



The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents

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Introduction and Background

The dispute between Australia and Timor-Leste (often called East Timor) over resources in the non-delimited marine area between their coastlines known as the “Timor gap” has a long history that predates Timorese independence.[1] It is a history bound up in the arbitral dispute[2] that Timor-Leste instituted on April 23, 2013, in which it seeks to have the 2006 Treaty with the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS treaty) declared invalid or void.[3] Timor-Leste claims that espionage carried out by Australia during the course of CMATS treaty negotiations has vitiated the agreement.

This maritime boundary dispute cannot be settled in the International Court of Justice (ICJ) or under the dispute settlement provisions of the United Nations Law of the Sea Convention (LOSC) because shortly before Timorese independence, Australia lodged new reservations to jurisdiction in its declarations in the ICJ and under the LOSC.[4] While couched in broad language, these reservations were clearly intended to preclude Timor-Leste from bringing a claim against Australia over the disputed area. On the day of

Timorese independence, Australia and Timor-Leste entered into the Timor Sea Treaty (TST),^[5] followed by a number of related instruments over the next year.^[6] Under the new arrangements, the largest known petroleum deposits, collectively known as "Greater Sunrise," were apportioned so that Australia received nearly eighty-two per cent of the total resource, leaving newly independent and impoverished Timor-Leste with roughly eighteen percent.^[7]

Due to Timorese dissatisfaction with these lopsided arrangements, the CMATS treaty was negotiated to govern the revenue split between Timor-Leste and Australia over exploitation of the Greater Sunrise deposit. The CMATS treaty provides for an equal share for Timor-Leste and Australia of the revenue derived from upstream exploitation of petroleum from the Greater Sunrise deposits. While this revenue-sharing arrangement is more generous than before, Australia has worked to ensure that refining operations (where the real money and economic development is) are carried out in Darwin, Australia. The treaty is also notable for its duration until 2057 and its extension of the TST until 2057. Significantly, it also establishes a moratorium on claims to sovereign rights and jurisdiction and maritime boundaries for the period of the treaty and excuses the parties from any obligation to negotiate in good faith over permanent boundaries until 2057. The immediate point of contention, though, is the way in which Timor-Leste's consent to the CMATS treaty was apparently procured.

The Arbitration Between Timor-Leste and Australia

While Timor-Leste is blocked from action in the ICJ and under the LOSC, it has invoked the TST dispute settlement provisions to challenge its own consent to the CMATS treaty. At first blush this would seem to pose significant jurisdictional hurdles because dispute settlement under the CMATS treaty is limited to consultation or negotiation. Presumably Timor-Leste is arguing that the 2004 CMATS treaty negotiations were taking place as part of an ongoing commercial joint venture created by the TST and associated instruments.

The bases of Timor-Leste's claims against Australia are unknown because these proceedings are confidential. If the recent media reports are accurate that Australia bugged the Cabinet room of the Timor-Leste government when the CMATS treaty was being negotiated,^[8] then this treaty, related instruments, and the extension of the TST may be invalid under the law of treaties or voidable under general international law on three separate grounds explained below.

Invalidity on Account of Fraud

First, as a matter of treaty law, under Article 49 of the Vienna Convention on the Law of Treaties (VCLT), to which both Australia and Timor-Leste are party, a state that is induced to conclude a treaty by the fraudulent conduct of a negotiating state may invoke the fraud to invalidate its consent to be bound by the treaty. The definition of fraud in international law includes deliberately deceitful behaviour in the formation of an international agreement.^[9] Spying to obtain confidential and privileged information in order to gain advantage in treaty negotiations is deceitful behaviour. Less certain, however, is whether this deceitful

behaviour actually induced Timor-Leste to enter the CMATS treaty. If the evidence presented proves a deceitful inducement, Australia may have the dubious distinction of being the first known state to have a treaty declared invalid on account of fraud.[10]

A Breach of Good Faith

The reported spying by Australia would be a breach of its obligation of good faith under international law. According to the ICJ, “[o]ne of the basic principles governing the creation . . . of legal obligations, whatever their source, is the principle of good faith.”[11] In the *North Sea Continental Shelf* case, the ICJ held that “good faith” underpinned the essence of negotiations related to seabed boundaries,[12] and by implication, the resources of a disputed seabed. In the context of treaty negotiations, good faith requires fair proceedings in the creation of legal obligations between the parties.[13] In the case of the CMATS treaty, Australia arguably already had a vastly superior bargaining position, with expertise in diplomacy, international law, and the science relevant to reserves and their apportionment. To seek to gain a further upper hand by way of spying would be the antithesis of good faith.

