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HAVING IT BOTH WAYS: AUSTRALIA'S CONFLICTED POSITION IN THE TIMOR SEA



PROTESTS OUTSIDE THE AUSTRALIAN EMBASSY IN DILI, TIMOR-LESTE, 2013. LA'O HAMUTUK

By Sarita Ryan

For Alexander Downer, former Australian Foreign Minister and subsequent board advisor to Woodside Petroleum, it's all nothing more than a crude resource grab. Timor-Leste's appeal to terminate a key treaty with Australia in the Permanent Court of Arbitration reveals the tiny nation, according to Downer, to be an unruly negotiator:

'This is exactly why developed countries are reluctant to invest in developing countries. The sovereign risk is too high. An agreement, a law, a treaty is only okay when it suits the government...East Timor will win a reputation for being unreliable with no leverage to gain extra revenue from its reckless policy. As a person who did so much to get East Timorese their independence, that makes me sad.'

Recent proceedings have suggested that it might be Australia, rather than Timor-Leste, that is currently most at risk of gaining a bad reputation. When Sir Eli Lauterpacht, Timor-Leste's leading counsel at the International Court of Justice, dubbed ASIO's confiscation of evidence 'improper and inexplicable', Australia's legal team responded to the assertions as 'wounding'. Unfortunately for Australia, hurt feelings didn't translate into a legal high ground in the ICJ, and it's possible there are more sad faces to come; the ANU's Donald Anton notes that if Timor-

Leste's allegations prove true, and Australia is found to have gained an unfair advantage in treaty negotiations through spying on Timor-Leste, Australia may earn the dubious distinction of being the first known state to have a treaty declared invalid on account of fraud (under Article 49 of the Vienna Convention on the Law of Treaties). Australia may well be losing the image game in its dealings with Timor-Leste.

For decades, Australia has sought to carefully manage the conflicting positions of its desire for resource control in the Timor Sea and its image as a nation aligned with the moral principles of sovereignty and self-determination. It is now looking increasingly like Australia may not be able to have it both ways. Contrary to Downer's claim, the arbitration case concerns more than the gain of 'extra revenue' in Timor-Leste. Certainly, this is a case about oil and espionage, fair resource distribution and good faith in agreements between nations. However, the drama surrounding the spying scandal is something of the tip of an older issue: Timor-Leste's ongoing struggle to become an independent, sovereign state, complete with maritime boundaries, and Australia's fraught position in this process.

La'o Hamutuk, a prominent Timorese civil society organisation, has held several briefings for local and Australian journalists over the past few months to clarify a significant degree of confusion surrounding the case, including an often repeated claim that Timor-Leste's arbitration case is seeking to redraw Australian/Timorese maritime borders. The organisation stressed that permanent maritime boundaries have never been set between Australia and Timor-Leste, rather, previous agreements have related to the division of resources in the Timor Sea. In taking the present case to the Permanent Court of Arbitration, Timor-Leste is seeking not only a re-division of oil and gas reserves in the Timor Sea, but the establishment of maritime boundaries in accordance with international law, a persistent issue since the beginning of Australian/Timorese resource negotiations. As Juvinal Dias, a researcher at La'o Hamutuk, stressed, "(the arbitration case) is not just about oil. It's about sovereignty... This struggle is like the struggle for independence."

The story of Australian and Timorese oil and gas negotiations has been well documented, but is necessary to revisit in order to chart Australia's long-term strategy in the Timor Sea. Discovered by Woodside Petroleum in the early 1970s, the untapped resources in the Greater Sunrise field, worth an estimated \$40 billion, proved highly influential on Australia's position regarding an independent Timor-Leste. In 1974, reflecting global trends in maritime agreements, Portuguese Timor advocated for resource sharing along a median line between the two countries, under which Australia would have received little or nil of the resources. On the contrary, precedent suggested that Indonesia would be far more amenable to Australia claiming a significant proportion; Indonesia and Australia had previously negotiated maritime boundaries based on the outdated 'continental shelf' principle, resulting in a deal that was referred to in Indonesia as 'Australia taking us to the cleaners'. The following diplomatic cable, from the year prior to the collapse of Portuguese colonial rule and Indonesia's subsequent invasion of Timor-Leste, reveals the extent to which resources were at the forefront of Australian concerns, coupled with a need to maintain an image of impartiality:

