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**EXPLOITING THE TIMOR SEA: OIL, GAS,
WATER, AND BLOOD**

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Exploiting the Timor Sea: Oil, Gas, Water, and Blood

David Dixon¹

Frontiers and Borders: Oil, Water, Soil and Blood

This chapter explores frontiers as political and economic constructs, focusing on the contested borders of Timor-Leste. At its centre is a dispute about the maritime border between Timor-Leste and Australia which has recently been before the Permanent Court of Arbitration. At stake is access to massive oil and gas resources in the Timor Strait.

This maritime border dispute can only be properly understood in the broader context of relations between Australia, Timor-Leste, and Indonesia. This leads to another border, the division of the island of Timor between Indonesia and (what is now) the Democratic Republic of Timor-Leste. This complex border – one line dividing the island from north to south and another enclosing a small enclave in north-west Timor² – is a legacy of colonial occupation; by the Dutch in the west, by the Portuguese in the east. For a quarter of century, this border disappeared. Soon after East Timor declared independence in the wake of its 1975 abandonment by post-fascist Portugal, Indonesia invaded, uniting the island until an heroic resistance movement led to multinational intervention in 1999 and restoration of independence – and the border.

So there are borders of various types. There are land and maritime borders: the latter may differ in regard to the seabed and the water column above it.³ There are economic borders, established by resource-sharing agreements. But there are also less tangible borders between truth and lies, between expediency and principle, between the past and the future, between cynicism and integrity, and between people whose lives count and those whose lives do not. This chapter will show how the Australian Government's recent actions towards Timor-Leste connect with a sorry history of deceit and incompetence which contrasts with Australian public opinion towards Timor-Leste.

Oil and Water

Australia's economic interest in Timor's resources has a long history. Indeed, 'the first oil concession sought by an Australian business dates from 1905' (Cotton 1999: 1). Significant exploration began in the early 1960s when the Australian Government granted what is now Woodside Energy (Australia's largest independent oil and gas company) permits to operate in the Timor Sea. In so doing, Australia

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² The Oecusse enclave is 80 kms from the rest of Timor-Leste. Timor-Leste also includes the islands of Atauro and Jaco.

³ There are sections of 'the central and northern Timor Sea where Australia has jurisdiction over the continental shelf ... and Indonesia has jurisdiction over the overlying water column' (Schofield 2007: 193-4). On the consequences for people whose livelihood depended on fishing in the Timor Sea, see Balint 2005; Aditjondro 1999:27-30, 97-102).

asserted its claim to the seabed to the edge of a continental shelf running up to the Timor Trough, which is only some 70 kms from Timor (MBO 2016: 16). Unilaterally claiming maritime territory is, of course, just what China has recently done in the South China Sea, attracting considerable criticism from Australia and other countries (McDonald 2013: 3). In the 1970s, references to maritime boundaries and oil extraction appeared with increasing frequency and focus in Australian government records (Way ed 2000). From this period 'the desire to control oil and gas in the Timor Sea influenced (the Department of Foreign Affairs) thinking in favour of East Timor's integration with Indonesia' (Cleary 2007: 16). Commercial investment and resource development required stability and certainty about borders and resource extraction rights, so legal and political simplification became increasingly attractive.

As early as 1965, a cabinet document showed that the Australia Government saw 'no practicable alternative' to eventual Indonesian takeover of East Timor (King 2013: 9). Australia rebuffed requests from Portugal in 1970 for negotiations over a maritime boundary, preferring to make a deal first with Indonesia (PCA 2016: 23; Way ed. 2000: 111-12). In 1972, Australia and Indonesia agreed a treaty which set a maritime boundary based on the continental shelf delineation. This greatly favoured Australia, as the continental shelf put the maritime boundary much closer to Timor than the notional median line now favoured in international law (Lowe et al 2002: 9, 13). Indonesia's willingness to be so accommodating to Australia has been ascribed to President Soeharto's interest in good relations with Australia (and the economic aid and military support which went with it: King 2002: 83-4). The result was that Soeharto was seen as a man with whom the Australian Government could do business, despite his regime's corruption, authoritarianism and slaughter of hundreds of thousands of its own people. The 'expectation that President Soeharto would be as accommodating in negotiating a seabed treaty in the Timor Sea to the south of East Timor' (King 2002: 75) was to have tragic consequences for the East Timorese.

The failure to include Portugal created the problem of the 'Timor Gap' – the area of sea and seabed between East Timor and Australia, bounded either side by seabed divided between Australia and Indonesia (MBO 2016: 16). Not surprisingly, Australia and Indonesia drew this area as narrowly as possible (King 2013:27). Richard Woolcott (subsequently Australian Ambassador to Indonesia) commented that it was 'simpler and more practical to complete the complex seabed boundary negotiations with Indonesia than it would have been with Portugal or an independent East Timor' (2003: 156; see also Way ed 2000: 52). This was a facile justification for two countries agreeing to negotiate a border which involved a third nation (King 2002: 85).

Only when the Timor Sea Treaty was signed did Australia offer to negotiate with Portugal (King 2013:9-11). Portugal replied that negotiations should be delayed until UNCLOS (which began in 1974) was complete, expecting it to confirm the shift in international law towards defining boundaries primarily by medians rather than geophysical features such as continental shelves (Brennan 2004:19; Four Corners 2004: 3; King 2013: 12). However, Portugal did not hold off granting exploration permits in 1974 to an American company in part of the Timor Sea claimed by Australia, much to Canberra's displeasure (Aditjondro 1999: 12-13; King 2013: 12-13; Way ed 2000: 111; King 2002: 86-7). The significance of all this increased when, in 1974, Woodside discovered the massive potential of the Greater Sunrise Field in the Timor Sea. Coinciding with the 'declining production from Australia's major oil fields in Bass Strait' (Bergin 1990: 384), this attracted great interest from Australian government and companies.

