DAVID AND GOLIATH REVISITED: A TALE ABOUT THE TIMOR-LESTE/AUSTRALIA TIMOR SEA AGREEMENTS

FRANCISCO PEREIRA COUTINHO* & FRANCISCO BRIOSA E GALA**

* Professor at Faculdade de Direito da Universidade Nova de Lisboa (Lisbon Nova Law School, Portugal). Member of CEDIS – Centro de I & D sobre Direito e Sociedade.

** Ph.D. candidate at Faculdade de Direito da Universidade Nova de Lisboa (Lisbon Nova Law School, Portugal) with a doctoral grant from the Fundação para a Ciência e Tecnologia. Member of CEDIS – Centro de I & D sobre Direito e Sociedade.

I. INTRODUCTION

In the aftermath of the Westphalia peace agreements between the European powers in the seventeenth century, states emerged in the international legal realm as sovereign entities. These states saw themselves as Goliaths and did not recognize any superior power. This idea is still enshrined in Article 2, paragraph 1 of the United Nations (U.N.) Charter, which states that the organization "is based on the principle of the sovereign equality of all its Members."[1]

International relations, however, reveal profound asymmetries between and among states in regard to their political clout. This inequality derives from geographical, historical, and economic reasons and is a common trait in international politics. In the biblical sense, an analysis of the bargaining powers between states is in many cases similar to the one that confronted David and Goliath.[2] This reality is even recognized in a declaration attached to the law of the land that governs international treaties. The Vienna Convention on the Law of Treaties (VCLT) condemns "the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent."[3]

This Article offers a tale about a dispute over the continental shelf resources of the oil-rich[4] Timor Sea that currently involves a Goliath,

1. U.N. Charter art. 2, para. 1.

2. According to the Book of Samuel, twice a day for forty days, Goliath, the champion of the Philistines, came out between the lines and challenged the Israelites to send a champion of their own to decide the outcome of a battle between the two nations in a single combat. David, an Israeli soldier, finally accepted the challenge after hearing that a reward was being offered. Saul, the Israeli commander, offered his armor, but David refused, taking only his sling and five stones from a brook. David and Goliath confronted each other: Goliath with his armor and shield; David with his sling. David won the fight by hurling a stone from his sling at Goliath's forehead. 1 *Samuel* 17.

3. U.N. Conference on the Law of Treaties, Final Act of the United Nations Conference on the Law of Treaties, Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, Annex, Mar. 26–May 24, 1968 and Apr. 9–May 22, 1969, U.N. Doc. A/Conf.39/26.

4. The terms oil and petroleum are adopted as synonyms and, in the broad sense, mean any hydrocarbons, whether in a gaseous, liquid, or solid state.

Australia, and a David, Timor-Leste.[5] The story includes colonization by a European state, Portugal, an invasion and annexation by a neighbor country, Indonesia, the negotiation of several contentious international treaties, and, more recently, is akin to a John le Carré novel, as it includes espionage, thefts, and imprisonment of whistleblowers. This story is not about the kid-glove diplomacy that usually characterizes relations between states.

The Goliath in the tale is Australia. By 2014, Australia had experienced more than twenty years of continued economic growth, averaging more than 3% a year.[6] The country is the uncontested regional superpower, besides being one of the largest and richest nations in the world.[7]

The David is Timor-Leste. The country is a regional Lilliput both in terms of size and economic power.[8] In a referendum held in 1999, the Timorese people voted for independence from Indonesia, but it was only after an Australian-led United Nations military intervention and some years of international administration that independence became a reality in 2002.[9] Since then, the country has been dependent almost exclusively on oil for its economic survival. According to the International Monetary Fund, "Timor-Leste stands out as the most oil-dependent country in the world. In 2009, petroleum income accounted for about 95 percent of total government revenue and almost 80 percent of gross national income."[10]

The area of contention, the Timor Sea, is a half-closed sea within the definition of Articles 122 and 123 of the United Nations Convention on the Law of the Sea (UNCLOS).[11] It is bound in the north by the southern coast of Timor-Leste, in the south by the Australian coast (Western Australia, Northern Territory, and Melville Island), in the east by the Arafura Sea and Indonesian territorial waters, and in the west by the Indian Ocean and by the southern coast of the Indonesian island of

5. Timor-Leste is often referred to in English as East-Timor, but its official name is the "Democratic Republic of Timor-Leste." *See Country Information: Timor-Leste*, U.S. DEP'T ST., http://travel.state.gov/content/passports/english/country/timor-leste.html (last visited Apr. 14, 2015). For the sake of simplicity, we refer to it as "Timor-Leste."

