



**EMBASSY OF THE DEMOCRATIC REPUBLIC OF
TIMOR-LESTE
CANBERRA**

**One-day Public Seminar - Maritime Boundaries in the Timor Sea:
“Perspectives in International Law”**

15 February 2016,

Jointly hosted by Castan Centre for Human Rights, Monash University and
Swinburne Institute of Technology, held at Monash Law School,
Melbourne CBD,

**Presentation by H.E. Ambassador Abel Guterres
delivered on Behalf of the Government of Timor-Leste**

INTRODUCTION

Distinguished Participants, Ladies and Gentlemen, I want to acknowledge the Traditional Custodians of the land and pay my respects to the elders Past and Present and Future on whose land we gather today. I want to thank the Castan Centre for Human Rights, Monash University and the Swinburne Institute of Technology for hosting this important seminar. I want to acknowledge the participation of International Law Experts Prof. Don Rothwell - ANU, Prof. Don Anton - Griffith University and Dr. I Made Andi Arsana - Gadjadara University Indonesia.

Ladies and Gentlemen, for us the timing of today's seminar on the delimitation of maritime boundaries cannot be better. This is because our Prime Minister, Dr. Rui Maria de Araújo has just sent his official letter to Prime Minister Malcolm Turnbull, to request just that – to begin negotiations in good faith on the delimitation of permanent boundaries.

My speech today is not necessarily focused on legal matters, more on politics, although as we all know, law and politics are always hard to deal with as completely separate matters. My speech is the telling of our story trying to settle our maritime boundaries with Australia, in plain and simple language, not finessed with diplomatic nuance.

Academics and lawyers characterise this matter as a *dispute*. For Timor-Leste all we seek and have continually sought is to negotiate with Australia its permanent and sovereign maritime boundaries and so far the Australian government has not agreed to come to the negotiation table.

The primary goal for Timor-Leste is to achieve demarcation of maritime boundaries based on international law and we are requesting to enter into the next phase of negotiations on permanent maritime boundaries in the Timor Sea.

THE NEXT PHASE OF TIMOR SEA TREATY NEGOTIATIONS

The question of the delimitation of permanent maritime boundaries has always been on the table from the Timorese side. When the United Nations, represented by UNTAET (the United Nations Transitional Administration for East Timor) negotiated what became the current arrangement with Australia, the question of permanent boundaries was put firmly on the table.

Australia preferred, indeed insisted on a temporary arrangement. This temporary arrangement was a new one but one that is prima face modeled on Australia's treaty with Indonesia, a treaty Timor-Leste regarded as done on an illegal basis and achieved at odds with international law.

The Timor Gap Treaty, which created the Zone of Cooperation (ZOC), was famously signed on an airplane flying over the zone, and celebrated by the two relevant ministers clinking champagne glasses, while the Timorese were being killed by the Indonesian military in genocidal proportions and lived in atrocious conditions.

During the period of the United Nations' transition, Australia did all it could to shove that treaty at East Timor, to ensure that Timor-Leste had no option but to "agree to it", just as we were being born as a sovereign State. The pressure from Australia was such that Foreign Minister Alexander Downer felt appropriate and necessary to remind the then Special Representative of the United Nations and Transitional Administrator of East Timor, the late Sergio Vieira de Mello, that "Australia could bring meltdown to East Timor if it so chose".

As you can draw from this mood, it was a situation where the United Nations and the Timorese leaders could not sustain their position under Australian pressure. Lawyers might call this out as unconscionable conduct.

The desperation of Australia to force these treaties onto the Timorese leaders extended to the period of 2004 and 2007 when the CMATS (Certain Maritime Arrangements on the Timor Sea) was pushed through the Australian Parliament. Pushed through by the Government disrespecting at worst or bypassing at best, its own standards for treaty making.

The Parliamentary Standing Committee on Treaties that analyses treaties, was ignored, before CMATS was subjected to the deliberation of the Parliament. The then Foreign Minister Alexander Downer saw fit to make use of the executive powers of the government to bypass Parliamentary procedures. Mr. Downer argued that his move was to safeguard national interests because the Timorese were soon to go through an election. In giving this reason he invoked the 'National Interest Exemption'.

