Australia's aversion to compulsory settlement for maritime boundary disputes comes back to bite it

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[For an abridged version making for a somewhat quicker read at the price of some loss of detail, please see here at the website of the University of Aberdeen School of Law]

The background

The long-running saga over the maritime boundaries between Australia and Timor-Leste has been keeping lawyers for both sides busy, with no fewer than four separate legal proceedings in recent years related directly or indirectly to the issue. (In fact, reaching back to the 1990s, one could add a fifth: the case brought unsuccessfully by Portugal against Australia in the International Court of Justice (ICJ) seeking to have Australia's conclusion of the 1989 Timor Gap Treaty with Indonesia declared unlawful, on the basis that Australia had no right to deal with Indonesia as sovereign of the eastern half of the island of Timor, formerly the Portuguese colony of East Timor. The Court declared the Portuguese claim inadmissible – that is, despite having jurisdiction over the case, it declined to make a decision on the merits – because, in order to succeed, it would have required the Court to rule unlawful Indonesia's takeover of East Timor by which it came to exercise sovereignty over that territory, making Indonesia a necessary third party to the case, which thus could not proceed because Indonesia was not before the Court. That matter will not be analysed further here.)

Focusing on developments in the current decade, the four proceedings in order of their commencement are:

(1) an arbitration under the 2002 Timor Sea Treaty, still continuing, in which Timor-Leste seeks a declaration of the invalidity of the 2006 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS) on the ground that its conclusion was tainted by the alleged planting of listening devices in 2004 by the Australian Secret Intelligence Service (ASIS) in Timor-Leste's cabinet room;

(2) a case brought by Timor-Leste before the ICJ relating to the seizure by the Australian authorities of papers relevant to case (1) from the offices of a Canberra solicitor advising both Timor-Leste and the ASIS operative turned whistleblower whose disclosure brought to light the eavesdropping operation, since settled;

(3) a separate arbitration under the Timor Sea Treaty brought by Timor-Leste in which the issue is whether the jurisdiction accorded to Australia by Article 8(b) of that Treaty over the pipeline from the Bayu-Undan field in the Joint Petroleum Development Area created by the Treaty, landing in Australia at its northern port of Darwin, is exclusive or must be shared with Timor-Leste; and

(4) the subject of this post, the invocation by Timor-Leste of compulsory conciliation under Article 298 of the United Nations Convention on the Law of the Sea (UNCLOS) and Annex V to UNCLOS as a means of settling permanently their outstanding boundaries, despite a clause in CMATS by which the parties agreed not to invoke such proceedings against each other for 50 years, with particular reference to the ruling by the conciliation commission (the Commission) rejecting Australia's challenge to its competence, delivered on 19 September 2016.

Much has been written over the years about the substance of the dispute as to where the maritime boundaries between Australia and Timor-Leste should lie, and the Commission will come up with its own recommendations now that it has rejected the Australian challenge to its competence. Readers unfamiliar with the arguments on both sides will find them conveniently illustrated by the Timor-Leste and Australian slideshows from the public opening session of the conciliation hearing on 29 August 2016 (which, along with the transcript of that session and the Commission's preliminary ruling, are the only publicly available documents at the time of writing other than press statements; in particular, the written submissions have not been released). This post, however, is confined to the procedural aspects of the conciliation, which are novel enough in themselves. Indeed this was the first-ever compulsory conciliation under UNCLOS (or at least the first that has entered the public domain – it cannot be excluded that parties to earlier disputes have settled or attempted to settle them by conciliations which they have agreed not to disclose).

Conciliation as a method of settling disputes

Conciliation has been defined by the Institut de Droit International as a procedure in which the disputant parties establish a commission or other body to help resolve their dispute, whose chief task is to examine the dispute impartially and attempt to define the terms of a settlement it thinks likely to be acceptable to the parties, and to assist them in whatever other specific way they may have requested of it. UNCLOS provides for both voluntary (see Article 284) and compulsory conciliation. The latter is an unusual combination of compulsory procedure with a non-binding outcome, but is occasionally encountered elsewhere, for example the Vienna Convention on the Law of Treaties provides for compulsory conciliation of a small class of disputes arising under it (though again none is known to have actually occurred).

