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SYMPOSIUM ON SARA MCLAUGHLIN MITCHELL & ANDREW P. OWSIAK, "JUDICIALIZATION OF THE SEA: BARGAINING IN THE SHADOW OF UNCLOS"

THE LAW OF THE SEA, INTERNATIONAL COURTS, AND JUDICIALIZATION

*Donald R. Rothwell**

Dispute settlement is entrenched in the 1982 UN Convention on the Law of the Sea (UNCLOS) through the Part XV compulsory mechanisms.[1] It is also reflected in UNCLOS's indication that delimitation of the exclusive economic zone or the continental shelf is to be by way of agreement between coastal states. While maritime boundary delimitation may be viewed as dominated by judicialization, that is not reflected in UNCLOS. The maritime boundary delimitation project unleashed by UNCLOS gave primacy to delimitation by agreement, with third party settlement under Part XV the secondary mechanism. The 2018 Australia/Timor-Leste maritime boundary settlement highlights how, even when Part XV third party mechanisms were used, the coastal states were able to reach agreement on a maritime boundary by negotiation, without recourse to judicialization.

The Law of the Sea and International Courts and Tribunals

The law of the sea has always been an international legal regime strongly associated with the decisions of international courts and tribunals. Some of the earliest decisions in the field, not delivered by domestic courts, have had profound impact and ongoing influence. These include, for example, the *Fur Seals Arbitration*[2] and the *Grisbådana* case.[3] The influence of law of the sea cases was reinforced in the modern era by decisions such as *Corfu Channel*,[4] the first contentious case decided by the ICJ, and *North Sea Continental Shelf*.[5] That trend has continued since the negotiation and entry into force of the UNCLOS in which the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and arbitral tribunals have played an important role in the convention's interpretation. The early ICJ law of the sea decisions, such as *Corfu Channel* and *Fisheries*,[6] were influential in the deliberations of the International Law Commission during the 1950s and impacted the agreed text found in the 1958 Convention on the Territorial Sea and Contiguous Zone.[7]

* *Professor of International Law, ANU College of Law, Australian National University, Canberra, Australia.*

[1] UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS].

[2] Fur Seals Arbitration (G.B. v. U.S.), *in* History and Digest of the International Arbitrations to Which the United States Has Been a Party I 755 (John Basset Moore ed. 1898).

[3] The Grisbådarna Case (Nor. v. Swe.) PCA Case No. 1908-01 (1909).

[4] Corfu Channel (U.K. v. Alb.), 1949 ICJ Rep. 4 (Apr. 9).

[5] North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 ICJ Rep. 3 (Feb. 20).

[6] Fisheries (U.K. v. Nor.), 1951 ICJ Rep. 116 (Dec. 18).

[7] Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 UNTS 205.

Judicialization of the law of the sea began at the First United Nations Conference on the Law of the Sea where agreement was reached on an Optional Protocol concerning the Compulsory Settlement of Disputes.[8] While not widely endorsed, it paved the way for the UNCLOS Part XV dispute settlement mechanisms, which are compulsory and recognize the competence of five courts, tribunals, and commissions to undertake formal dispute settlement.[9] In addition, there remains capacity for law of the sea disputes, and other disputes with respect to oceans-related matters, to also be determined by other international tribunals.[10] It cannot be disputed that the UNCLOS framework for the oceans regime strongly endorses the peaceful settlement of disputes and states have multiple judicial and quasi-judicial options with which to settle their disputes.

Maritime Boundary Delimitation

The development of the law of the sea precipitated a new phenomenon in international law: maritime boundary delimitation. The First United Nations Conference on the Law of the Sea in 1958 gave a clear endorsement to the entitlement of coastal states to a territorial sea, contiguous zone, and continental shelf. This gave an impetus to the maritime boundary delimitation project as highlighted in *North Sea Continental Shelf*. The Third UN Conference on the Law of the Sea not only reaffirmed those three existing maritime zones but added the Exclusive Economic Zone (EEZ) to the suite of coastal state maritime entitlements. The consequence was that ocean space became subject to multiple different types of maritime claims and, with the EEZ and continental shelf extending to a minimum distance of 200 nautical miles, there was the potential that in due course many maritime boundaries would need to be delimited. When UNCLOS was concluded there were estimates that approximately 400 maritime boundaries would eventually need to be settled.[11]