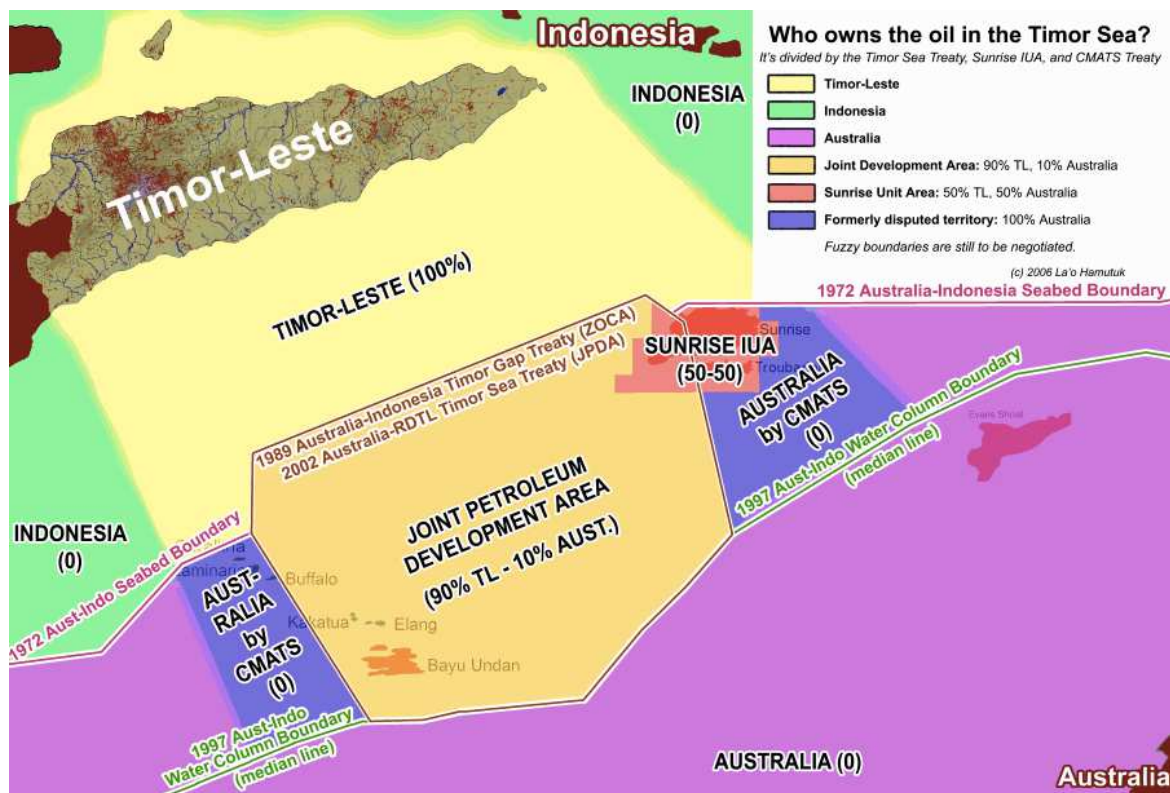
"The Indonesians would probably be prepared to accept the same compromise as they did in the negotiations already completed on the seabed boundary between our two countries. Such a compromise would be more acceptable to us than the present Portuguese position. For precisely this reason however, we should be careful not to be seen as pushing for self-government or independence for Portuguese Timor or for it to become part of Indonesia, as this would probably be interpreted as evidence of our self-

interest in the seabed boundary dispute rather than a genuine concern for the future of Portuguese Timor.’

In 1975, Australia chose to adopt a ‘realist’ rather than ‘idealist’ position on Timorese self-determination, which was argued to provide not just greater regional stability, but greater possibilities for resource access. This famous letter from Richard Woolcott, Australian Ambassador to Indonesia in 1975, provides the background of Australia’s tacit approval of the Indonesian annexation of Timor-Leste:

‘It would seem to me that (the Australian) Department (of Minerals and Energy) might well have an interest in closing the present gap in the agreed sea border and that this could be much more readily negotiated with Indonesia...than with Portugal or independent Portuguese Timor...I know I am recommending a pragmatic rather than a principled stand (regarding Indonesian annexation) but this is what national interest and foreign policy is all about.’

This ‘pragmatic’ position proved highly profitable for Australia. Following Indonesia’s 1975 invasion of Timor-Leste, Australia and Indonesia signed the Timor Gap Treaty (1989). By this stage, the 1982 UN Convention on the Law of the Sea (UNCLOS) had come into effect, establishing the median line principle as the basis for setting maritime jurisdictions between countries less than 400 nautical miles apart. However, in a highly favourable deal to Australia, the Timor Gap Treaty divided the resources between the 1972 boundary and the median line equally. The treaty proved extremely profitable, with Australia netting more than \$2 billion in government taxes from the Laminaria-Corallina fields alone. These fields are now largely depleted.



