

Comments on the termination of CMATS

12 January 2017

On 9 January, 2017, the Governments of Timor-Leste and Australia, and the Conciliation Commission issued a joint statement regarding the termination of CMATS:

Excerpts from the Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea, 9 January, 2017

“The Government of Timor-Leste has decided to deliver to the Government of Australia a written notification of its wish to terminate the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea pursuant to Article 12(2) of that treaty. The Government of Australia has taken note of this wish and recognises that Timor-Leste has the right to initiate the termination of the treaty. Accordingly, the Treaty on Certain Maritime Arrangements in the Timor Sea will cease to be in force as of three months from the date of that notification

The governments of Timor-Leste and Australia agree that, following the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 and its supporting regulatory framework shall remain in force between them in its original form, that is, prior to its amendment by the Treaty on Certain Maritime Arrangements in the Timor Sea.

The governments of Timor-Leste and Australia agree that the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea shall include the termination of the provisions listed in Article 12(4) of that treaty and thus no provision of the Treaty will survive termination. All provisions of the treaty will cease to have effect three months after the delivery of Timor-Leste’s notification.

For the further conduct of the conciliation process, the governments of Timor-Leste and Australia have each confirmed to the other their commitment to negotiate permanent maritime boundaries under the auspices of the Commission as part of the integrated package of measures agreed by both countries.”

See the full Joint Statement [here](#)

I. Termination of the Treaty on CMATS

Timorese presidential elections are scheduled in April 2017, parliamentary elections in July 2017.

If the letter signed by the Timorese government expressing their wish to terminate CMATS is received by the Australian government in February, the Treaty on CMATS will be terminated at the end of May, but not permanently invalidated, as there is no provision in the treaty allowing permanent invalidation. Although the Joint Statement issued on January 9, 2017, asserts that “*all provisions of the treaty will cease to have effect three months after the delivery of Timor-Leste’s notification*”, it is probable that such a simple cavalier mention will not prove sufficient for the total invalidation of the treaty, and a new treaty will need to be put in place to repeal CMATS altogether. Only after a formal treaty to repeal

CMATS has been not only signed, but also ratified or considered by the relevant vetting structure in each country, would CMATS be definitely invalidated. Such a process would certainly last until after the Timorese July elections.

Although the treaty ratification process in East Timor is probably quite straightforward, in Australia “*all treaties (except those the Government decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken.*” “*Such action would include entering into a new treaty, negotiating an amendment to an existing treaty or withdrawing from a treaty*”. It is unlikely that the repeal of CMATS will be deemed particularly urgent or sensitive. In Australia, the Joint Standing Committee on Treaties (JSCOT) considers tabled treaties (see [Treaty making process](#) on the Australian Department of Foreign Affairs and Trade webpage).

Since it is quite unlikely that the treaty repealing CMATS could be negotiated, let alone come into force, before the July election, the current Timorese government will be in a position, during the electoral campaign, to portray the termination of CMATS as a positive step on the road leading to the acquisition of the whole of Sunrise and Troubadour fields and to the installation of a petroleum processing facility on Timorese shore. However, it is not until CMATS has been repealed, probably quite a while after the April and July elections, that:

1. East Timor will lose EEZ jurisdiction over the JPDA;
2. the sharing of resources will revert from the current 50-50% to the Timor Sea Treaty apportionment ratio of 18%- 82% , East Timor receiving the smaller part; and
3. East Timor will regain the ability to “*assert, pursue or further its claims to sovereign rights and jurisdiction and maritime boundaries*”.

It seems Australia would be the net beneficiary of the repeal of CMATS, since her share of revenue from Sunrise and Troubadour would increase from 50% to 82%, and her maritime boundaries are quite secure, considering the Australian declaration in 2002 that the jurisdictions of International tribunals do not extend to her maritime boundaries, and considering also that the current boundaries already coincide with lines of true equidistance and the areas being contested lie within de-facto Indonesian waters.

