

Espionage & Good Faith in Treaty Negotiations: East Timor v Australia

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In April last year, [East Timor instituted arbitral proceedings against Australia](#) at the Permanent Court of Arbitration ('PCA') in relation to a dispute arising under the 2006 *Treaty on Certain Maritime Arrangements in the Timor Sea* ('CMATS Treaty'). Timor Leste (as East Timor is formally known) alleges that the CMATS Treaty is invalid because Australia engaged in espionage in the course of negotiating the Treaty. As noted by Matthew Happold in [an earlier EJIL:talk! post](#), Timor Leste has also [initiated proceedings](#) against Australia the International Court of Justice in respect of the seizure of documents by Australian authorities from the offices of the Australian lawyer who is acting for Timor Leste in the PCA arbitration. Indeed, the ICJ is holding hearings, this week, on Timor Leste's request for provisional measures that will require Australia to give up to the custody of the Court all documents and data seized by Australia pending disposal of the ICJ case and to give assurances that 'it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers'.

The details of the arbitration before the PCA have not been made public, so it is difficult to form any clear assessment of the precise international law issues that arise. However, from [public statements](#) and media reports, it seems that Timor Leste is alleging that the CMATS is invalid because "*Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage*". According to the [lawyer for Timor Leste](#), during the negotiations for the CMATS Treaty, Australian intelligence services inserted listening devices into the wall of Timor-Leste's negotiating room under the guise of an Australian aid program concerning renovation and construction of cabinet offices. The lawyer for Timor-Leste has likened the behaviour of the Australian intelligence services to insider trading. The PCA case is particularly interesting as it might be the first case in which a state seeks invalidity of a treaty on the ground that the other treaty party acted fraudulently in the negotiation of the treaty. The case raises the question whether states not only have an obligation to negotiate treaties in good faith but whether breach of the obligation to negotiate in good faith amounts to a ground for invalidity of a treaty.

Before turning to the grounds for invalidity, it is first worth noting that one of the interesting aspects of these proceedings is that they were even commenced at all. The CMATS Treaty, which sits alongside the [Timor Sea Treaty](#), allows for joint exploration of an area of petroleum deposits in the Timor Sea known as the 'Greater Sunrise' area, and provides for the distribution of revenue from that exploitation. It places a moratorium on settling the maritime boundary between Australia and Timor Leste until 2057. Under the CMATS Treaty, if the development plan for joint exploration of Greater Sunrise has not occurred within six years of the entry into force of the Treaty, either party may terminate the Treaty.

That six-year mark passed in February 2013, and no development plan has as yet been approved, so it was open to Timor Leste to exercise its right of termination. Instead, it has brought proceedings seeking to invalidate the Treaty entirely. Why might this be the case? Two reasons are most likely. First, if the treaty is terminated on this basis and petroleum production in the area subsequently takes place, the Treaty comes back into force. Secondly, even if the treaty is terminated, the treaty provides that any comments or findings of courts, tribunals or dispute settlement bodies regarding the maritime boundary or delimitation in the Timor Sea shall be of no effect. Thus, termination of the CMATS Treaty does not allow for any judicial resolution of the ultimate question, the resolution of the maritime boundary. In contrast, if the Treaty is found to be invalid, it will lift the moratorium on the determination of the maritime boundary.

Good Faith in the Negotiation of a Treaty

Good faith is a thread that runs through the law of treaties. There is the obligation to interpret a treaty in good faith (Art. 31, Vienna Convention on the Law of Treaties – 'VCLT') and the obligation to perform a treaty in good faith (Art. 26 VCLT). The question raised by this case is whether there is an obligation to negotiate in good faith? It

could be argued that when states have an international obligation to negotiate, this is an obligation to negotiate in good faith (*Railway Traffic between Lithuania and Poland Case* (PCIJ, 1931); *Lake Lannoux Arbitration*). However it may be asked whether this obligation of good faith in treaty negotiations is merely an aspect of an initial duty to negotiate (i.e, good faith merely defines the obligation to negotiate) or whether the obligation to negotiate in good faith exists independently of any initial obligation to negotiate. In other words, is it the case that whenever negotiations take place (whether there is a duty to negotiate or not), those negotiations must take place in good faith? It may be argued that it is the conclusion of a treaty that creates the obligation to act in good faith such that even in cases of obligations to negotiate in good faith, it is the creation of the prior international obligation to negotiate that brings the obligation to act in good faith into being.

