

# TEMPO SEMANAL

Husi Imba Imiti

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Agio Pereira is The Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste

## Agio Pereira

In recent weeks we witnessed leaders of various countries, including Australia, iterating or promoting the need to resort to international law to ensure countries act sensibly and with moral authority when approaching disagreements with neighbors. In doing so, reference has expressly been made to the United Nations Convention for the Law on the Sea (UNCLOS), in the context of international maritime issues. To give one example, the Australian Defence Minister David Johnston stated in his speech "Managing Strategic Tensions" at the Shangri-La Dialogue that all parties must exercise restraint, "refrain from actions that could increase tensions, to clarify and pursue claims in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea." Prime Minister Tony Abbot repeated the same call in an ABC radio interview on June 3<sup>rd</sup>, when he affirmed the need for disputes to be settled within the confines of international law. In addition, the U.S. Defense Secretary Chuck Hagel, in the same Shangri-La Dialogue meeting, also expressed concern that fundamental principles on the international order are being challenged. These calls to abide by international law, including UNCLOS, for the settlement of maritime boundary disputes, should bode well for Timor-Leste and its desire to close the Timor Gap in accordance with UNCLOS.

The Timor Gap was created by the 1972 Australia-Indonesia boundary agreement and still exists today. At the time the 1972 Australia-Indonesia maritime boundary was being negotiated, Timor was occupied by Portugal, and hence Australia and Indonesia could not establish a maritime boundary to the south of Timor as Timor's territory did not belong to Australia or Indonesia. However, Indonesia did (and still does), have territory to the east and west of Timor so a 'gap' in the boundary was left and marked by points in the Timor Sea known as A16 (in the east) and A17 (in the west). Despite global opinion denouncing Indonesia's subsequent occupation of Timor (1975 - 1999), Australia

recognized Indonesian sovereignty over Timor so it could 'close' the Timor Gap. Australia hoped to simply link up A16 and A17 with a more-or-less straight line and (wrongly) believed it was 'legal' to do so as Timor was now Indonesian territory. By the mid-1970s though, Indonesia had 'wised-up' to being "taken to the cleaners" in the 1972 boundary agreement with Australia (as the boundary was closer to Indonesia than Australia), so Australia had to settle for a petroleum sharing zone under the 1989 Timor Gap Treaty. This petroleum sharing zone has now been inherited by Timor-Leste, following a treaty entered into on Timor-Leste's first day of independence (20<sup>th</sup> May 2002). As a result, the Timor Gap has not been 'closed' as there is no permanent maritime boundary in the area, only a petroleum sharing arrangement.

On 20<sup>th</sup> March 2002, the Australian Government opportunistically and in what could be characterised as an act of bad-faith, withdrew from the maritime boundary dispute settling jurisdiction of the International Court of Justice (ICJ) and the International Tribunal of the Law of the Sea (ITLOS). This brazen withdrawal came just months before Timor-Leste became a sovereign state on the day of its Restoration of Independence (20<sup>th</sup> May 2002). Australia's carve-out of jurisdiction came amidst months of tense negotiations on the Timor Sea Treaty, regarding the maritime area between the northwest region of Australia and the south coast of Timor-Leste. It was a cowardly act of retreat because the then Australian Government was certainly concerned that, if Australia was to conform to the current calls of its leaders to act in accordance with international law, it would 'lose-out' in a maritime boundary delimitation with the newly sovereign and independent Nation-State of Timor-Leste. Despite the positive influence of the Australian military in helping restore peace in Timor-Leste, such a gesture of bad faith marked the beginning of difficult relations regarding maritime boundaries. It also heavily influenced the subsequent negotiations pertaining to the Certain Maritime Arrangements in the Timor Sea or (CMATS) and the International Unitisation Agreement (IUA). These arrangements/agreements concern the Sunrise and Troubadour gas fields, which collectively are known as Greater Sunrise.

The difficulties of such a process led to the current complex legal situation faced by Australia in the ongoing International Arbitration on the matter of spying on Timor-Leste during the negotiations, being conducted in the legal precinct of The Hague and in accordance with the rules of the Permanent Court of Arbitration. In the same city of law and justice, the International Court of Justice (ICJ) is hearing the matter of the seizure of legal documents belonging to Timor-Leste, which were seized in a raid on a lawyer's office in Canberra.