*'Now where's the champagne?'*⁴

Tension between Australia and Portugal over the Timor Sea inevitably spilt over into Australia's attitude to East Timor's future. As noted above, the Australian Government had good reason to think that Indonesia would be easier to deal with than either Portugal or an independent East Timor. It is an overstatement to claim that Australian governments' complicity in Indonesia's destabilisation and invasion of East Timor was simply 'rooted in the desire for oil.' (Cleary 2007: 32). Political factors (fears of communism, concerns about regional stability, prioritisation of relations with Indonesia) were also significant. However, there can be no doubt that Australian greed for oil poisoned the consideration of East Timor's future: as an Australian senator put it in 1973, the Timor Sea promised to match 'the fabulous riches of the Middle East' (Justin O'Byrne, quoted King 2002: 85).

Indonesia's bloody invasion of the briefly independent East Timor in 1975 opened the way for Australian-Indonesian negotiations to close the Timor Gap. 'Australia hoped to simply rule a line to join the end points of the existing seabed boundaries with Indonesia' (MBO 2016: 17). This was a significant factor in Prime Minister Whitlam's notoriously ambivalent signals to Soeharto about incorporation and self-determination (King 2002: 93). When Whitlam's successor, Malcolm Fraser, visited Jakarta in October 1976, he was accompanied by the managing director of BHP, which had a controlling interest in Woodside- Burma (Pilger 1994: 257-8). However, this time the Indonesian Government would not be so accommodating: realising what a poor deal the 1972 Treaty had been for them, they argued for a median line boundary.

It seemed that the Australia Government's complicity in Indonesia's invasion of East Timor had come to nought (King 2002), but obstruction to exploitation by failure to agree on a legal boundary was eventually overcome by negotiating a resource sharing agreement. In 1989, Australian and Indonesian politicians signed the Timor Gap Treaty, providing for development of the seabed in the area off Timor which had not been covered by the 1972 Treaty. Proceeds were to be equally shared between Australia and Indonesia (Bergin 1990; Senate Committee 2000: ch.4). This took place during an infamous, champagne-accompanied ceremony on a flight over the Timor Sea: Indonesian Foreign Minister Ali Alatas being toasted by his Australian counterpart, Gareth Evans, 'represented the photo-snap image of Australia's recent history of moral and political bankruptcy in relation to East Timor' (Balint 2005:45; Maloney and Grosz 2011).

Australia caused great offence amongst East Timorese in signing this treaty. The reason deserves emphasis: Australia was agreeing to benefit from one of the worst crimes of the twentieth century (Dunn 1996). Australian recognition of Indonesian sovereignty over East Timor was a consequence: Australia was the first country in the world to do so. In a letter to Prime Minister Hawke, Xanana Gusmao⁵ denounced it as 'a total betrayal by Australia of the Timorese people' (quoted, King 2013: 28). The treaty was probably in breach of international law (Clark 1992, 1995). In the International Court of Justice, Portugal attempted to challenge this agreement to exploit an area for which it was still (according to UN resolutions) responsible, but this was blocked by Indonesia's refusal to accept the Court's jurisdiction (Senate Committee 2000: 57, 166). The 1972 and the 1989 treaties were

⁴ Foreign Minister Gareth Evans, celebrating the Timor Gap Treaty, (quoted, Wilkinson and Cronau 2014: 6)

⁵ Resistance leader, President 2002 to 2007, Prime Minister 2007-2015 and currently Minister of Planning and Strategic Investment and lead negotiator in the PCA conciliation.

incorporated into a more general treaty in 1997 which also included provision for fishing and economic zones (Kaye 1997).

Chega⁶

This attempt to resolve the Timor Gap problem unravelled when Timor-Leste emerged once more as an independent state following Indonesia's withdrawal in 1999. Australia sought to minimise the impact of independence by replicating the arrangements made with Indonesia. José Ramos-Horta (Timor Leste's Prime Minister, then President, 2006-2012) put it bluntly: 'Ever since our independence, Australia has tried to push down our throats the same arrangement it unfairly managed to sell to Indonesia' (2016: 6). Australia was keen to continue the existing arrangement out of concern that Indonesia would seek to renegotiate the 1972 treaty if it saw Timor-Leste getting a better deal, especially as Australia had benefited significantly from exploiting resources in an area which a median treaty would have allocated to Indonesia (Senate Committee 2000: 60, 73). In fact, Australia did not wait for independence and had sought to prepare the ground by negotiating a Memorandum of Understanding with the UN transitional administration of Timor-Leste (UNTAET), providing for post-independence application of the Timor Gap Treaty's provisions to Australia's continuing development in the Timor Sea of a 'Joint Petroleum Development Area'.

