

THE CONVERSATION

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Explainer: Australia and Timor Leste in The Hague

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Several issues of international law arise from Timor Leste's dispute with Australia over the negotiations of a 2006 treaty regulating the exploitation of petroleum and similar resources in the Timor Sea, which has now reached The Hague.

Timor Leste now asserts the treaty is invalid. Its argument is that the negotiations in 2004-05 leading to the treaty's conclusion were not conducted in good faith because Australia engaged in spying during those negotiations. The case has been given



Timor Leste claims that a treaty with Australia on regulating the exploitation of petroleum and similar resources in the Timor Sea is now invalid. EPA/Antonio Dasiparu

prominence after Australian intelligence agencies raided the offices of a lawyer and detained a whistleblower involved earlier this week.

Legal issue #1

The first legal issue to arise is whether international law prohibits a state from spying against another state.

For spying to be prohibited, and given the absence of a treaty prohibiting the behaviour, there needs to be both practice by the vast majority of states sustaining such a prohibition, as well as a conviction by states that the practice is unlawful.

The difficulty is that all states engage in spying. This observation is in itself sufficient to defeat the existence of the rule, although other relevant questions may be asked in this context.

For example, do states, when caught spying, try to justify their spying on the basis of a legal exception to the purported prohibition? If so, it would testify to the purported rule's existence. This, however, is not borne out by practice. States generally assert instead that they do not comment on matters of national security.

Secondly, does state behaviour reveal a conviction that spying is unlawful, not only for other states but also by reference to their own behaviour? To be a rule of law, it must apply equally to all states in the community to which the rule purports to apply.

Clearly, all states engage in spying, so it is doubtful – for the purposes of international law (and by extension in terms of a state's responsibility) – that spying is prohibited.

That being said, international law does prohibit interference in the domestic affairs of another state. For such interference to be prohibited, however, an element of coercion – which need not be physical – is required.

Whether Australia's purported interference in the conduct of East Timor's internal affairs crossed that threshold must be assessed on the facts.

Legal issue #2

The second legal issue – and perhaps the most interesting aspect of the case – is whether the treaty is invalid as a consequence of the negotiations leading to its conclusion being tainted by spying and, consequently, not having been conducted in good faith by Australia.

The principle that treaties must be negotiated in good faith is well established in international law. Whether a breach of this rule occurred does not depend on whether or not Australia's alleged spying was unlawful. However, if there was a prohibited interference, it would perhaps be easier to establish that Australia lacked good faith in its conduct of negotiations. Timor would probably need to establish that the spying, as the alleged breach of good faith, was in legal terms sufficiently proximate or related to the negotiations.

The crucial point, however, is that if Australia through its alleged spying activities failed to negotiate in good faith, the breach of international law that has taken place is simply a breach of the fundamental obligation to negotiate in good faith.

This, however, does not necessarily mean that such a breach renders the 2006 treaty invalid. That is a separate question.

The Vienna Convention on the Law of Treaties, mentioned as being relied upon by Timor Leste in its claims against Australia, lists the grounds for treaty invalidity, and does so exhaustively.

Significantly, these grounds do not include a failure to negotiate in good faith. Nor indeed are unequal treaties included amongst the grounds for invalidity. These are treaties, generally

concluded in the 19th century, in which the parties' bargaining position was so unequal that they lacked in reciprocity. The doctrine of unequal treaties has never clearly been adopted as part of international law – although in this case, such behaviour might constitute a prohibited interference.

How might the case play out?

Of the grounds of invalidity present in the Vienna Convention and on the available facts, only one might possibly apply and even then it might be difficult to establish. Timor Leste would need to show that Australia has breached a rule of such importance for the international community as a whole that no alteration of or other departure from its prescriptions is permitted. The rule in question here is self-determination.

Timor Leste enjoys permanent sovereignty over natural resources, which results from self-determination. It could be alleged that Australia, in failing to conduct negotiations in good faith, deprived Timor Leste of that right.

However, such a claim would also rest on it being shown that permanent sovereignty is enjoyed over resources in the continental shelf, over which Timor has mere sovereign rights, but not sovereignty. If such a claim were successful, the treaty would indeed be invalid.

That said, if, as is perhaps more likely, it was merely established that Australia breached its obligation to negotiate the treaty in good faith, the treaty would not, as indicated above, be invalid on that basis alone. However, Australia would then be under an obligation to make reparation. This is the principal consequence of state responsibility.

Significantly, this obligation of reparation might (though not necessarily) in turn impact on the continued operation of the treaty. This is because the obligation of reparation requires the restoration of the situation to what it would have been but for the unlawful act. Arguably, it might even result in an obligation to renegotiate the treaty so as to bring about an instrument not tainted by the lack of good faith of one of the parties.

This might be a better for solution for Timor Leste than the mere invalidity of the treaty. In effect, it would yield the same result but also provide an opportunity for Timor Leste to try to tailor the new treaty more to its own advantage.