These new and extended maritime entitlements, which all coastal states enjoyed, had been strongly promoted by the Group of 77 developing states. This added to the momentum for the settlement of maritime boundaries. Four ICJ cases during 1978–1985 highlighted this boundary settlement trend and gave weight to the judicialization occurring in the law of the sea: *Aegean Sea Continental Shelf* (1978),[12] *Continental Shelf* (Tunisia/Libya) (1982),[13] *Gulf of Maine* (1984),[14] and *Continental Shelf* (Libya/Malta) (1985).[15] UNCLOS addressed how maritime boundaries were to be delimited in Articles 15 (Territorial Sea), 74 (EEZ), and 83 (Continental Shelf). Only the Article 15 territorial sea rule provides clear guidance for states as to how they should go about maritime boundary delimitation, referencing reliance on median and equidistant lines, which was well embedded in state practice. With respect to EEZ and continental shelf maritime boundaries, Articles 74 and 83 are mirror images, which endorse

[8] Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 UNTS 169.

[9] Those being the ICJ, ITLOS, Annex VII Arbitration Tribunals, Annex VIII Special Arbitration Tribunals, and Conciliation Commissions. In addition, Special Chambers can also be established within some of these bodies, such as the Sea-Bed Disputes Chamber of ITLOS.

[10] Arbitration Under the Timor Sea Treaty (Timor-Leste v. Austl.), PCA Case No. 2015-42, and In the Matter of an Arbitration Under the Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed 4 November 2009 (Croat. v. Slovn.), PCA Case No. 2012-04, Award (June 29, 2017), are cases before ad hoc arbitral tribunals outside of the UNCLOS framework.

[11] David Anderson, *Developments in Maritime Boundary Law and Practice*, *in* International Maritime Boundaries V 3199, 3200 (David A. Colson & Robert W. Smith eds., 2005).

[12] Aegean Sea Continental Shelf (Greece v. Turk.), 1978 ICJ Rep. 3 (Dec. 19).

[13] Continental Shelf (Tunis./Libyan Arab Jamahiriya), 1982 ICJ Rep. 18 (Feb. 24).

[14] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ Rep. 246 (Oct. 12).

[15] Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ Rep. 13 (June 3).

delimitation by agreement on the basis of international law in order to "achieve an equitable solution."[16] Only in the absence of an agreement being reached within "a reasonable period of time"[17] are the UNCLOS Part XV procedures to be referred to. As such, UNCLOS overwhelmingly supports maritime boundary delimitation by agreement between states as a first order response. Only when states are unable to reach agreement are the secondary Part XV mechanisms activated.

This is not to diminish the role of the ICJ, ITLOS, and Annex VII Arbitral Tribunals in maritime boundary delimitation. The ICJ's UNCLOS maritime boundary decisions have been pivotal in developing jurisprudence in the field, especially the 2009 *Black Sea* case.[18] There the court developed a "delimitation methodology" that for the first time laid down a relatively clear set of rules as to how it would approach contemporary maritime boundary delimitation involving an EEZ, continental shelf, and in some instances areas of seabed beyond the 200 nautical mile limit. Likewise, ITLOS[19] and Annex VII[20] Arbitral Tribunals have in the past decade also handed down important decisions that have developed and enhanced this delimitation methodology approach.

Timor Sea Conciliation

The Timor Sea Conciliation between Australia and Timor-Leste is a counterpoint to an aspect of the judicialization argument. Both were UNCLOS parties and had also made Part XV Article 287 choice of procedure declarations. Nevertheless, they found themselves in a maritime boundary dispute which because of Australia's separate Article 298 declaration was exempt from most Part XV procedures other than compulsory conciliation. This ultimately provided a mechanism for the eventual negotiation of the 2018 Timor Sea Treaty.

