

Timor: Rules-based order and spying

Stephen Grenville
Previous Posts



3 March 2016 2:33PM

There are a couple of issues from the The Interpreter discussion of the maritime border with Timor Leste that merit more exploration. First, the relevance of 'rules-based order'; second, the ASIS spying.



Rules-based order

Malcolm Jorgensen makes an eloquent argument for handing over the rule-making on maritime boundaries to UNCLOS, largely on the basis that to do otherwise undermines our arguments elsewhere (in particular, in relation to the South China Sea) for a rules-based order.

Everyone is in favour of a rules-based order. The operational question, however, is 'who writes the rules?'

In this case the relevant rules are not found in UNCLOS itself, but in dispute-resolution outcomes. In my most-recent post, I hazarded the guess that an arbitrated solution in this case would leave everyone unhappy: the Timorese because they are unlikely to get wider laterals that include the Sunrise gas-field; Australia because it would likely lose some of its continental shelf; and Indonesia (not a direct party, but closely interested) because the new border would be a constant reminder of how they were 'taken to the cleaners' in the 1972 treaty with Australia.

Could patient negotiation find a better solution? By all reports, past negotiations have been acrimonious, justifying the Timorese view that they were bullied. Even so, the 2006 Certain Maritime Arrangements in the Timor Sea treaty (CMATS) demonstrated a degree of flexibility, compromise, and give-and-take that international arbitration could not have achieved, with its search for consistent universal rules.

Indeed CMATS, at least initially, was favourably received by both parties as a reasonable compromise (Robert King's submission to the 2013 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Australia's relationship with Timor-Leste*, records this history comprehensively).

Timor got 90% of the revenue from the Joint Petroleum Development Area (JPDA). It opened the way for Sunrise to be developed, with Timor getting 50% of the revenues, even though only 20% of Sunrise falls within the JPDA. Timor's Exclusive Economic Zone (EEZ) would encompass the whole of the JPDA. The vexed issue of a permanent maritime border covering the seabed was put off for 50 years.

The CMATS logic seemed sound: let's get on with developing the valuable resources, giving Timor a bigger share than it would most likely get from international arbitration. The differences of view on the maritime boundary were put off into the far distant future. Indonesia still felt it had been cheated in 1972, but it could take solace in two aspects. First, the Timor-Australia maritime border was not settled at equidistant, which would have been a constant reminder of Indonesia's own anomalous maritime border with Australia. Second, the 1997 treaty with Australia had confirmed Indonesia's EEZ extended to the median.

Does this arrangement need further adjustment? If Timor needs to settle its maritime boundaries now and comes to a re-opened negotiation believing that widening the laterals and getting direct ownership over Sunrise is a matter of national honour, then it's hard to see how negotiations

could succeed (if only because Indonesia has a close interest and isn't present at the table). In time, the parties may be able to reset their expectations. The solution may be at variance with UNCLOS norms (as CMATS is), but would still be consistent with the UNCLOS over-riding principle that the best solution is an agreement between the parties.

Does it seem too much of a stretch to envisage that this kind of flexible give and take process might even have relevance as a model for the South China Sea disputes? Agreement in the Timor Sea would demonstrate that patient negotiation between all the parties can reach an acceptable, flexible and innovative outcome that might involve sharing resources and responsibilities in ways other than those envisaged in UNCLOS.

In the South China Sea there is no chance of finding an overall solution by submitting ad hoc parts of this problem to international arbitration. Is anyone suggesting that calling in the surveyors to draw some equidistant lines between the relevant countries could ever settle this issue? An overall agreement with all interested parties (perhaps beginning with a negotiation between ASEAN and China) might be a big ask, but it would open up possible compromises and innovative solutions specific to the region and the circumstances that are simply not on the table if this goes to international arbitration. For example, can you see anything familiar in this proposal for two Joint Development Areas in the South China Sea?

So of course we are all in favour of a rules-based order. But sometimes patient efforts at agreement are better than legal process.

Spying

Let's turn now to the spying. As I have said before, this was not only scandalously unacceptable behaviour, but incompetent as well. So what should we do now? First, we should admit what we did, apologise and undertake never to do this sort of thing again. If the information collected was of any use, and got us a better outcome in CMATS, we should offer to rectify this unfair betterment. But so far no one has suggested what aspects of the CMATS outcome would have been different if we had refrained from this bumbling stupidity. As the then foreign minister said, 'you didn't have to spy on the East Timorese to know their position'.

How can we put substance behind a promise not to do this again?

We have to fix the failed governance of ASIS. It's not good enough to hide behind the 'never confirm or deny' smoke-screen, when the only lesson learned is: 'next time don't get caught'. Like other Government institutions (which also have their secrets), ASIS should not only be held accountable for its actions, but the value of its output requires continuous critical appraisal. The current accountability doesn't seem to go much beyond checking administrative issues (was the petty cash properly accounted for?). How many more episodes of incompetence occurred but didn't happen to come to light? In this process, we need to ask why we need this kind of cloak-and-dagger James Bond activity at all? And it's not the intelligence community's sole recent public debacle: listening in on SBY's wife was just mindless.

What is needed is a wide-ranging enquiry into the net benefits of this kind of intelligence-gathering. If we do need ASIS, then it requires a degree of oversight which has clearly been lacking. If such an inquiry produced a substantial shrinking (or even disappearance) of ASIS and reining-in of the Signals Directorate, that would free up resources to boost DFAT's overt intelligence collection.

Photo by Pamela Martin/Getty Images