

Treaties C'tee re CMATS Agreement **Rob Wesley-Smith**
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16th March 07
(emailed 18th March)

I understand the Australian Federal Parliament's Treaties Committee is still inquiring into a treaty between Australia and East Timor on "Certain Maritime Arrangements in the Timor Sea", or CMATS. This was signed on 12 January 2006, tabled in Federal Parliament in February 2007, and rushed through the Parliament such that jsct was bypassed, and on 23rd February in Dili an exchange of notes was done to bring the agreement into force so that it is now the CMATS Treaty. I appreciate that despite these actions the jsct is finishing its Inquiry.

"The Treaties Committee welcomes submissions from individuals and organisations with an interest in the Timor Sea treaties," Andrew Southcott, Chair of the Treaties Committee said. As someone with a deep interest in these issues and a previous petitioner on all such Timor related treaties I would like to make some comments on this Treaty and process.

The Australian Government has stated in its national interest analysis that "the CMATS Treaty is intended to sit alongside the Timor Sea Treaty and Sunrise IUA. Together they underpin stable legal and fiscal regimes for the exploration and exploitation of petroleum resources in the Timor Sea between Australia and East Timor to the benefit of both countries. Australia and East Timor also signed a security agreement covering the Timor Sea oil and gas fields which will allow each country to conduct surveillance operations and to respond separately or cooperatively to any threats to offshore oil platforms and facilities in the area.

I personally, guided by expert friends, spent a lot of effort in March-May 2002 trying to dissuade the nascent, East Timor government from signing the Timor Sea Treaty. In March an authoritative report by **Lowe, Carlton and Ward** warned against signing this treaty for various reasons, in particular as doing so would jeopardise the likely success of any referral to the International Tribunal of the Law of the Sea (ITLOS) of the UN to look at determining fair Maritime Boundaries for the new nation of East Timor according to the guiding principles of the UN Convention of the Law of the Sea (UNCLOS).

The East Timorese leadership characteristically believed that having fought against Indonesian occupation for 24 years and won, that they knew best about everything. In particular Jose Ramos Horta as a diplomat of great experience and success, believed it was more important to foster good relations with its giant neighbours than to stand up for all of East Timor's rights and international principles. When you are an ant between 2 bricks I suppose you do what you have to to avoid them falling on you. However this left out the opportunity for Australian and international activists to work on public opinion in Australia, and the UN itself, to try to avoid this debacle. It also clouded the fact that such negotiations between such vastly different sized and

established protagonists can never be between equals. Indeed a number of times we have heard Australian Foreign Minister Downer whinge that he is after all the Foreign Minister of Australia not East Timor. This has implication even now, for future negotiations under this Treaty are hardly likely to be between equals in reality.

It was a debacle because Australia withdrew from aspects of the UNCLOS treaty in March 2002 precisely to avoid ITLOS deciding that maritime boundaries, signed illegally between the Indonesian military occupying regime and Australia, were void or needed substantial modification to the detriment of Australia and its hegemony over known oil and gas resources in the Timor Sea. We believe that had such boundary changes occurred within UNCLOS principles, then East Timor would have gained control of the Corallina/Laminaria oil fields just west of the jpd, and 80-100% of Greater Sunrise gas and oil fields to the east. At that time Australia claimed 80% of Greater Sunrise, and of course has extracted and kept 100% of over \$2bn in Royalties from Corallina/Laminaria since 1999, especially vital while East Timor was trying to rebuild from a wilful destruction of around 75% of its infrastructure (excluding roads). The discontent with grinding poverty which helped fuel the outbreaks of violence in 2006 can be linked in part to this act of unneighbourliness, to put it in mild terms.

It is true that a later defiant stand by Mari Alkatiri and an effective campaign by Australian activists eventually caused Australian public outrage and the Australian government agreed to lift the Royalties from Greater Sunrise to 50:50 for both countries. Many argue this will be as good as it gets for East Timor, so sign up and be grateful. It ignores the acts of malice and doubtful legality as outlined above. It also ignores that East Timor has as much income as it needs for at least 20 years from Bayu Undan, and natural gas will likely be worth even more by then! East Timor fought against overwhelming odds against Indonesian armed invasion and occupation, and with the support of activists and increasingly of world opinion it eventually won, so why succumb to injustice now? In fact Horta let it be known a couple of years ago that he felt that activists should mind their own business, and many since have - even me, mostly.

Now Jose Ramos Horta is the interim Prime Minister with the main tasks no doubt of pulling the country together, achieving peace in Dili, and kickstarting economic development and poverty reduction. The country is beholden even more than usual to Australia after its intervention in May 2006 and still with around 1,000 troops and police currently in the country. Parliament is engaged in political sorting out, including their own personal fortunes, and preparing for an April presidential and shortly afterwards a general election. After potential serious court action was dropped against Mari Alkatiri, Mr Downer and the Australian government panicked to think that he could become PM again or Minister for Timor Sea matters, and so pushed for immediate ratification. In this context the old diplomat Horta decided to rush through the ratification of the CMATS treaty in his parliament. Ironically he may be introducing this as PM and then signing it into law as President.

