

Stoush over alleged Australian spying on East Timor has a long history

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In the last instalment of *Keating*, the recent series of interviews on ABC, former prime minister Paul Keating claimed he tried to do everything possible for the people of East Timor, but that his government never "got any credit from the East Timor lobby, of course". The reason for this lack of credit - not only for the Keating government, but for governments of all political persuasions - has a long history.

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It is a history that is bound up with the present attempt by East Timor to have an arbitral tribunal declare invalid the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea. This history has been ably recounted in many places. It need be only briefly rehearsed here for one to understand the dissatisfaction of East Timor with CMATS.

The trouble begins after 1972, the year Australia was able to use the law of "natural prolongation" based on the geophysical characteristics of its continental shelf to extract a lopsided agreement from Indonesia by which it obtained, by one estimate, nearly 80 per cent of a maritime area that had been subject to overlapping claims by Indonesia. The rub was that Australia was unable to extract a similar agreement from Portugal, the UN administrative authority of East Timor.

After the illegal invasion and forcible acquisition of East Timor by Indonesia in 1975, further agreement on a seabed boundary between the coasts of Australia and Indonesian-controlled East Timor was impossible. Indonesia insisted on using the "equidistance" principle, now an accepted rule of delimitation, which requires states with opposite coastlines closer together than 400 nautical miles to draw a median line between them, at least as a starting point for negotiations. Australia would not have it.

This stalemate persisted until 1991, when the notorious Timor Gap Treaty entered into force. Under its provisions Australia and Indonesia purported to set up a zone of co-operation to divvy up - between them alone - oil resources belonging to East Timor.

The Timor Gap Treaty, however, was illegal because Indonesia had used military force to assert control over the territory of East Timor, an act that is prohibited by one of international law's most fundamental prohibitions. As a result, Indonesia had no title to the East Timorese territory or the oil resources of its exclusive economic zone over which it could deal with Australia.

From 1991 to 1995, Australia fought hard to preserve the Timor Gap Treaty in the International Court of Justice against a challenge to its legality by Portugal. The successful Australian defence was not based on the merits of the validity of the treaty, but involved the use of a procedural argument that precluded the ICJ from hearing the case because Indonesia refused to appear.

Four years later, however, the Timor Gap Treaty was terminated after East Timor was allowed to exercise its right of self-determination to become an independent state.

Australia did not wait long to begin to reposition itself in connection with the petroleum resources covered by the defunct Timor Gap Treaty. First, it lodged a new reservation to the jurisdiction of the ICJ and the International Tribunal for the Law of the Sea clearly intended to preclude East Timor from suing Australia over the disputed maritime zone.

Then, Australia and East Timor entered into the Timor Sea Treaty, followed by a number of related instruments over the next year. Under the new arrangements, the largest known petroleum deposits, collectively known as "Greater Sunrise", were apportioned in a manner whereby Australia received about 82 per cent of the total resource, leaving newly independent and impoverished East Timor with 18 per cent.

This brings us to the negotiation of the CMATS treaty. CMATS is notable for its duration until 2057, its extension of the Timor

Sea Treaty until 2057, its moratorium on all claims to sovereign rights and maritime boundaries for the period of the treaty, and its relief from any obligation to negotiate in good faith over permanent

boundaries until 2057. Significantly, it also provides for an equal share for East Timor and Australia of the revenue derived from upstream exploitation of petroleum from the Greater Sunrise deposits. While this revenue sharing arrangement seems much 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 East Timor government from 2004, when the CMATS treaty was being negotiated, then it is very likely that CMATS (and the extension of the Timor Sea Treaty) is invalid and thus void. 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 closed to public view, it is possible that CMATS could be declared invalid or void on three separate grounds.

First, under the Vienna Convention on the Law of Treaties, which binds Australia and East Timor, a state that is induced to conclude a treaty by fraudulent conduct may invoke the fraud to invalidate its consent to be bound by the treaty.

The definition of fraud under the Vienna convention is much broader than that found in domestic law. It includes deliberately deceitful behaviour. It seems clear that secretly purloining confidential cabinet information to gain advantage in treaty negotiations is deceitful behaviour. Less certain is whether this deceitful behaviour actually induced East Timor to enter the CMATS treaty. That will depend on what the evidence discloses. If a deceitful inducement is disclosed, Australia will apparently have the dubious distinction of being the first known state to have a treaty declared invalid on account of its fraud.

Second, it appears that the sort of spying 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 that requires fair dealing between states generally.

In the context of treaty negotiations it requires fair proceedings in the creation of legal obligations between the parties. In the case of CMATS, Australia already had a vastly superior bargaining position with its sophisticated experience and expertise in 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.

Finally, if the spying reports are true, it seems clear that Australia has breached international law by illegally intervening in the most intimate domestic affairs of East Timor without its consent. International law prohibits one state from spying on another state because international law prohibits states from interfering with matters within the sovereignty of other nations. Despite all the claims from the United States and Australia that all states spy, it remains illegal under international law. This is confirmed by the vigorous protests that invariably and immediately follow as soon as a state publicly learns that it is being spied on.

This saga is likely to continue absent goodwill 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 between East Timor and Australia to achieve an equitable solution.

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This story was found at: <http://www.theage.com.au/comment/stoush-over-alleged-australian-spying-on-east-timor-has-a-long-history-20131205-2ytm6.html>