6. *The World Factbook: Australia*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/as.html (last visited Apr. 14, 2015).

7. *Id.* Australia ranked 6th in land mass and 20th in GDP in 2014.

8. *The World Factbook: Timor-Leste*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html (last visited Apr. 14, 2015). Timor-Leste ranked 160th in land mass and 163rd in GDP in 2014.

9. *Id.*

10. *IMF Executive Board Concludes 2010 Article IV Consultation with the Democratic Republic of Timor-Leste*, INT'L MONETARY FUND (Mar. 8, 2011), www.imf.org/external/np/sec/pn/2011/pn1131.htm.

11. U.N. Convention on the Law of the Sea arts. 122, 123, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

West-Timor.[12] The distance between Timor-Leste and Australia is approximately 238 miles. This portion of the Timor Sea includes a huge oceanic trough called the Timor Trough.[13] Timor-Leste and Australia have not reached an agreement to delimit the maritime boundary.

Despite some possible good oil prospects in the Timorese territorial sea, and even onshore, all of Timor-Leste's currently extracted oil comes from reservoirs located in an area where, due to the lack of a delimitation, Timor-Leste and Australia jointly manage oil activities—the Joint Petroleum Development Area (JPDA).[14] Also, most of the proved reserves that Timor-Leste may eventually claim are located within the JPDA or in its outskirts. The most remarkable is the gigantic Greater Sunrise gas field, which comprises the Sunrise and the Troubadour fields.[15] The Greater Sunrise straddles the JPDA boundary into an area where Australia exercises exclusive sovereign rights, even though these sovereign rights are not recognized by Timor-Leste.[16]

Since its independence, Timor-Leste has battled for its economic survival in negotiations with Australia over the exploration of the resources located in the Timor Sea.[17] Recently, arbitral proceedings were initiated against Australia seeking to invalidate one of the international agreements that currently regulates the Timor Sea.[18] Given that arbitration procedures can harm ongoing relationships,[19] we will begin by explaining the intricate legal framework that regulates the continental shelf of the Timor Sea, describing the evolution of the set of international agreements established in the last forty years among Indonesia, Timor-

12. For a map of the area, see *Timor Gap Map*, AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT, http://www.atns.net.au/objects/Timor.JPG (last visited Apr. 14, 2015) [hereinafter *Timor Gap Map*].

13. This trough is a depression 700 km long and between about 30 and 75 km wide, with depths between 2 and 3.2 km. M.G. Audley-Charles, *Ocean trench blocked and obliterated by Banda forearc collision with Australian proximal continental slope*, 389 TECTONOPHYSICS 65, 67 (2004).

14. Timor Sea Treaty art. 3, Austl.-Timor-Leste, May 20, 2002, [2003] A.T.S. 13 (entered into force Apr. 2, 2003).

15. *See id.* Annex E.

16. 6 INTERNATIONAL MARITIME BOUNDARIES 4371 (David A. Colson & Robert W. Smith eds., 2011) (explaining that Australia has long exercised rights over the Continental Shelf in that area based on the 1972 agreement with Indonesia, discussed *infra*).

17. *See Bugs in the pipeline: Timorese leaders push for a better deal from their offshore gas fields*, ECONOMIST (June 8, 2013), http://www.economist.com/news/asia/21579074-timorese-leaders-push-better-deal-their-offshore-gas-fields-bugs-pipeline.

18. Donald K. Anton, *The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents*, 18 ASIL INSIGHTS 6 (Feb. 26, 2014), *available at* http://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage.

19. *See* CLAUDE DUVAL ET AL., INTERNATIONAL PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC AND POLICY ASPECTS 317–18 (2d ed. 2009) (explaining that the downside of harming the ongoing relationship is particularly large in international petroleum agreements, where longevity is often one of the most prominent features).