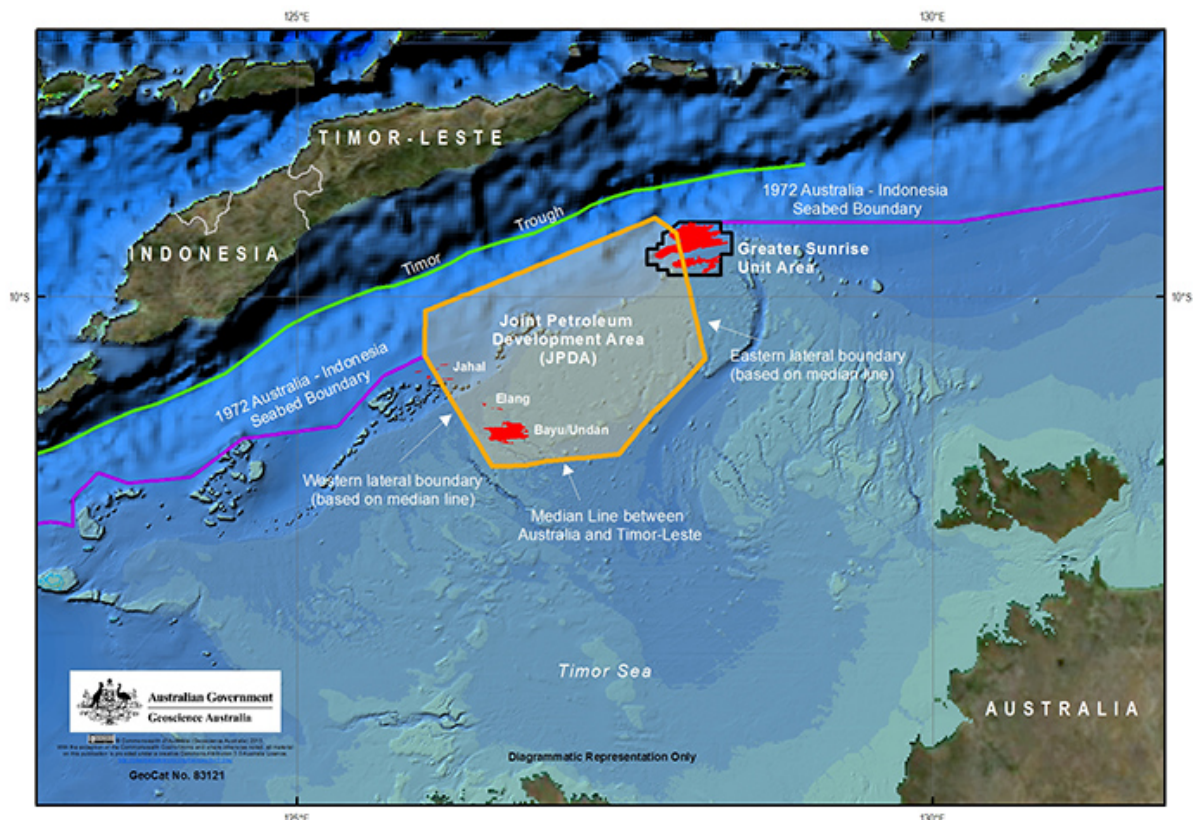
On 20 May 2002, the day of independence, Timor-Leste signed the Timor Sea Treaty (TST) with Australia to govern the exploitation of oil and gas resources in the Joint Petroleum Development Area (JPDA). There was also a Memorandum of Understanding for unitisation of the Greater Sunrise field which straddled the eastern lateral side of the JPDA (MBO 2016: 19). The TST split the benefits of the JPDA 90%-10% in Timor-Leste's favour, sailing 'as close to recognition of East Timor's sovereignty over the disputed seabed as it is possible to manoeuvre without conceding the point entirely' (Triggs and Bialek 2002: 333). Subsequent attempts to negotiate the boundary failed, so TST was followed by the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). Instead of a boundary, the outcome was an agreement to share equally benefits from areas outside the JPDA, including Greater Sunrise.

Timor-Leste was under pressure from both oil companies and international donors to make an agreement allowing oil and gas funds to flow. While allocating Timor-Leste half the non-JPDA revenues, CMATS put 'a moratorium on "asserting, pursuing or furthering" a permanent maritime boundary for the next 50 years' (MBO 2016: 20). The Australian Government hoped that there would be no talk of drawing borders until Greater Sunrise had been exhausted, by which time the location of the border would be inconsequential. However, CMATS also provided for its own termination by either State if a development plan for Greater Sunrise had not been approved within six years. The Australian Government claims that the allocations of shares of JPDA and Greater Sunrise revenues were acts of pure generosity to Timor-Leste: former Foreign Minister Downer speaks of personally giving these benefits to the Timorese for whom he has 'a soft spot' (interview in Wilkinson and Cronau (2014) . Downer repeatedly referred to Australia's generosity, like the school yard bully who grabs the bag of sweets and expects the owner to be grateful when he gives one

⁶ *Chega*, Portuguese for 'no more, stop, enough', is the title of the *Report of the Commission for Reception Truth and Reconciliation in Timor-Leste* (CAVR 2005).

back. Such patronising attitudes rankled in Timor-Leste, increasing resentment and encouraging ambition: 'It's become quite clearly evident ... that ... what was always intended to be an interim provisional treaty was in fact going to be used to extract a permanent benefit' (Jose Texeira, Minister with responsibility for natural resources, 2002-2007, in Four Corners 2004: 7). Australia could not give something that it had never properly owned: the ownership of the seabed was what the dispute was about.

Resources and Boundaries in the Timor Sea



The Timor Sea can be divided into four areas:

- First, there is the area the south of the median line which Timor-Leste proposes as the appropriate maritime boundary with Australia: Timor-Leste makes no claim to this
- Secondly, north of the median line lies the JPDA, which includes Bayu-Undan, the largest of several fields which are reaching the end of their life (MBO 2016:11). Output is piped to a processing facility in Darwin, Australia. Timor-Leste got 90% of JPDA revenue, but now claims everything north of the median line.
- Thirdly, a series of major fields - Laminaria, Corallina, Buffalo - lie north of the median but outside the JPDA to the west: these have been 'fully or mostly depleted by Australia' which has taken the proceeds (MBO 2016:11). While Australia continues to provide aid to Timor-Leste, its value is calculated to be half that which Australia has received from the Laminaria-Corallia field (Timor Sea Forum 2015). Arguments that the funds from such fields should go into an escrow account until negotiations complete have been resisted (Triggs and Bialek 2002).

- Fourthly, straddling the eastern edge of the JPDA, there is Greater Sunrise (Sunrise and Troubador) which has ‘the largest known deposits of hydrocarbons in the Timor Sea’ (MBO 2016:56). It is this border – the eastern lateral – which is at the heart of the current dispute. Because only 20% of Greater Sunrise lies within the JPDA, the 2002 Memorandum of Understanding provided for its unitisation. CMATS allocated 50% of the non-JPDA area proceeds to Timor-Leste, while it got 90% of the JPDA proceeds.

A Median Line?