In the late 1990s, the growing surge for independence in Timor-Leste threw all previous agreements between Indonesia and Australia into doubt. In anticipation, Australia withdrew its

recognition of the maritime boundary dispute jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea, just two months prior to Timor-Leste's declaration of independence. At the time, Downer asserted that it was Australia's 'strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation.' Timor Sea agreements between the newly independent Timor-Leste and Australia were then negotiated directly between the two countries, without reference to UNCLOS. The resulting Timor Sea Treaty (signed in 2002, ratified in 2003) established that fields in the Joint Petroleum Development Area (JPDA), such as Bayu Undan, are shared via a 90% (Timor-Leste) and 10% (Australia) split, an improvement on the 50/50 split under Indonesian rule. This appears considerably more equitable than the earlier arrangement; however, it must be kept in mind that Australia would not be entitled to any of these resources under the median line principle. During the negotiations, Timor-Leste repeatedly tried to raise the issue of permanent maritime boundaries along a median line, prompting this well documented outburst from Downer: 'We don't have to exploit the resources (in Bayu Undan). They can stay there for 20, 40, 50 years.... We are very tough. We will not care if you give information to the media. Let me give you a tutorial in politics- not a chance.'

Another key problem of the Timor Sea Treaty was its link to the Sunrise-International Unification Agreement (referred to in this article as the 'Sunrise Agreement'). Despite the Greater Sunrise field falling entirely in Timor-Leste's maritime territory under UNCLOS, the Sunrise Agreement stated that less than 20% of Greater Sunrise lay within the JPDA, with the remaining 80% assigned to Australia. Australia would not ratify the Timor Sea Treaty until Timor had signed the Sunrise Agreement, delaying desperately needed cash flow to Timor from Bayu Undan. At the time, Greens Senator Bob Brown accused the Howard Government of 'blackmail', and was suspended from the Senate for the day as a result. Timor-Leste is now claiming, through its case at the Permanent Court of Arbitration, that Australia was well aware of its desperate position through the bugging of government offices in Dili, and that these agreements were made in bad faith on Australia's part. Timor-Leste resisted ratifying the Sunrise Agreement for years after signing it, and in 2006 the Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty was devised as a compromise, giving each country a 50% share of Greater Sunrise. The treaty also came with the condition that Timor-Leste would not raise the issue for another fifty years, thus effectively closing the possibility for Timor-Leste to set permanent maritime boundaries, at least until after Timor Sea oil and gas reserves had been exhausted.

As far back as 1974, it was acknowledged in Australian government circles that it was important to balance Australia's resource aspirations with establishing a cooperative relationship with an independent Timor-Leste: 'If Australia thus became a focus of antagonism, we would almost certainly lose much of our capability to influence or assist a newly independent government' (38 Cablegram to New York, 1974). Australia is acknowledged as a key actor in Timor-Leste's independence narrative; our assistance through the INTERFET peace keeping force during the 1999 independence referendum and subsequent violence is well remembered and appreciated, and AusAID (now DFAT) contributes roughly \$116 million per year in aid expenditure, making Australia Timor's largest bilateral donor. However, it has also been well noted that Australia's profits from Timor Sea reserves, both during Indonesian occupation and post-independence, far outweigh the costs of any military and humanitarian assistance to Timor-Leste. As Dias exclaimed during our conversation: 'You can't give me a hand and take my arm!' That the alleged spying occurred under the cover of an AusAID program is uncomfortably symbolic of Australia's long-standing position towards Timor-Leste. Timorese sovereignty and Australia's economic self-interest in the Timor Sea have never sat easily together.

In January 2014, Downer wrote an opinion piece promoting Australia as a responsible international citizen after a series of attacks by the ABC and others, describing such criticism as a 'standard practice at the ABC. Whenever a foreigner criticises us, it's always our fault.' Downer describes CMATS as an act of charitable goodwill by the Australia government: 'In 2006 we struck a deal with the Timorese: we'd give them 50 percent of the revenue (of Greater Sunrise) because they were poor and we were rich....We didn't really need the money to the extent that they did.'

Strikingly, not once in Downer's opinion piece does he mention the awkward reality of the median line principle and UNCLOS, which might suggest that Australia may have 'given away' that which was, in fact, not its to give.

The upcoming months may prove to be dramatic for the relationship between Australia and Timor-Leste. It could well be that Australia walks away from the Permanent Court of Arbitration not just with the loss of Greater Sunrise, but with an unenviable reputation as a country that conducts international agreements in bad faith, and exploits small, poor countries for its own economic gain. The game may well have changed. If Timor-Leste is successful in the Court, it will certainly seek to establish its own permanent maritime boundaries, in accordance with the median line principle. For Timor-Leste, this would be the conclusion of a struggle for self-determination spanning forty years. For Australia, it may well prove to be a clear sign that its economic self-interest in the Timor Sea is simply at odds with both the sovereignty of its tiny neighbor, and principles of international law. Perhaps having it both ways was never really possible.

Sarita Ryan researches labour and development issues. She is currently enjoying life in Timor-Leste, before joining the Social Anthropology department at the London School of Economics as a postgraduate student.