CMATS was tabled before Parliament on the 6 February 2007. Mr. Downer announced the National Interest Exemption on 22 February 2007, with the treaty entering into force on 23 February 2007. He explained that he was invoking the National Interest Exemption because: (i) the treaty did not alter arrangements under the Sunrise IUA, which the Committee had already reviewed and supported, (ii) CMATS had been publicly available since January 2006, and (iii) Timor-Leste had indicated to the Australian Government that it wished to move ahead expeditiously to bring CMATS into force, with an opportunity to do so prior to its presidential and parliamentary elections. Mr. Downer explained that, given the importance of the treaty to Australia and Timor-Leste, Australia did not wish to allow an opportunity to pass to finalize the treaty, and it was uncertain when such an opportunity would arise after the Timor-Leste elections. This process was quite interesting, seeing a rarely used exemption invoked for CMATS.

At the time, there was considerable criticism of Mr. Downer's decision to invoke the exemption, given that the treaty had been signed a year prior to being tabled before Parliament, and the somewhat unclear explanation of Timor's political circumstances on the decision to expedite CMATS' entry into force.

In his letter to Dr. Andrew Southcott MP, Mr. Downer wrote “I have decided to invoke national interest exemption and proceed with taking binding treaty action for the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty even though twenty sitting days have not elapsed since it was tabled”. Mr. Downer went further adding “The CMATS Treaty would also suspend maritime claims for a significant period.” This reference is to a moratorium of fifty years on maritime boundary matters.

Now, we can look back and see that this process is another interesting aspect of the story behind CMATS.

We Timorese believe that had good faith been a feature of our interactions we would have a chance to explore a pipeline to our shores, in the same way that Australia had one to theirs with great benefits ensuing to the Northern Territory and Australian economy. That was not to be. The good faith was blown up firstly by Australia not assisting at all in this endeavor to have a pipeline to our shores or even consider it, and secondly when we had confirmed to us in the second part of 2012 that we were not only spied on during the treaty negotiation, but that Australian agents had entered our government offices to plant listening devices under the guise of an aid project. This was and is still unacceptable.

Thirdly, we believed that Australia would enter into negotiations on the delimitation of maritime boundaries, in the future, having established some temporary arrangements.

WITHOUT PREJUDICE

Bearing in mind this moratorium clause to quote Mr. Downer, the expectation was that Timor-Leste, even after fourteen years of independence, as a sovereign country and member of the United Nations, still cannot discuss its sovereign rights to access to its natural resources allowed for by international law. This is just not right. And the Government of Timor-Leste is ready and committed to change it.

Adding salt to the wound, on the 22nd of March 2002, two months before Timor-Leste was to become an independent and sovereign State, and a member of the United Nations, Australia saw fit to withdraw itself from the jurisdiction of the ICJ and ITLOS under UNCLOS, in relation to [and I quote] “any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation”.

ADHERENCE TO INTERNATIONAL LAW

Nevertheless, both the Timor Sea Treaty and CMATS clearly indicate the intention of the parties not to hinder the right to negotiate maritime boundaries in the future; and that such negotiation will be under international law provisions, UNCLOS being one such provision. I hope our experts, academics and supporters today would continue to articulate this for the benefit of a healthy debate and discussion on this important issue.

In this regard, Timor-Leste is encouraged by the recent statements of Prime Minister Malcolm Turnbull concerning international law. Reflecting upon

the South China Sea, Mr. Turnbull advocated that the United States ratify the United Nations Convention on the Law of the Sea because “non-ratification diminishes American leadership where it is needed most”. This correlation is of vital importance.

Adhering to the rules of international law and leadership in international affairs are intertwined. Reflecting upon the dispute between Timor-Leste and Australia, the fact that Australia withdrew from relevant provisions of UNCLOS to protect itself from dealing specifically with maritime boundary delimitation matters that can only be applicable to Timor-Leste, does not conform to the behavior of a country that wants to also exert its international rules based leadership in our region and beyond. In pursuit of this we observe that Australia is seeking a seat on the United Nations Human Rights Commission.

And this is why Timor-Leste welcomed the 2015 resolution of the ALP National Conference to settle permanent maritime boundaries with Timor-Leste based on international law. This resolution, approved unanimously, demonstrated a courageous policy stand by the ALP because of its readiness to put right a wrong and to seriously review the reservations that Australia, under the Coalition government and Mr. Downer, registered in the United Nations to deny any possibility of Timor-Leste taking the maritime boundary dispute to the ICJ or ITLOS.