The history associated with this maritime boundary is complex, and extends back to negotiations in the 1970s between Australia and Portuguese-occupied East Timor. Australia sought settlement of separate seabed maritime boundaries across the Arafura and Timor Seas with both Indonesia and Portugal. The Australia-Indonesia boundaries to the east and west of East Timor were settled in 1971[21] and 1972[22] but no progress was made with Portugal. When Indonesia occupied East Timor in 1975 following Portuguese withdrawal from the territory, a gradual process commenced for negotiation of the Australia-East Timor (Indonesia) maritime boundary. That was eventually settled in 1989,[23] which in turn was impacted by Indonesian withdrawal from East Timor in 1999, after which interim arrangements were put into place during a period of United Nations administration of East Timor.[24] A new boundary arrangement, the 2002 Timor Sea Treaty, was subsequently concluded between Australia and the

[16] UNCLOS, *supra* note 1, arts. 74 (1), 83 (1).

[17] *Id.* arts. 74 (2), 83 (2).

[18] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 ICJ Rep. 61 (Feb. 3).

[19] Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16 (Mar. 14, 2012).

[20] In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case 2010-16, Award (July 7, 2014).

[21] Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, May 18, 1971, [1973] ATS No. 31.

[22] Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, Oct. 9, 1972, [1973] ATS No. 32.

[23] Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, [1991] ATS No. 9.

[24] *See, e.g.*, Exchange of Notes Constituting an Agreement Between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the Continued Operation of the Treaty Between Australia and the Republic of

now independent Timor-Leste.[25] However, that treaty was only intended as an interim arrangement and was to operate for a period of thirty years or until such time as a permanent maritime boundary was in place.[26]

The negotiation of the 2002 Timor Sea Treaty took place in a unique setting where the UN Transitional Administration for East Timor (UNTAET), operating under UN Security Council mandate,[27] represented Timor in the maritime boundary negotiations with Australia between 1999–2002. However, it was apparent that Timor was seeking to keep its options open to begin formal proceedings against Australia in an appropriate international forum if it was unable to secure a satisfactory outcome to the negotiations. Australia, in 2002, in order to prevent Timor from commencing proceedings before the ICJ and ITLOS, adjusted its Article 36(2) Statute of the ICJ declaration[28] and separate acceptance of jurisdiction under Article 298 of UNCLOS so as to exclude maritime boundary disputes from Part XV, Section 2 procedures.[29]

Notwithstanding Timor's relatively recent emergence as a state, it was determined to secure a more favorable maritime boundary with Australia. Efforts were made to reopen negotiations in order to permanently delimit the boundary and to abandon the various forms of joint development that had been adopted for the area and that were a legacy of the original 1989 Australia/Indonesia boundary. Australia rebuffed these overtures and Timor eventually commenced arbitration proceedings in order to terminate the treaty and effectively force Australia into negotiations.[30] In 2013–2014 Timor also brought proceedings against Australia in the ICJ, not with respect to these law of the sea disputes, but following the seizure in Canberra of certain documents and data from a Timorese legal advisor that directly related to the maritime boundary issue.[31] In order to bring about the settlement of a permanent Timor Sea maritime boundary, Timor-Leste eventually commenced compulsory conciliation against Australia under UNCLOS Article 298 (1)(a). The conciliation was conducted between 2016 and 2018[32] and resulted in negotiation of the 2018 Timor Sea Treaty.[33]

The Timor Sea Conciliation is remarkable on a number of levels. It was the first compulsory conciliation completed under Annex V of UNCLOS which utilized the exceptional procedures provided for in Article 298 (1)(a). Notwithstanding Australia's Article 298 declaration exempting itself from certain Part XV procedures, Timor-Leste was able to successfully convince the Conciliation Commission of its competence over the dispute.[34] Two parties to the Convention, which had made Article 287 Declarations regarding their preferred choice of procedure, therefore found themselves engaged in compulsory UNCLOS dispute settlement. The conciliation

Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, Feb. 10, 2000, [2000] ATS No. 9.

[25] Timor Sea Treaty Between the Government of East Timor and the Government of Australia, May 20, 2002, [2003] ATS 13.

[26] *Id.* art. 22.

[27] S.C. Res. 1272 (Oct. 25, 1999).