As provided for by Article 3 of Annex V, a five-member conciliation commission was constituted. Pursuant to Article 3, the party initiating the proceedings appoints two conciliators and the other party does the same. The four chosen conciliators together in turn nominate a fifth who becomes the chairman. It comprises HE Ambassador Peter Taksøe-Jensen (Chairman, a former UN Assistant Secretary-General for Legal Affairs – I am grateful to a member of the audience at the initial presentation of these thoughts at the Faculty of Law of the Victoria University of Wellington a few weeks ago for pointing this out), Dr Rosalie Balkin (a former Director of the Legal Division and Assistant Secretary-General of the International Maritime Organization, a specialised agency of the United Nations, appointed by Australia), Judge Abdul G. Koroma (of the ICJ, appointed by Timor-Leste), Professor Donald McRae (a member of the International Law Commission, a body of experts reporting to the Sixth Committee of the UN General Assembly, appointed by Australia) and Judge Rüdiger Wolfrum (of the International Tribunal for the Law of the Sea (ITLOS) established by UNCLOS,

appointed by Timor-Leste). Its decision of 19 September 2016 to uphold its own competence despite the objections put forward by Australia was unanimous and will, I suspect, have taken many observers by surprise, myself included, though this is not to say that it is wrong in law.

The relevant law

Australia's analysis, like my own before the event, took as its starting point Article 4 of CMATS, which remains in force until and unless the Timorese attack on its validity in case (1) above succeeds. This provision is headed "Moratorium" and provides in pertinent part:

> 1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.
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> […]
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> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, […] neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.
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> 5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.
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> […]
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> 7. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty.

By Article 12 of CMATS, the "period of this Treaty" referred to above is 50 years from its entry into force, which took place in 2007. On its face, therefore, there has been a clear breach of Article 4 by Timor-Leste in calling these conciliation proceedings into being. Nothing in the words of Article 4 suggests that the fact that the proceedings do not have a binding outcome makes any difference in that regard. Of course, if the Timorese claim in case (1) above succeeds, CMATS will have been void *ab initio* and thus there will have been no breach of it by Timor-Leste after all, but it would be risky for it to rely on that outcome, since that condition has not yet been satisfied, and may never be.

The Commission, however, rejected this approach and instead based its analysis on the dispute settlement provisions within UNCLOS, grouped in Part XV (Articles 279 to 299), since it was to UNCLOS that it owed its own existence. It said that, having been created under UNCLOS and not under CMATS or the Timor Sea Treaty, it had no authority to decide any secondary claim that there had been a breach of CMATS by Timor-Leste in bringing the primary claim.

Instead, it began with Article 280 of UNCLOS: "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." This makes clear that the UNCLOS compulsory mechanism for settling disputes is a default one and can be displaced by agreement of the parties to a dispute, even if what they put in its place is non-compulsory or leads to a non-binding outcome, or both.

Article 280 is one of three relevant provisions in Part XV of UNCLOS for this conciliation. The effect of making an alternative choice under Article 280 is governed by Article 281, headed "Procedure where no settlement has been reached by the parties", which is in the following terms:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
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> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

This is another way of saying that the compulsory procedures of Part XV can still be applied to a dispute if the alternative methods of the parties' own choice under Article 280 have not led to its settlement, unless the original agreement to contract out of Part XV precludes this. Article 281 was critical to the result in the *Southern Bluefin Tuna arbitration* where an arbitral tribunal formed under Annex VII to UNCLOS found by majority that it lacked jurisdiction because the 1993 Convention for the Conservation of Southern Bluefin Tuna procedurally displaced UNCLOS through its optional dispute settlement provision, from which it inferred the exclusion of any further procedure within the meaning of Article 281(1) of UNCLOS, even though the relevant provision of the 1993 Convention was completely silent on the matter. Appended to the majority Award is Sir Ken Keith's separate opinion (in effect a dissent on this point): his view was that a clear indication of intent to displace UNCLOS would have been needed in the 1993 Convention but was absent there. This decision has in the main been heavily criticised and has very few supporters, so it was not unexpected when in 2015 a differently composed Annex VII tribunal in the *South China Sea arbitration* accepted the Philippines' invitation to depart from the reasoning of the *Southern Bluefin Tuna* tribunal, deciding that the non-compulsory procedures of the 1992 Convention on Biological Diversity, to which the Philippines and China were both parties, could not displace Part XV jurisdiction as argued by China in an informal position paper.