Timor-Leste’s argument for a median line ‘is supported by considerable state practice and jurisprudence. Indeed, equidistance has, over the years, proved to be far and away the most popular method of ... delimitations between opposite coasts’ (Schofield 2007: 198). Publicity for Timor-Leste’s case has focused on the median line, as it lends itself to a relatively straightforward argument for fairness. It is illustrative that the Australian Joint Select Committee on Treaties (JSCT) report on the cancellation of CMATS (see below) noted that: ‘A large number of submissions support the position of Timor-Leste in the maritime boundary dispute – a delineation of boundaries based on the median line principles’ (JSCT 2017:19). While this characterisation of the dispute must have encouraged Timor Leste, it skipped over some difficult issues

The assumption that an adjudicator would set a median boundary at a simple mid-way point is questionable. As Ong explains, the median could be set not at a simple midpoint but by taking into account the different lengths of the two coastlines, using the proportionality test applied to resolve a dispute between Malta and Libya. This could mean a ‘median’ line well above half-way between Australia and Timor, leaving East Timor without a claim to fields such as Bayu-Undan (Triggs and Bialek 2002:362; Ong 2002: 87-9; Brennan 2004: 31). Furthermore, despite the prominence of the case for a median line in Timor-Leste’s advocacy, it would not (wherever it is set) get what Timor-Leste wants, the benefits of Greater Sunrise. Timor-Leste is relying on success of a much harder argument – the redrawing of the eastern lateral boundary.

The Lateral Boundaries

A change which did no more than set the median line as the maritime boundary would be of limited benefit to Timor-Leste. While potentially increasing its share from 90% to 100% of the proceeds from the fifth of Greater Sunrise which now falls in the JPDA, this would leave the complex question of the remaining bulk to the east (from which Timor-Leste was allocated 50% by CMATS). This is in an area allocated to Australia by the Australia- Indonesia 1972 Treaty. Consequently, Timor-Leste has to argue not just that the median line between Timor-Leste and Australia should be set as the maritime boundary, but also that the boundaries of the JPDA should be expanded further east (and west: see below) because the Timor Gap was too tightly drawn. As noted above, the problem of the lateral boundaries of the JPDA stemmed from Australia and Indonesia making an agreement without involving the then third party, Portugal. They acknowledged in the 1970s ‘that those endpoints might have to be revised were there ever to be any negotiations among all three parties with an interest in the Timor Sea’ (Brennan 2004: 22; see also Triggs and Bialek 2002: 342; King 2002: 82).

To the West, Timor-Leste relies on an influential legal opinion by Lowe, Carleton and Ward to argue for a boundary set by calculating a perpendicular from the coast rather than using the equidistance method. It argues that the western lateral is incorrectly located (2002: 15). However, Triggs and Bialek disagree, concluding that 'there appears little justification for the adoption of a perpendicular line on East Timor's western maritime boundary with Indonesia' (2002:351). Australia will presumably resist redrawing the western lateral as doing so might encourage Timor-Leste to argue for a retrospective share of the historical proceeds from Corallina, Laminaria and Buffalo, fields to the west of the JPDA (King 2013: 65; Leach 2017; Bateman and Rothwell 2000: 175).

It is the eastern lateral which is critical. Timor-Leste argues that it does not take account of the East Timorese island of Jaco, while giving too much effect to small Indonesian islands and coastal features which were interpreted as requiring the Gap to converge from 140 nautical miles on the coast to 120 at the median line (MBO 2016: 64; Prescott 2000: 104; Brennan 2004: 28). Timor-Leste argues that appropriate maritime boundaries would create an area which broadened out (rather than narrowed) from the coast to a simple median line so that Greater Sunrise (as well as the fields to the west) sits comfortably within it (MBO 2016: 8, 68; Brennan 2004: 42,48).

Despite insistent legal advocacy by Timor-Leste and its Australian supporters, international law does not provide a simple method of setting lateral boundaries. UNCLOS article 83(1) requires countries to delimit maritime boundaries by agreement 'in order to achieve an equitable solution', but does not mandate a particular methodology (Cox 2017; Strating 2017). This might indicate the need for tripartite negotiations now, with Timor-Leste taking Portugal's place in discussions with Australia and Indonesia. A complication is that, if Timor-Leste benefits from a median line, Indonesia may seek to renegotiate the 1972 Treaty, arguing that it should be updated to reflect current norms of maritime boundary settlement (Bateman and Rothwell 2000: 174). Somewhat glibly given its argument with Australia, Timor-Leste claims that Indonesia remains bound by the 1972 Treaty, leaving the former to negotiate with Australia about the eastern lateral.

To date, Indonesia has given no indication of interest in renegotiating the 1972 Treaty, has made no claim to Greater Sunrise, and treated the matter as settled in dealings with the UN Commission on the limits of the Continental Shelf in 2009 (Collaery 2015: 24). It appears that Indonesia's focus is on the maritime boundaries to the north rather than the south of Timor (Brennan 2017) and it regards itself as 'well-endowed with energy resources elsewhere and has yet to develop significant identified resources well within its sovereign boundaries' (Collaery 2015: 23). Nonetheless, Australia is concerned that Indonesia's attitude might change if Timor-Leste benefits from a redrawn eastern lateral. In fact, Timor-Leste and Indonesia have begun discussions to delimit maritime boundaries (Gusmao, in PCA 2016: 16). Australia must be very concerned that this could spill over into a wholesale review. The Australian Government regards this as potentially 'a deeply unsettling development in our relationship with Indonesia and for our foreign policy generally' (Downer, quoted in Triggs and Bialek 2002: 363). One of the many ironies in this story is that relations between Timor-Leste and Indonesia are now much better than either country's relationship with Australia. According to Xanana Gusmao, 'Our countries enjoy a close friendship and have become a global model for reconciliation' (MBO 2016: 3).

However, if negotiations were to result in the boundary between Australia and Indonesia being redrawn at the median line without change to the eastern lateral, Timor-Leste would then have to negotiate a deal over Greater Sunrise, not with Australia but with Indonesia which at least matches the 50% of proceeds allocated under CMATS. Finally, Woodside and other resource extraction companies would have to be convinced of the commercial security of developing such a field in Indonesian waters. None of these outcomes seems likely, meaning that, despite Timor-Leste rhetoric about securing its maritime borders, the outcome may well be another resource sharing agreement rather than a redrawing of maritime boundaries.

