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Timor-Leste pushes Australia to conciliation

Australia has yet to enter into compulsory conciliation talks with Timor-Leste over maritime boundaries, but it has already disputed the legality of the process.



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Students protest in March outside the Australian embassy in Dili, Timor-Leste.

EPA / Antonio Dasiparu

Timor-Leste rolled out the red carpet last month to Vladimir Golitsyn, president of the International Tribunal for the Law of the Sea (ITLOS), the Hamburg-based judicial body established to deal with disputes under the United Nations Convention on the Law of the Sea (UNCLOS).

Judge Golitsyn was the star turn at an international conference, which, in theory, addressed broad issues of maritime law. In practice, the gathering was directed at the Timorese push for Australia to negotiate a permanent maritime boundary with its neighbour.

About 600 people packed into Dili's convention centre for the conference – politicians, public servants, lawyers, veterans of Timor-Leste's independence struggle against Indonesia, journalists, students and diplomats, including the Australian ambassador, Peter Doyle.

The proceedings were mostly in English, rather than the nation's official languages of Tetum or Portuguese, and the discussion was often technical and philosophical. Indeed, Judge Golitsyn's rumbling keynote speech included an early reference to Immanuel Kant's views on the importance of the rule of law.

But the audience listened intently for about six hours, and most of them stayed for the afternoon session. For this observer, the two most interesting moments were an impassioned speech by a veteran of the resistance, and a demand from a group of students that they should be able to ask questions despite the conference running into overtime.

The veteran, who did not speak in English, had unmistakable gravitas. A local who translated for me said the veteran reckoned there was a paradox between Australia being a comrade during World War II and leading the International Force for East Timor peacekeeping taskforce in 1999, but now refusing to negotiate a maritime boundary.

In contrast, the veteran noted, Timor-Leste was now on good terms with Indonesia, despite a bloody and comparatively recent occupation. Furthermore, Indonesia has agreed to negotiate on maritime boundaries.

When it comes to the Timor Sea, Australian officialdom tends to talk about existing agreements, legal precedents, international law and oil money when defending the refusal to negotiate a boundary between the nations.

But the Timorese, from the prime minister down, talk about a maritime boundary as the final stage of their country gaining independence. Certainly one of the world's newest and smallest countries

wants to secure a new stream of oil money, but locals insist there is a deeper level of significance.

In a wide-ranging interview, the prime minister of Timor-Leste, Rui Maria de Araújo, argued that his country only managed to restore its independence from Indonesia after a 24-year struggle.

“Now we are in the second phase of our sovereignty claim,” he said. “The maritime boundary is a sovereign issue for us. It’s an issue of rights. It’s an issue of international law.”

Australia has struck a series of treaties with Timor-Leste, which gets 90 per cent of the output from a Joint Petroleum Development Area. There is a proposed 50-50 split of Woodside Petroleum’s undeveloped Greater Sunrise field, which is likely to stay dormant for many years based on current oil prices.

The Timorese argue that international law supports the maritime border being on the median line between it and Australia, which would expand its footprint of oil and gas reserves.

But Timor-Leste can’t take its case to the International Court of Justice or before Judge Golitsyn’s tribunal because Australia withdrew from the treaty clauses that provide for compulsory dispute resolution, shortly before Timor-Leste gained independence in 2002.

Timor-Leste has instead sought compulsory conciliation, which can increase pressure and scrutiny of Australia but is not binding. Australia and Timor-Leste have each nominated two representatives to the conciliation commission, with UN Secretary-General Ban Ki-moon having the power to nominate a fifth member as chairman if the two countries cannot agree on who should fill the position

Prime Minister Araújo said that Timor-Leste was “very appreciative” of Australia participating in the conciliation process, even though the “first point of disagreement” was that Australia had indicated it would be challenging the jurisdiction of the conciliation commission.

He revealed to *The Saturday Paper* that Australia has already indicated it will argue the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) deferred establishment of a permanent maritime boundary for 50 years.

“The way it is framed is that Australia is claiming that because of the agreement that we had, CMATS, the compulsory conciliation doesn’t have jurisdiction on that,” Araújo said.

“So the commission of conciliators will have to go through the arguments from Australia, and also the arguments for Timor-Leste, and make a decision.”

