

Arbitrating the Treaty on Certain Maritime Arrangements in the Timor Sea: The Latest Round between Timor-Leste and Australia

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Introduction and background

In a recent interview, former Australian Prime Minister Paul Keating claimed that he tried to do everything possible for the people of East Timor during his time in office, but complained that his government never “got any credit from the East Timor lobby, of course”.¹ The reason for this lack of credit -- not only for the Keating government but for Australian governments of all political persuasions -- has a long history.² It is a history that is bound up with the current dispute between East Timor and Australia in which East Timor seeks to have an arbitral tribunal declare invalid the 2006 *Treaty with the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* (CMATS).³ And, it needs to be briefly rehearsed in order to understand East Timor’s dissatisfaction with the CMATS treaty.

This history begins in 1972 with the *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*.⁴ The Agreement established the seabed boundaries between Australia and Indonesia in the Arafura and western Timor seas. The Agreement employed “natural prolongation” to establish the boundaries. This meant Australia’s continental shelf was extended by virtue of its geophysical characteristics to the Timor Trough, located approximately 40 nautical miles from the Indonesian coast (and the coast of Timor-Leste) and 250-350 nautical miles from the closest part of Australia. The rub for Australia was that no similar agreement, however, was ever reached with Portugal, the U.N. administrative authority of East Timor. By using “natural prolongation” to set the maritime boundary, Australia secured a uneven agreement where it obtained, by one estimate,⁵ nearly 80% of the area that had been subject to overlapping claims by Indonesia.

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¹ ABC Television, *Keating*, Part IV (broadcast Dec. 3, 2013), available at: <http://www.abc.net.au/tv/programs/keating/>.

² 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 M. LANGTON, M. TEHAN, L. PALMER & K. SHAIN, EDs., *HONOUR AMONG NATIONS? TREATIES AND AGREEMENTS WITH INDIGENOUS PEOPLE*, chap. 19 (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).

³ [2007] ATS 12 (entered into force 23 February 2007).

⁴ 974 UNTS 319 (entered into force 8 November 1973).

⁵ JONATHAN I. CHARNEY & L.M. ALEXANDER, EDs., II INTERNATIONAL MARITIME BOUNDARIES 1210-11 (1993).

The Timor Gap Treaty

After the illegal invasion and forcible acquisition of East Timor by Indonesia in 1975,⁶ further agreement upon a seabed boundary between the coasts of Australia and Indonesian-controlled East Timor was not possible. Indonesia insisted that a delimitation of this area be based on an “equidistance” principle, which was becoming part of the new law of the sea. Equidistance requires that states with opposite coastlines closer together than 400 nautical miles, as is the case between Australia and Timor-Leste, to draw a median line between the opposite coasts as the boundary, at least as a starting point for negotiations. This was unacceptable to Australia (and apparently remains so). The result of the inability to complete the delimitation became known as the “Timor Gap” -- the still non-delimited distance between the coasts of Timor-Leste and Australia, represented by the eastern and western limits of the 1972 agreed seabed boundaries of between Indonesian and Australia.

The stalemate between Australia and Indonesia prevailed until 1989 when they signed the notorious *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* (known as the Timor Gap Treaty).⁷ The treaty entered into force on February 9, 1991. Under its provisions Australia and Indonesia purported set up a zone of cooperation to divvy up -- between them alone -- the zone’s resources, including oil resources belonging to the people of East Timor. The Timor Gap Treaty, however, was illegal because Indonesia had used military force to acquire the territory of East Timor in a manner prohibited by one of international law’s most fundamental prohibitions.⁸ As a result, Indonesia could not obtain and had no title to the East Timorese territory or the oil resources of its Exclusive Economic Zone over which it could deal with Australia.⁹ Moreover, Australia was bound under international law not to recognise the unlawful