The East Timor Parliament members voted on this bill, 48 in favor, five against and three abstentions, but of course this means around 40 I think did not vote for it as against 48 who did. I am prepared to hazard a guess that few had read it. In fact the agreement is in English and I wonder how many can read it. I felt they should discuss

ratification only after general elections in East Timor and in Australia, as this will give incoming administrations the chance to live with the consequences. Perhaps CMATS can be modified later by agreement in East Timor's favour, after all its doubtful that a Labor Party government under Kevin Rudd will be as mean as the Howard government has been to East Timor. Yes, its no use quoting what we have done for them when we take from more than we give to the poorest country in the region.

Some issues that need to be dealt with before endorsement is given to the CMATS Treaty:

1. **Maritime Boundaries should be agreed to under UNCLOS guidelines**, by bilateral negotiations, which would result in East Timor 'owning' more seabed than at present. Timor fought for its own hegemony, not to give some away to Australia for 50 years. Many intellectuals and younger generation do not accept the present actions.

[One wonders how the present companies came to be the owners as they were not the discoverers, and the 1972 Maritime boundaries agreements with Indonesia obviously took Indonesia to the cleaners. We see legal action proceeding by Oceanic Exploration against ConocoPhillips alleging massive corruption to dud them out of Bayu Undan. Is this a stable basis for long term development, could it happen here?]

*On the Maritime Boundaries issues, I'm advised that the law of treaties (customary law, Vienna Convention) is such that States parties are free to contract as they see fit, including the bargaining away of jurisdiction. After all, every treaty notionally involves some loss of sovereignty, or jurisdiction, to put it simply. It is a case of defining what is the "common will" of the parties. On the other hand, the argument is a sound one that the **concept of universal rights in a treaty setting must always permit some residuum of or a capacity for legal action.** A country can't surrender its rights to legal recourse.*

But a treaty must be done and performed in good faith. "Pacta sunt servanda". Can a treaty that "trades away" so fundamental (that is, defining) a right as ocean jurisdiction be done in good faith? There is a prior right to claim jurisdiction on Maritime Boundaries. What preemptory norm of international law would not tolerate the waiver of justiciability?

No doubt East Timor could at some stage withdraw, after all Australia did from UNCLOS over Maritime Boundaries in 2002.

2. However, due to serious events of April/May 2006 mainly in Dili, it can hardly be argued that East Timor is a country with a low **sovereign risk** for an international oil company to invest a couple of \$bn in infrastructure to extract oil and gas. That is, the dream of a gas pipeline to East Timor and a liquefield natural gas (lng) plant on its shores must surely remain a dream for at least until after a decade of stability. As such Australia will benefit even more from any development of Greater Sunrise with extra downstream taxes, labour, skills and industrial development. (Indeed the Bayu Undan to Darwin gas pipeline can run at much higher pressures to take more gas from another development such as Sunrise, and the Wickham Point site in Darwin Harbour has an area cleared for another lng processing train.) These are reasons for a **higher % Royalties** for East Timor than in the present CMATS Treaty.

3. Thus the higher % Royalties from Greater Sunrise to go to East Timor would be: **80%** (= the lowest estimate of that seabed area rightfully owned by East Timor); or **90%** (= as provided within the Joint Petroleum Development Area jpda, and would apply if the jpda boundaries were moved to where the Maritime Boundaries should be).

[That's not to say that East Timor should entirely give up its dream of hosting some of its own Timor Sea oil and gas onto its land for power and industrial development.

Perhaps using the quickest plant to build, so I'm told, the SHELL ALNG "Gamechanger" in 2.5 TCF modules, (this design can also be augmented for LNG and middle distillates - aviation turbine fuel & diesel), it should call for some of their entitlement to the Sunrise field gas to be produced as middle distillates, and also that both LPG (propane – butane) and natural gas also be made available for domestic use. It is quite bizarre that this poor country, but rich with oil and gas reserves, cannot gain any to fuel its own industry.]

4. East Timor should also have in force in the Treaty a provision where it supplies **50% of the labour**, or has a right to provide that. I believe the 1989 Timor Gap Treaty provided a 50:50 share of labour rights. Why has this been ignored a decade and half later? We see from the abysmal employment record of ConocoPhillips with Bayu Undan that unless employment and training requirements are specifically itemised in such a treaty then it won't happen. So there's another way East Timor loses out and does not get the industrialisation benefits it should. OK, East Timor did not bargain hard enough, perhaps it had too little experience, or was too arrogant, but again Australia has duded it whilst it is inexperienced and immature as a government and nation. The provision of logistics services would have similar issues.

