

Timor pours oil on spy fire

PAUL CLEARY | THE AUSTRALIAN | JANUARY 24, 2014

IT was a case of saving the best to last. On the third and final day of the proceedings brought by East Timor before the International Court of Justice in The Hague this week, vice-president Bernardo Sepulveda Amor put what seemed like a very tough question to Australia's phalanx of 15 legal representatives. Sepulveda Amor got to the heart of the matter, but his question also brought out the best in Australia's defence.

He asked what evidence Australia had to support its proposition that the documents seized by ASIO on December 3 last year from a red-brick home at 5 Brockman Street, Narrabundah, ACT, indicated that East Timor was "encouraging the commission of crimes under Australian law or otherwise jeopardising Australia's national security", as the Solicitor-General Justin Gleeson SC had argued the previous day.

Aside from the intriguing answer to the question, the proceedings this week reveal a lot more about East Timor's motivation for taking action at the ICJ, and its related bid in another tribunal in The Hague to have a 2006 treaty declared void.

East Timor, with its small army of lawyers led by the octogenarian Sir Elihu Lauterpacht, is evidently using the proceedings to unravel what it perceives to be an unfair settlement over the Timor Sea's petroleum riches.

In this latest episode in the contest over Timor oil, on one side of the ledger Australia is accused of egregious behaviour by planting listening devices inside the office of East Timor's prime minister during treaty negotiations in 2004, and then raiding the office of the country's Canberra-based legal adviser and seizing documents belonging to East Timor.

But on the other side, it emerged this week that East Timor may have encouraged a former Australian spy to divulge highly sensitive information, which is a criminal offence, and used this information to determine the identity of as many as five security agents.

The question was asked by Sepulveda Amor just after 11am on Wednesday in The Hague, and Gleeson returned with a response that demonstrates why neither side is likely to emerge with its credibility unscathed.

The Australian team had just six hours to prepare its response, despite not having any knowledge of the contents of the documents, given they remain sealed with ASIO. Gleeson apologised for the late arrival of supporting documents for the 15-member panel of judges.

Gleeson explained that Australia was putting the proposition about the threat to national security at the level of "reasonable apprehension", and that in the interests of not inflaming an already tense situation, "Australia does not want to allege anything more".

Australia's "apprehension" was that East Timor, allegedly through its legal adviser Collaery, may have obtained information from a former ASIS agent and then used this as a "springboard" to make further inquiries. This resulted in East Timor identifying four men who it claims carried out the bugging operation in 2004, while a fifth agent, a woman, was also involved. The East Timor government has now said publicly there is a risk to the safety of these people.

Under section 39 of the Intelligence Services Act 2001 it is a criminal offence for a present or former security officer to communicate information concerning the performance or function of the Australian Security Intelligence Services without the approval of the director-general, Gleeson explained to the court. Further, under section 41, it is a crime to make public the identity of ASIS officers, or information from which their identity can be inferred, he added.

Gleeson went on to allege that East Timor and Collaery appear to have encouraged an officer to commit the first offence, while the government of East Timor was at risk of committing the second offence.

He cited an interview given by East Timor's natural resources minister, Alfredo Pires, in Singapore last year in which he said the country had "irrefutable proof" that Australia's spy agency had illegally obtained information during negotiations in 2004. Pires's lawyer, Collaery, said the Timorese prime minister's offices were bugged.

Separately, Gleeson then quoted from an interview Pires gave to AAP after the ASIO raid in which he said the government had identified the people who carried out the bugging operation. He said the government knew the date of the operation and had "names that we have been able to deduce".

"Those names are inside some of our computers and in today's age, no one with a computer is safe. If those names wind up in the wrong hands, if those people may be still active in other parts of the world, maybe working on some aid project, they have to take extra precaution not to be identified.

"There are dangers involved. We don't want anyone else to get hurt in this thing," Pires told AAP journalist Rebecca Le May.

As a result, Gleeson asserted that East Timor's lawyer had not only encouraged the former ASIS agent to divulge security information, but the government had then used its own records to identify the names of the people involved in the operation. "

There is an apprehension that the Timorese government has used the information as a springboard to ascertain the identity of Australian officers, potentially putting their lives at risk," he said.

Australia did not assert that Pires intended to publish the names of the officers or cause them harm in any way, but that East Timor's actions created a situation where Australia was now relying on the good conscience of various people not to divulge their identities.

"I trust you will now see we have a situation where the conscience of Mr X (the former ASIS agent), the conscience of Mr Collaery and the conscience of senior Timor-Leste officials is to be the guard of safety of Australian lives and Australian security information," Gleeson said.

This situation, he said, was manifestly unacceptable.

Further, after the ASIO raid of December 3 last year, Collaery was interviewed for an ABC program which disclosed some of the affidavits sworn by the former agent. This included the statement that the newly arrived head of ASIS, David Irvine, who is now the head of ASIO, had instructed the agent to plant the listening devices inside the PM's office.

Gleeson said: "These are the documents they now want protected. I trust the court will appreciate the apprehension that we have." He added that this conduct "is wrongful, is unlawful, is damaging to our security".

At this week's three-day hearing, East Timor was seeking to have provisional measures - essentially an injunction - that would require Australia to give all of the seized documents to the court. But a parallel action involves the country's bid in the Permanent Court of Arbitration to have the 2006 CMATS (Certain Maritime Arrangements in the Timor Sea) treaty declared void, because it says it has irrefutable proof that Australia engaged in espionage during the negotiations.

While spy games have certainly proved to be a good source of drama this week, they are a trivial, though entertaining, part of the proceedings at The Hague.

In a series of tense and perhaps unscripted exchanges, the bigger picture in the dispute emerges. At the heart of what is likely to be a costly and prolonged legal campaign is East Timor's pursuit of a permanent maritime boundary which it believes would deliver it a much larger share of the Timor Sea's spoils. The country's leaders are also wanting to ensure that the settlement with Australia includes greater onshore development in East Timor after having seen how the LNG plant in Darwin has turned the city into a boom town.

On the first day of proceedings, East Timor's counsel described the 2006 treaty as "seriously disadvantageous" to the country.

Gleeson took issue with these remarks and pointed out that the 2006 CMATS treaty increased East Timor's share of the Greater Sunrise field from 18.1 per cent to 50 per cent.

When summing up East Timor's case, the country's agent in the proceedings, ambassador to the UK Joaquim da Fonseca, said he could not allow the remark by Gleeson to go unchallenged. "

Mr Gleeson criticised Timor-Leste for omitting to mention the profitable revenue-sharing arrangement for the Greater Sunrise fields under the CMATS Treaty. This is not the place to debate CMATS, but we cannot let that remark pass without pointing out the following.

"Both the Timor Sea Treaty and CMATS Treaty are meant as temporary arrangements for the exploration and exploitation of maritime resources in the Timor Sea. But under no conceivable maritime delimitation would the Greater Sunrise fields lie within Australia's territory. They are located within 200 nautical miles from the coastline of Timor-Leste, far closer to Timor-Leste than they are to Australia. "

So, in the absence of a permanent maritime boundary, the question remains. To whom actually do the resources currently shared at 50:50 per cent between Timor-Leste and Australia really belong? And who is being generous to whom?"