⁶ See Gillian Triggs and Dean Bialek, *The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap*, 3 MELB. J. INT’L L. 322, 326-57, citing *Resolution of 22 December 1975*, S.C. Res. 384, UN SCOR, 30th sess, 1869th mtg, U.N. Doc. S/Res/384 (1975) and the series of U.N. General Assembly Resolutions on the matter: G.A. Res. 3485, UN GAOR, 30th sess, 3485th mtg, U.N. Doc. A/Res/3485 (1975); G.A. Res. 31/53, UN GAOR, 31st sess, 85th plen mtg, U.N. Doc. A/Res/31/53 (1976); G.A. Res. 32/34, UN GAOR, 32nd sess, 83rd plen mtg, U.N. Doc. A/Res/32/34 (1977); G.A. Res. 33/39, UN GAOR, 33rd sess, 81st plen mtg, U.N. Doc. A/Res/33/39 (1978); G.A. Res. 34/40, UN GAOR, 34th sess, 75th plen mtg, U.N. Doc. A/Res/34/40 (1979); G.A. Res. 35/27, UN GAOR, 35th sess, 57th plen mtg, U.N. Doc. A/Res/35/27 (1980); G.A. Res. 36/50, UN GAOR, 36th sess, 70th plen mtg, U.N. Doc. A/Res/36/50 (1981); G.A. Res. 37/30, UN GAOR, 37th sess, 77th plen mtg, U.N. Doc. A/Res/37/30 (1982). For an interesting analysis of Western support for the illegal Indonesian acquisition of East Timor by force based on declassified documents see Brad Simpson, “*Illegally and Beautifully*”: *The United States, the Indonesian Invasion of East Timor and the International Community, 1974-1976*, 5 COLD WAR HISTORY 281 (2005).

⁷ [1991] ATS No 9.

⁸ See *Case Concerning East Timor* (Portugal v. Australia), [1995] ICJ 90, 103; Roger S. Clark, *Timor Gap: Legality of the “Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia*, in PETER CAREY & G. CARTER BENTLEY, EDS., *EAST TIMOR AT THE CROSSROADS: THE FORGING OF A NATION* 73 (1995). See also Tina Hunter & Thomas Storey, *Oil and Politics Apparently do Mix: The Role of Multinational Resource Corporations in National Sovereignty*, 16 ASIA PAC. L. REV. 111, 120 (2008).

⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 125 (4th ed., 1990).

Indonesian acquisition of territory, which it nevertheless did in order to enter into the Timor Gap Treaty.¹⁰

From 1991 to 1995 Australia fought hard to preserve the Timor Gap Treaty in the International Court of Justice against a claim challenging its legality brought by Portugal as the administering power over East Timor. Portugal essentially asserted that the unlawful use of force to acquire East Timor meant Indonesia had no title by which to enter the Timor Gap Treaty. The successful Australian defence was not based on the merits of its claim about the validity of the treaty, but involved the use of an “indispensable third party” procedural argument that precluded the ICJ from hearing the case because Indonesia refused to appear.¹¹ Four years later, however, the Timor Gap Treaty was a dead letter after East Timor was allowed to exercise its right of self-determination and voted to become an independent state.

An Independent Timor-Leste and the Timor Gap

Australia did not wait long to begin to reposition itself in connection with the petroleum resources covered by the now defunct treaty. First, two months before East Timor gained independence, Australia withdrew its acceptance of compulsory jurisdiction from the ICJ and the International Tribunal for the Law of the Sea and substituted a new declaration accepting jurisdiction, but with a reservation that Australia would refuse to appear before the court if it was sued over any dispute relating to the delimitation of maritime zones or to the exploitation of any disputed area of any such maritime zone pending its delimitation.¹² These reservations were clearly intended to preclude East Timor from suing Australia in the ICJ. Then, on the day of East Timor independence in 2002, Australia and East Timor entered into the *Timor Sea Treaty*¹³ and in 2003 the parties signed an *Agreement Between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise and Troubadour Fields*.¹⁴ Both treaties were accompanied by memorandum of understandings and the Timor Sea Treaty also was accompanied by an exchange of notes regarding exploration and exploitation.

Under these arrangements, the largest known petroleum deposits, collectively known as “Greater Sunrise”, were apportioned 79.9% for Australia and 20.1% for the Joint Petroleum Development Area (JPDA). The JPDA was to be further divided with

¹⁰ Roger S. Clark, *Obligations of Third States in the Face of Illegality – Ruminations Inspired by the Christopher Weeramantry Dissent in the Case Concerning East Timor*, in ANTONY ANGHIE & GARRY STURGESS, EDS., *LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY* 631 (1998).

