

# Another win for 'David' Timor against 'Goliath' Australia

Frank Brennan | 26 September 2016

**David Timor has once again scored a win against Goliath Australia in the international legal forum. Last time it was in the International Court of Justice which took strong exception to Australia's raiding of the office of a lawyer involved in the preparation of Timor Leste's case, though admittedly Australia's one ad hoc judge did dissent on key points from the other 15 judges!**

This time it was before a five-member Conciliation Commission convened under the auspices of the Permanent Court of Arbitration. Timor had asked for compulsory conciliation seeking to advance its demand that Australia come to the table and commence the negotiation of maritime boundaries. Australia raised six objections to the conciliation. All six objections were rejected unanimously by the commission.

Two of the commissioners were nominated directly by Australia. One of those commissioners was Dr Rosalie Balkin who had been a highly respected Assistant Secretary in the Australian the

Attorney-General's Department. She had been in charge of the Public International Law Branch in the Office of International Law.

Balkin's involvement is very significant in light of the long entrenched Canberra bureaucratic mindset which has informed governments of both political persuasions on Timor issues, urging them to yield no ground when it comes to boundary negotiations.

Responding to the commission's findings, Attorney General George Brandis and Foreign Minister Julie Bishop on Tuesday regurgitated the long repeated Canberra mantra: 'The current treaty arrangements between Australia and Timor-Leste have been hugely beneficial to Timor-Leste and have supported the accumulation of a \$16 billion sovereign wealth fund ...

'We have a strong interest in Timor-Leste's stability and growing prosperity, and in providing a stable and transparent framework for investment in the Timor Sea.'

They have no idea just how patronising this sounds in Dili each time Australia gets defeated in the international forum. They may well be right. But it's not their call. Timor-Leste is now an independent sovereign nation and its leaders, which include those who fought for its independence, now want to negotiate maritime boundaries. It's time for some very plain speaking in Canberra.

Australia and Timor Leste negotiated the Timor Sea Treaty in 2002 and the CMATS Treaty (Treaty on Certain Maritime Arrangements in The Timor Sea) in 2006. The CMATS treaty was negotiated in such indecent haste that Foreign Minister Alexander Downer deliberately circumvented the usual Australian parliamentary process for scrutinising the treaty.



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It was finalised at a time of great political instability in Timor Leste. CMATS was designed to put the negotiation of maritime boundaries on hold for 50 years, providing Timor Leste with a 50 per cent revenue share of the Greater Sunrise oil and gas field, even though most of the field fell within Australian jurisdiction under the 2002 agreement. Back in 2006, commentators including me endorsed CMATS as a fair deal given that it was supported by the Timorese leadership who were content to put boundary negotiations on the long finger in exchange for a short term financial windfall.

The expectation was that a deal for the development of Sunrise would be finalised within six years and that production would start shortly thereafter. But that never happened. No deal was struck with the joint venturers led by Woodside and Shell. With the present glut in oil and gas prices, it is highly unlikely that Sunrise will be developed in the foreseeable future. For example, Shell has shelved the Browse project off the Western Australian coast. Browse is twice the size of Sunrise, and has none of the complex jurisdictional issues.

Having learnt that Australia spied on the Timorese negotiators when CMATS was being finalised, the Timorese have been keen to invalidate the CMATS Treaty. They have other international proceedings on foot seeking a declaration of invalidity. They may succeed; they may not. Meanwhile the Timorese have received legal advice which encourages them to think that the whole of Sunrise might eventually be included within Timor's jurisdiction, avoiding the need to deal further with the Australians. There is no certainty about this, because negotiations will need to include a place at the table for Indonesia as well as Australia and Timor-Leste.

The Timorese convinced the Labor Party before the last election that a future Labor government should commit to prompt negotiation of a maritime boundary. Labor also announced it would reverse the 2002 Australian decision to withdraw Australia from court determinations or arbitration in the event of a failure to reach agreement. The Timorese then treaded carefully and respectfully with Malcolm Turnbull during the election campaign. With new prime ministers on either side of the Timor Trough, the Timorese thought the time was ripe to seek agreement on commencing the negotiation of maritime boundaries. They could have enlisted their many Australian friends to campaign against Turnbull in the election. But they decided not to. They opted to wait.

Armed with a strong legal team from the UK led by Vaughan Lowe and Sir Michael Wood, two of the doyens of international maritime law, the Timorese then took a bold step. Lowe and Wood had advised that the UN Convention on the Law of the Sea (UNCLOS) contained provisions for compulsory conciliation in cases where the parties had agreed not to go to arbitration or to judicial settlement. They argued this was the situation with CMATS. The commission agreed. The commission decided:

Nothing in CMATS constitutes an agreement 'to seek settlement of the dispute by a means of [the Parties'] own choice'. Nor does the commission consider that an agreement not to pursue any means of dispute settlement can reasonably be considered a dispute settlement means of the parties' own choice. Accordingly the commission concludes that CMATS is not an agreement [pursuant to UNCLOS] that would preclude recourse to compulsory conciliation.

The Conciliation Commission will now host a year of meetings between the parties assisting them to reach agreement on maritime boundaries. The commission will then produce a report. Though the report and any observations by the commission are not legally binding, this one-year procedure should now be enough to convince the Turnbull government that there is no point in putting negotiations on hold for another 41 years or until the election of the next Labor government.

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Turnbull's advisers may well continue to tell him that CMATS provides certainty for economic development of Greater Sunrise, while putting on hold the uncertainty of maritime boundary negotiations which might exacerbate tensions with Indonesia, given the past dealings and agreements between Indonesia and Australia. They may well continue to argue that risks in relationships can be minimised by maintaining present arrangements. This week's ruling should give the Canberra bureaucrats every reason to pause.

There is nothing to be gained for Australia by continuing to put negotiations on hold when there is no immediate prospect of Sunrise being developed, when the Timorese are increasingly convinced (whether rightly or wrongly) that they were duped, when Australia is wanting to put out a clear message in the South China Sea that China be committed to negotiations in accordance with international law, and when Australia has to spend a year at the table engaged in conciliation under the watchful eye of five commissioners who have already taken a dim view of Australia's legalistic approach.

More than ever, Turnbull will have to stop preaching on the South China Sea if he is not prepared to act in the Timor Sea. Australia has already told the commission that 'it will engage in the conciliation in good faith'. So Turnbull will need to develop a new narrative as to why Australia wouldn't make the best of a bad lot and use the compulsory conciliation as a means to kick start a sensible negotiation of maritime boundaries. Hopefully he will drop the patronising Canberra line that we Australians know what's best for the Timorese. With their flash UK legal advisers and Norwegian commercial advisers, the Timorese will make their own decisions from here on. Thus far, David has scored two king hits in the international forum. It's time for Goliath to take stock.



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Main image: Children in East Timor, by NeilsPhotography via Flickr (<https://www.flickr.com/photos/neilspicys/2705565333/in/photolist-585Jja-9zzCS-589TKw-hQRyz-589UvY-5hQATk-9ob1V-ab8XT-npPLX-e1qkV-5aVVqh-97ttf-9oaTA-cts5p-9mkTR-9m3iF-9TtqL-9mkTS-cqXH8-G5TA-7n5j4g-uGuZj-nkdKM-9kxWE-iPoGA-7BxTZy-ifFhR-nohSB-9kuzW-57MBe4-hHQmD-cg78n-e1qkS-j24X2-uGxpp-FMbfi-j219n-aeMt9-9Bh35-noizp-e1qkR-585FSz-aeMtb-585Hbi-589Qqb-589PYm-beHKXH-iPqgQ-589Tu7-5aRzSB>)

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