

The Timor-Leste-Australia Maritime Boundary Treaty

By Charles Scheiner, La'o Hamutuk. 21 March 2018

Timor-Leste won a great victory on 6 March, when Australia and Timor-Leste signed the Treaty Establishing Their Maritime Boundaries in the Timor Sea (hereinafter, Boundary Treaty). After decades of occupation and struggle, and tens of billions of dollars in extracted petroleum, the Australian government finally accepted its northern neighbor's sovereign right to a border based on current international law. This article will examine the provisions and implications of that agreement, its historical significance, and what is likely to happen as a result of the precedent-setting Boundary Treaty.

La'o Hamutuk has actively advocated for a fair maritime boundary between Timor-Leste and Australia since we were founded in 2000,¹ and we campaigned against prior agreements between Australia and Timor-Leste (signed in 2002, 2003 and 2006, all to be voided by the Boundary Treaty). However, this article does not discuss the long history of campaigning, manipulation, duplicity and negotiation which led up to the recent agreement. That fascinating story is told in many publications and on our web site;² today we are looking at the present and the future.

Australia has finally recognized Timor-Leste's national sovereignty.

Although Timor-Leste formally restored its independence in May 2002, Australia has long prevented Timor-Leste from settling their common boundary by withdrawing from international dispute resolution mechanisms; deferring or banning boundary discussions in every interim petroleum-sharing treaty; and insisting on outdated, self-serving, "continental shelf" principles based on 75-year-old practices and the illegal Indonesian occupation. For 14 years, Timor-Leste's leaders conceded to Canberra's stubbornness by signing several agreements to enable oil and gas production – the principal source of money for this young nation.

However, many Timor-Leste citizens and international supporters believed that the struggle for independence was not complete until the boundaries of the nation were defined. In 2004, Timor-Leste civil society formed the Movement Against the Occupation of the Timor Sea (MKOTT), friends in Australia formed the Timor Sea Justice Campaign, and activists around the world expressed their solidarity with Timor-Leste's rights. Our principal objections were to Australia's protracted refusal to talk about a maritime boundary, their denial of the now-well-established "median line" principle of drawing a boundary halfway between two coasts, and their unyielding rejection of any third-party dispute resolution by an international court or arbitrator. Beginning in 2013, Timor-Leste's government added its diplomacy and resources to the people's struggle.

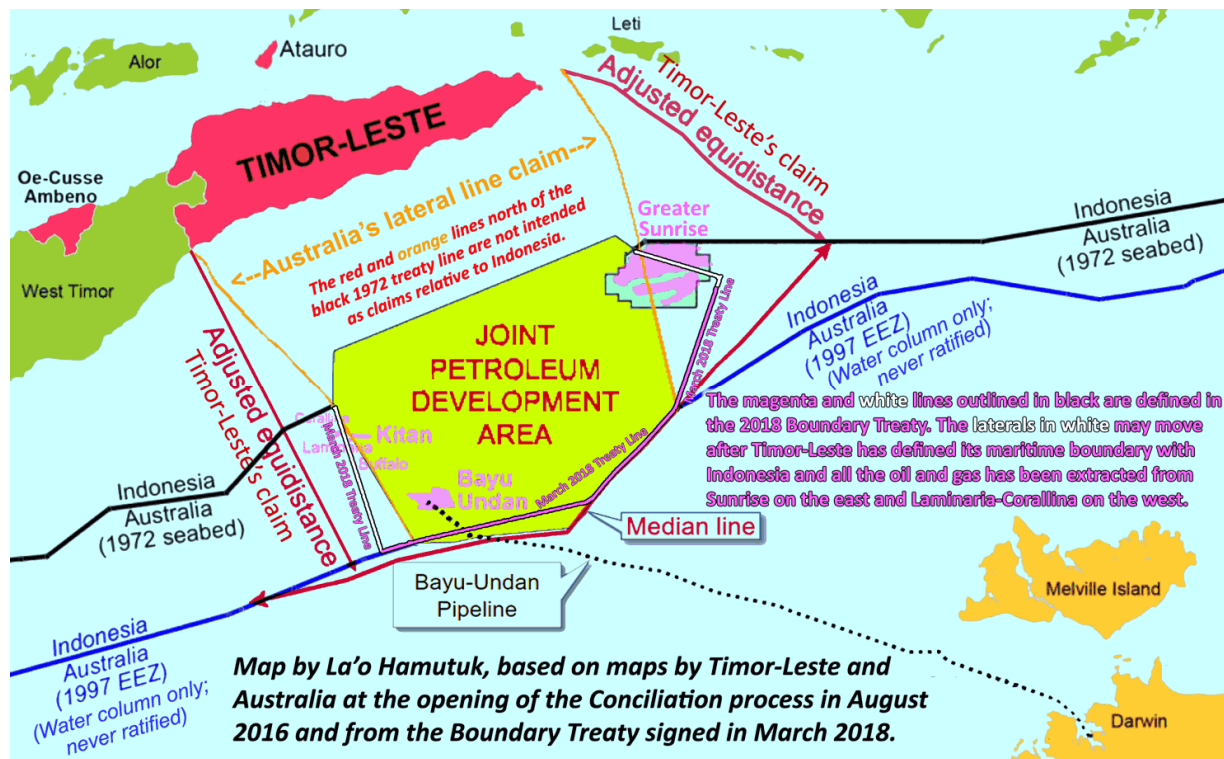
Australia's recent change in policy has deeper significance than mere political and petroleum exhaustion, or even the need to appear less hypocritical when they tell China to obey international law in the South China Sea. From the perspective of many in Timor-Leste and in Australia, this is a significant, hard-fought, victory. We hope that it marks a new era in which "our nations will both benefit when our bond is based on equality, including full recognition of each other's people, rights and national sovereignty."³