Leste, and Australia. Any legal analysis of these agreements must consider the geography of the area and the economic and political issues that constrain the parties. We will argue that Timor-Leste's position, compared to Australia's, is legally stronger from an international law perspective but politically weaker because the former's bargaining strength was severely limited. The following section addresses the prospects for Timor-Leste to succeed in its legal challenges. The chance that Timor-Leste will obtain a legal victory resembles David's at the onset of his battle with Goliath. Timor-Leste's legal efforts may become a political slingshot that brings Australia back to the negotiating table.

II. A NEVER-ENDING STORY: CHRONOLOGY OF THE DIVISION OF SEABED RESOURCES IN THE TIMOR SEA

A. Indonesia's Independence from the Netherlands (1949) to the End of Portuguese Colonization of Timor-Leste (1975)

In the sixties and seventies, geography was tantamount to the Australian position over the seabed resources in the Timor Sea:

> [T]he rights claimed by Australia in the Timor Sea are based unmistakably on the morphological structure of the sea bed . . . . The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the two coasts, provided for in the Convention in the absence of agreement, would not apply for there is no common area to delimit.[20]

Australia argued for the application of a geological criterion for the definition of the extension of continental shelves based on the natural prolongation of the landmass. This position relied on the Truman Proclamation that mentioned the existence of a continental shelf "as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it,"[21] but also in the *North Sea* cases decided by the International Court of Justice (ICJ).[22]

However, the principle of delimitation by mutual agreement and in accordance with equitable principles was already the international guiding rule for the delimitation of opposite continental shelves. That

20. Robert Miller, *Australian Practice in International Law*, 1973 AUSTL. Y.B. INT'L. L. 136, 146. The Convention mentioned in the paragraph is the Convention on the Continental Shelf. Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 499 U.N.T.S. 311 (entered into force June 10, 1964).

21. Proclamation No. 2667, 10 Fed. Reg. 12305 (Sept. 28, 1945).

22. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3 (Feb. 20) [hereinafter *North Sea*].

meant that states could raise criteria in addition to geography, such as the equidistance line and other relevant circumstances.[23] Indeed, delimitation does not rely upon a single criterion, especially if that criterion would lead to an inequitable solution, with equity being interpreted here "in the broad sense of a just, fair, reasonable, appropriate means of finding a boundary."[24]

Australia argued that the Timor Sea should be divided according to a simple geological criterion, which meant a separation of the continental shelves by a natural cut-off barrier, the Timor Trough, north of which was the Timorese continental shelf and south of which a much larger Australian continental shelf.

In 1972, Indonesia and Australia agreed on the delimitation of their maritime boundary in the Seabed Boundary Treaty.[25] This Treaty established the maritime border between both countries close to the Timor Trough;[26] however, the Treaty had a gap—the Timor Gap—between points A16 and A17, the area that was presumed to include the continental shelf of Timor-Leste, a Portuguese territory, and Australia.

Portugal rejected Australia's claim that the maritime boundary should follow the Timor Trough, arguing that the maritime boundary should be the median line, which lies much further south than the Timor Trough,[27] a position more consistent with principles already echoing in various forums of international law, especially after the beginning of the Third United Nations Conference on the Law of the Sea in 1973.[28]

B. Timor-Leste's Indonesian Occupation Years (1975–1999)

The Portuguese Carnation Revolution of April 25, 1974, opened the path for independence of its colonies.[29] In Timor-Leste, after months of civil unrest that followed the departure of the Portuguese authorities in August 1975, a Marxist-leaning political party, Fretilin, declared the independence of the territory on November 28, 1975.[30] In response, Indonesia—an ally of the United States—invaded Timor-Leste on

23. Peter-Tobias Stoll, *Continental Shelf*, *in* 2 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 719, 722 para. 13 (Rüdiger Wolfrum ed., 2012).

24. M. D. Blecher, *Equitable Delimitation of Continental Shelf*, 73 AM. J. INT'L. L. 60, 85 (1979) (internal quotation marks omitted).

25. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, Austl.-Indon., May 18, 1971, [1973] A.T.S. 31 (entered into force Nov. 8, 1973) [hereinafter Seabed Boundary Treaty].

