments against Australia's position.

Evolving Approaches to Maritime Delimitation

Articles 74 and 83 of UNCLOS, dealing with delimitation of the continental shelf and exclusive economic zone (EEZ) respectively, call in identical general terms for delimitation to be "effected by agreement" or, pending agreement, "provisional arrangements of a practical nature" may be entered into for a "transitional period". Other than a general statement that such agreements are to be reached on the basis of international law in order to achieve "an equitable solution", UNCLOS is silent concerning how agreements are to be reached in practical terms. In particular, no preferred method of delimitation is indicated.

That being said, in recent cases international courts and tribunals have applied a three-stage process. This was first articulated by the International Court of Justice in 2009 in the *Black Sea Case*. This consists of First, the construction of a provisional delimitation line using geometrically objective methods, that is, “an equidistance line will be drawn *unless there are compelling reasons that make this unfeasible* in the particular case” [emphasis added]. At the second stage factors are considered which may merit a shift in the provisional delimitation line and at the third stage a disproportionality test is to be applied. Subsequent international decisions have likewise applied the three-stage approach.

A key issue in any negotiation towards a permanent maritime boundary between Australia and Timor Leste is likely be Timor Leste’s arguments that its ‘window’ on the Timor Sea, presently defined by the Timor Gap, should be widened. Certainly the Gap (c.120 nautical miles) is narrower in the central Timor Sea as opposed to Timor Leste’s coastal front (c.140 nautical miles) so Timor Leste’s argument has some merit. It is uncertain, however, that this relatively moderate narrowing of Timor Leste’s maritime entitlements in the Timor Sea based on equidistance merits the substantial shift in the lateral maritime boundaries that would be crucial to Timor Leste gaining a greater share of the Greater Sunrise complex of fields than CMATS would have delivered in any case.

In particular, for Timor Leste to gain greater than the 50% share of Greater Sunrise provided for under CMATS there would have to be substantial discounting of Indonesia’s Leti islands. This appears unlikely given that some of the islands in question such as Leti Island itself are substantial (c.90km²) and populated. Even bearing in mind the relatively ‘high bar’ set for ‘full’ island status provided by the Arbitration Tribunal in the South China Sea case (the Philippines vs China, 2016), there seems little doubt that such features are capable of generating EEZ and continental shelf rights. Additionally, these Indonesian islands are fronted by segments of Indonesia’s archipelagic baselines system.

Conciliation

While the outcome of the conciliation process, at least in relation to maritime boundaries, is yet to be determined it can be observed that one maritime conciliation process has already occurred – that between Iceland and Norway (Jan Mayen Island).

In 1980 Iceland and Norway reached agreement on a maritime boundary relating to the EEZ, to be based on 200nm arcs measured from basepoints on Iceland. The agreement referred the question of continental shelf delimitation to a Conciliation Commission. This body subsequently made recommendations that whilst the continental shelf boundary should coincide with the EEZ boundary, a joint zone should also be established and a further treaty between the parties was concluded in 1981 which gives effect to the recommendations of the Conciliation Commission. The 45,470km² joint zone established under the 1981 agreement unevenly straddles the maritime boundary line with 61 per cent on the Norwegian side and 39 per cent on the Icelandic side. Each state is entitled to 25 per cent of revenues deriving from the exploitation of oil and gas on the other side of boundary. Moreover, hydrocarbon fields straddling the joint zone and Icelandic waters are considered wholly Icelandic. The delimitation of the maritime boundary along 200nm arcs drawn from Iceland was designed to recognise Iceland’s “strong economic dependence on fisheries” as well as its greater size and population relative to Jan Mayen. The confirmation of the continental shelf boundary being coincident with the water column boundary and uneven distribution of the joint zone across the delimitation line, which also favoured Iceland, also took the disparity between Iceland

and Jan Mayen into account. Additionally, Iceland's lack of mineral resources was a factor in the recommendations of the Conciliation Commission.

This outcome is illustrative of the creative ways that a conciliation commission may seek to resolve a contentious dispute. That both parties adopted the Conciliation Commission's recommendations is also instructive. While the Conciliation Commission's findings are non-binding, the political cost of not adopting such recommendations is likely to be high. Additionally, non-compliance with the outcomes of a conciliation process may open the door to further legal proceedings.