¹¹ *Case Concerning East Timor* (Portugal v. Australia), [1995] ICJ 90.

¹² Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945 (22 March 2002), available at: <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU>; Australian Declarations under Articles 287(1) and 298(1) of the United Nations Convention on the Law of the Sea 1982 (22 March 2002), available at: http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf.

¹³ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, [2003] ATS 13, entered into force 2 April 2003.

¹⁴ [2007] ATS 11, entered into force 23 February 2007.

Australia receiving another 10% and East Timor receiving 90%. In other words, in a case where the maritime boundary over the resource was clearly uncertain, Australia was able to extract roughly 82% of the total resource for itself, leaving newly independent and impoverished East Timor with 18%.

The Arbitration between Timor-Leste and Australia

This brings us to the negotiation of the 2006 CMATS treaty. The treaty itself is notable for its duration until 2057, its extension of the Timor Sea Treaty until 2057, and its moratorium on all claims to sovereign rights and jurisdiction and maritime boundaries for the period of the treaty. It also excuses the parties from any obligation to negotiate in good faith over permanent boundaries until 2057. Significantly too, however, it provides for an equal share for East Timor and Australia of the revenue derived from upstream exploitation of petroleum from the Great Sunrise deposits. While this revenue sharing arrangement is more generous than previously, the problem now appears to be the way in which East Timor's consent to the CMATS treaty was procured.

If the recent media reports are accurate and Australia bugged the Cabinet room of the Timor-Leste government from 2004 when CMATS Treaty was being negotiated,¹⁵ then it is possible that this Treaty (and the extension of the Timor Sea Treaty) is invalid under the law of treaties or voidable under general international law. While it is impossible to know the basis of the claims East-Timor is asserting against Australia in the current arbitration because these proceedings are almost always closed to public view, it may seek to have CMATS declared invalid or avoided on three separate grounds.

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 parties, 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 is much broader than that found in domestic law. It includes deliberately deceitful behaviour in the formation of an international agreement.¹⁶ It seems clear that 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. That will depend on what the evidence discloses. If the evidence adduced proves a deceitful inducement, it appears that Australia will have the dubious distinction of being the first known to have a treaty declared invalid on account of its fraud.¹⁷

¹⁵ See Nick Miller, East Timor Seeks to Scrap Oil Treaty with Australia in The Hague over Spying Allegations, *Sydney Morning Herald*, December 6, 2013, available at: <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 *Arbitration under the Timor Sea Treaty*, 3 May 2013 (joint media release by the Australian Minister for Foreign Affairs and Special Minister of State), available at: http://foreignminister.gov.au/releases/2013/bc_mr_130503.html.

¹⁶ PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 137-38 (1989).

¹⁷ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 254-55 (2000).

A breach of good faith

Second, it appears that the sort of spying by Australia that is reported to have taken place is a breach by Australia of its obligation of good faith under international law. Good faith is a broad rule of international law. As the ICJ has stated, “[o]ne of the basic principles governing the creation ... of legal obligations, whatever their source, is the principle of good faith”.¹⁸ In the *North Sea Continental Shelf Case* the ICJ held that “good faith” underpinned the essence of negotiations related to seabed boundaries,¹⁹ and by implication, the resources of a disputed seabed. Good faith requires fair dealing between parties generally. In the context of treaty negotiations it requires fair proceedings in the creation of negotiated legal obligations between the parties.²⁰ In the case of the CMATS treaty, Australia already had vastly superior bargaining position with its long and sophisticated experience and expertise in both the diplomacy and the science relevant to reserves and apportionment. To seek to gain a further upper hand by way of spying is the antithesis of good faith.