If you consider those reservations combined with Australia’s current refusal to negotiate maritime boundaries with Timor-Leste, you can see the effect. It has rendered Timor-Leste almost powerless. Almost powerless to exert any pressure on Australia to come to the negotiating table in good faith to

reach a maritime boundary delimitation that is fair, equitable and permanent, as provided for by applicable international law.

The language of the ALP resolution is what we can call a show of leadership and the party's commitment to find a real solution. The commitment to maintaining a positive relationship with the people of Timor-Leste is certainly echoing what most Australians want. Entering into structured engagement with Timor-Leste to negotiate the settlement of maritime boundaries between both countries reflects what is perceived by Timor-Leste as an act of good faith, particularly when one reaffirms the duty to commit to a rules-based international system and the readiness to review its reservations to the United Nations Convention on Law of the Sea (UNCLOS) to the settlement of maritime boundary disputes through the ICJ and the International Tribunal of the Law of the Sea (ITLOS).

The review promised in that resolution was obviously undertaken forensically with the party that is the alternative government now announcing it will submit itself to the jurisdiction of the judicial umpires of the ICJ and ITLOS, or another mutually agreed forum, to settle permanent maritime boundaries with Timor-Leste if negotiations fail to reach an agreement. This is the right and sensible approach.

We sincerely welcome this approach as one, that is "very Australian", a phrase we have heard Prime Minister Turnbull use on very serious matters. He said it recently in his most welcome speech on domestic violence. A serious and challenging matter that besets and blights both our societies.

The good will and strong adherence to international norms, which enhances Australia's reputation as a good international citizen, was well articulated by the Hon Tanya Plibersek, the Deputy Opposition Leader and Shadow Minister for Foreign Affairs, in her address to the Press Club last week and in subsequent media interviews. In an interview with Lateline, Shadow Minister Pilbersek said:

“I’m responding to the fact that for decades we haven’t had a proper border with one of our nearest neighbors. I’m responding to that in a way that is acceptable to the Government of East Timor and most importantly, also in Australia’s national interest.

The ongoing uncertainty about where the border lies between our two nations is not in our national interest and it’s also not good for us internationally, not good for our reputation. We are a country that has benefited a great deal through the rule of law internationally – the fact that we were able to take Japan to the ICJ and win the whaling case was because we are party to conventions including UNCLOS – United Nations Convention on Law of the Sea - that allow us to do that.”

We cannot agree more. Entering into negotiations with Timor-Leste now to reach an agreement, in good faith, on maritime boundaries is, indeed, not only the right thing to do but also in Australia's national interest.

THE CASE OF ESPIONAGE IN THE HAGUE

This seminar also intended to look into “current court cases” and I know that there has been a lot of public attention given to the espionage case. In

2014, Prime Minister the Hon Tony Abbott and his foreign minister the Hon Julie Bishop asked our then Prime Minister Mr. Xanana Gusmão to drop both cases. The cases being the raid of lawyer Bernard Colleary's office in Canberra confiscating documents related to the espionage case that culminated in the matter being before the ICJ, as well the espionage case arbitration.

The idea was to begin consultations with Timor-Leste, they said. We said talks.

Again, Timor-Leste, acting in good faith acceded to that request, not dropping the cases but agreeing to suspend them for a period of six months. We decided it would give us time to listen to what Canberra had to say about the request of Timor-Leste to begin maritime boundary negotiations. At the end of the six months suspension period, Canberra had nothing new to say, except its readiness to dialogue on the basis of the current arrangement, as if the current arrangement is a biblical arrangement which one cannot change.

Australia always says, speaking for itself, that they are happy with the current arrangements. Australia says the same speaking for Timor-Leste too! Well yes, we are sure they are, but the current arrangements are clearly not working and bring into question serious matters of legality and indeed morality.

Regarding the case in ICJ it reached a conclusion when Australia decided to return all the documents, thus acknowledging the sovereign rights of Timor-Leste and its proprietary rights in the seized documents. The Australian Attorney-General Mr. Brandis acknowledged, in writing, the obligation of

Australia not to interfere with the communications between Timor-Leste and its lawyers.

So this case has concluded.