Diplomacy, Conflicts and Interests

At a 2002 meeting in Timor-Leste, Australian Foreign Minister Alexander Downer was reported to have been 'belligerent and aggressive' (Wilson 2002): he 'thumped the table and abused' Prime Minister Alkatiri and his officials (King 2013: 52), telling them: 'We don't have to exploit the resources. They can stay there for 20, 40, 50 years. We don't like brinkmanship. We are very tough ... Let me give you a tutorial in politics – not a chance' (Cleary 2013). This incident says much about the Australian Government's condescending attitude towards its neighbour.

Australia's handling of its disagreement with Timor-Leste has been remarkable for its heavy-handedness and arrogance. Just two months before Timor-Leste's independence in 2002, Australia withdrew from the maritime boundary jurisdiction of the International Court of Justice under UNCLOS and ITLOS, preventing Timor-Leste from seeking judicial determination of its maritime boundary with Australia. International legal obligations are acceptable, it seems, only so long as they weigh on others. Downer explained that he didn't want 'having courts and arbiters and, you know, people over there in The Hague deciding on our relationship' with neighbours (Four Corners 2004: 7). As a prominent Australian legal commentator noted, this is 'an odd thing to say if one accepts that we are a nation governed by the rule of law' (Ackland 2004:1). This left the Australian Government open to accusations of hypocrisy when, in the context of the 2016 South China Sea dispute, its Foreign Minister lectured the Chinese Government on the importance of international law, including UNCLOS as 'the foundation for peace stability and prosperity in East Asia' (Clarke 2016). Displaying commendable chutzpah, a Department of Foreign Affairs and Trade (DFAT) official claimed that the 'Timor Sea treaties show Australia's commitment to rules-based order' (Cox: 2016). The Dili-based NGO La'o Hamutuk acidly enquired: 'Do some of the "Rule of Law" trainers and advisors AusAID pays to work in Dili need to build capacity in Canberra?' (2017: 8).

Timor-Leste claims that CMATS imposed unfair and disadvantageous arrangements on a country that, at its emergence to independence, was impoverished, disorganised, diplomatically and legally inexperienced, and dependent on foreign aid (MBO 2016: 19, 42; see also Gusmao in PCA 2016: 17-18; Senate Committee 2000: 569-71; King 2013). Australia's representatives reject this account, counter-claiming that 'Timor-Leste proposed many of the key aspects of these arrangements itself, celebrated them at the time as major achievements, and has benefited significantly from them' (Justin Gleeson, Australian Solicitor-General, in PCA 2016: 100).

Following CMATS, Timor-Leste tried for several years to open negotiations about the maritime boundary or to renegotiate resource sharing. Again, there are conflicting accounts of their reasons for doing so. The Australian Government has claimed that Timor-Leste's 'change of heart in relation

to the Timor Sea treaties has created uncertainty, raised sovereign risk, undermined investor confidence and considerably delayed Greater Sunrise's development' (Gleeson, in PCA 2016: 104). From this perspective, Timor-Leste had benefited considerably from the exploitation of fields in the JPDA which are or soon will be depleted, while facing the prospect of a less advantageous division of the spoils from Greater Sunrise. In addition, Timor-Leste is portrayed as petulantly reacting to Woodside's refusal to pipe the output to a new processing facility in Timor-Leste which would boost the local economy and job market (see below)

The Timor Sea story has brought attention to the close relations between the Australian Government and Woodside. An expression of this relationship has been the movement of people between them. In 2005, the retired head of the Department of Foreign Affairs and Trade (DFAT), Ashton Calvert, was appointed to the Woodside Board. When Alexander Downer, Australia's long-serving foreign minister (1996-2007), left politics, he took a very lucrative consultancy with Woodside the following year. Soon after finishing as Energy and Resources Minister (2007-2013), Martin Ferguson went to work as a Australian Petroleum Production and Exploration Association lobbyist representing companies including Shell, Exxon Mobil, Woodside and BHP. Ferguson was replaced by a former Woodside executive, Gary Gray, who was Resources and Energy Minister for several months in 2014. The closeness of relations between Woodside and the Australian Government justifies Collaery's description of Woodside as 'an instrument of foreign policy by proxy' (2015: 35) although one could equally say that the Australian Government became an instrument of commercial ambition by proxy. It seems that where interests coincide, there can be no conflict of interest.

Espionage in Dili

Downer's consultancy with Woodside provoked an embarrassing and damaging revelation of the Australia Government's dealing with Timor-Leste (and its own critics). Angered by Downer's move, a whistle-blower (a former Australian intelligence officer of the Australian Secret Intelligence Service, ASIS) made public the fact that, during refurbishment of the Timor-Leste Government's offices in Dili in 2004, notionally as part of an AusAid development program, Australia had taken the opportunity to install listening devices which had been used to spy on Timor-Leste's preparation for the CMATS negotiations (MBO 2016: 43). There was already resentment in sections of the ASIS that the Dili operation had improperly diverted resources from investigation of the 2002 terrorist bombing in Bali (Cannane, Koloff and Andersen 2015).

Whether or not the Dili bugging constituted the criminal offence of conspiracy to defraud in Australian law, it is certainly the case that using aid work to camouflage espionage is highly irresponsible and 'runs the risk of endangering all legitimate aid workers who seek to help the disadvantaged... To deploy intelligence agents under the cover of aid workers is to exploit the fragile trust that aid agencies must forge with their host country. It weakens their security because it discredits their altruism' (The Age 2013).

