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BUGGED: ESPIONAGE IN EAST TIMOR



*SPIES". IMAGE COURTESY OF EMORY ALLEN HTTP://WWW.FLICKR.COM/PHOTOS/OCULARINVASION/

By Sayomi Ariyawansa

On 3 December 2013, Australian Security Intelligence Organisation (ASIO) officers entered premises owned by Bernard Collaery, the Australian lawyer representing East Timor in international arbitration proceedings regarding the sharing of resources in the Timor Sea. ASIO officers spent six hours seizing documents and data, and executed the search warrant at a time when Collaery was known to be outside Australia.

Australia has strongly asserted that the seizure of documents was unrelated to the arbitration proceedings. It is thought that the documents and data seized may disclose details of the activities of the Australian Security and Intelligence Service (ASIS) during the period when Australia and East Timor negotiated the 2006 Certain Maritime Arrangements in the Timor Sea Treaty (CMAT Treaty) on the exploitation of resources in the Timor Sea – a treaty largely considered advantageous to Australia, at the expense of East Timor.

One of East Timor's key claims in the arbitration proceedings is that ASIS bugged the offices of East Timorese cabinet members during CMAT Treaty negotiations in 2004 under the cover of Australia's aid program. One of their crucial witnesses is a former director of all technical operations at ASIS, who decided to blow the whistle on these activities. Australia disputes these allegations. Around the time of the execution of the search warrants at Collaery's business premises, the passport of the former ASIS officer was cancelled. He is no longer able to travel to The Hague to give his testimony.

All this raises the question: did Australia spy on East Timor to obtain a financial advantage in an essentially commercial negotiation with one of the poorest countries in the world? And if so – is that okay?

Speaking on ABC's Lateline, Collaery was unequivocal: "the director of [ASIS] ... ordered a team into East Timor to conduct work which was well outside the proper functions of ASIS. Our Australian people don't expect their espionage service to be assisting revenue deliberations and commercial negotiations between partners."

Collaery's outrage is fair-minded, but is he correct? Surprisingly, the answer is not so clear-cut.

Setting aside his remark about the expectations of the Australian people, in one respect Collaery is wrong. Section 11 of the Intelligence Services Act 2001 sets out the limits of ASIS functions as follows: "The functions of the agencies are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia."

As [ABC Fact Check](#) states: “Given that ASIS has broad powers in relation to the collection of intelligence overseas, and one of its specific functions is to obtain intelligence in relation to Australia’s economic well-being, it is unlikely that espionage in relation to negotiations over multi-billion dollar energy reserves would be outside the agency’s proper powers.”

While conducting espionage activities to obtain information relevant to Australia’s economic well-being is a lawful purpose, the manner in which it is done may possibly be unlawful under Australian law. Details about the operation itself are required to address this point – details which, thanks to seizure of documents and data by ASIO and the cancellation of the passport of the former ASIS officer, may not be disclosed for some time, if ever.

Even after assuming the manner of conduct and purpose of ASIS activities in East Timor during negotiations were both lawful under domestic law, we still need to ask: should countries be allowed to conduct spying activities for financial purposes? What are the limits of legitimate intelligence gathering in the national interest?

There is no prohibition on spying in international law. Indeed, it appears it is widely acknowledged as an ordinary part of a state’s intelligence activities. [Dr Emily Crawford](#) of Sydney University’s Centre for International Law notes that there are no international treaties or laws preventing foreign spying, stating: “Espionage sits in the vanishing point of international law. It is a legal black hole.”

It is unsurprising that international law offers little clarity in response to these questions. International law is created by states, and states are loath to restrict their own activities with respect to protecting their national interests.

The one international instrument that is tangentially helpful is the [Vienna Convention on Diplomatic Relations 1961](#). Under Article 22, the premises of any diplomatic mission, such as an embassy, shall be inviolable and “[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the mission or impairment of its dignity.” Although this convention is of limited use, as it only explicitly constrains behaviour with respect to diplomatic missions within a state’s own borders and not activities undertaken overseas, [it has been cited](#) in the context of the revelations that the United States National Security Agency (NSA) spied on the diplomatic missions of the European Union in Washington and New York.

