A few comments about 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, released on 9 January 2017

See the full joint statement here

10 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."

Comments

1. Termination of CMATS

According to paragraph 2 of Article 12 (Period of this Treaty), *either Party may notify the other Party in writing that it wishes to terminate this Treaty, in which case the Treaty shall cease to be in force three calendar months after such notice is given, if:*

(a) a development plan for the Unit Area has not been approved … within six years after the date of entry into force of this Treaty; or

(b) production of petroleum from the Unit Area has not commenced within ten years after the date of entry into force of this Treaty

Condition (a) was met, but only because East Timor demanded one particular technical option, the pipeline to its shores, in clear contravention of the terms of the treaties. CMATS entered into force on 23 February 2007, so it is likely that the notification of termination will not be delivered until 23 February 2017, and CMATS will be terminated according to (b), not (a).

However, paragraph 3 of the same article provides that: "*Should petroleum production take place in the Unit Area subsequent to the termination of this Treaty pursuant to paragraph 2 of this Article, all the terms of this Treaty shall come back into force and operate from the date of commencement of production*." This paragraph seems to imply that CMATS, and in particular the 50-50% provision and EEZ rights in the JPDA, cannot in fact be terminated at will.

Paragraph 4 provides that:

The following provisions of this Treaty shall survive termination of this Treaty, and the Parties shall continue to be bound by them after termination:

(a) Article 2;
(b) the second sentence of paragraph 5 of Article 4;
(c) paragraph 3 of this Article; and
(d) this paragraph.

Even though the terms of the treaty on CMATS provide that it would cease to be in force three months after one party notified the other that it wished to terminate the treaty, for instance if production had not commenced within ten years after the date of entry into force (23 February 2007), the terms of the treaty do not provide for its permanent invalidation, in particular with regard to maritime boundaries and petroleum production.

To achieve permanent invalidation the parties need to agree that the termination provisions of Article 12-4 of the treaty are also terminated. The Joint Statement of 9 January 2017 clearly states that "no provision of the Treaty will survive termination".

Therefore CMATS will be effectively terminated three months after the delivery by East Timor to Australia of the written notification of its wish to terminate. On that day, the agreement will revert to the Timor Sea Treaty and the Unitization Agreement, according to which (see paragraph 2 below):

- East Timor is entitled to 18.09% of Sunrise petroleum, and Australia to 81.91%;
- East Timor loses EEZ jurisdiction over the JPDA;
- East Timor regains the ability to assert, pursue or further its claims to sovereign rights and jurisdiction and maritime boundaries.

2. Timor Sea Treaty and Unitization Agreement

The Agreement relating to the Unitization of the Sunrise and Troubadour Fields was signed in 2003 and entered into force in 2007, the same day as the 2006 Treaty on CMATS (Certain Maritime Arrangements in the Timor Sea).

The Unitization agreement provides that:

***ARTICLE 3, Exploitation of the Unit Reservoirs**:*

(1) The exploitation of the Unit Reservoirs shall be undertaken in an integrated manner in accordance with the terms of this Agreement.

***ARTICLE 7, Apportionment of Unit Petroleum**:*

Production of Petroleum from the Unit Reservoirs shall be apportioned between the JPDA and Australia according to the Apportionment Ratio 20.1:79.9, with 20.1% apportioned to the JPDA and 79.9% apportioned to Australia.

***ARTICLE 27, Entry into Force, Amendment and Duration**:*

(2) This Agreement may be amended or terminated at any time by written agreement between Australia and Timor-Leste.

(3) In the event of permanent delimitation of the seabed, Australia and Timor-Leste shall reconsider the terms of this Agreement. Any new agreement shall ensure that petroleum activities entered into under the terms of this Agreement shall continue under terms equivalent to those in place under this Agreement.

The Timor Sea Treaty provides that "*of the petroleum produced in the JPDA, ninety (90) percent shall belong to East Timor and ten (10) percent shall belong to Australia*" which implies that Australia's apportionment is 79.9%, plus 10% of 20.1%, which equals 81.91% of production, and East Timor's 18.09%. Contrary to East Timor's statements in The Hague on 29 August 2016, the Timor Sea Treaty did not become void upon CMATS termination. Article 22 of the Timor Sea Treaty (Duration of the Treaty) states that "*This 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. This Treaty may be renewed by agreement between Australia and East Timor.*"

The terms of the Unitization Agreement infer that the agreement may be terminated at any time by written agreement, but, if it is not, new seabed boundaries would result in a modification of the apportionment ratios but not of the unitization concept. If the parties chose to de-unitize the fields, then each could develop its share in an independent fashion, a clearly uneconomical option for East Timor.

3. EEZ rights in the JPDA

Loosing EEZ rights in the JPDA means that the ownership of all water column rights in the JPDA, which, according to CMATS, were exclusively East Timor's, reverts to an undefined status, whereas the water column on each side of the JPDA, and therefore above the fields, is clearly under Indonesian jurisdiction. In particular, fishing rights, which were exclusively East Timor's, become undefined.

4. Summary of events required if the Timorese position is to be vindicated (100% of revenue and facilities onshore in East Timor, see page 24 of hydrographer.org)

A. After the invalidation of CMATS East Timor's share of Sunrise has reverted from 50% to 18.09%;

B. Australia gives away her seabed to Indonesia, and Indonesia gives away her new seabed and water column to East Timor, despite these areas being closer to Indonesia;

C. A processing plant is built in East Timor, although it has been shown elsewhere that the processing of field production on Timorese shores would be rigorously unprofitable.

5. Possible explanation for the joint statement of 9 January 2017

A possible face-saving scenario behind the Joint Statement could be that:

A. Confronted with facts and reality, East Timor has unofficially accepted that there is no viable alternative to the field production being taken to Darwin through a spur linking Sunrise to the existing Bayu Undan to Wickham Point pipeline, the Bayu Undan FSO being reused for Sunrise (see **Sunrise Alternatives**), and that the negotiation with Australia of maritime boundaries inside Indonesian waters is fraught with uncertainty;

B. Because of her increased onshore tax revenue pursuant to the presence of the pipeline and processing plant on her territory, as opposed to these facilities being built either offshore or overseas, Australia agrees to reassess the sharing of gross revenue. To that effect a new sharing agreement may be established, so that the division of revenue goes from 18-82% to perhaps 60-40% ($12 billion to East Timor - $8 billion to Australia).

C. The parties could then agree to either freeze again the delineation of permanent boundaries for another 50 years, or to make some of the current equidistance boundaries permanent (with the exception of the northern edge of the JPDA), a move that would enable the delineation of permanent boundaries between East Timor and Indonesia along, and in continuity with, such lines of equidistance, these boundaries being currently inexistent.

MMM