The Australia Government aggravated the dispute by sending as its representative to talk to the Timor-Leste Government a person who, from her previous appointment as Australian Ambassador to Jakarta, was implicated in the espionage operation (Cannane, Koloff and Andersen 2015). Then Australian security officials raided the whistle-blower's home and the office of an Australian lawyer who represents Timor-Leste's interests, seizing various documents. Timor-Leste began action in the

International Court of Justice complaining about this and seeking return of the documents. When the whistle-blower attempted to leave Australia to travel to give evidence at The Hague in December 2013, his passport was cancelled (Collaery 2015: 9; PCA 2016: 33). Both the whistle-blower and his lawyers were threatened with prosecution for security breaches (Wilkinson and Cronau 2014: 1). The Australian Government claimed that national security was at stake: it is rare that the economic interest of the country and the commercial interest of a major company have been so openly identified as matters of national security.⁷ In March 2014, the International Court of Justice made Australia the subject of an embarrassing interim order neither to use the material seized nor to obstruct contact between Timor-Leste and its lawyers. (The action was finally dropped as part of the January 2017 agreement to negotiate: see below.) Australia returned the papers and the case was discontinued.

Not surprisingly, Timor-Leste sought to take the moral high ground in arguing for new sea boundaries, claiming that time had brought the economic and political stability lacking immediately after independence. However, the Timor-Leste Government has gone further, setting the achievement of maritime boundaries in accordance with international law as ‘a matter of national sovereignty and the sustainability of our country. It is Timor-Leste’s top national priority’ (Gusmao, in PCA 2016: 21). Framing it like this meant that Timor-Leste chose to play a high stakes game, raising domestic expectations and reducing the room for compromise (Strating 2016).

The Australian Government rebuffed Timor-Leste’s attempts to open negotiations about a border (MBO 2016: 23), so a way was found to make engagement unavoidable. Timor-Leste launched proceedings in the Permanent Court of Arbitration (PCA) in 2013 seeking to invalidate CMATS on the ground that it had not been negotiated in good faith because of Australia’s espionage, and requesting compulsory mediation under UNCLOS (MBO 2016: 21). While Australia had withdrawn from the binding dispute settlement procedures under UNCLOS (see above), Timor-Leste was still able to activate the compulsory conciliation procedure (Triggs and Bialek 2002:361). A Conciliation Commission was established and began work in mid-2016. Australia tried to block the proceedings and, when this failed, ‘repeatedly emphasised the non-binding nature of the UNCC recommendations’ (Strating 2017).

Negotiating a solution?

In January 2017, Timor-Leste activated its option to terminate CMATS, removing the block on negotiating over maritime boundaries. It has dropped its legal actions against Australia, including the complaint of espionage. In a significant change of policy, Australia agreed to negotiate on borders, joining with Timor-Leste and the Conciliation Commission in making a statement of intent in January 2017. But, despite making a ‘commitment to work in good faith towards an agreement on maritime boundaries by the end of the conciliation process in September 2017’ (Joint Statement 2017), Australia does so knowing that that Timor-Leste cannot afford a significant delay and so can negotiate at its leisure and confidentially, without the embarrassment of public criticism spurred by proceedings about spying and bullying.

⁷ With the chutzpah (or ignorance) which characterises so much Australian Government commentary on this issue, PM Tony Abbott said (in the context of leaks suggesting Australia had spied on Indonesian officials engaged in trade talks over prawn exports: ‘We use surveillance .. to protect our citizens .. we certainly don’t do it for commercial purposes’ (quoted, McGrath 2014: 4).

By contrast, Timor-Leste's position is precarious. 90% of Timor-Leste's state budget and 70% of total GDP has relied on revenue from the Joint Petroleum Development Area (Strating 2016). It has been invested in a sovereign wealth fund which 'has significantly encouraged social and economic development since 2005' (MBO 2016: 14). The World Bank reports that in the decade following 2005, 'Timor-Leste has made good progress in alleviating poverty and the benefits of public investment are becoming evident with sharply improved access to electricity and significant improvement in other basic infrastructure services' (2017: 166). However, Timor-Leste is in the UN's category of 'Least Developed Countries. Poverty remains persistently high, particularly in rural areas, where the majority of the population lives. Nearly half of the population is estimated to live below the national poverty line of US\$0.88 per day' (MBO 2016: 14).

The World Bank puts it bluntly: oil production is ceasing leaving a large fiscal deficit and a depleting sovereign fund' (2017: 164). It estimates that oil production 'may have fallen by as much as 50% in 2016', while oil revenue fell by 60%. The budget is now in deficit, with 'the government running down its financial assets' (World 2017: 164-5). For the Timor-Leste Government, further development depends on continuing revenue from resource exploitation. This reliance is unsustainable unless Greater Sunrise is exploited (Evans 2015). 'The Bayu-Undan field will stop producing in 2022 and the \$16 billion sovereign wealth fund could be depleted by 2025 (Strating 2016). At stake in Greater Sunrise are reserves now thought to be worth twice that estimated a decade ago: 5.3 trillion cubic feet of gas and 225.9 million barrels of condensate worth some \$40 billion. Woodside leads a commercial joint venture also includes Royal Dutch Shell, ConocoPhillips and Osaka Gas ((JSCT 2017: 6; Stewart 2017).

