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The Australia/Timor-Leste maritime boundary dispute

Centre for International Law, National University of Singapore

Symposium: Small States, Legal Argument, and International Disputes

by Bill Campbell. *12 July 2023*

A photo of Timor-Leste and Australia signing the historic Maritime Boundary Treaty at the United Nations Headquarters in New York. (From the Official website of the Maritime Boundary Office, Government of the Democratic Republic of Timor-Leste)

This post seeks to go some way towards dispelling the notion that there was a complete asymmetry of power involved in the settlement of the long-running dispute between Australia and Timor-Leste over maritime delimitation in the Timor Sea.* In so doing, it will focus on the first-ever conciliation under Part XV, Art 298.1(a)(i) and Annex V of the 1982 United Nations Convention on the Law of the Sea Convention (the 1982 Convention). The Part XV conciliation between Timor-Leste and Australia demonstrated that this cooperative form of dispute settlement is particularly suited to settling disputes between a small state and a larger state.

Initial efforts to resolve the delimitation dispute between Timor-Leste and Australia involved the negotiation of three treaties: the 2002 Timor Sea Treaty, the 2003 Greater Sunrise Agreement and the 2007 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). The ensuing litigation phase involved an International Court of Justice (ICJ) case and two arbitrations (see here and here) under the Timor Sea Treaty, all commenced by Timor-Leste.

The alleged facts surrounding the first arbitration and the ICJ case were controversial, involving allegations of spying in the course of the negotiation of the CMATS Treaty and the seizure of documents from the Canberra premises of one of Timor-Leste's legal advisers, Bernard Collaery. After hearing the Parties, on 3 March 2014 the ICJ ordered provisional measures. Under those measures, Australia was obliged to ensure that the content of the seized material was not in any way to be used to the disadvantage of Timor-Leste and was to be kept under seal. It also ordered Australia not to interfere in any way in communications between Timor-Leste and its legal advisers in connection with the arbitration under the 2002 Timor Sea Treaty. The ICJ case was ultimately discontinued following the return of the seized documents by Australia.

Australia and Timor-Leste then moved on to the compulsory conciliation phase – which was ultimately successful. The process of conciliation does not result in a binding legal decision. Rather, it is intended facilitate and assist negotiations between the parties to a dispute.

The 1982 Convention provides for the compulsory conciliation of a maritime delimitation dispute in circumstances where one of the parties—in this case Australia—has otherwise excluded maritime delimitation from dispute settlement under the Convention. Timor-Leste initiated such a compulsory conciliation on 11 April 2016. After rejecting an Australian challenge to its 'competence' (jurisdiction) on 19 September 2016, the five member Conciliation Commission chaired by the then Danish Ambassador to India and former United Nations Deputy Secretary–General for Legal Affairs, Peter Taksøe Jensen, presented its detailed report on 9 May 2018. The other members were Dr Rosalie Balkin (former International Maritime Organization Legal Adviser), Professor Don McRae (International Law Commission), Judge Abdul Koroma of the ICJ and Judge Rüdiger Wolfrum of the International Tribunal for the Law of the Sea. The 2018 Timor Sea Treaty reflecting the report of the Commission entered into force on 30 August 2019.

Unlike the litigation stage, the conciliation was very much a cooperative exercise on the part of both the parties and the Commission involving as it did the agreement of all players on a number of factors that undoubtedly contributed to its success.

For example, early on, the Parties agreed on a series of what the Commission called 'confidence building measures' aimed at relieving bilateral tensions and thus facilitating the conciliation process. The measures included the termination of the CMATS Treaty I mentioned earlier, a commitment by both parties to negotiate permanent maritime boundaries, the termination of the two arbitral proceedings, the withdrawal of a recent release of petroleum acreage by Australia and positive public communication by the parties.

These measures were complemented by the agreed rules of procedure for the conciliation which emphasised flexibility and informality in the conduct of the conciliation proceedings – and this was borne out in practice. On most occasions, the Commission met each party separately rather than at the same time. This enabled the parties to be more frank and the Commission to guide each party towards possible compromise. An agreed compromise was ultimately reflected in the

Comprehensive Package Agreement of August 2017 which was then used by the parties to negotiate the final text of a treaty on a bilateral basis.

Furthermore, with the agreement of the Parties, the conciliation took a holistic approach, dealing not only with maritime delimitation but also related issues at dispute between the parties including the development of resources in the Timor Sea. In that respect, the Commission met not only with the parties but separately with the private joint venturers of the key Greater Sunrise development.

The conciliation was, in my view, a success, though there do remain some significant practical issues—as including the location of processing facilities and the associated pipeline from the Sunrise deposit—that need to be resolved before exploitation of the Greater Sunrise deposit can proceed.

At all stages of the dispute, the both parties were represented by skilled negotiators and legal practitioners of a high calibre—as well as senior political figures—in putting forward positions consistent with their respective national interests. During the negotiations for the original 2002 Timor Sea Treaty, Timor-Leste was more than ably represented by Prime Minister Mari Alkitiri and Peter Galbraith, a former US Ambassador and then member of the UN Transitional Authority in Timor-Leste – with Australia being represented by senior officials from Department of Foreign Affairs and Trade (DFAT) and other Government Departments. At the last stage of conciliation and subsequent negotiation of 2018 Timor Sea Treaty, political leaders including Xanana Gusmão and Julie Bishop represented their respective countries as did senior departmental officials on both sides. Also, each side engaged highly qualified counsel to represent them in the litigation and the subsequent conciliation, with Sir Michael Wood and Professor Vaughan Lowe QC representing Timor-Leste and the Solicitor–General Justin Gleeson SC, the late Professor James Crawford SC and Sir Daniel Bethlehem QC representing Australia. As one would expect, the ICJ, the relevant arbitral tribunals and the Conciliation Commission treated both parties equally and with respect (see further the symposium contribution from Juliette McIntyre). Such factors must go some way towards dispelling the notion of a complete asymmetry of power affecting the outcome – as does the outcome itself in the form of the 2018 Timor Sea Treaty.

* *The suggested asymmetry is exemplified in the opening statement in the Part XV Conciliation by HE Minister Kay Rala Xanana Gusmão on 29 August 2016: 'Inexperienced in negotiations, ignorant of our rights and desperate for revenue to rebuild our country from ruins, we succumbed to Australia's pressure and signed the CMATS treaty to facilitate the development of the Greater Sunrise field.'*

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