Both legal processes continue to attract international attention, not least in Australia, where experts on international law convene public forums to analyze and discuss the impact of these legal processes upon Australia, Timor-Leste and on international law itself. The Australian National University (ANU) held a symposium dedicated to these topics. In a summary attested to by participants with legal backgrounds, a number of salient points emerged.

Dr. Christopher Ward, speaking on the background to the dispute, acknowledged that Australia has "consistently shifted ground away" from the natural prolongation/continental shelf argument, while "still playing lip service to natural prolongation". In addition, he noted that if the determination of the maritime boundary was brought before an international court, "something very different to natural prolongation would come forward". Commenting on the lateral boundaries, he noted that if A16, the eastern point of the Timor Gap area is moved "laterally", all the Greater Sunrise will lie within Timorese territory.

Dr. Sarah Heathcote spoke on "The Claim of Treaty Invalidity and CMATS", which is currently being argued by Timor-Leste's legal team, Sir Elihu Lauterpacht and Professor Vaughan Lowe QC in the spying case being arbitrated. Dr Heathcote presented her view that Timor-Leste has to prove that the legal principles within the framework of the Vienna Convention on the Law of Treaties (VCLOT) are customary law or that grounds beyond the VCLOT exist to declare CMATS to be void. Timor-Leste cannot rely on the VCLOT itself invalidating CMATS because Timor-Leste was not a party to VCLOT at the time of the alleged espionage activity. However, if a provision within VCLOT can be proved to be customary international law, it is theoretically binding on all States. While there are limited grounds available, one possible ground is fraud. Dr. Heathcote went on to note that "it is difficult to say" if fraud is a customary principle of international law as many jurisdictions have different definitions of fraud and there is a lack of relevant international law precedents. On other likely grounds, Dr. Heathcote also made reference to the history of Unequal Treaties, saying that the Soviet-style interpretation of the doctrine, which focuses on a developed State taking advantage of a developing State, "fits nicely" with the Australia/Timor-Leste dispute. However, she also pointed out that Unequal Treaties is not customary international law and it is also not covered by the VCLOT. Further, she outlined a "fantasy" ground for invalidity, such that the treaty is invalid for violating rules of *jus cogens* (the peremptory norms on which international law is based).

Professor Donald Anton, speaking on "The Closest Nature of Arbitration in the Context of the Dispute", echoed the view that CMATS could be declared void if espionage is shown to have occurred, as it breaches Australia's obligation to act in good faith under CMATS, despite the fact that there are no treaties on spying, nor customary international laws prohibiting espionage. Citing the *Nuclear Test Case* and the *North Sea Continental Shelf* cases he described the notion of good faith as a "broad rule of international law" and added that "good faith underpins the essence of negotiations related to seabed boundaries". On spying, Dr. Anton stressed that it "looks more like bad faith when for commercial gain" and that "sending in agents to a foreign country without consent offends the principles of non-intervention" set out in previous cases. He added that Timor-Leste stills needs to prove that the espionage activities occurred.

However, regardless of the legal theoretical dilemmas, the conclusion to be made from the academic debate is that Timor-Leste, as a Nation-State, has the right to avail itself of these legal avenues and to seek remedies under international law to protect its rights, including its sovereign status. As long as Timor-Leste continues to act with due propriety and reasonableness, as it has, the case can be considered a strong one in favor of Timor-Leste. It is true that

there is the need to prove that the espionage activity did occur and within the realms of the international arbitration to a 'balance of probabilities' standard of proof.

In the same symposium, Dr. Donald Roth well made the point that if Timor-Leste was seeking see a "litigation advantage" from the public nature of the ICJ hearings, they were right to do so.

On the need for Timor-Leste to successfully argue that spying constitutes fraud under the VCLOT, it has been argued that such a need is due to the fact that 'everyone is spying on everyone anyway'. However, this can be a very misleading perspective. The argument put by Peter Galbraith in the latest documentary from ABC's Four Corners on the topic, made a distinction between different types of espionage. One type is the recording of someone's conversation or hacking into their emails or telephones. A second type, and the more offensive type, is to enter a foreign government's office illegally, install a bugging device, listen to the Prime Minister and his minister's confidential discussions; and enter again the same venue to extract the bug. This type of espionage, not average by any standard, could only be characterised as a desperate move to gain commercial advantage during a serious negotiation on natural resources. In such negotiations the parties are expected to act in good faith, particularly because Timor-Leste was and is not an enemy of Australia. The reference to "commercial" advantage" and not to "national security" is most important in this context.