[28] Declaration Under the Statute of the International Court of Justice Concerning Australia's Acceptance of the Jurisdiction of the International Court of Justice, Mar. 21, 2002, [2002] ATS No. 5.

[29] Declaration Under the United Nations Convention on the Law of the Sea Concerning the Application to Australia of the Dispute Settlement Provisions of that Convention, Mar. 21, 2002, [2002] ATS No. 6.

[30] Arbitration Under the Timor Sea Treaty (Timor-Leste v. Austl.), PCA Case No. 2013-16; and Arbitration Under the Timor Sea Treaty (Timor-Leste v. Austl.), PCA Case No. 2015-42.

[31] Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, 2014 ICJ Rep. 147 (Mar. 3).

[32] Timor Sea Conciliation (Timor-Leste v. Austl.), PCA Case No. 2016-10.

[33] Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, Mar. 6, 2018, [2019] ATS No. 16.

[34] Timor Sea Conciliation (Timor-Leste v. Austl.), PCA Case No. 2016-10, Decision on Competence (Sep. 19, 2016).

proceeded without delay and satisfactorily progressed at such a pace that the parties were able to conclude the 2018 Timor Sea Treaty prior to the finalization of the Commission's report.[35]

This was not an instance where two UNCLOS parties that had made Article 287 Declarations and were fully aware of the range of Part XV peaceful dispute settlement mechanisms were able to willingly negotiate their maritime boundary. No doubt the legacy that Timor-Leste inherited—of first the 1989 Australia/Indonesia boundary arrangements, which UNTAET had endorsed on an interim basis for 1999–2002, and second the 2002 Timor Sea Treaty, which retained some of the joint development aspects of the original treaty—was a unique factor. Australia's unwillingness to entertain a negotiated permanent boundary, which would have seen it concede sovereign rights over the Timor Sea, was also a factor. As was the significant power imbalance between the two states. Nevertheless, a negotiated maritime permanent boundary was eventually concluded, albeit one facilitated by the conciliation.

UNCLOS and Unresolved Maritime Entitlements

UNCLOS legalized maritime boundary delimitation This legalization extended from The Hague to various capitals, to local communities impacted by the drawing of an imaginary line in the sea. It resolved what had been up to the 1970s a number of contested aspects of the law of the sea, of which the limits of outer maritime zones had been some of the most significant.

Yet UNCLOS still left some aspects of this dimension of the law of the sea unsettled. The responsibility for delimitating the vast maritime entitlements of coastal states principally rested with those states—delimitation was to be by agreement between the states. Part XV dispute settlement mechanisms were available to states if they failed to reach an agreement, but they were not the principal means for the resolution of maritime boundaries. Judicialization did not spur states on to the settlement of their maritime boundaries and to the resolution of those maritime claims. They had other incentives, including UNCLOS itself, which makes clear that states control their own destiny in maritime boundary delimitation. This is reflected in state practice where, overwhelmingly, maritime boundaries are settled by agreement.[36]

UNCLOS provides a judicialization frame in Part XV and it cannot be doubted that maritime boundary delimitation is legalized. The history of maritime boundary delimitation and the resulting treaties and agreements reflect this. While UNCLOS provides clear parameters for the resolution of maritime boundaries, it predominantly favors agreement over referral to judicial mechanisms. Even when agreement proves difficult to reach, as occurred with the Timor Sea maritime boundary, Australia's Article 298 declaration was a bar to judicialization. Compulsory conciliation was the only formal third-party dispute settlement open to Timor-Leste under UNCLOS, which paved the way for the eventual settlement of a negotiated maritime boundary.

Maritime boundary delimitation has over one hundred years proven to be a challenging legal, political, and technical process. Determining any form of boundaries for a state goes to the heart of sovereignty and it is appropriate that there are a range of mechanisms available. While judicial settlement of maritime boundaries has attracted much attention, it is not a dominant force in the law of the sea.

[35] Timor Sea Conciliation (Timor-Leste v. Austl.), PCA Case No. 2016-10, Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea (May 9, 2018).

[36] As reflected in the reports that have appeared in International Maritime Boundaries I-VII (Jonathan I. Charney et al. eds., 1993-2020).