However, there is dicta to suggest that states have an obligation to act in good faith even in the process of creating legal obligations *inter se*. In the *Nuclear Tests Case (Australia v France)*, the ICJ stated: ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’ (para. 46, emphasis added). Even the ILC stated in the [commentaries to the VCLT](#) that: “In the case of treaties, however, there is the special consideration that the parties *by negotiating* and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith.” (p. 262, para. 2, emphasis added).

The principle that negotiating states have a duty to act in good faith even while they negotiate may be supported by a general principle of private law found in many legal systems and in statements seeking to set out principles of contract law. For example Art. 1.7(1) of the [UNIDROIT Principles of International Commercial Contracts](#) requires the each party to a contract to act in accordance with good faith and fair dealing. The commentary to that principle states that: “By stating in general terms that each party must act in accordance with good faith and fair dealing, paragraph (1) of this Article makes it clear that even in the absence of special provisions in the Principles the parties’ behaviour throughout the life of the contract, *including the negotiation process*, must conform to good faith and fair dealing.” (emphasis added). Also [Article 2:301 of the Principles of European Contract Law](#) prohibits negotiations contrary to good faith. In national contract law, there is a dissenting voice with regard to an obligation to negotiate in good faith. In the English case of *Walford v. Miles* [1992] 2 AC 128, the House of Lords refused to accept that negotiating parties had an obligation to act in good faith. Lord Ackner stated that a “concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations” and maintained that each party “is entitled to pursue his (or her) own interests, so long as as he avoids making misrepresentations.” However the position in that case seems very much to be a minority position in national law and has been criticised even in England.

Invalidity of a Treaty Negotiated in Bad Faith? Is Bad Faith Fraud?

Even if it may be argued that there is always a duty to negotiate in good faith, the problem for Timor Leste is that it is not clear whether breach of that obligation is a ground for invalidity of a treaty. It is unclear precisely what legal arguments will be advanced to support Timor-Leste’s claim for invalidity. In [media reports](#), Timor-Leste has pointed to the principles in the VCLT as supporting its claim. Part V of the VCLT sets out several grounds for invalidity, and Article 42(1) makes clear that such grounds are exhaustive. Of these exhaustive grounds, failure to negotiate in good faith is not included. So, absent any specific ground dealing with good faith, what other grounds for invalidity may be invoked by Timor Leste? Based on the information publicly available, one ground that may be relevant is invalidity for fraud. Article 49 of the VCLT provides that:

“If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty”.

The questions to be resolved, therefore, are whether the alleged acts of espionage by the Australian intelligence officials constitute ‘fraudulent conduct’, and whether Timor Leste has been induced to conclude the CMATS Treaty by that fraudulent conduct.

Does espionage amount to ‘fraudulent conduct’? There appears to be no precedent to guide this inquiry, and

should Timor-Leste succeed in its claim, it will be the first State to successfully invoke the fraud provision. 'Fraud' and 'fraudulent conduct' are not defined in the VCLT. In the [International Law Commission's commentary](#) to the draft Article 46 on the Law of Treaties which became Art. 49 of the VCLT, the ILC noted (at page 245, opening para) that 'fraudulent conduct' includes:

“any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give consent to a treaty which it would not otherwise have given.”

If the allegations regarding the bugging of the cabinet room for commercial gain are true, it could be argued that such behaviour is a deceitful action. Taking the analogy of insider trading used by Timor Leste's lawyer, a recently retired Australian High Court judge [described](#) the Australian insider trading provisions as 'catch[ing] the conduct by those who trade on the basis of untruths'. Whether that analogy is apt in a diplomatic negotiation context is unclear. However, like insider trading, access to information in a treaty negotiation that was obtained through espionage may limit the parties' ability to negotiate freely and fairly; it does indeed seem contrary to the idea of good faith. Whether that is significant enough to constitute a fraud that would invalidate the Treaty remains to be seen.

Even if such conduct is fraudulent, Timor Leste must additionally show that it was induced to conclude the CMATS Treaty by that fraudulent conduct. This will depend on the evidence presented. Given the highly sensitive nature of the behaviour in question, which goes to the heart of Australian overseas intelligence operations, it seems unlikely that such information will be available to the public any time soon.