¹ For example, see "Australia: Stop Stealing East Timor's Oil" in the May 2002 La'o Hamutuk *Bulletin* <http://www.laohamutuk.org/Bulletin/2002/May/bulletinv3n4.html>, as well as our July 2002 submission to the Australian Parliament: <http://www.laohamutuk.org/Oil/Boundary/jsctlh.html> .

² See <http://www.laohamutuk.org/Oil/Boundary/CMATSindex.htm> for events during the last five years, <http://www.laohamutuk.org/Oil/OilIndex.html#Boundaries> for developments since 2000, or <http://www.laohamutuk.org/Bulletin/2006/Apr/bulletinv7n1.html#CMATS> for a chronology from 1970 to 2006.

³ La'o Hamutuk's March 2013 submission to Australian Parliamentary Inquiry on Relations with Timor Leste, <http://www.laohamutuk.org/misc/ParlInq/sub040LaoHamutuk.pdf>

The Boundary Treaty itself



Previous arrangements

The black line on the map represents the 1972 Australia-Indonesia seabed boundary treaty. That boundary is closer to Indonesia (and to Timor-Leste) than it is to Australia, and remains in force. The "Timor Gap" in the line (the yellow area recently called the Joint Petroleum Development Area) is because Portugal declined to participate in the negotiations, and the 1972 treaty recognized that the Gap's endpoints may have to be adjusted based on future negotiations with Portuguese Timor or its successor.

The yellow area on the map is the Joint Petroleum Development Area (JPDA), which was divided 50-50 between Indonesia and Australia from 1991 to 1999, and 90-10 between Timor-Leste and Australia since the 2002 Timor Sea Treaty. Under the Boundary Treaty nearly all of it belongs 100% to Timor-Leste, although Australia will not pay back the \$2.4 billion it took in from oil and gas fields in this area since 1999. (Timor-Leste has received about \$21.4 billion.) The JPDA's edges delimit a petroleum revenue sharing zone, not national territory, although its southern edge is close to the median line between Australia and Timor-Leste.

The light green and pink area is the "Sunrise Unitized Area" defined in a 2003 "International Unitization Agreement" (IUA) between Australia and Timor-Leste.⁴ According to the 2002 treaty, Timor-Leste would get 18% of Sunrise extraction ("upstream") revenues; this was increased to 50% by the 2006 CMATS Treaty (which was revoked last year), and to 70% or 80% (depending on where the pipeline goes) by the Boundary Treaty.

The Boundary Treaty replaces the Timor Sea Treaty and the Sunrise Unitization Agreement, which join CMATS in the rubbish bin. However, it includes some articles to fulfill functions of these now-defunct agreements, covering governance, revenue-sharing, applicable laws and other topics.

⁴ Unitization is applied when an oil or gas field straddles a boundary in order to avoid disputes over which side a given molecule of petroleum originated on.