If concerns about fundamental principles of international law being challenged reflect a fear that the international order may be weaker if Nation-States do as they please to nurture their greed for more territory and resources, Timor-Leste has been right in availing itself of what international law resources can do to resolve potentially destructive tensions. Those tensions, aggravated by acts of espionage and raiding lawyers offices to take advantage of information which otherwise may not be available, serve certain economic interests as opposed to protecting national security. Timor-Leste resolved not to politicise unnecessarily the espionage issue, as well as the raiding of one of its lawyers' office, which reflects the seriousness of the Timorese Government to protect the extremely good relations between Australia and Timor-Leste at all levels. It was Australia that publicized these activities and it is Timor-Leste that wishes to engage in discussions to overcome the disagreement over the Timor Sea but has had to resort to the neutral forms of international law available to sovereign Nation-States, such as Arbitration and the International Court of Justice, to progress its interests.

In regards to Timor-Leste exercising its right to self-determination, Australia's attitude towards the rights of the people of Timor-Leste has been consistent. Australia supported the illegal occupation of Timor-Leste led by President Suharto. During the 24-year occupation Australia benefitted handsomely from many developments which have exploited the oil and gas resources in the Timor Sea.

The Timor Gap Treaty signed while Indonesia was illegally occupying the territory of East Timor was one of the most venal and hurtful acts and demonstrated a kowtowing to President Suharto and turning a blind eye to the murderous policies being implemented by the same regime against the people of East Timor. This was all done for the sake of natural resources, which Australia, being a vast island-continent rich in oil, gas and minerals, was not so desperately in need, unlike East Timor.

This *de jure* recognition was wrongful and done under the cliché of *realpolitik*, one which was wrongly applied to Timor-Leste because the premise was that East Timor will be never become independent; and the best it can hope for was some sort of autonomy within the Republic of Indonesia. This proved to be a monumental miscalculation caused precisely by underestimating the power of international law applicable to non self-governing territories. Australia tried unsuccessfully to have this matter removed from the Decolonisation Committee of the United Nations, where East Timor was listed. Decolonization can mean the need to hear the voice of the people through a plebiscite, whereby the people vote in a free and peaceful manner to determine their future. The people of East Timor exercised this right on the 30<sup>th</sup> of August 1999, bringing about the newly sovereign and independent Nation-State of the Democratic Republic of Timor-Leste. Australian politicians had a wake-up call when faced with the reality made by the people of Timor-Leste, supported by international law against all odds.

The question to be pondered by this state of affairs and how Australia continues to act about the Timor Sea is "Have Australian politicians really understood and learnt a lesson?". It is difficult to appraise this learning curve. One reason is because Australian federal politicians are elected in a cycle of three-year elections and the majority does not get a real opportunity to be involved in international politics, let alone maritime boundary delimitations. These matters are more often than not left to senior Canberra bureaucrats and experts in the foreign affairs, defence and security sectors, to gauge the pros and cons of these issues and to advise internally on the national interest. The politicians further get standard advice on the best 'lines' to use, if and when they have to say and/or act on these matters. There are always some politicians though who speak to principle and did so throughout the illegal occupation of Timor-Leste.

As is the way with politics, reactive statements are mostly for short-term political consumption, rather than long-term strategic national interest.

The prejudicial and long formed attitude in Canberra to the tiny nation state of Timor-Leste is difficult to supplant. If it does not come from within the agencies and led by politicians, then it requires pressure from the international realm, combined with domestic public opinion to turn the attention of the powers-that-be in Canberra to listen to the claims of Timor-Leste. When the Timor Sea Treaty was signed on May 20<sup>th</sup>, 2002, on the very first day of the restoration of independence of Timor-Leste, promises were made that there would be talks on "permanent boundaries" soon. But the promise has been on hold now for twelve years.

In spite of the recent requests by the Timorese Government to start such talks, the appeal from Timor-Leste has fallen

on deaf years. It appears that no one in Canberra is really listening to what Timor-Leste states it wants in terms of its maritime boundaries. The retort is, "Well they need to tell us what they want". There is really only one way to say, "Timor-Leste wants to sit at the table with Australia and have structured talks on maritime boundaries in the Timor Sea."