26. See blue line on the map in *Timor Gap Map*, *supra* note 12.

27. See purple line on the map in *Timor Gap Map*, *supra* note 12.

28. Madeleine J. Smith, *Australian Claims to the Timor Sea's Petroleum Resources: Clever, Cunning, or Criminal?*, 37 MONASH U. L. REV. 42, 53 (2011).

29. DAVID BIRMINGHAM, A CONCISE HISTORY OF PORTUGAL 186–90 (2nd ed. 2003).

30. *History of East Timor*, E. TIMOR GOV'T, http://www.easttimorgovernment.com/history.htm (last visited Apr. 15, 2015).

December 7, 1975.[31] Notwithstanding several United Nations Security Council and General Assembly resolutions calling for the withdrawal of Indonesian forces,[32] the occupation lasted until 1999. During this period, Australia moved away from its original condemnation of the invasion and decided to accept Timor-Leste as part of Indonesia.[33] After this recognition, Australia and Indonesia began to negotiate the allocation of resources within the Timor Gap.[34]

Meanwhile, in 1982, the UNCLOS was finalized.[35] This Convention discounted the importance of geographical features in determining maritime boundaries. Accordingly, Indonesia refused the logical outcome of a simple prolongation of the boundaries drawn in 1972.[36]

On December 11, 1989, after years of negotiations, Australia and Indonesia finally reached an agreement—the Timor Gap Treaty.[37] This agreement established a Joint Development Zone (JDZ) that allowed both parties to share the potentially valuable hydrocarbon resources of the Timor Sea without establishing a definitive maritime border.[38]

31. *See id.*

32. The most relevant resolutions concerning East-Timor adopted by the United Nations are: G.A. Res. 3485 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10426, at 118 (Dec. 12, 1975) (adopted by 72 votes to 10, with 43 abstentions); S.C. Res. 384, U.N. SCOR, 30th Year, U.N. Doc. S/RES/384 (Dec. 22, 1975) (adopted unanimously); S.C. Res. 389, U.N. SCOR, 31st Year, U.N. Doc. S/RES/389 (Apr. 22, 1976) (adopted by 12 votes to 0, with Japan and the United States abstaining); G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, U.N. Doc. A/31/362, at 125 (Dec. 1, 1976) (adopted by 68 votes to 20, with 49 abstentions); G.A. Res. 32/34, U.N. GAOR, 32nd Sess., Supp. No. 45, U.N. Doc. A/32/361, at 169 (Nov. 28, 1977) (adopted by 67 votes to 26, with 47 abstentions); G.A. Res. 33/39, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/33/455, at 181 (Dec. 13, 1978) (adopted by 59 votes to 31, with 44 abstentions); G.A. Res. 34/40, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/668, at 206 (Nov. 21, 1979) (adopted by 62 votes to 31, with 45 abstentions); G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/598, at 219 (Nov. 11, 1980) (adopted by 58 votes to 35, with 46 abstentions); G.A. Res. 36/50, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/679, at 200 (Nov. 24, 1981) (adopted by 54 votes to 42, with 46 abstentions); G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/623, at 227 (Nov. 23, 1982) (adopted by 50 votes to 46, with 50 abstentions).

33. Australia voted for General Assembly Resolution 3485 of December 12, 1975, which called for the withdrawal of Indonesian forces. G.A. Res. 3485 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10426, at 118 (Dec. 12, 1975). Regarding the recognition of Timor-Leste as a part of Indonesia, see William T. Onorato & Mark J. Valencia, *The New Timor Gap Treaty: Legal and Political Implications*, 15 ICSID REV. 59, 77 (2000) (stating that in 1985 Australia became the "only western country to formally recognize the Indonesian takeover of East Timor").

34. Christine M. Chinkin, *East Timor Moves into the World Court*, 4 EUR. J. INT'L. L. 206, 207 (1993).

35. UNCLOS, *supra* note 11.

36. *See* Seabed Boundary Treaty, *supra* note 25.

37. Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, Austl.-Indon., Dec. 11, 1989, [1991] A.T.S. 9 (entered into force Feb. 9, 1991) [hereinafter Timor Gap Treaty].

