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Right but wrong: Australia is using a legalism to delay resolution of the Timor sea boundary dispute

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It is reasonable to suppose that for much of the time between 2007 and 2013, those responsible for managing Australia's diplomatic relationship with Timor-Leste rested easy about the potential irritant represented by the unresolved dispute involving the delimitation of the Timor Sea maritime boundary that divides the opposite coastlines of both countries.

In large measure, the Australian sense of ease on this issue was attributable to the treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS), which entered into force in February 2007. Article 4 of CMATS provides notable calm by establishing a 50-year moratorium on Australia's otherwise immediate and ongoing obligation to negotiate a permanent maritime boundary with Timor-Leste.

This sheltered sense of rule-bound tranquillity was first upset in April 2013 when Timor-Leste began binding arbitral proceedings under the 2002 Timor Sea Treaty. However, it was difficult to see how a successful challenge to the TST – a different treaty – could end the CMATS' moratorium. Inextricable synergistic links between the two treaties provide some plausible arguments that it could happen, but they are still difficult arguments to make. Linking the TST and CMATS in the arbitration, however, is essential for Timor-Leste if it wants to reopen negotiations on the maritime boundary before 2057. This is because CMATS itself excludes all forms of compulsory dispute settlement.

The TST arbitration remains pending, but the legal manoeuvres have continued. Most recently, in April this year, Timor-Leste initiated compulsory conciliation proceedings against Australia under the UN Convention on the Law of the Sea. Using this approach, Timor-Leste must surmount Australian arguments about jurisdiction and admissibility. If this can be accomplished, then the use of the UNCLOS seems a more promising route for Timor-Leste to reopen negotiations and bring them to fruition without waiting a half-century.

Compulsory conciliation concerning a dispute about a maritime boundary under UNCLOS arises when one party has objected to having such a dispute resolved by other available compulsory procedures entailing binding decisions. In March 2002, two months before Timor-Leste's independence, Australia declared that it would not consent to any compulsory procedure in any dispute relating to the delimitation of maritime zones, or to the exploitation of any disputed area of any such maritime zone. This means, amongst other things, that Timor-Leste cannot petition the International Court of Justice or International Tribunal for the Law of the Sea for a conclusive resolution of the dispute.

This is not the end of the matter, however. The law of the sea gives priority to the settlement of boundary disputes. Where a maritime boundary dispute exists, UNCLOS requires a party that has objected to having the dispute settled by compulsory, binding procedures, to accept the submission of the matter to compulsory conciliation. The conciliation commission's report that will be the result of the conciliation process is not binding, but the parties are required to use it for the basis of negotiated settlement.

If a negotiated settlement continues to prove impossible, then UNCLOS requires the parties to submit the question to one of the other available compulsory procedures (by mutual consent) for a binding decision. If things reached this stage, it would be incumbent on the parties to strive in good faith to agree on one of the procedures. This would require Australia to seriously consider, in good faith, resolving the dispute by way of a compulsory procedure, instead of steadfastly insisting on a policy it put in place in 2002 – that maritime boundaries disputes are best resolved by negotiation instead of litigation.

The compulsory conciliation process initiated by Timor-Leste, however, is more complicated than this brief description. In part this is because, as mentioned, Australia has jurisdiction and admissibility arguments to make.

Looking at jurisdiction first. The dispute settlement procedures provided for in UNCLOS, including compulsory conciliation, apply only where they are not excluded by an agreement between the parties. The moratorium established by CMATS is still in place and would appear to exclude all UNCLOS dispute settlement procedures, including compulsory conciliation. This is a significant problem for Timor-Leste in invoking the jurisdiction of the commission, but it may not be insurmountable.

In this proceeding, unlike the TST arbitration, CMATS can be attacked directly in defending the jurisdiction of the conciliation commission. Presumably, that is why, on the first day of hearings, it was reported that Timor-Leste castigated the alleged Australian espionage associated with the negotiation of CMATS. If Timor-Leste can prove these allegations, then reasonable arguments can be made that the commission must reject Australia's jurisdictional objection because CMATS is invalid or otherwise void at international law. If accepted, no agreement of the parties would bar the commission's jurisdiction.

Turning to the admissibility problem (a reason why the commission might not hear the claim even if it has jurisdiction), the press has reported that Australia maintains that no negotiations have preceded the initiation of these proceedings as required by UNCLOS. This is factually inaccurate. A press release by former Foreign Minister Alexander Downer established that as at May 2005 at least six rounds of inconclusive negotiations had taken place. Whether this is sufficient remains for the commission, but it is clear that since 2007 CMATS has made negotiation impossible.

If Timor-Leste were to clear the jurisdiction and admissibility hurdles, Australia will have to face up to the fact the equidistance principle guides delimitation in the modern law of the sea. It is no longer the days before UNCLOS. The application of this principle could easily mean that Australia's current 10 per cent cut of the resources (and revenues driven by exploitation) in the Joint Petroleum Development Area would be reduced to nil. And it would be reduced much sooner than 2057.

All of this, though, is possibility and detail. It is legally important, but it obscures bigger, fundamental questions about our character as a country, that are raised by Australia's dogged resistance to a compelling claim by a small, impoverished neighbour.

Do we want Australia, a big country already blessed with a rich abundance of terrestrial and marine natural resources of a magnitude most countries can only dream of, to be so selfish; to shake down a small, developing neighbour that can ill afford a dubious split in revenue; to stand on narrow legalism to delay the inevitable; to resist diplomatic goodwill, and the myriad benefits (well beyond the small, non-renewable revenues under current treaty arrangements) that will flow from a quick negotiated settlement. I know how I answer.

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