II. Commercial development of Sunrise and Troubadour

With regard to the development of the Sunrise and Troubadour fields, there seems to be three options only:

- A. A pipeline from Sunrise to East Timor, a gas conditioning facility on Timorese shores, and an offshore liquid petroleum processing facility
 - a. Capital cost: \$24 billion
 - b. Overall loss assuming a \$45 per barrel crude oil price: -\$28 billion
 - c. Project breaks even with an \$85 barrel over a 30 year period
- B. A combined floating facility for gas conditioning and liquid petroleum processing
 - a. Capital cost: \$15 billion
 - b. Overall loss assuming a \$45 per barrel crude oil price: -\$11 billion
 - c. Project breaks even with a \$60 barrel over a 30 year period

- C. A pipeline spur linking Sunrise to the Bayu Undan-to-Darwin pipeline, the reutilization of the Bayu Undan gas conditioning facility on Australian shores, and the reutilization of the Bayu Undan offshore liquid petroleum processing facility
 - a. Capital cost: \$5 billion
 - b. Overall profit assuming a \$45 per barrel crude oil price: \$21 billion
 - c. Project breaks even with a \$20 barrel over a 30 year period

Irrespective of the political outcome of the announced boundary negotiations, which would start only after the entry into force of the treaty to repeal CMATS, it seems highly unlikely that any option but option **C** will be selected, in which case the decision to develop the fields will need to be made before the Darwin facility at Wickham Point is turned over to another project in the Timor Sea. The decision will probably need to be made within months, not years, in order not to miss the opportunity of reutilizing the Bayu Undan assets after the end of commercial exploitation.

III. Potential reasons for the termination of CMATS

The Joint Statement makes it clear that CMATS will be terminated at the request of East Timor. The avowed reason for the termination is to “*create the conditions conducive to the achievement of an agreement on permanent maritime boundaries in the Timor Sea.*”

On the other hand, although the Joint Statement does not mention any other possible post-invalidation scenario, there could be others, one in particular being the renegotiation of the provisions of CMATS, leading to a new agreement, tentatively dubbed here CMATS II for convenience.

For East Timor, one of the two downsides of invalidating CMATS is that she loses in the process her exclusive rights over the water column (EEZ) inside the JPDA. The existence of the JPDA, which was created by the Timor Sea Treaty, is apparently not questioned in the Joint Statement (“*the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 and its supporting regulatory framework shall remain in force between them in its original form*”).

There are seemingly three ways for East Timor to recover her exclusive rights in the JPDA:

1. Wait until 2033; or
2. Wait until her permanent boundaries are agreed upon (The Timor Sea “*Treaty shall be in force until there is a permanent seabed delimitation between Australia and East Timor or for thirty years from the date of its entry into force, whichever is sooner*”), or
3. Recover her EEZ through CMATS II

The other downside of invalidating CMATS, for East Timor, is that her share of the revenue from Sunrise will fall from 50.00% to 18.09% exactly. According to option C above, her revenue would fall from \$8.5 to \$3.1 billion. The difference represents perhaps 15 years of real non-petroleum GDP for the country.

There are apparently four ways for East Timor to increase her share of Sunrise revenue:

1. Acquire 100% of Sunrise and Troubadour by convincing Australia, Indonesia, and the Conciliation Commission, that the permanent boundaries must be drawn as far as 85 nautical miles away from lines of true equidistance, inside Indonesian waters and above Australian seabed; or

2. Acquire less than 100% but more than 20% of Sunrise and Troubadour, by negotiating a permanent boundary intersecting the fields, away from lines of true equidistance, inside Indonesian waters and above Australian seabed; or
3. Agree that the true lines of equidistance, which currently define the boundaries of the JPDA, be made permanent, and negotiate in CMATS II either an equal sharing of revenue, or an unequal sharing favoring East Timor; or
4. Continue the status quo of provisional boundaries, and negotiate in CMATS II either an equal sharing of revenue, or an unequal sharing favoring East Timor.

IV. Possible outcome of the termination of CMATS

It should perhaps be borne in mind that whichever of the 7 alternatives of section III applies, the more than probable, perhaps the only possible, commercial development option for Sunrise and Troubadour will be option **C** described in section II, in which case, even if Australia had relinquished all claims on the seabed north of the median line separating Australian from Indonesian waters, and if Indonesia had accepted to turn over to Timorese jurisdiction parts of her exclusive waters, it is likely that Australia would levy taxes for using her seabed to lay and operate the pipeline and for using facilities located on Commonwealth soil (should Indonesia not turn over to East Timor any of her waters, it is also probable that she could also desire to levy taxes for operating in her waters).