Yet there has been a significant policy shift back in Australia, where Labor has ended bipartisanship on Timor-Leste. Foreign affairs spokeswoman Tanya Plibersek pledged that Labor will negotiate on the maritime boundary, or have it arbitrated if talks fail.

The changed Labor stance followed a meeting in Canberra on March 16 last year between Labor

leader Bill Shorten, Plibersek, shadow attorney-general Mark Dreyfus and the Timorese resistance leader and former prime minister Xanana Gusmão, who is chief negotiator on the maritime boundary. Plibersek then visited Dili in May 2015, where she held detailed talks on the issue.

This week, Plibersek told the Lowy Institute that Australia had “allowed the maritime boundary dispute to poison relations” with Timor-Leste. She pledged to visit Timor-Leste by the end of August to start negotiations, if Labor wins the July 2 election.

Araújo stressed that the Timorese “don’t want to meddle into Australian internal politics”, saying the Turnbull government’s decision to participate in the conciliation talks showed it was taking the issue seriously. “Australia has shown an interest in starting a process. That’s a good sign for us.”

But the new Labor policy leaves the Department of Foreign Affairs and Trade in a challenging position. It supports the status quo, which will be overturned if Labor wins the election.

DFAT’s first assistant secretary of its South-East Asia maritime division, Allaster Cox, has argued in the Lowy Institute’s publication *The Interpreter* that Timor has accrued a petroleum fund worth more than \$16 billion under the current arrangements and that reopening the treaties would undermine investment certainty and delay revenue flows to both countries.

Cox argued that Australia was legally entitled to settle its boundaries through negotiation, which required an “equitable solution”, which was not the same thing as equidistance or a median line.

The departing DFAT secretary, Peter Varghese, has told senate estimates that bilateral negotiations could also “flow into a trilateral issue” involving Indonesia.

“We think the current arrangements serve Australia’s interests well,” Varghese said. “I might add, we think that the current arrangements, if properly implemented, provide a very fair and, indeed, quite a generous deal to East Timor.”

But these “reasoned” arguments have been overshadowed by the Timorese legal action alleging that Australia bugged their cabinet offices during the 2004 negotiation of the CMATS treaty, exposing that it was not negotiated in good faith.

Timor-Leste needs answers on the boundary sooner rather than later. Its oil income has been slashed by the global fall in oil prices and production is declining from the existing wells in the Joint Petroleum Development Zone, which might dry up in six or seven years.

The Timor-Leste government wants to diversify the economy away from oil but, at the same time, has ambitious – perhaps over-ambitious – plans for onshore spinoff industries in special economic zones on the country’s south coast.

In the conciliation proceedings, Timor-Leste has plenty of bright young lawyers and a legal eminence in the British QC Vaughan Lowe, who is emeritus Chichele professor of public international law and an emeritus fellow of All Souls College, Oxford.

While addressing the Dili conference, Lowe sidestepped a question on whether Indonesia would eventually have to be part of the boundary negotiations. But he noted there were well-established principles that bilateral negotiations “cannot do anything that affects the rights of a third state”.

Asked about the legitimacy of Australia withdrawing from legal jurisdictions that could impose an outcome, Lowe kept his powder dry.

“States are entitled to make exceptions of this kind. Australia has exercised the right that it has. It may be on political or other grounds that might be regretted, but the fact is that they have a legal right and they have done it.

“The point I would add is that does not end the matter, because simply withdrawing from the International Court [of Justice] or the ITLOS still leaves ... the basic duty to negotiate on the boundaries on the basis of international law so as to achieve an equitable solution, and Australia and Timor both remain bound by that duty.”

On the sidelines of the conference, the Nobel prize-winner and former Timor-Leste prime minister and president, José Ramos-Horta, had a less legalistic view.

“I cannot say I am optimistic or not optimistic,” he told *The Saturday Paper*. “I believe common sense, wisdom, will prevail.”

Ramos-Horta believes the maritime boundary will be “high on the agenda in Canberra”, regardless of which party wins the coming election.

“If Australia realises that a drawn-out controversy on this issue will harm Australia’s image, credibility, in Timor-Leste, around the world, how could Australia go to the international fora, the UN and other places, talk about upholding international law, international decency in relations, when it refuses to engage in sustained negotiations with Timor-Leste?

“So, you know, I have faith in the goodwill of the people in Australia, including the political leaders. I think Australians are very naturally ... sympathetic to the underdog.”

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