38. *See* Ana E. Bastida et al., *Cross-Border Unitization and Joint Development Agreements: An International Law Perspective*, 29 HOUS. J. INT'L L. 355, 389 (2007) ("The need for a JDZ stemmed from the fact that Indonesia relied on the 1982 UNCLOS to claim a median line basis for delimitation based on the 200 nautical mile [exclusive economic zone], whereas Australia

The Timor Gap Treaty established a very peculiar JDZ that included three different areas: A, B, and C.[39] Areas B and C, which are closer to the Australian and Timorese landmasses, were to be exploited by each state individually (Area B by Australia and Area C by Indonesia), with the other state receiving a small revenue share.[40] The area where both parties had overlapping claims, Area A, was to be jointly exploited with a 50/50 sharing of revenues.[41] To manage Area A, the parties established a joint authority as a "repository of the rights of both States Parties"[42] and approved a specific set of legislation.[43]

On February 22, 1991, Portugal filed a claim against Australia in the ICJ.[44] This decision was part of Portugal's strategy to raise the awareness of the international community over the illegal invasion and annexation of Timor-Leste by Indonesia.

Portugal argued that by entering into the Timor Gap Treaty, Australia violated Portugal's sovereignty rights over Timor-Leste.[45] This position, supported by many legal authors,[46] rested upon Portugal's argument that Indonesia's claim for sovereignty was in breach of the principle of customary international law[47]—that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal."[48] Moreover, Portugal argued that Australia violated the right of self-determination of the Timorese people and the inherent right of the Timorese people's access to and sovereignty over the natural resources in the maritime areas adjacent to the coast of Timor-Leste.[49]

maintained delimitation should be based on the principle of natural prolongation of territorial land.").

39. See yellow on the map in *Timor Gap Map*, *supra* note 12.

40. *See* Timor Gap Treaty, *supra* note 37.

41. *Id.*

42. Clive R. Symmons, *Regulatory Mechanisms in Joint Development Zones*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS 141, 146 (Hazel Fox ed., 1990).

43. For a thorough analysis of the Timor Gap Treaty, see William T. Onorato & Mark J. Valencia, *International Cooperation for Petroleum Development: the Timor Gap Treaty*, 5 ICSID REV. 1 (1990).

44. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 1 (June 30).

45. *Id.*

46. Amongst others, Rainer Lagoni considered that the JDZ created by Australia and Indonesia breached international law, as it was obtained through an agreement that not only purported to give effect to Indonesia´s unlawful occupation of Timor-Leste, but also did not take into account the valid claims of a third state, Portugal, which was at the time still recognized by the United Nations as the legitimate administrative power of Timor-Leste. Hazel Fox, *Joint Development and the Institute's Model Agreement: Summary of Conference Discussions and the Research Team's Response*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 25, 30.

47. *East Timor*, 1995 I.C.J. ¶ 10.

48. G.A. Res. 2625 (XXV), U.N. GAOR, 30th Sess., Supp. No. 28, U.N. Doc. A/8082, at 123 (Oct. 24, 1970).

49. *East Timor*, 1995 I.C.J. ¶ 10. *See, e.g.*, International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171 (stating that all peoples "may, for their own ends, freely dispose of their natural wealth and resources" and that "[i]n no case may a people be deprived of its own means of subsistence"); International Covenant on Economic, Social and

The ICJ refused to consider the merits of the claim, as this would require the determination of rights and obligations of a third state—Indonesia—in the absence of the consent of that state to accept the jurisdiction of the tribunal.[50] Nevertheless, the court did not miss the opportunity to declare that self-determination is an *erga omnes* right and an essential principle of contemporary international law.[51] Since the Timorese people's right to self-determination had already been recognized by a vast number of resolutions of the United Nations General Assembly and Security Council,[52] this decision bolstered the independence cause, which became a reality on May 20, 2002, following a referendum held on August 30, 1999, where 78.5% of the Timorese people voted for independence from Indonesia.[53]