The last relevant provision of Part XV of UNCLOS is Article 298. This creates, in the words of its heading, a series of "[o]ptional exceptions to [the] applicability of section 2", in other words to Articles 286 to 296 which is where the compulsory procedures are found. One of the limited number of opt-outs it offers is for maritime boundary disputes:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may…declare in writing that it does not accept any one or more of the procedures

provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, […] provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and […] no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; […];

Australia had made such a declaration in 2002, shortly before Timor-Leste's independence. Since it could have done so at any time since signing UNCLOS in 1982, the timing of it understandably raised eyebrows. While it may be going too far to paint this as an act of bad faith on Australia's part (then again, Australia's habit of constant insistence on its own good faith, e.g. twice here in the short media release by the Foreign Minister and Attorney-General in the wake of the September ruling, has always struck me as protesting too much), my own criticism of this is a different one. For what Australia says about maritime boundary disputes being better settled by negotiation than litigation is in fact true of all disputes, so it is a poor justification for the step Australia took. At most it might be used to defend a withdrawal from any and all compulsory dispute settlement mechanisms, but that would be incompatible with the 1997 White Paper on foreign and trade policy in which the rule of law is at the top of the list of values that Australia brings to its foreign policy, not to mention its "support for the rules-based international order" stated in the abovementioned media release. Be that as it may, unlike the other opt-outs in the remaining subparagraphs of Article 298(1), for a subset of excluded disputes a declaration like Australia's is not the end of the road: no further procedure is available for pre-existing disputes, but for those arising once UNCLOS is in force, compulsory conciliation of the kind represented by these proceedings is contemplated.

The unsuccessful Australian objections

The foregoing provisions collectively enabled the Commission to dismiss each of Australia's objections made on six distinct grounds, which I paraphrase in the underlined text before commenting on each:

1. Article 4 of the CMATS Treaty precludes either party from initiating compulsory conciliation under Article 298 of UNCLOS and from engaging in the substantive matters in dispute in such proceedings. As noted above, the Commission took the view that it had no authority to give effect to a treaty other than UNCLOS except where UNCLOS itself dictated this, adopting a narrow reading of Article 293(1), which prescribes the sources of law that a Part XV forum should apply as follows: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

2. The CMATS Treaty falls within the category of "provisional arrangement[s] of a practical nature" specifically contemplated by Articles 74 and 83 of UNCLOS for the situation when a boundary delimiting the parties' exclusive economic zones and continental shelves respectively remains outstanding, hence the moratorium in CMATS was not displaced by the later entry into force of UNCLOS between the parties, which occurred in 2013 when Timor-Leste acceded to

UNCLOS (Australia having been an original party to it since 1994). To the extent that this argument also depended on direct application of CMATS, the Commission declined to give effect to it for the same reason as the first ground.

3. In 2003 the parties agreed on a mechanism for resolving their boundary dispute, i.e. negotiation. The CMATS Treaty built on that agreement, confirmed negotiation as the method of dispute resolution, and added a time stipulation, namely that the negotiation was not to occur for 50 years. Accordingly, the Commission's competence is precluded by UNCLOS Article 281, which recognises the CMATS Treaty as a relevant choice by the parties as to how their dispute is to be settled. Although this argument is more in tune with Commission's approach of needing a gateway within Part XV of UNCLOS itself through which the provisions of another treaty can enter into its considerations, the Commission interpreted both Articles 280 and 281 and CMATS strictly: Part XV would in principle yield to any agreement to settle the dispute by some other means, but the moratorium in Article 4 of CMATS was something different: in fact it amounted to an agreement *not* to settle the dispute for 50 years. Thus the gate remained shut, and Article 281 proved to be of no use to Australia.