Failure to negotiate in good faith provides Timor-Leste with a basis to seek the avoidance of the CMATS treaty. A breach of good faith in negotiations may have a vitiating effect under general principles of international law[14] or the customary law of treaties.[15] Depending on the terms of the arbitral tribunal and the relief sought by Timor-Leste, the tribunal might issue a declaratory judgement finding the CMATS treaty null and void because of a breach of good faith by Australia in its negotiation.[16]

Intervention in Timor-Leste Without Consent

Almost all states around the world criminalize espionage and the stealing of state secrets.[17] However, the states have not committed to any general or regional treaties prohibiting peacetime espionage. While the vast collection of these criminal statutes might be evidence of a general principle of law as referred to under Article 38(1)(c) of the ICJ Statute or a practice supporting a customary norm, such arguments remain contentious, not least because, at least in terms of custom, evidence of *opinio juris* is weak.

Nevertheless, it is clear that peacetime espionage[18] in the territory of another state without consent is a significant form of interference in its sovereignty and that is prohibited by one of the most basic of international law norms. As the Permanent Court of International Justice highlighted in the *Lotus* case, “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”[19] A legitimate act of self-defense or authorization by the UN Security Council would serve to permit espionage. These do not apply to the dispute at hand. Instead, there seems to be espionage by the agents of one state in the territory of another state without its consent—something generally considered an exercise of power that is prohibited by international law based on these fundamental rules of exclusive sovereign control over territory and sovereign independence.[20] Of course, some circumstances, such as necessity, might preclude the wrongfulness of espionage,[21] but none seem to be present in this case based on the known facts.

The alleged unlawful intervention or interference provides Timor-Leste with an additional basis to seek the avoidance of the CMATS treaty. Timor-Leste may seek a declaration that the CMATS treaty is void if it can prove that during its negotiation Australia violated its territorial sovereignty in order to obtain information concerning Timor-Leste's negotiation position or strategy.

Consequences of Invalidity or Avoidance of the CMATS Treaty

Allegations of fraud, breach of good faith, and unlawful intervention by Timor-Leste mean that it is possible, perhaps likely, that the CMATS treaty will be declared invalid or void. Evidence will be key. If the treaty falls, however, this does not necessarily mean that Timor-Leste will find itself in a better position. The TST will still be in force and is much less generous than the CMATS treaty. The TST, however, will expire in 2033, and, unlike the CMATS treaty, it requires Australia to negotiate in good faith over permanent maritime boundaries. Forcing continuing negotiations may be part of the Timorese strategy, although it also appears that Timor-Leste may be trying to use the arbitration to leverage a pipeline from the Greater Sunrise deposit to the south coast of Timor-Leste. Perhaps the simplest course of action at this point would be to allow an independent third party to finally make a judicial determination of the seabed boundaries between Timor-Leste and Australia in order to achieve a permanent equitable solution, create certainty about rights, and bring an end to this continuing saga.

Timor-Leste's Request of ICJ Provisional Measures Against Australia

Two days before the hearings in the TST arbitration discussed above were to commence, the Australian Security Intelligence Organisation (ASIO) raided the Australian office of a lawyer representing Timor-Leste and seized documents related to the case.[22] Following the seizure, Timor-Leste requested the return of documents and property belonging to it which had been caught up in the raid.[23] Australia failed to comply with the request, claiming that the raid had been carried out to protect the "national interest" and that it was unrelated to the arbitration. On December 17, 2013, Timor-Leste instituted proceedings in the ICJ for the return of the documents.

Timor-Leste alleges that during the raid, "documents and data . . . relating to a pending arbitration under the 2002 Timor Sea Treaty between Timor-Leste and Australia" belonging to Timor-Leste were seized by "agents of Australia." [24] Timor-Leste seeks an order for the return of the documents, destruction of any copies made of them, satisfaction in the form of an apology from Australia, and payment of Timor-Leste's legal costs.

Timor-Leste has also requested the Court to indicate provisional measures and requested the President of the Court to exercise his powers to "call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects" pending a decision on the request.[25] On December 18, 2013, acting under Article 74(4), President Tomka sent an urgent communication to the Prime Minister of Australia to "draw the attention" of Australia "to the need to act in such a way as to enable any Order . . . for provisional measures to have its appropriate effects" and to "refrain from any act which might cause prejudice to the rights claimed by" Timor-Leste.