There have been meetings between leaders, at the highest levels - Prime Ministers Xanana Gusmão with Tony Abbott and also with Foreign Minister Julie Bishop; yet no clear message has come from Canberra as to its willingness to listen and to respect international law in the Timor Sea.

This silence is a poor sign of misunderstanding again, shown by Australian political leaders, that things may just get worse before they can get better. Unfortunately for both sides, this will continue to occur if the Timorese leadership and society are not taken seriously. Last year, in an interview to ABC radio program 'PM' Dr. Ramos-Horta, former President of Timor-Leste and Nobel Peace Prize laureate, appealed to the Australian Government to take the Timorese leadership seriously. He made the point that the Timorese are serious about their sovereignty and they will prosecute their rights to their resources in the Timor Sea, in accordance with international law. It seems he is also being ignored.

Why now? This is an important question. One of the most respected and internationally a well renowned former U.S. Senator, experienced in mediation on borders and natural resources, simply answered: it must be now because temporary arrangements on borders if left too long, can and do tend to become permanent. This is a simple truth, particularly in the scenario of Timor-Leste and Australia, where there are no agreed maritime boundaries at all; what does exist is a cordoned off zone of development inherited from the illegal Timor Gap Treaty Australian entered into with Indonesia during the time of the illegal occupation of East Timor. Furthermore, Australia has entered into maritime delimitation with all its neighbors, and is party to the Antarctic Treaty, except the country Australian leaders frequently refer to as its closest and friendliest neighbor; Timor-Leste. And comparatively, one is referring to a very tiny area and portion of Australia's vast border.

### **The middle/median line**

For the Exclusive Economic Zone (EEZ), Timor-Leste has a right to expect the middle or median line to be drawn in the Timor Sea between Timor-Leste and Australia. Surely this has to be negotiated in accordance with international law. No matter what arrangements are in place in the Timor Sea, Australia has no right to refuse to negotiate with Timor-Leste for the settlement of its maritime boundaries. It is time for Australia to make genuine efforts to resolve the dispute and find a constructive solution through an honest and transparent process. The international law of the sea, reflected largely in UNCLOS no longer supports the natural prolongation theory alone, so the middle line is and will be the departing point, where the borders are less than 400 nautical miles apart, as is the case. As for the lateral borders, Australia has expressed publicly some concerns related to Indonesia, but these cannot be overcome without substantive dialogue and honest and transparent negotiations. In short, sitting with Timor-Leste to talk about maritime boundaries now is advantageous for Australia, as well as for Timor-Leste. Australia cannot just say it is too hard, thus denying Timor-Leste its lawful right to negotiate maritime boundaries with Australia. This right exists under international law and Australia expressly agreed to do so in the 2002 and 2006 treaties.

The boundary is one - but are there other problems? The answer is yes. One central problem is attitude. The world has progressed, but the way Australia's largely old and tired technocrats view the Pacific constitutes a problem. South Pacific countries' leadership is hardly taken seriously by Australian officials. Just recall how the Prime Minister of Papua New Guinea was held at the airport in Brisbane and forced to take his shoes off, humiliating him. Protests were made between foreign ministries but to no avail. The same policy still exists.

When Timor-Leste initiated its international arbitration against Australia, a senior bureaucrat in Canberra categorized the move as that of a 'banana republic'. And when Timorese diplomats and others speak to Canberra bureaucrats about issues related to delimitation of maritime boundaries, the reply is that the politicians cannot do much; it's the bureaucrats in Canberra that decide, which means Timor-Leste has an even tougher summit to climb.

What the bureaucrats do not fully appreciate though is that Timor-Leste has a habit of fighting goliaths and this fight is one that is familiar to its leadership. Hence the appeal of Dr. José Ramos-Horta for Canberra to take Timorese leadership seriously should not fall on deaf years. An opportunity exists for Australian politicians to seize the opportunity before them - to effect change and act on their conscience, not the advice of technocrats. It would also free Australia from constantly worrying about whatever it did with Indonesia and for the first time could have an open relationship with two of its closest and critically important neighbors. It would free itself of the past and unshackle itself from its locked-in paradigm on this matter. A win all round. International law and political will can do this. There exists a window of opportunity, one which presents itself to leaders periodically to look beyond the status quo, beyond the sneers of the opposition and beyond the next election.