Conciliation leads to compromise

Australia withdrew from international maritime boundary dispute resolution processes two months before Timor-Leste became independent in 2002 to avoid legal accountability. However, they overlooked a never-used mechanism in the United Nations Convention on the Law of the Sea (UNCLOS, signed in 1982, ratified by Australia in 1994 and by Timor-Leste in 2013). UNCLOS Article 298 and Annex V describe a compulsory conciliation process through which one nation can bring an unwilling neighbor into bilateral boundary discussions which are facilitated by a team of expert “conciliators” appointed by both sides, under United Nations auspices. The conciliators have no power to make binding decisions; all they do is encourage the parties to listen and respond to each other.

Waiting until the oil is gone

In 2004, after more than a decade of difficult negotiations, Australia and New Zealand signed a maritime boundary treaty based on median line principles. La’o Hamutuk asked New Zealand’s ambassador here what this country could learn from New Zealand’s successful negotiations with Canberra. His answer – “don’t have any oil under your sea” – has proved prophetic. Now that Buffalo, Elang-Kakatua and Kitan are shut down and more than 97% of Bayu-Undan revenues have been collected, Australia has accepted Timor-Leste’s claim to sovereignty over nearly all of the former “joint” development area. On its western side, Laminaria-Corallina is nearly empty – and Australia will give it up when it has no more economic value. No new discoveries have been made in contested areas.

Timor-Leste initiated this process in April 2016 and, although Australia initially resisted, they accepted it by September. At the start of the conciliation, each side stated its claim; Timor-Leste’s is red on the map, and Australia’s is orange. The conciliators started out like marriage counselors, separately listening to each party’s needs and concerns and relaying them to the other party, while the two sides sat in separate rooms.

The process took a year and a half, with 13 negotiating sessions in six cities on four continents. In August 2017, Australia and Timor-Leste agreed on the overall outlines of a boundary and brought in the oil companies to help decide how Greater Sunrise would be developed. Although that question remains unresolved, the Boundary Treaty was signed in March 2018 and is pending ratification by both countries.

Scholars of and participants in peaceful mechanisms for resolving international disputes are elated that the conciliation mechanism, which lay dormant for more than three decades, has proved its worth. Once again, Timor-Leste has made history.

The newly-established boundary

Although conciliation was under UNCLOS provisions and the outcome complies with the Law of the Sea, the Boundary Treaty is not a legal ruling handed down by a court or arbitrator. It evolved through diplomatic give-and-take by each government, who argued based on their political, legal, economic and historical preferences. Although the conciliators facilitated the negotiations and encouraged compliance with international law, all decisions were made by the two governments. The final boundary compromise, shown as purple and white lines on the map, largely reflects Timor-Leste’s median line claim for the southern part of the boundary (putting all petroleum-containing areas of the JPDA into Timor-Leste’s territory), while drawing lines in between the two nations’ claims for the lateral boundaries on both sides. It delineates each country’s seabed (“continental shelf”) and water column (“Exclusive Economic Zone - EEZ”) areas, although Timor-Leste’s eastern and western water column boundaries are still to be negotiated with Indonesia.

Three oil and gas fields have been commercially developed in the JPDA: Elang-Kakatua was shut down in 2007, Kitan closed in 2015, and Bayu-Undan has 2-3 years of remaining production. Many other exploration contracts have been signed and relinquished in other areas of the JPDA, and seventy test wells have been

drilled over the last three decades, so that it is unlikely that significant, commercially-viable, oil and gas reserves (other than Greater Sunrise) are yet to be discovered.⁵

All government revenues from fields in the JPDA will go to Timor-Leste once the treaty is ratified, which could increase Dili's take by about \$100 million from Bayu-Undan's last puddles of oil and gas. In the unlikely event that production is restarted at Kitan or Elang-Kakatua, or that the small Kuda Tasi or Jahal oil fields are developed, Timor-Leste will get all the taxes and royalties (after the companies recover their capital investment, operating costs and profits).

On the western side of the JPDA, the southern part of the (white) lateral boundary is further west than the edge of the JPDA. As a result, the small Buffalo field, formerly considered to be in Australian waters, now belongs to Timor-Leste. Buffalo produced 20 million barrels of oil from 1999 until it was decommissioned in 2005, and Australia will keep its revenues from that time. In 2016, a new contract was signed with the Carnarvon company, which believes that it can use modern technology to extract about 30 million more barrels. If Carnarvon's estimates are correct, Buffalo could generate \$500 million or more for Timor-Leste over the next decade.