If Timor-Leste's evidence demonstrates that Australia has confiscated its property and refuses its return, then international law appears to be on the side of Timor-Leste.[26] Moreover, the official papers and documents of one state are ordinarily immune from seizure by another state, absent exceptions that do not seem, on the face of things, applicable here. If, however, Timor-Leste's property has been caught up in an otherwise lawful seizure of property and is returned promptly, then the outcome will be much less certain. Australia's response, however, has been not to return the requested documents but to argue that requirements needed to grant provisional measures have not been established by East Timor; that the issue is *lis pendens* in the arbitration and should be dealt with in that forum; and more generally argued about the exercise of jurisdiction under the "security principle" in protecting a "national interest" in making the seizure.

Conclusion

One way to look at this dispute is as a complaint by Timor-Leste against an unequal treaty based on unequal bargaining power. Of course, the use of asymmetry in political and economic power to negotiate beneficial treaty terms is not presently a ground of invalidity under the law of treaties—although the Final Act of the VCLT Conference includes a declaration condemning the use of political and economic pressure.[27] As a result, absent facts not presently known, it seems that the lopsided 2002 TST is in little danger itself. This means Timor-Leste has had to focus on arguably illegal uses of power—espionage and seizure of property in its attempt to use international law to leverage a better position in relation to the petroleum resources in the Timor Gap.

Should the CMATS treaty fall, international law will have had a role in reanimating Australia's obligation to enter into continental shelf delimitation negotiations, which "must be conducted in good faith and with the genuine intention of achieving a positive result," or alternatively, to agree to have the delimitation determined "by recourse to a third party possessing the necessary competence." [28] This may finally force Australia to confront the "equidistance" principle of delimitation, which requires states, like Australia and Timor-Leste, with opposite coastlines closer together than 400 nautical miles, to draw a median line between the opposite coasts as their boundary as the starting point for negotiations. International law will have gone some way from having very little to say about unequal treaties to promoting a more equitable division of the marine resources of the Timor Gap.

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[1] For a detailed account, see Paul Cleary, *Shakedown: Australia's Grab for Timor Oil* (2007). See also Gillian Triggs, *Creative Conflict Resolution: The Timor Sea Treaty Between Australia and East Timor*, in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain, eds., *Honour Among Nations? Treaties and Agreements with Indigenous People* 329-42 (2004); Clive Schofield, *Minding the Gap: The Australia–East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)*, 22 *Int'l J. Marine & Coastal L.* 189 (2007).

[2] Permanent Court of Arbitration, *Arbitration Under the Timor Sea Treaty (Timor-Leste v. Australia)*, http://www.pca-cpa.org/showpage.asp?pag_id=1403 (http://www.pca-cpa.org/showpage.asp?pag_id=1403).

[3] *Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, [2007] ATS 12 (Austl.) (entered into force Feb. 23, 2007), available at <http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html> (<http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html>).

[4] International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory* (Mar. 22, 2002), <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU> (<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU>); International Tribunal for Law of the Sea, *Declarations of States Parties Relating to Settlement of Disputes in Accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2 of the Convention)* (June 2011), http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf (http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf).

[5] *Timor Sea Treaty Between the Government of East Timor and the Government of Australia*, [2003] ATS 13 (Austl.) (entered into force Apr. 2, 2003), available at <http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html> (<http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html>) [hereinafter *Timor Sea Treaty*].

[6] *Agreement Relating to the Unitisation of the Sunrise and Troubadour Fields*, [2007] ATS 11 (Austl.) (entered into force Feb. 23, 2007), available at <http://www.austlii.edu.au/au/other/dfat/treaties/2007/11.html> (<http://www.austlii.edu.au/au/other/dfat/treaties/2007/11.html>). This agreement and the TST were accompanied by memorandum of understandings. The TST also was accompanied by an exchange of notes regarding exploration and exploitation.

[7] *Timor Sea Treaty*, *supra* note 5, art. 4, Annex A.