While failure to negotiate in good faith is not a recognized ground of invalidity under the VCLT, it nevertheless 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 law²¹ or the customary law of treaties.²² While no bright line test exists for what constitutes a breach of good faith in treaty negotiations, first principles indicate that a breach of good faith in the negotiation of a treaty exists if a state intentionally seeks to dupe or put the other party at an unfair advantage. For this reason, the commission of fraud itself in the negotiation of a treaty would be an instance of bad faith that renders a treaty both invalid under the VCLT and null and void under general international law.²³ It depends, of course, on the terms of the arbitral tribunal, but it is clearly possible that a 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 in order to let the parties know their relative legal positions.²⁴

¹⁸ *Nuclear Test Case* (Australia v. France), [1974] ICJ 253, 268.

¹⁹ *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands), [1969] ICJ 3, 46-47.

²⁰ *Id.*, at 33.

²¹ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 158-160 (1953).

²² LORD MCNAIR, *THE LAW OF TREATIES* 553-554 (1961).

²³ Bin Cheng, *supra* n. 20, at 160 (discussing fraud in the formation of an international tribunal as a violation of good faith that renders the entire proceedings null and void).

²⁴ Cf CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 100-101 (1990).

Intervention in Timor-Leste without consent

Finally, if the spying reports are true it seems clear that Australia has breached international law by illegally intervening into the most intimate of internal affairs of Timor-Leste without its consent. Australia argued as *amicus curiae* in *Rio Tinto, PCL v. Sarei*, in opposing protection against alleged gross human rights violations by Rio Tinto under the U.S. Alien Tort Statute (ATS), that the exercise of U.S. jurisdiction under the ATS against non-U.S. nationals for actions taken in territory outside the U.S. violates international law because it “would interfere fundamentally with other nations’ sovereignty”.²⁵ Deliberately sending spies into another state without permission to secretly obtain confidential, privileged, and classified information of the other state is a much more significant intervention into the exclusive sovereign domain of a state and is clearly prohibited by international law. As the Permanent Court of International Justice highlighted in *Lotus*, “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.*”²⁶ Clearly spying in another state without consent²⁷ is an exercise of power that is prohibited.

Despite repeated assertions from the United States and Australia that all states spy, the simple fact is that it remains illegal under international law, at least where it occurs in the territory of another state or at inviolate premises.²⁸ This is demonstrated by several obvious facts. First, it is undoubtedly untrue that all states spy in the territory of other states, at least in the wholesale, universal way that the U.S. National Security Agency seems to employ. Many poor or underdeveloped states simply do not have the resources or capacity to engage in espionage with the frequency, scope or level of intrusiveness that the U.S. and Australia seem to claim is so. Moreover, no states of

²⁵ Motion for Leave to File Brief as Amici Curiae and Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions in Their Petition for a Writ of Certiorari, *Rio Tinto, PLC. v. Sarei*, No. 11-649, 2011 WL 6934726 (U.S. Dec. 28, 2011), at 8.

²⁶ *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (1927) (Sept. 7)(emphasis added).

²⁷ A clear form of permissible strategic observation by one state within the territory of another state arises under certain arms control agreements. See e.g. Art. XI(1), *Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Intermediate-Range Missiles*, 27 ILM 90, 95 (1988). If espionage in the territory of another state was legal at international law, then presumably there would be no need for inspection provisions in arms control and other treaties. Of course, this sort of consent to external observation does not allow for or imply that covert observation beyond the overt observation expressly permitted under the treaty is allowed.

²⁸ 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 (“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]”). Other 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). If this were the case, then foreign espionage is illegal in Timor-Leste because it is protected against under the *Government Decree Law on the Intelligence System of the Democratic Republic of East Timor* (13 December 2007), available at: http://www.eastimorlawjournal.org/Government_Decree_Laws_East_Timor/intelligence_system.html.

which I am aware, including the U.S. and Australia, are on the record claiming that they are regularly engaged in espionage in the territory of other states because it is permissible under customary international law. It is incumbent on states asserting that a customary rule permitting spying exists to shoulder the burden of proof. So far, the evidence of a wide-spread, nearly uniform practice²⁹ remains entirely conjectural. Merely stating all states spy, without hard evidence of the practice, is clearly insufficient in proving custom.

