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Australia called to Hague on Timor Gap



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With its defence department gearing up to join the Americans in the occasional defiant flyover of the new Chinese artificial islands in the South China Sea, the Australian government finds itself on the same side of the dock as the Chinese in international maritime law proceedings.

Both China and Australia are being taken to arbitration in The Hague by smaller, weaker neighbours accusing them of riding roughshod over their claims to maritime resources.

The Philippines has taken China to the Permanent Court of Arbitration to seek a ruling on resource zones around the Spratly Islands, where China has been dredging up sand islands on some reefs and harassing Filipino marines holed up in a beached ship on another reef. China has said it will not be party to the case or accept any ruling, but the court will try to construct a notional Chinese case before giving its ruling next year.

Timor-Leste delivered a diplomatic note on June 1 to Australia, formally notifying intent to proceed to arbitration by a private panel under The Hague court's auspices, to have the 2002 treaty known as CMATS (Certain Maritime Arrangements in the Timor Sea) declared invalid because of Australia's allegedly fraudulent conduct on subsequent negotiations flowing from it.

Just before Timor-Leste became legally independent in May 2002, after the United Nations interregnum following Indonesia's exit in 1999, the Howard government famously withdrew Australia from the jurisdiction of international courts in setting maritime boundaries, then overawed the Timorese into accepting a compromise in the dispute about the "Timor Gap" and its resources, notably the vast Greater Sunrise gas field leased to a Woodside Petroleum consortium.

The Timorese have long been unhappy with the deal, and dug in hard on negotiations about Greater Sunrise to get the gas landed in Timor, rather than piped to Darwin or processed by a floating factory. The act of a whistleblower from the Australian Secret Intelligence Service (ASIS), notifying Timor's lawyers that he had led a team that bugged the cabinet office in Dili in 2004, gave them grounds of bad faith to seek annulment of the CMATS treaty, which would otherwise defer boundary disputes for 50 years from signature; that is, long after Greater Sunrise was exhausted. Fortunately, a provision for arbitration in the treaty has given a loophole for such a move.

Things have got quite nasty at times. The Australian Security Intelligence Organisation, then headed by David Irvine who'd been ASIS chief at the time of the 2004 bugging operation (under Alexander Downer's helm at DFAT), raided Canberra lawyer Bernard Collaery's office to get the leaked ASIS material in December 2013. Timor then mounted a side-action in the International Court of Justice to get it back. Solicitor-General Justin Gleeson had the hide to tell the court Timor and its agents had encouraged the "crime" of disclosing intelligence matters to a foreign government. In May, the court ordered the material handed back. Attorney-General George Brandis swore he had not peeked at it to help Australia's litigation.

Meanwhile, there has been lots of duchessing of Timorese leaders, with former prime minister Xanana Gusmão and his wife Kirsty Sword Gusmão given gongs in recent honours. But after a six-month suspension, Dili, under new prime minister Rui Araújo, is pushing the case again, and unlike the Chinese, the Australians have no option but to front up at The Hague.

Australia has nominated Yale legal expert Michael Reisman to the arbitration panel, and Timor the British law lord Lawrence Collins, and they between them have named Italian maritime law expert Tullio Treves to the chair. The hearings will be in camera, which will disappoint spectators wanting to see how the Timorese got screwed after being liberated. But this actually gives a pathway for the ASIS whistleblower, known as Witness K, to give evidence in confidence, should the government give him back his passport.

Should the panel rule that the CMATS treaty is invalid, then Australia will have lost control of the resources it believes it owns across the median line of the Timor Sea, and will have to negotiate from scratch. Indonesia, which was pressured into signing an invidious maritime boundary on either side of the Timor Gap in 1972, will be watching.