On the other hand, whether equidistant boundaries are made permanent (which would terminate the Timor Sea Treaty, thus increasing East Timor's post-CMATS share from 18.09% to 20%), or the status quo is upheld, it would make political, commercial, and equitable sense to revisit the sharing of revenue in CMATS II in order to compensate for the exclusive taxes that Australia will levy from the pipeline and conditioning plant operations, as well as for labor and corporate taxes. It is suggested that the new sharing could benefit East Timor to the tentative tune of 60%-40%, to be adjusted after due consideration of all taxation and labor aspects of the deal, which could for instance incorporate the facilitation of working permits for Timorese personnel employed in the Australian facilities.

This outcome could not materialize without the prior invalidation of CMATS.

More comments on the termination of CMATS

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About the invalidation process requiring a treaty to repeal the treaty: if there is no provision in a treaty to invalidate it, invalidation will require a new instrument, otherwise provisions to terminate would not have been embedded in the treaty in the first place. In democracies, international treaties are scrutinized and vetted by the legislature. In the U.S., all treaties require Senate ratification. In Australia treaties are tabled in both Houses of Parliament (see [Treaty making process](#) on the Australian Department of Foreign Affairs and Trade webpage). The Joint Standing Committee on Treaties (JSCOT) considers tabled treaties. The treaty that JSCOT considered eleven years ago did not give authority to the executive to invalidate it. The idea that the executive is at liberty to modify or invalidate treaties at will, ignoring treaty provisions, which were agreed upon by both Houses of Parliament

before the treaty went into force, runs afoul of the democratic obligation to table treaties in both Houses of Parliament.

Irrespective of whether Mr. Gusmão already made a tentative post-CMATS decision or not, the process will take longer than the few months left before national elections in East Timor. It is likely that Mr. Gusmão will portray the soon to come (but still not occurred) termination of CMATS as a great victory for his country, paradoxically, and whoever wins the elections will make the decision to either continue the territorial struggle and take the country to bankruptcy, with all the social consequences, or negotiate CMATS II. Both avenues will be open after the invalidation of CMATS, although only one has been mentioned in the Joint Statement.

It is unlikely that many in the East Timorese government openly favor the Darwin option, or even know about it, or have thought of a second CMATS, and if they do will have the desire to speak publicly. As a matter of fact, the diocese of Dili has already congratulated the prime minister, although it is known that the bishop is unofficially skeptical of Mr. Gusmão's strategies. It is probable that the Australian negotiators, by accepting that East Timor request the termination of CMATS, were only helping wipe the slate clean so that the responsibility for elaborating a face saving solution would fall on East Timor's shoulders. The sugar on the pill would be a higher share of revenue for East Timor, which anyway would require to be economically justified for the Australian government to accept, hence the tax issues described in "*Comments on the termination of CMATS*" above (the Australian government will not make free gifts of taxpayer's money without risking an electoral backlash, as any educated Australian citizen would know). The request to modify the apportionment ratio would of course also have to come from the Timorese side.

If Mr. Gusmão is still in power after the 2017 elections he will chose to go either way and will decorate his decision with the appropriate garlands, and if he is beaten he will be likely to accuse the next government of treason, whichever way they went.

The real quandary for Dili is now that if the pipeline goes to Darwin, how will they justify the scrapping of the grandiose Tasi Mane project and the millions already spent? How to best repurpose the project if natural gas never comes their way?

From the Australian standpoint, the invalidation of CMATS will be beneficial overall, and it will either take her one step closer to de-unitization, if necessary, or lead to the speedy piping of the gas resource to Darwin, with all the associated tax revenue and social advantages. The new apportionment ratio, although detrimental to her at first sight, would not affect her overall revenue.

It is up to the Timorese government to word the future agreement in a style that saves their face as much as possible. Here is their one opportunity to see Sunrise return some revenue any time soon. It is up to them not to miss the opportunity.