C. Timor-Leste Under International Administration (1999–2002)

The referendum on self-determination was followed by a period of great political and civil unrest. After weeks of slaughter and massive destruction of property, the Indonesian government accepted the offer of assistance from the international community.[54] The United Nations Security Council then authorized the multinational force, INTERFET, to reestablish order and appointed Australia to lead INTERFET under a unified command structure.[55]

Meanwhile, Portugal and Indonesia agreed to transfer authority in Timor-Leste to the United Nations.[56] The United Nations Security Council then adopted Resolution 1272, which established the United Nations Transitional Administration in Timor-Leste (UNTAET), a unique peacekeeping operation that assumed a state-building goal of preparing the territory for independence.[57]

During the United Nations administration, the Timor-Leste Transitional Administration and the Australian Government negotiated a template for a future agreement between Australia and Timor-Leste. On

Cultural Rights art. 1, Dec. 19, 1966, 993 U.N.T.S. 3 (stating that all peoples "may, for their own ends, freely dispose of their natural wealth and resources" and that "[i]n no case may a people be deprived of its own means of subsistence"); G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 15 (Dec. 14, 1962) (stating that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned").

50. *East Timor*, 1995 I.C.J. ¶ 26.

51. *Id.* ¶ 29.

52. *See supra* note 32.

53. *United Nations Mission of Support in East Timor*, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/past/unmiset/background.html (last visited Apr. 15, 2015).

54. *Id.*

55. *Id.*

56. *Id.*

57. S.C. Res. 1272, U.N. SCOR, 54th Year, U.N. DOC. S/RES/1272 (Oct. 25, 1999).

July 5, 2001, these parties signed the Memorandum of Understanding of Timor Sea Arrangement.[58]

The memorandum sought to secure the continuation of the development of the offshore petroleum resources during the unstable political climate that preceded Timor-Leste's independence.[59] Although it could not bind Timor-Leste, the memorandum set out the basic terms and conditions that would be included in any future treaty between Australia and the newly independent state.[60]

D. Timor-Leste's Independence Years (2002–2014)

1. Negotiation Strengths and Weaknesses of Australia and Timor-Leste

a. The Law of the Land

At the onset of Timor-Leste independence, Article 76, paragraph 1 of UNCLOS was the applicable international law of the sea regarding the delimitation of continental shelves.[61] Article 76, paragraph 1 provides:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[62]

This definition of continental shelf provides for a 200 nautical mile (nm) continental shelf, as well as the possibility of an extended continental shelf based on geological features, if the outer edge of the continental margin extends beyond 200 nm from the baselines from which the breadth of the territorial sea is measured. Under this approach, even if the outer edge of a state's continental margin is located near the coast, that state is still entitled to a continental shelf of 200 nm. In this circumstance, the geological option does not apply—that is, the continental shelf will be defined exclusively by the legal or 200 nm

58. Memorandum of Understanding of Timor Sea Arrangement, Austl.-Timor-Leste, July 5, 2001, http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html.

59. *Id.*

60. *Id.*

61. *See Ad Hoc Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea*, PERMANENT CT. ARB., http://www.pca-cpa.org/showpage.asp?pag_id=1288 (last visited Apr. 15, 2015) ("The 1982 United Nations Convention on the Law of the Sea (UNCLOS), *which came into force on November 16, 1994*, is an international treaty that provides a regulatory framework for the use of the world's seas and oceans.") (emphasis added).

62. UNCLOS, *supra* note 11, art. 76.

criterion.[63] In other words, the geographical criterion is only applicable outside the limit of the 200 nm—in the so-called external continental shelf that runs to a maximum of 350 nm.[64]

Where, however, the sea lying between two states totals less than 400 nm, then Article 83, paragraph 1 of UNCLOS provides that the states' continental shelf delimitation "shall be effected by agreement on the basis of the international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[65] In the absence of agreement, Article 83, paragraph 2 of UNCLOS foresees that "the States concerned shall resort to the [dispute settlement] procedures provided for in Part XV."[66] Moreover, under Article 83, paragraph 3 of UNCLOS:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[67]

The only requirement foreseen in the Law of the Sea is that the delimitation of continental shelf boundaries between states with opposite or adjacent coasts has to be equitable.[68] But how does one get to equity in a given case?