In the absence of international treaties or conventions, “custom”, or state practice, is highly relevant – and, in this instance, the argument that “everyone is doing it” is a legitimate strike against the existence of any international prohibition on spying. That being said, the limits on the legitimate purposes of spying are an entirely different issue.

The President of Brazil, Dilma Rousseff, [strongly admonished](#) the United States for conducting espionage activities into the oil company Petrobras, saying that “if the facts are confirmed, it would be a clear the espionage was not for security or the fight against terrorism, but to respond to economic and strategic interests.” Thus, in her view, while espionage activities may be justifiable for the purpose of security interests, it is inappropriate for the purposes of furthering economic interests.

Writing for Forbes magazine, [Christopher Helman defended](#) the actions of the United States on the basis that as a state-controlled company, the “NSA spying on Petrobras is no different from the NSA spying on the Brazilian government”. For this reason, “[a] weakened Petrobras means a weakened Brazil, which means a less stable South America”, concluding: “[s]houldn’t this be directly in the NSA wheelhouse?” Although Helman is looking at a justification that is broader than direct national security interests, it appears implicit that geo-political considerations may justify espionage activities – again, something more than mere economic interests.

In a similar vein, albeit advocating a narrower view, [President Obama said in response to the exposure of NSA’s spying activities](#): “[W]hen it comes to intelligence gathering internationally, our focus is on counter terrorism, weapons of mass destruction, cyber security...core national interests of the United States”.

In reality, economic interests are also core national interests for the United States, or indeed for any other country. No country can claim a true separation between the two. Despite this, it is clear that in the interests of global citizenship espionage activities need to be seen to have a purpose beyond the mercenary.

Where does that leave Australia and the alleged activities of ASIS during the negotiations of the CMAT Treaty?

Literature on ethics in international relations focuses largely on its amorality. The crux of the orthodox view on the ethics of interactions between state parties stems from the expectation that states cannot interact with each other within the same moral framework that governs interactions between individuals. Spying activities are absolutely verboten between individuals or between corporations, yet there is a tacit acknowledgement that these activities occur between states.

But the recent fracas surrounding the exposure of alleged Australian and United States spying activities clearly indicates that these actions are only accepted to the extent that [these matters relate to national security and counterterrorism activities](#).

The allegation of Australian spying activities sits uneasily against the [preamble to the CMAT Treaty](#), which states that its

terms are agreed as between Australia and East Timor in a manner that is “fully committed to maintaining, renewing and further strengthening mutual respect, friendship and cooperation between Australia and Timor-Leste” and “mindful of the interests which Australia and Timor-Leste share as immediate neighbours and in a spirit of cooperation, friendship and goodwill”. If true, the allegations erode any sense of basic fairness and good faith negotiation – especially given the disparity in bargaining power between Australia and East Timor.

It may be said that the process of negotiations between Australia and East Timor were sufficiently connected to geo-political considerations in the sense put forward by Helman to justify espionage activities. However, the purpose of the CMAT Treaty is essentially commercial. Under the treaty, both Australia and East Timor must refrain from asserting or pursuing their maritime boundaries claims for 50 years, and must not commence any proceedings that would raise the delimitation of maritime boundaries in the Timor Sea. The CMAT Treaty is about how Australia and East Timor will share the gas and oil resources in the Timor Sea, and any revenue flowing therefrom. Under the CMAT Treaty, Australia is currently able to “share” resources with East Timor – resources to which Australia may not have any proper claim.

Australia’s alleged belligerence in East Timor may have other consequences.

The allegations that the espionage activities in East Timor were conducted under the cover of an Australian aid program are also particularly troubling. As [Australian Greens leader Christine Milne has argued](#), the impact of this tactic could be vast, as “people working in Australian aid programs around the world will be under suspicion.” Even on an amoral view of ethics in international relations, the conduct of the alleged spying activities in East Timor is difficult to justify.

While a certain level of espionage between states may be tolerated, particularly in the interests of national security, spying on the poorest country in Asia in peacetime for pure commercial gain goes too far. It reinforces the spectre of Australia as the bully of the Asia-Pacific.

Sayomi Ariyawansa is a Melbourne lawyer. She has volunteered with the Asylum Seeker Resource Centre, interned in the New York office of Human Rights First and previously worked for the Victorian Department of Justice. She is currently on the committee for the Global Ideas Forum 2014.