4. The parties' dispute over maritime boundaries dates from 2002, before UNCLOS entered into force as between them, so the first condition of Article 298, that the dispute must have arisen "subsequent to the entry into force of this Convention", was not met. Had this objection succeeded, the failure of the prior ones would not have mattered, since any one objection on its own would have had the desired effect for Australia of putting an end to the conciliation. But it too failed, in this instance because the Commission interpreted against Australia the ambiguity in the quoted phrase: does it refer to the entry into force of UNCLOS generally, which occurred in 1994, or as between the particular disputants, which did not happen until 2013? The objection would succeed only under the latter interpretation, but the Commission preferred the former (as do I "with some diffidence" in a new commentary on UNCLOS, though I confess with embarrassment to having missed altogether the significance of the words "to settle the dispute" in my contributions on Articles 280 and 281 in the same volume, which proved fatal to the previous objection).

5. Because both Parties have observed the CMATS Treaty, there have not been negotiations on the maritime boundary, which Article 298 requires before resort to its provisions. Accordingly, the second condition of Article 298 is not met. In this instance the Commission took a broader view of what was encompassed by the term "negotiations" – there clearly had been negotiations on the dispute as a whole, if not, at Australia's insistence, on the boundary itself.

6. The dispute is "inadmissible" because Timor-Leste was seeking to seise the Commission in breach of its treaty commitments to Australia, or at the least the Commission should stay the conciliation proceedings until the Tribunal constituted to hear the related arbitration concerning the validity of the CMATS Treaty has reached its decision on that point. The first half of this contention logically would have to suffer the same fate as the first two objections, but under other circumstances – i.e. if the Commission had decided those points differently – there would certainly have been an argument that it would make sense for the conciliation to wait until the fate of CMATS, on which Australia was relying, had become apparent through the outcome of case (1).

Next steps

So where to from here? One important consequence of the Commission's disinclination to apply CMATS is that Australia's (and my own) contention that Timor-Leste's initiation of the conciliation was in violation of the Article 4 moratorium remains undetermined, thus leaving Australia free to pursue that claim in whatever ways are open to it. The obvious solution would be to bring a case of its own against Timor-Leste under CMATS alleging its violation, and to seek by way of remedy an order compelling Timor-Leste to discontinue the UNCLOS proceedings, a kind of international equivalent of an anti-suit injunction. This, though, is easier said than done. Although CMATS has a provision dealing with dispute settlement, Article 11, all it says, reflecting Australia's negative attitude towards compulsory settlement of maritime boundary disputes, is: "Any disputes about the interpretation or application of this Treaty shall be settled by consultation or negotiation." So uncharitable observers might ascribe to *karma* the fact that Australia now finds that it would need Timor-Leste's consent to bring a claim against it seeking a remedy for its plain breach of CMATS, which is clearly not going to happen.

This leaves the conciliation to run its course, and the Commission has indicated that will allow a year for this. Australia's full if not necessarily enthusiastic participation, to judge by the tone of the media release, is a welcome development that will reinforce the UNCLOS procedures which were beginning to show signs of fraying at the edges after the respondents in two recent cases, the *Arctic Sunrise* and *South China Sea* arbitrations, refused to take part. Despite the good start that seems to have been made, one final ambiguity may need to be resolved once the Commission reports back to the parties: UNCLOS Article 298(1)(a)(ii) states that "…after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree[.]"

Here it is not clear which of "shall" and "mutual consent" takes precedence: in other words, would the failure of post-conciliation negotiations pave the way to an ordinary compulsory Part XV case to decide the boundary through a putative oxymoronic obligation of the parties to consent to this? This would suit Timor-Leste, but is the very thing Australia has been at pains to avoid. Or are the disputants free to give or withhold their consent as they please, such that only if both of them consent "shall" the question ultimately come before a Part XV forum? Thus it is by no means beyond the bounds of possibility that a sixth case on the Timor Gap would become necessary a year or so from now to decide this point. For what it is worth, in the forthcoming UNCLOS commentary mentioned above I did not entirely rule out the former but expressed a preference for the latter as, given the weight placed on State consent as the foundation of the jurisdiction of international courts and tribunals, an intention to dispense with it would have been expected to be expressed in clearer terms than this, so it is unlikely to be deemed to have been given automatically. Given my at best mixed predictive record exposed by this conciliation, however, readers thinking of wagering significant sums on the outcome of such international legal proceedings would be well advised to seek out a more reliable tipster.