The fragility of Timor-Leste's dependence on natural resources was emphasised when, between 2012 and 2015, oil and gas prices slumped, producing a fall of more than one third in Timor Leste's revenue (Cleary 2015). From the resource companies' perspective, this decline in oil and gas prices reduced short-term pressure to get the field operational, and encouraged them to play hard ball with Timor-Leste: in 2015, Woodside suspended further preparatory work on Greater Sunrise until boundary and processing issues are resolved. Many in Timor-Leste believe that this announcement was a bargaining tactic, intended to put pressure on the Timor-Leste government to give in to the positions of the company on continuing the CMATS agreement without establishing a maritime boundary and installing a floating liquefied natural gas (LNG) plant rather than on-shore processing. Woodside is predicting 'commodity prices will rally in 2019' and hopes the governance issues will be resolved by then (Stewart 2017). The World bank reports that 'The prospect of new oil fields being exploited in Timor-Leste remains highly uncertain ... Even if viable fields were developed (this) is unlikely to happen for 10 years' (2017: 166)

As discussed above, Timor-Leste's argument is not just the relatively straightforward case for the median line, but also for redrawing of the lateral boundaries. However, there is a crucial third element in Timor-Leste's demands: they want the output of Greater Sunrise to be piped to a processing facility on Timor's south coast. They regret that Timor-Leste was unable to share in the benefits which the Bayu-Undan pipeline brought to Australia's Northern Territory, which included several thousand jobs (Collaery 2015: 19; McDonald 2013: 4; King 2013: 64). In 2010, the Timor-Leste Government decided not to approve any development plan for Greater Sunrise which didn't include 'a pipeline to Timor-Leste and a LNG plant on the south coast'. Nonetheless, Woodside 'announced its preference for a floating platform' later that year (La'o Hamutuk 2015: 4). Xanana

Gusmao became strongly committed to piping output to a south coast hub (King 2013: 72). Claims that piping to Timor-Leste across the Timor Trough would be impossible have been challenged: it can be done technically and economically enough to meet the commercial standard required (Brennan 2004: 56). It is the prospect of onshore development which made Timor-Leste prepared to give up the 50% deal under CMATS (Brennan 2017).

In 2007, Woodside announced that it favoured a floating liquefied natural gas facility (FLNG) on which gas would be 'processed, liquefied and stored ... before being loaded onto tankers and exported' directly to consuming countries. (King 2013: 49). Naturally, the Australian Government backed Woodside's opposition to processing on Timor-Leste, despite independent surveys showing that their claims that crossing the Timor Trough was not feasible were incorrect (Collaery 2015: 34-5). A primary objection was additional cost (suggested to be \$5 billion more than FLNG: Evans 2011:3). Crossing the 3000 metre Timor Trough would be difficult but possible. Woodside is bound to adopt the most commercially favourable option. However, matters are complicated by the interest of its partners Shell in FLNG and ConocoPhillips in piping output to Darwin, where it operates a facility for the product of Baya-Undan (La'o Hamutuck 2015:3). The Australian Government stepped back from this argument, leaving Timor-Leste with the unenviable task of dealing with Woodside, resulting in considerable friction between Timor-Leste and Woodside chief executive Don Voelte (who stated that the pipeline would go to Timor-Leste 'over my dead body' (Whyte 2011: 7) until his replacement by Peter Coleman in 2011 (Evans 2011:2,6). Woodside's adversarial and disparaging treatment of Timor-Leste up to this time has been strongly criticised by a former employee (Whyte 2011).

In anticipation of winning the case for on-shore processing, Timor-Leste has invested heavily in 'mega-projects and large-scale infrastructure spending' (Leach 2017), notably the Tasi Mane Project, 'the flagship programme of Timor-Leste's development strategy' (Palatino 2011)⁸ which involves three petro-chemical industrial clusters on Timor-Leste's south coast. Given Woodside's opposition to on-shore processing, this might be a risky investment, particularly when the downstream revenue is projected to be less than a quarter of the upstream revenue, 'wherever the pipeline goes' (La'o Hamutuk 2015: 10). Opinion in Timor-Leste is not uniform, with José Ramos-Horta expressing scepticism about the Government's attitude: 'We must be the only country in the world that has organised demonstrations against international investors' (quoted, La'o Hamutuk 2015: 11). If Timor-Leste managed to negotiate borders which put Greater Sunrise in its exclusive zone, then 'Timor would be able to dismiss the joint venturers who were unwilling to contemplate development in Timor and to enlist a developer sympathetic to Timor's nationalist development goals' (Brennan 2017). China is an obvious possibility as an alternative partner. From the Australia Government's perspective, this amounts to a strong argument for resisting any shift of the eastern lateral.

For a time, this seemed to be an impasse. However, possibilities of freeing the deadlock have been opened by declining enthusiasm for FLNG. Earlier 'touted as the solution to the soaring development costs now blighting the next wave of LNG investment in Australia' (Evans 2014), it is no longer seen as the sine qua non. Substantial delays and budget blow-outs are reported in Shell's Prelude project, involving an enormous FLNG facility off West Australia (Klinger 2016). One option is a 'middle way' of sharing the processing between FLNG and TLNG (Evans 2011:3; McKee 2011)

⁸ See also Cleary 2015; <https://www.laohamutuk.org/Oil/OilIndex.html#TasiMane>

A second is that Timor-Leste should focus not on on-shore processing, but on a deal to access ‘all the LNG gas it needs for electricity generation and industrial feedstock, and supply the entire domestic market for household LPG’ (McDonald 2013: 5) so providing the power supply to encourage other economic activity (Evans 2011:3). This finds some support in critics of the Timor-Leste Government’s investment in the south coast development who say Timor-Leste should diversify its economy, reducing dependence on oil and gas (Cleary 2015; Scheiner, quoted in McDonald 2013: 6). The World Bank agrees that the ‘overriding fiscal challenge for Timor-Leste is ot transition to a more sustainable model and rebalancing towards private-sector-led growth’ (2017: 166). It is argued that local benefits of LNG should not be overstated, especially given the limited capacity of Timor-Leste to supply material and skilled works (Evans 2011:4) ‘For more than decade La’o Hamutuk) and others in civil society have encouraged the (TL) government to cut its dependency on petroleum income and steer a more sustainable course. Even the World Bank, after years of echoing the government’s petroleum-dominated priorities, highlighted the need for non-petroleum economic development in its 2013-2017 Country Partnership Strategy’ (Evans 2015a). Almost inevitably, the phrase ‘resource curse’ is applied by the Government’s critics.⁹

Timor-Leste faces a real dilemma. A resource sharing deal may be more achievable than new boundaries, but may not be acceptable to Timor-Leste’s people. The leadership has made much of the sovereignty principle, claiming that the maritime boundary will complete Timor-Leste’s independence. If borders are negotiated, compromise is almost inevitable, raising the potential problem of the Timor-Leste government facing ‘domestic political backlash if it gives up half of what has been presented as a sovereign entitlement’ (Strating 2016). The national politics are important, explaining Timor-Leste’s high risk strategy which could bring a greater share of Greater Sunrise, but could also lead to less, not least if talk of shifting the eastern lateral stirs Indonesia into seeking a share via renegotiation of the 1972 treaty. Most commentators agree that, whatever happens, it will not happen quickly, and delay may be very costly to Timor-Leste.