Another problem is that Canberra seems to believe that all Timor-Leste is seeking is more money. It is evident as it comes up first and foremost in many government level conversations. Former Foreign Minister Alexander Downer recites this often. The Australian political framework seems to have been absorbed by the propaganda of 'generosity' of Australia towards Timor-Leste due to the sharing of Timor Sea Treaty revenues and the agreement on Greater Sunrise which includes a 50:50 share of revenues, in spite of the probable 100 per cent ownership at international law.

This generosity paradigm has been challenged in many ways, including within legal realms currently ongoing in the Singapore International Arbitration Centre (SIAC). When one refuses to draw the line with your neighbors and push

beyond limits including threats that “Australia could bring meltdown to East Timor if it so chose”, as Mr. Downer was quoted in ‘A Study of the Offshore Petroleum Negotiations Between Australia, the U.N. and East Timor, by A. Munton (ANU), generosity is a far-fetched award one has the right to claim for oneself; opportunism, bad faith and sheer disrespect for a relatively much smaller and emerging country are likely to be most appropriate.

Of course every Nation-State in the world nowadays, including Australia, needs more money. However, putting this ‘more money’ concept into perspective, it can be offensive to Timor-Leste, to say the least. To say that Timor-Leste has taken its case to the international arbitration tribunal and the ICJ, simply because it needs more money, is utterly wrong. There is a need to understand clearly the notion of ‘principle’ when one delves deep into these matters pertaining to commercial interests in the Timor Sea whereby the profit orientated strategies of multinational resource companies (MRC) and the national interests of the owners of the same resources can overlap or derail.

This is why Prime Minister Xanana reiterates - time and again – that as far as Timor-Leste is concerned, it is a matter of principle. But what does "principle" mean here?

First, it is about acknowledging that Timor-Leste has rights over the maritime boundaries which, no matter what happens, Canberra cannot write them off as it pleases. Second, it is about sovereignty; which means defining exactly where are the sovereign maritime borders of Timor-Leste, so that our Defence Forces and Allies in the defence field (including Australia) can plan defence capabilities, not necessarily for war purposes, but most importantly, for strategic and peace purposes, for the protection of strategic natural resources such as oil and gas and the most vital natural resource, water. Permanent maritime boundaries are also crucial for effective cooperation with strategic regional allies. Third, it is about consolidation of the process of independence. Having been stripped of resource rights by Australia and Indonesia in the Timor Gap Treaty, it is time for Timor-Leste to register its claims within the realms of international law. Fourth and last, but not least important, it is about long-term national interests, say the next hundred years and where Timor-Leste believes it will be, and securing the interests of our future generations too.

Where Timor-Leste ‘will be’ is planned through the national strategic development plan (SDP);this Plan envisages Timor-Leste gradually becoming a vibrant and self-reliable economy, a model of social justice and equity, and a leading country within the community of Nations that have succeeded in building a flourishing liberal democracy. From a very low base, we are making positive and real steps in that direction. In addition, Timor-Leste wants to become a country with a population that is well educated and also contributes towards the well-being of other Nation-States, particularly those most in need. This is what is meant by Timor-Leste's "principled approach" in the context of maritime boundaries. It does not and will never mean 'more aid', for the sake of greed; it does not mean more handover money for the sake of covering losses due to pipelines; it certainly does not mean more dependency, more humiliation, more hitchhiking diplomacy and security. Ultimately, it is about principle in the sense of human dignity, as well as State's (Country) dignity. It is about being in charge of what rightly belongs to Timor-Leste, be it big or small, within its' maritime boundaries and in accordance with international law. Therefore, this “principle” is about ensuring that “the future of the people of Timor-Leste” can be upheld with dignity.

To conclude, one must stress that Australia and Timor-Leste are neighbours and shall work together at all times to ensure bilateral relations are maintained at its best. Cooperation rather than competition for the sake of selfish gain must be the guiding principle. However, cooperation can only be strengthened through mutual trust which develops from respecting the rights of each Nation-State. On the maritime borders, this means settling them on the basis of international law.

**Note : His excellency Agio Pereira is The Minister of State and of the Presidency of the Council of Ministers and Official Spokesperson for the Government of Timor-Leste**

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