The larger Laminaria-Corallina oil field, which has already yielded more than \$2 billion in revenues for Australia and is still in production (but nearing the end of its life), remains in Australian waters. However, the new Treaty provides for moving the northern part of the western lateral further west after Laminaria-Corallina is decommissioned, in order to line up with a future Indonesia-Timor-Leste maritime boundary line. Once again, money already taken by Canberra will not be returned.

On the other side, the central part of the eastern edge of the JPDA has moved outwards, placing more of Greater Sunrise and the area south of it in Timor-Leste's waters. For the moment, a (white) line has been drawn through the Sunrise Unitized Area, placing the northwestern 30% of the field in Australian waters, and the remaining part in Timor-Leste. As the field is still in both countries, it will be managed jointly; both Timor-Leste and Australia need to agree on how it will be developed. The Treaty and conciliators offered several inducements for Timor-Leste to accept a pipeline from Sunrise to the soon-to-be-idle LNG plant which has been processing gas from Bayu-Undan in Darwin, including increasing Timor-Leste's share of Sunrise revenue from 70% to 80%, but Dili politicians have strongly rejected this option.

As on the west, the eastern lateral is provisional. After Sunrise has been extracted and decommissioned, it will be shifted further east to line up with a future Timor-Leste-Indonesia maritime boundary. In a few decades, all of the (now empty) Sunrise area could be in Timor-Leste's territory.

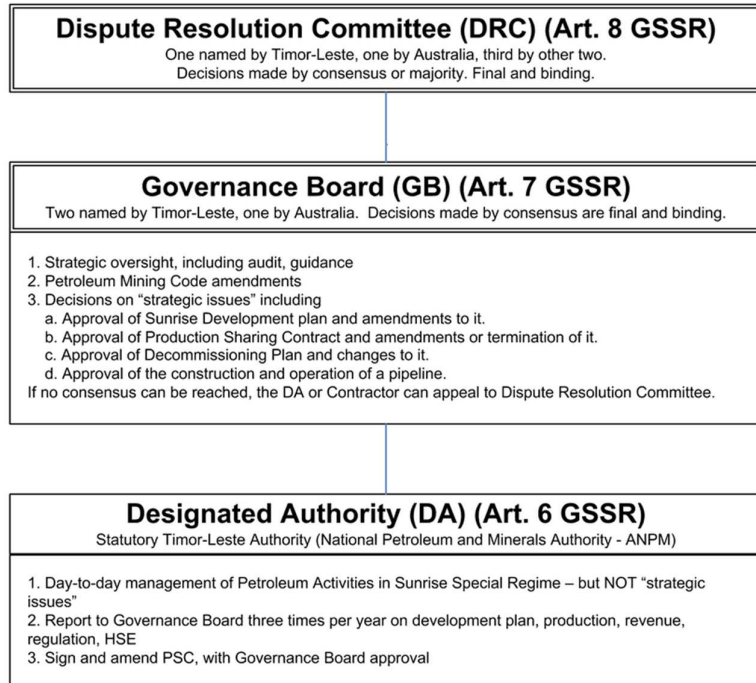
⁵ See *As Bayu-Undan dries up: challenges and opportunities*
<http://www.laohamutuk.org/misc/TLSA2017/ScheinerTLsABayuDriesEn.pdf>

Governance agreements and Greater Sunrise

The new Treaty re-authorizes the existence of the “Designated Authority” (DA) created by the Timor Sea Treaty, which has been the Timor Sea Designated Authority (TSDA, 2002-2009), National Petroleum Authority (ANP, 2009-2015), and National Petroleum and Minerals Authority (ANPM, 2015-present). This is a regulatory body which signs contracts and oversees petroleum operations in Timor-Leste and jointly administered land and sea territory, as well as encouraging further development.⁶

Because the Sunrise Unitized Area is still under bi-national oversight, the DA’s work in this area is overseen by a “Governance Board” (GB) made of two representatives appointed by Timor-Leste and one by Australia, which is tasked with deciding the most important “Strategic Issues” relating to the Sunrise project. As the GB decides by consensus, its numeric makeup is not important. If the GB is unable to agree on a Strategic Issue, the DA or the Sunrise contractors may refer it to a Dispute Resolution Committee (DRC) consisting of one representative of each country and a third member chosen by the other two.⁷

