

East Timor: Concession is the price for a rules-based order

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The shift in Labor's position in regard to Australia's long running maritime border dispute with East Timor will likely appeal to diplomatic conventions and notions of equity but, of greater significance, the new policy is also consistent with promoting Australia's long-term geopolitical interests.

Deputy Labor leader and shadow foreign minister, Tanya Plibersek, announced last week that Labor had dropped its longstanding refusal to allow independent adjudication, according to established principles of international law, in the long-running dispute.

The over-arching principle that Australian leaders of all political stripes have used to describe Australia's Asia-Pacific policy is maintaining a 'rules-based order'. Kevin Rudd, Julia Gillard and Julie Bishop (under two prime ministers) have all employed this turn of phrase. In Prime Minister Malcolm Turnbull's recent address in Washington, he reminded his audience that 'the US-anchored rules-based order has delivered the greatest run of peace and prosperity this planet has ever known'. Its preservation is therefore 'a consistent and absolutely central objective'.

Positioning itself as defender of a rules-based order has allowed Australia to criticise the US and China, as the two largest maritime powers in the region, wherever their actions depart from predetermined legal constraints. Australia has consistently admonished the US for failing to ratify the UN Convention on the Law of the Sea as a valuable tool in the face of growing maritime tensions. In his Washington address, Turnbull asserted that: 'Non-ratification diminishes American leadership where it is most needed.'

Likewise, Australia's concern about growing Chinese dominance in the South China Sea has been framed as a breach of territorial rules mandated by UNCLOS, while it has supported arbitration to determine disputed island claims according to established principles of international law. In essence, Australia demands that these powerful states set aside parochial interests and instead adopt a longer time horizon that recognises national interests in constructing a robust legal order.

In this context Australia's continued obstruction of East Timorese maritime claims is revealed as both incoherent and self-defeating.

The international legal system doesn't sit under a government capable of enforcing the law, but rather requires reciprocity between countries. Australia followed that dynamic in 2014 when the ICJ ruled it must cease spying on East Timor, but that same month ruled in Australia's favour by ordering Japan to cease whaling in the Southern Ocean. This draws fresh attention to Turnbull's Washington statement that 'to enjoy the rewards of a rules-based order and the stability that it delivers, we must also share the responsibilities that come with it'.

East Timor inherited its maritime boundary from a 1972 agreement between Indonesia and Australia under which the latter argued that, because its continental shelf jutted far into the Timor Sea, it had territorial rights to nearly the entire area. This departs from the presumption under international law of drawing equidistant maritime lines. Crucially, two months before East Timor gained independence in 2002, Australia withdrew from the jurisdiction of both the International Court of Justice and the International Tribunal on the Law of the Sea for 'any dispute concerning or relating to the delimitation of maritime zones'.

It is certainly legal for any country to establish reservations on ICJ or ITLOS jurisdiction, but Australia has itself set the objective of strengthening regional rules and architecture. That includes not only the UNCLOS regime, but also the Trans-Pacific Partnership and key multilateral economic forums. Demanding US and Chinese fidelity to a rules-based order rings hollow when Australia refuses to grant the same toward one of its least powerful neighbours. As emphasised by Plibersek, advancing order requires that Australia 'urge all parties to abide by both the terms and the spirit' of international law.

Both US and Australian resistance to fully embracing UNCLOS is motivated by various concerns that include access to mineral resources in the continental shelf. Australian policy is specifically designed to prevent East Timor claiming rights through legal mechanisms, thereby leaving the matter to be determined by the distribution of political power. Yet the Australian case represents an even more naked power grab than the Americans. While US presidents have largely supported ratification, but been blocked by Congress, Australian policy reflects calculated political judgements.

By accepting arbitration or waiving reservations to adjudication, Australia potentially reduces its slice of an estimated \$40-\$100 billion in Timor Gap resources. Yet there are much more consequential stakes attached to upholding a rules-based order in the region as a whole. In the South China Sea alone, 60% of Australia's exports and over \$5 trillion in annual global trade depend on China's respect for freedom of navigation rules. Australians should heed the words of President Eisenhower that 'it is better to lose a point now and then in an international tribunal, and gain a world in which everyone lives at peace under a rule of law.'

Plibersek explicitly recognised the underlying strategic calculation in concluding that upholding international law 'is in the interests of the system itself that has delivered so much for Australia.' There is no illusion that the international legal system is capable of displacing the realities of geopolitics. The Asia-Pacific strategic environment will be shaped by the Sino-US power contest for the foreseeable future. But persistent recognition that rules are capable of bringing order to that contest will require bipartisan commitment to investing real political capital in the international legal order.