5. Under the CMATS Treaty both Australia and East Timor will be bound to refrain from asserting or pursuing their claims to rights, jurisdiction or maritime boundaries, in relation to the other, for 50 years. It goes without saying I am opposed to this, it is unfair to East Timor.

According to a Treaties C'tee statement, the CMATS Treaty also provides for an independent assessment process at the request of either Party to review the reconciliation of the revenue sharing, the continuation of East Timorese water-column (fisheries) jurisdiction within the JPDA, and the establishment of a Maritime Commission to constitute a focal point for bilateral consultations on Timor Sea issues. I just want to reassert that negotiations between such vastly unequal parties is hardly going to be fair and equal.

6. The provision for **future discoveries** within the seabed area claimed by both parties will be administered by Australia, in its designated interests, is unfair and should be characterised as potential theft once again. What are Australia's interests? Are they only short term financial gain? It seems to be assumed that this is the case, whereas I don't think so. This is the same blight on our society which has companies' vision only to improve monies to shareholders and directors, instead of looking somewhat at community benefit.

7. Its funny how Mr Downer can do a Media Release 23rd Feb 07 re CMATS Treaties with so many statements which as individual components may be true but which by omission combine to be quite erroneous, in fact insulting.

a. eg "... provide **stable legal and fiscal regimes** for the exploration and exploitation of petroleum resources in the Timor Sea between Australia and East Timor to the benefit of both countries."

OK, sure its legal and fiscal, but will it be long term stable if one party feels aggrieved, and although its to the benefit of both parties, its actually in my view theft from East Timor, and a lot less beneficial than it should be to East Timor, and thus more beneficial to Australia than it should be.

b. eg "CMATS puts on hold the Parties' claims to **jurisdiction and maritime boundaries** in the Timor Sea for 50 years."

OK, sure, but Australia insisted on this, and bullied East Timor to get this. It is inconceivable that East Timorese who fought so hard for so long and suffered so much for their hegemony would be happy with this loss of sovereignty. And it may be legally unsustainable, see earlier.

c. eg "Australia has agreed to share equally with East Timor the **upstream revenues** from the Greater Sunrise reservoirs, a move which will help underpin the economic independence of our neighbour."

OK, that is the agreement, but East Timor just gets upstream revenues, and it will help it but also Australian independence. Why the paternalism - is Downer feeling guilty?

d. "The new maritime arrangements agreed with East Timor under these treaties are on top of the already **generous sharing** arrangements within the JPDA under the existing 2002 Timor Sea Treaty, where East Timor receives 90% of revenue from production of petroleum resources, which may be worth as much as US\$15 billion."

OK, here's a disagreement. Why is 90% of what you 100% own generous? Australia is taking 10% of East Timor's revenues from jpda, that's the fact, I believe jsct approved this under the Timor Sea Treaty. Why is it relevant to talk how much East Timor will earn or has earned? What about comparable figures for Australia and totals? Why the paternalism? Are we meant to say: Gee Whizz, isn't Australia generous for allowing East Timor to keep some of its own property? Does Downer think that rebuilding a country devastated back to cinders, the poorest in SEAsia anyway, and going backwards due to many factors - but lack of budget funds in its first 6 years when Australia unilaterally abrogated to itself all the Government Royalties from Corallina/Laminaria fields, is definitely one of them - can be done with **coconuts**?

e. eg "Under the new agreements, **Australia will** continue to exercise continental shelf jurisdiction outside the JPDA and south of the 1972 Australia-Indonesia seabed boundary."

OK, and ah yes, there is the crux of it, Australia will take all the disputed seabed for itself. Outbluddyrageous! There is no suggestion I can see in the Treaty that East Timor will share in this likely bonanza, this should be commented upon I believe.

And how is it that Downer can say East Timor may get \$15bn from Bayu Undan and only \$4bn from the far larger Greater Sunrise project? Who is out of date, or is there something happening we don't know about?

I put these points to the Treaties Committee for your edification, consideration, and recommendation in the best interests of the two societies involved and for the betterment of the world. The Treaties C'tee has not often I believe challenged the government's position, but as this is a done deal, perhaps now would be a good time in your report to stress elements of fairness, international law, morality, and practical neighbourliness. Robert F Kennedy said 'each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centres of energy and daring, those ripples build a current that can sweep down the mightiest'. I'm not sure of this relevance but I do challenge you to strike against injustice in this case. Phil Goff said last month that injustice is perpetuated when pragmatism is so predominant

that our human rights values and principle are lost sight of. These series of Timor Sea Treaty's and action going back to 1989 are built entirely on the idea of **pragmatic solutions** not principled ones, a legacy of Gareth Evans et al and the Howard/Downer government, and so should be spoken against. Please do NOT endorse this treaty as it stands.

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