The Sunrise Joint Venture (Woodside, ConocoPhillips, Shell and Osaka Gas) currently holds two contracts with Australia and two with Timor-Leste for different parts of the Sunrise Unit Area. Under the new Treaty, these four contracts will be replaced by a single one between the Designated Authority and the Sunrise Joint Venture (SJV).⁸



⁶ La’o Hamutuk is concerned that Article 6.2(c) of the new Boundary Treaty, which allows the DA to keep fees it collects from oil companies, contradicts RDTL Petroleum Fund Law No. 9/2005, which requires that all petroleum-related revenues be deposited into the Petroleum Fund. This was convenient when the first DA was first created before the Petroleum Fund Law was in force, but it is no longer appropriate or legal. Although the technicalities of this issue were considered by the Court of Appeals in *Proc. 01/Const/09/TR*, it should be re-evaluated before the DA is re-created, in light of the good petroleum governance that Timor-Leste’s Petroleum Fund was designed for.

⁷ People with “any direct commercial or financial interest” in the operation of the Sunrise project or whose appointment “would create any reasonable perception of, or actual, conflict of interest” cannot serve on the Governance Board or Dispute Resolution Committee.

⁸ The existing Production Sharing Contracts (PSCs) for Bayu-Undan and Greater Sunrise, which were signed in 2003, have never been made public. However, according to Article 30.1(a)(1) of RDTL Petroleum Activities Law No. 13/2005 such contracts are public documents, and all PSCs signed since then are available. The Extractive Industries Transparency Initiative (EITI) standard that Timor-Leste complies with also requires contract transparency. In October 2017, Timor-Leste and Australia exchanged letters committing to revise the Bayu-Undan and Kitan PSCs. The Treaty says that the contract for Buffalo will be replaced, and a new Sunrise PSC will be signed. The companies and the fiscal terms of the contracts will remain as before, although there may be some alterations to comply with the new Treaty and changes in other laws. La’o Hamutuk is concerned that contract transparency is not mentioned in any of the recent bilateral agreements. Although the Boundary Treaty doesn’t explicitly violate Timor-Leste law in this area, it fails to inform Australia and the oil companies that the contracts will be made public.

During the conciliation process, the parties had hoped to agree on a Sunrise Development Concept (the basic outline of how Sunrise is to be developed, including the location of the pipeline and LNG plant) before the Boundary Treaty was signed, but this did not happen. Annex B of the Treaty, which defines a Special Regime for Greater Sunrise, refers to “the approved Development Concept” three times, but does not explain how such a Concept is to be approved. This decision, which presumably needs the consent of both governments and the Sunrise Joint Venture, is essential to proceeding with the project.

In 2008, La’o Hamutuk wrote a book *Sunrise LNG in Timor-Leste: Dreams, Realities and Challenges*, much of which is still accurate (except for the fiscal analysis).⁹ A detailed assessment of whether it would be good for the people of Timor-Leste to construct a pipeline from Sunrise to an LNG plant in Beaçu and to build the other components of the Tasi Mane Project, is beyond the scope of this article. The currently politicized controversy, with accusations and disinformation, does not lend itself to rational discussion.

Regardless of how Sunrise is eventually developed, La’o Hamutuk is concerned that exaggerated promises of vast revenues and economic benefits may distract from the urgent need to diversify Timor-Leste’s economy away from oil and gas exports and processing. Even according to the most optimistic credible projections, Sunrise will only finance Timor-Leste’s state and economy for less than one generation. We owe it to our children and grandchildren to think further ahead.

Before a Sunrise decision is made, Timor-Leste needs to thoroughly and objectively weigh the financial, economic, environmental and social benefits, costs and risks, including realistic projections of Timorese jobs and spinoff contracts from an LNG plant, as well as the incentives recommended by the Conciliation Commission. Although many studies have been done, none of the published ones we have seen provide accurate and unbiased analysis. We urge that Sunrise be developed to serve the best interests of the people of this country, rather than those of a particular oil company, political faction, or region. The decision is too important to be swayed by emotional, political or personal considerations.

