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CUTTING THE GORDION KNOT – SOLVING THE EAST TIMOR V AUSTRALIA DISPUTE



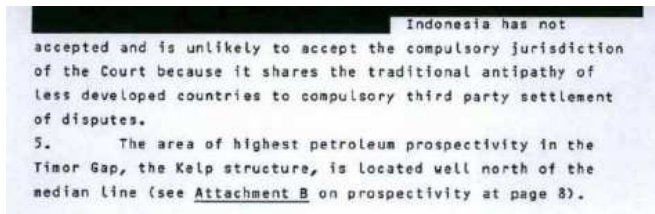
AUSTRALIAN FOREIGN MINISTER GARETH EVANS AND INDOONESIAN FOREIGN MINISTER ALI ALATAS SIGN THE TIMOR GAP TREATY

By Clinton Fernandes

This article is part of our March focus on Australia’s relationship with East Timor.

Recently declassified Cabinet papers from the 1980s provide insights into the thinking of Australian officials when they negotiated the Timor Gap Treaty with Indonesia, then in occupation of East Timor. Indonesia’s position, Cabinet was told, was that there is “one shared continental shelf between Australia and Indonesia” and therefore “a boundary equidistant between the two coasts (the median line) would be appropriate”. Furthermore, Indonesia was arguing that developments in the law of the sea, particularly the 1982 United Nations Convention on the Law of the Sea, meant that international law was on its side in its claim to the median line. However, although the so-called “Kelp structure”, which was the area most likely to contain oil and natural gas, was located “well north of the median line”, Cabinet was told that Indonesia was unlikely to take Australia to the International Court of Justice to enforce its claim. The reason for this view is worth quoting in full:

“Indonesia has not accepted and is unlikely to accept the compulsory jurisdiction of the Court because it shares the traditional antipathy of less developed countries to compulsory third party settlement of disputes.” [emphasis added].



This supposed “traditional antipathy” to international legal mechanisms was not confined to “less developed countries”, however; in March 2002, just two months before East Timor became independent, Australia withdrew unilaterally from the maritime boundary jurisdiction of the International Court of Justice and the International Tribunal on the Law of the Sea. It withdrew because it knew its own legal position was extremely weak.

Unable to use the International Court of Justice (ICJ) due to Australia’s unilateral withdrawal, East Timor is alleging before a three-person Arbitration Panel that Australia had breached international law by bugging East Timor’s cabinet rooms during the 2004 bilateral negotiations over the Timor Sea Treaty. Meanwhile, on 3 December 2013 the Australian

Security Intelligence Organisation (ASIO) raided the Canberra office and home of Bernard Collaery, a former Attorney-General of the Australian Capital Territory who is providing legal advice to the government of East Timor. ASIO seized documents and data containing correspondence between East Timor's Government and its legal advisers. It also raided the house of an unnamed former Australian intelligence officer. He is said to be the Director of all technical operations for the Australian Secret Intelligence Service, which allegedly conducted the bugging operation using the Australian aid program as a cover.

As a consequence, on 17 December 2013 East Timor went to the ICJ to seek an order compelling Australia to return its documents. Its lawyers argued that Australia had placed itself in a position of considerable advantage in the dispute at the Arbitration panel as well as in "the negotiations that must take place between Timor-Leste and Australia regarding maritime delimitation and access to maritime resources." It will be several months, possibly a year, before the ICJ rules on this point. Until then, Timor's lawyers argued, there was a "risk of irreparable prejudice and injury" if Australia were allowed to study the contents of the documents that it had seized. They therefore asked the ICJ to issue an interim order (known as a "provisional measure" – akin to an injunction in domestic law) ordering Australia to seal the seized documents and data and deliver them to the custody of the ICJ. They also asked for an assurance that Australia would not intercept or cause or request the interception of its communications with any of its lawyers.

Australia's lawyers argued that there was no risk of irreparable prejudice to East Timor's rights. George Brandis, Australia's Attorney-General, provided solemn undertakings that the seized items had been sealed upon seizure, that he himself had not read them, that they would remain sealed – even from ASIO – until the ICJ had made a ruling, and that they would not subsequently be shown to anyone involved in conducting the arbitration proceedings on behalf of Australia. Tellingly, he gave no such undertaking to cease interfering with East Timor's communications with its lawyers. The British Judge on the ICJ, Christopher Greenwood, said he was "surprised" by this omission and accepted "that there is a real and imminent risk of such interference which requires action on the part of the Court".

The Court noted that Senator Brandis, as Attorney-General, had the authority to bind Australia as a matter of both Australian and international law. Furthermore, it said, Australia's good faith in complying with its commitment must be presumed. It therefore did not order the seized items to be delivered to its own custody in The Hague but ordered Australia to keep them under seal until it made a final ruling on the subject. As an aside, Brazilian judge Cançado Trindade wrote a separate opinion that stands out for its erudition, sparkling wit, philosophical insights and sense of history. It deserves to be read in full, and will be appreciated by all who love great jurisprudence combined with great eloquence.

The Court further ordered that Australia "shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002'. This order is of great interest. The Australian Government will likely be concerned about a ruling by the International Court of Justice that bars certain espionage activities. If it violates this ruling, it will always be at risk from future whistleblowers. As Australia's finest national security commentator, Dr Philip Dorling, has said, decision makers have to factor in the possibility that something they are doing will be held up to public scrutiny. It they think that maybe, just maybe, there's a risk, then it has a moderating impact. The element of risk is a useful check on power.

In this case, the risk of one day being exposed disobeying an order by the International Court of Justice will harm any future case between Australia and any other country; its good faith and ability to honour a commitment would never again be presumed. And that is a greater deterrent than anything East Timor may say or do in the current proceedings. Australia and its allies are probably involved in discussions right now about whether to reach a quiet settlement with East Timor.

There is a way out of all this, reminiscent of the tale of the Gordian Knot; as Alexander the Great was conquering all before him, he arrived in Gordium in Phrygia, in modern-day Turkey. There he learned about a wagon in the Temple of Zeus that was tied with a knot so intricate that no one had been able to unravel it. He tried to unfasten it but when he realised he couldn't, he drew his sword and cut through it. Australia too can cut the Gordian Knot – instead of wasting time, money and international goodwill on arm-twisting an impoverished neighbour (with a GDP of \$6 billion in contrast to ours of \$1,400 billion), we could simply agree to negotiate in good faith and in accordance with international law. Let us keep what is rightfully ours – no less, no more; and let the East Timorese do the same. Let us, to quote from the Cabinet papers of the 1980s, not "share the traditional antipathy of less developed countries to compulsory third party settlement of disputes".

Dr Clinton Fernandes is an Associate Professor at the University of New South Wales, Canberra. He has written widely on the independence of East Timor, and Australian-Indonesian relations. His principal research area is international relations and strategy, and he recently took part in an international Fact-Finding Mission on the elections in Malaysia.