On the espionage case, Timor-Leste has informed the Tribunal that it is willing to continue with the case, which will probably last for another year until its conclusion. The Australian government has, it seems, talked to the witness known as 'witness K', taken away this person's passport and until now continues to refuse to return it. It seems that the Australian government refuses to allow the witness to make themselves available to the Tribunal, in person, in order to contribute towards the due process of the Tribunal.

The dilemma for the Australian government is that it actively engaged in this legal process, has been following all the procedures, has replied to Timor-Leste's submission and has access to the affidavit signed by the witness. In addition, the Tribunal has formerly requested Australia and Timor-Leste to cooperate in order to allow the Tribunal access to the witness. Having 'talked' to the witness, the onus is now with the Australian government to allow the Tribunal unfettered access to the witness.

The Australian government must cooperate with the Tribunal, and not bypass the natural course of justice. Again, I am no expert in legal procedures and international law, so I leave this issue here.

What I see as important to remember is that, in this case, Timor-Leste did not take the case to the international tribunal based on statements made by witnesses from other countries. Timor-Leste was informed about this espionage case by one of Australia's own intelligence veterans and Timor-Leste being the victim has the right to pursue, if it so chooses, redress and

the truth, which it did. The reason Timor-Leste opted for an international arbitration tribunal in dealing with this sensitive matter is also relevant. Being such a sensitive matter, it is dealt with in a private hearing where the parties cannot disclose the details of the proceedings. In our view this is proper and reasonable.

IT'S TIME TO DRAW THE LINE

It is now high time to draw the line, as one of Australia's public intellectuals Father Frank Brennan has written in his works on this matter. One reason is that this is not the first time Timor-Leste calls upon Australia to draw the line. Going back in time, Australia and Indonesia recognized the 'gap' as belonging to Timor-Leste. Then Portuguese Timor was asked by Australia to join the negotiation on maritime boundaries, for the 1972 Seabed Boundary Agreement to begin with, but Portugal refused knowing that the law of the sea was evolving and becoming even less favorable to Australia's position. And Portugal was right. They objected to the spurious continental shelf claim.

More recently in 2004, a United States Congressman wrote to then Prime Minister John Howard appealing to Australia to negotiate maritime boundaries with Timor-Leste, under international law and in good faith. Even during the negotiations of the Timor Sea Treaty, Timor-Leste discussed the need for permanent maritime boundaries.

Professor Gillian Triggs and Dean Bialek wrote, in their paper "The New Timor Sea treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap", published in 2003 by the University of Melbourne, that "Concerns that ratification of the *Timor Sea*

Treaty will be interpreted as acceptance of the coordinates have prompted calls for East Timor to negotiate new permanent boundaries before it agrees to ratify”.

The National Parliament of Timor-Leste has also adopted legislation on maritime boundaries, including the Exclusive Economic Zone (EEZ), a middle line, closing the gap, so that Timor-Leste has what rightfully belongs to it, an EEZ.

CONCLUSION

I began by pointing out that we are ready and would want to enter the post phase of the Timor Sea Treaty and CMATS negotiations. I also stated that both treaties have a clear “without prejudice” clause to protect the rights and positions of each party to negotiate maritime boundaries in due course.

It is time to get back to the negotiation table to discuss, in good faith and within the realms of international law, maritime boundaries between our two friendly nations. After all, Australia has settled its maritime boundaries with its other five neighbors. Only less than two percent remains, which is with its sixth neighbor - Timor-Leste. It is time.

Bearing in mind our common history, including the active solidarity the Timorese showed to Australia during the Second World War, our call for maritime boundaries delimitation should fall on a receptive, friendly ear in Canberra. After all, about 50,000 (fifty thousand) Timorese died for supporting the Australian commandos in WWII, they died in defense of the sovereignty of Australia.

Now, when the Timorese call for maritime boundary negotiations with Australia, it is calling on Australia to help finally define the Timorese people's sovereignty, to conclude a quarter of century struggle for our national independence and sovereignty of the new state.

Australia and Timor-Leste are loyal friends and allies with a bond of friendship forged in times of war and misery, tested in the rugged mountain jungles of Timor-Leste during WWII. The Timorese villagers and the trusted *Criados* never betrayed their Aussie mates and ensured that they stayed alive to come back home to their loved ones in Australia.

Please Australia; it is time to Right the Wrong in the Timor Sea and give your close friends, next door - a fair go!

Thank you