How the Sunrise Development Plan will be approved

1. Approval of Development Concept in closed discussions among Australia, Timor-Leste and the Sunrise contractors.
2. Plan submitted to GB and DA.
3. DA hears from companies, makes changes and recommendation within 180 days.
4. GB considers DA recommendation, in accordance with these Criteria:
 - a. Accords with “the approved Development Concept.”
 - b. Supports each party’s policy, objectives and needs.
 - c. Is commercially viable and technically feasible.
 - d. Is consistent with Good Oilfield Practice and companies’ Health/Safety/Environment strategies.
 - e. Provides fair return to the Contractor, who is seeking best commercial advantage.
 - f. Contractor has financial and technical competence to carry out on schedule.
 - g. Contractor has arranged to sell or process the gas.
5. GB approves plan within 180 days or GB rejects plan, specifying reasons.
6. If rejected, any party can appeal to the DRC within 15 days.
7. If DRC determines within 90 days that the proposed plan meets Development Concept and Criteria, it shall approve the plan.
8. However, if DRC finds that the Plan is not in accordance with the Development Concept or Criteria, it shall reject the plan, specifying reasons.
9. Decisions by GB and DRC are binding on the parties.

Everyone familiar with Timor-Leste Petroleum Law (including the companies who participate in EITI) knows that contract transparency is mandatory, and we expect that the new Bayu-Undan, Greater Sunrise, Kitan and Buffalo contracts will be published. It would be a shame -- as well as an insult to RDTL national sovereignty -- if Article 9.2 of the new Treaty (“no effect on rights and obligations arising under the Timor Sea Treaty and IUA”, both of which predated Timor-Leste’s legislation) were used to justify continuing violation of transparency requirements. Timor-Leste is proud of its transparent system of managing petroleum development and revenues, and neither Australia nor the oil companies should be allowed to sabotage it.

⁹ The book is available for free download in English or Bahasa Indonesia, with a summary in Tetum, from <http://www.laohamutuk.org/Oil/LNG/Report.htm>.

What happens now?

Closed-door discussions will continue on the Sunrise Development Concept, and the transitional arrangements for the Bayu-Undan and Kitan contracts will be implemented.

Before the Boundary Treaty becomes legally effective, it must be ratified by both countries. Until then, Australia will continue to receive 10% of Bayu-Undan revenues (about \$4 million per month).

Timor-Leste's National Parliament has been dissolved, and the new Parliament will not take office before June, with the Eighth Constitutional Government a month or two later. Timor-Leste's new Council of Ministers and Parliament will probably ratify the Boundary Treaty within two months after that, and we encourage public consultations and careful analysis for consistency with Timor-Leste law.

Australia's process could take six months, and requires a Parliamentary Inquiry and public hearings by the Joint Standing Committee on Treaties. We hope that there will be no unnecessary delays.

Timor-Leste will resume negotiating its maritime boundary with Indonesia this year, and it should be easier than with Australia because there is probably no oil and gas under potentially contested areas. Once this is settled, Australia and Indonesia will be able to amend and finally ratify their draft 1997 water column boundary (EEZ) treaty, establishing security and economic rights over their respective water surfaces and fisheries.

However, nothing in the new Australia-Timor-Leste Boundary Treaty disturbs the Australia-Indonesia Seabed Treaty which has been in effect for 46 years. Although some people in Indonesia believe that the older treaty was unfair, Australia has no legal obligation to renegotiate it. Timor-Leste and Australia kept Indonesia informed throughout the recent process, and Jakarta has not objected.

After Timor-Leste and Indonesia have settled their seabed boundaries, and after all the oil and gas in relevant areas has been extracted, the lateral lines of the new Australia-Timor-Leste boundary will be adjusted to line up with the Indonesia boundary.

Article 10 of the new Boundary Treaty says that Timor-Leste shall not "have a claim for compensation" for money collected by Australia under prior treaties and agreements, which totals around five billion dollars. However, nothing in the Treaty prevents Australia from voluntarily returning this stolen money to Timor-Leste. The preamble of the Treaty mentions "promoting Timor-Leste's economic development" and being "good neighbors and in a spirit of cooperation and friendship ... in order to achieve an equitable solution." In this new spirit of mutual respect, it would be appropriate for Australia to give back what it took during the nearly three decades since it signed the Timor Gap Treaty in order to profit from Indonesia's brutal and illegal occupation of Timor-Leste.