[8] See Nick Miller, *East Timor Seeks to Scrap Oil Treaty With Australia in The Hague Over Spying Allegations*, *Sydney Morning Herald* (Dec. 6, 2013), <http://www.smh.com.au/federal-politics/political-news/east-timor-seeks-to-scrap-oil-treaty-with-australia-in-the-hague-over-spying-allegations-20131206-2yufv.html> (<http://www.smh.com.au/federal-politics/political-news/east-timor-seeks-to-scrap-oil-treaty-with-australia-in-the-hague-over-spying-allegations-20131206-2yufv.html>); see also Press Release, Austl.

Minister for For. Aff. & Spec. Minister of State, Arbitration Under the Timor Sea Treaty (May 3, 2013), http://foreignminister.gov.au/releases/2013/bc_mr_130503.html (http://foreignminister.gov.au/releases/2013/bc_mr_130503.html).

[9] Paul Reuter, *Introduction to the Law of Treaties* 137–38 (1989).

[10] Anthony Aust, *Modern Treaty Law and Practice* 254–55 (2000).

[11] *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268, ¶ 46 (Dec. 20).

[12] *North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.)*, 1969 I.C.J. 3, 46–47 (Feb. 20).

[13] See *Nuclear Tests*, *supra* note 11, ¶ 46; *Nuclear Tests (N. Z. v. Fr.)*, 1974 I.C.J. 457, 473, ¶ 49; see also Hugh Thirlway, *The Law and Procedure of the International Court of Justice, Fifty Years of Jurisprudence* 21–23 (2013).

[14] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 158–60 (1953).

[15] Lord McNair, *The Law of Treaties* 553–54 (1961).

[16] *Cf.* Christine Gray, *Judicial Remedies in International Law* 100-01 (1990).

[17] See Commander Roger G. Scott, *Territorial Intrusive Intelligence Collection and International Law*, 46 A.F.L. Rev. 217–23 (1999).

[18] Peacetime espionage is that which takes place outside of an armed conflict or other than in a time of war. Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 28 Brit. Y.B. Int’l L. 323, 329 (1951).

[19] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (emphasis added).

[20] See Manuel R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offences Under the Law of Extradition*, 26 U. Pitt. L. Rev. 65, 79–80 (1964) (“peacetime espionage is regarded as an international delinquency and a violation of international law”); John Kish, *International Law and Espionage* 88 (1995) (“the general principle of territorial sovereignty negates the permissibility of espionage in national territory [of another state]”). Some commentators take the view that espionage is prohibited by international law when it is criminalized by domestic legislation. See Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in Roland J. Stanger, ed., *Essays on Espionage and International Law* 12–13 (1962).

[21] See Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering*, 28 Mich. J. Int’l L. 687, 698–702 (2007).

[22] The Australian Security Intelligence Organisation (ASIO) also detained a witness in the case and cancelled his passport. Tom Allard, *ASIO Raids Office of Lawyer Bernard Collaery Over East Timor Spy Claim*, Sydney Morning Herald (Dec. 3, 2013), <http://www.smh.com.au/federal-politics/political-news/asio->

raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html

(<http://www.smh.com.au/federal-politics/political-news/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>).

[23] *East Timor Spying Row: Australia Asked to Return Documents Seized in ASIO Raid on Bernard Collaery's Office*, Austl. Network News (Dec. 11, 2013), <http://www.abc.net.au/news/2013-12-11/an-east-timor-raids/5148360> (<http://www.abc.net.au/news/2013-12-11/an-east-timor-raids/5148360>).

[24] Press Release, International Court of Justice, Timor-Leste institutes proceedings against Australia and requests the Court to indicate provisional measures, ICJ Press Release No. 2013/41 (Dec. 18, 2013); Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Order (Jan. 28, 2014), *available at* <http://www.icj-cij.org/docket/files/156/17990.pdf> (<http://www.icj-cij.org/docket/files/156/17990.pdf>).

[25] Rules of Court art. 74(4), Apr. 14, 1978, *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (<http://www.icj-cij.org/documents/index.php?p1=4&p2=3&>).

[26] See, e.g., Richard Alton & Jason Struble, *The Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice*, 16 Ann. Surv. Int'l & Comp. L. 9, 14–17 (2010) (customary international law prohibits seizure by one state of another state's property in the form of a passport).

[27] United Nations Conference on the Law of Treaties, Vienna, Austria, Apr. 9-May 22, 1969, *Final Act of the United Nations Conference on the Law of Treaties*, U.N. Doc. A/CONF.39/26, Annex (May 22, 1969).

[28] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 299, ¶ 112 (Oct. 12).

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