Blood and Soil

If this argument seems to be drifting against Timor-Leste, it is time to return to the land border and to consideration of Australia’s responsibilities.¹⁰ When Portugal withdrew from Timor in 1974, Indonesia decided that the border should be abolished, and invaded Timor-Leste. Debating Australia’s level of responsibility for this has continued ever since. On the most favourable account, Whitlam had insisted that the East Timorese had a right to self-determination and that any Indonesian incorporation of Timor-Leste should be peaceful and consensual. Unfortunately, the Indonesian generals pushing Soeharto for permission to engage heard only that Australia favoured incorporation, the first part of a notoriously ambivalent, indeed contradictory message. On a more critical reading, the references to self-determination (and indeed non-violence) were little more than window-dressing: the Australia Government – along with other allies, notably the USA – encouraged Indonesia to take East Timor, knew that this would be done by force, and gave a clear signal that they would not cause trouble by failing to protest about pre-invasion incursions, even when the largest of these included the slaughter at Balibo of five journalists (2 Australian, 2

⁹ <https://www.laohamutuk.org/Oil/OilIndex.html#TasiMane>)

¹⁰ This section summarizes a fully referenced account in Dixon 2017.

British and one New Zealander) to prevent them reporting on Indonesian military activity. Like the three wise monkeys, the Australian, British and New Zealand governments responded cravenly to the murder of their citizens. Another Australian journalist was murdered when Indonesian troops swept into Dili in December, beginning a period of terror, death, torture, starvation and displacement for most East Timorese. This hostile occupation led to the deaths of possibly 200,000 Timorese (Taylor 2003). The Indonesian government did what it could to keep information about what was happening in East Timor to a minimum. Australia cooperated by disrupting communications with the resistance. Meanwhile, the USA, the UK, and Australia got on with selling the Indonesian regime military equipment, including napalm and aircraft suited to ground attack.

International governmental opinion began to shift when indisputable evidence emerged of a massacre at a Dili cemetery in 1991. Soeharto's resignation and economic problems in Indonesia provided the potential for a change of policy. Australian Prime Minister John Howard suggested a gradual move to self-determination. This was expected to lead to consensual formal incorporation into Indonesia on improved terms. However, Indonesian PM BJ Habibie lost patience and called a referendum. Finally given the power to decide their own future, the people of Timor-Leste voted overwhelmingly for independence. The Indonesian military exacted a terrible revenge as it left Timor-Leste, as a campaign of murder and destruction left many dead and most of Timor-Leste's buildings in ruins. Having ignored warnings of what could happen, the Australian Government belatedly led an international peace-keeping mission.

Australia's policy towards Timor-Leste provides an exemplary case study of the problems of setting morality and expediency against each other. Consistently, politicians and officials insisted that relations with Indonesia were more important than what happened in Timor-Leste and that their critics were naïve and idealistic. One thing that pragmatic arguments cannot survive is empirical failure. After almost half a century, Australian-Indonesian relations are cool and untrusting. Meanwhile, despite being repeatedly let down, Timor-Leste continues to seek friendship with Australia, testament perhaps to their recognition of how far Australian public opinion is from the cynical pragmatism of Canberra.

It is a great irony that after fears of communist infiltration had such impact on earlier history that Australia's treatment of Timor may be opening the way for Chinese companies to get involved in the Timor Sea exploration as well as other commercial development (King 2013: 74). Meanwhile, fears about Timor-Leste being the 'Cuba of South Seas' look quaint as Cuba is 'winning the hearts and minds of the people' by 'delivering basic health care and literacy to the rural poor' (Quiddington 2009b). Thanks to Cuba's training program, Timor-Leste has 'more doctors per capita than any other country in south-east Asia' (Hodal 2012). Now, with walls in Dili carrying anti-Australian slogans, 'it is the Chinese and the Cubans who are making the greatest advances – politically, economically and socially – in shaping its future' (Quiddington 2009b, see also 2009a; Anderson 2008).

This is a harsh story of realpolitik, in which first fears about destabilisation in the region and later concern to develop political and economic links with Indonesia took precedence over responsible friendship, human rights and national integrity. Decolonization and neo-colonialism are seen very differently if one sits in Dili rather than Canberra – or London or Washington, for the UK and USA

were also implicated in the suffering of the East Timorese in the final quarter of the last century. 'Australian policy towards East Timor has often been characterised as one in which pragmatism, expediency and self-interest have prevailed at the expense of a more principled approach' (Senate Committee 2000: 73). This chapter has shown how well that has gone. Perhaps it is time for Australia to start acting like the country it thinks it is, a nation committed to principle, the 'fair go' and helping the underdog, rather than one that lies and bullies a weak neighbour. This is not just rhetoric: Australian government records show constant concern that governmental expediency is out of touch with public opinion (Way ed 2000).

As noted above, international law does not, despite claims by Timor-Leste's supporters, indicate a simply resolution of the problem. What it does is to require that principles of equity be applied, taking account of all the relevant circumstances (Lowe et al 2002: 13). Perhaps this will be possible in the current conciliation proceedings supervised by the Permanent Court of Arbitration. The chair of the Conciliation Commission has warned that 'conciliation is a marathon, not a sprint' (PCA 2017). In the context of Australia's involvement in Timor-Leste's sad history, principles of equity point strongly towards Australia relinquishing its claim to the resources in the Timor Sea north of the median line and leaving Greater Sunrise to Timor-Leste.

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