Second, even if there was a nearly uniform practice of spying, which was laying the ground for a permissive rule for a spying exception to the prohibition on intervention, it seems obvious that the requisite *opinio juris* is missing. It is not acceptance or tolerance, but vigorous protests that invariably and immediately follow as soon as a state publicly learns that it is being spied on.³⁰ If the spy is a diplomat, expulsion follows.³¹ Moreover, states around the world criminalize espionage and the stealing of state secrets.³² If spying were in fact legal under international law, then significant problems would arise because these domestic laws would seem to be in violation of the permissive international rule allowing spying.³³ No state of which I am aware accepts this.

As with the breach of good faith, unlawful intervention or interference is not a recognized ground of invalidity under the VCLT. Like the alleged breach good faith, though, it still provides Timor-Leste with a basis to seek the avoidance of the CMATS treaty. If the arbitral tribunal has the power to issue declaratory relief, there is no reason why Timor-Leste, as a wronged party, cannot seek a declaration that CMATS is void if it can prove that during its negotiation Australia violated its territory sovereignty through

²⁹ A requirement elaborated by the ICJ in *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands), [1969] ICJ 3, 41-45.

³⁰ Recent examples include protests of espionage carried out by one state in the territory of another state include protests by Germany, Spain, France, Italy, Brazil, Indonesia, Timor-Leste, India, Malaysia, and the list goes on and on. See, e.g., *E Timor Protest Australian Spying*, Oman Daily Observer, December 5, 2013; Shishir Gupta, *India Protests, Alleges US Political, Commercial Spying*, Hindustan Times, December 4, 2013; Thomas Reuter, *Australian Espionage and the History of Foreign Intervention in Indonesia*, Jakarta Post, December 1, 2013; AP, *Malaysia Summons Singapore Envoy Over Spying Claims*, The Guardian, November 26, 2013; Patrick Donahue, *Germany Seeks Spy Probe as Spain Protests U.S. Spying*, Bloomberg, October 29, 2013; Naomi O'Leary, *Italian PM Says Spying By Allies Unacceptable*, Reuters, October 24, 2013; Adrian Croft & Arshad Mohammed, *France Summons U.S. Ambassador Over Spying Report*, Reuters, October 21, 2013; Julian Borger, *Brazilian President: US Surveillance a 'Breach of International Law'*, The Guardian, September 25, 2013; Carol J. Williams, *U.N. Warns U.S. Against Illegal Spying on Diplomats*, L.A. Times, August 26, 2013.

³¹ See e.g., the following recent news reports, Marvis Birungi, *Uganda Expels Sudan Diplomat Accused of Spying*, Voice of America, Oct. 8, 2013; Gregory L. White, Paul Sonne & Siobhan Gorman, *Russia Expels American on Spy Allegations*, Wall Street Journal, May 14, 2013; U.S. Expels 50 Russian Diplomats, ABC News, Mar. 22, 2013; Iranian Diplomats Expelled from Bosnia over Spy Allegations, Intelnews, May 17, 2013. See generally, John Kish & David Turns, *International Law and Espionage* (1995).

³² See Commander Roger G. Scott, *Territorial Intrusive Intelligence Collection and International Law*, 46 A.F.L. Rev. 217-223 (1999). If one were to collect and compare all existing espionage legislation around the world, it might be possible to argue that a prohibition on espionage existed as a general principle of law under Article 38(1)(c) of the Statute of the International Court of Justice.

³³ 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).

clandestine action, false pretences, or disguise in order to obtain information concerning Timor-Leste's negotiation position or strategy.

Conclusion

Allegations of fraud, breach of good faith, and unlawful intervention mean that it is possible; perhaps likely, that CMATS will be declared invalid or void. Much will depend on the evidence.³⁴ Australia now finds itself in a difficult situation and the dispute is likely to continue and fester absent good will on the part of both parties. The most just course of action at this point could be to allow an independent third party to finally make a judicial determination of the seabed boundaries of between Timor-Leste and Australia in order to achieve an equitable solution, create certainty about rights, and bring an end to this continuing saga.

³⁴ Two days before the arbitration between Timor-Leste and Australia was 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. 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, December 3, 2013.