In the absence of any substantial references, some guidelines on the method to reach equity can be found in decisions of international courts, which are said to form a sort of "common law in the classic sense" regarding the delimitation of maritime borders.[69]

International courts often use a tri-step methodology to reach an equitable solution.[70] First, a provisional delimitation line is drawn based on the equidistance between coastlines, as "no other method of delimitation has the same combination of practical convenience and

63. Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13, ¶ 39 (June 3) [hereinafter *Libya/Malta*].

64. *See* UNCLOS, *supra* note 11, art. 76 (explaining that a state cannot claim the external continental shelf either *ipso facto* or *ipso iure* but has to submit a proposal on the extension to the Commission on the Limits of the Continental Shelf).

65. *Id.* art. 83, ¶ 1.

66. *Id.* art. 83, ¶ 2.

67. *Id.* art. 83, ¶ 3.

68. *See* Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18, ¶ 70 (Feb. 24) [hereinafter *Tunisia/Libya*] ("It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.").

69. Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227, 228 (1994).

70. *See, e.g.*, Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J 61, ¶¶ 115–22 (Feb. 3) [hereinafter *Romania/Ukraine*].

certainty of application."[71] Equidistance is thus a method of finding an equitable solution and not a rule of law or even per se the criterion to base a maritime boundary delimitation as—similar to any other criterion—in some cases, an equidistance/median-line rule can lead to an inequitable solution. The equidistance line will, however, work as the natural starting point in the search for an equitable solution.[72] In other words, the equidistance line will work as a presumption of equity.[73]

Second, courts will take into account all relevant circumstances of the case. The court will consider "whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result,"[74] which may include, among others, access to natural resources (e.g., petroleum), geographical and economic features of the parties, and historical or conventional rights of the parties. If equidistance is perceived as inequitable in light of the particular circumstances of the case, the court will adjust the equidistant line.[75] If not, the equidistance provisional line could still be adjusted, taking into account proportionality, which is a common ground for adjusting the provisional line.[76]

The proportionality test is commonly employed in an *a contrario sensu*: "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor."[77] Usually—but not exclusively—the ratio between the areas of continental shelves to the lengths of the respective coastlines is a common proportionality ground to adjust the equidistance line. Proportionality is thus a way of "remedying the disproportionality and inequitable effects produced by particular graphical configurations or features"[78] conceived as an ex post facto test of a proposed delimitation line.[79]

71. *North Sea*, *supra* note 22, ¶ 23. Equidistance is used more often than other methods of maritime boundary delimitation. Charney, *supra* note 69, at 245. *See also* Leonard Legault and Blair Hankey, *Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation*, *in* 1 INTERNATIONAL MARITIME BOUNDARIES 203, 215 (Jonathan I. Charney & Lewis M. Alexander eds., 1993) (finding that after examining sixty-two boundaries that involve delimitations between opposite coasts, fifty-five boundaries (89%) are based on the equidistance method).

72. *See* NUNO MARQUES ANTUNES, TOWARDS THE CONCEPTUALISATION OF MARITIME DELIMITATION: LEGAL AND TECHNICAL ASPECTS OF A POLITICAL PROCESS 245 (2003) [hereinafter ANTUNES, MARITIME DELIMITATION] (arguing that equidistance is a mandatory starting point in a maritime boundary delimitation).

73. Blecher, *supra* note 24, at 71.

74. *Romania/Ukraine*, *supra* note 70, ¶ 120.

75. *Id.*

76. *Id.* ¶ 122; ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 131 (3d ed. 2010).

77. Delimitation of Continental Shelf (U.K. v. Fr.), 18 R.I.A.A. 3, 58, ¶ 101 (Perm. Ct. Arb. 1977).

78. *Id.*

79. *See* Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), Verbatim Record, 24 (Jan. 25, 1993), http://www.icj-cij.org/docket/files/78/5803.pdf ("The

It is beyond the scope of this Article to elaborate on a putative maritime boundary delimitation between Timor-Leste and Australia. Each state will invoke plausible arguments to claim deviations to the equidistance line. Moreover, Indonesia's legal situation would also have to be taken into account. Thus, the ultimate outcome of this dispute is unpredictable.[80]

Several authors have opined on the possible outcome, and most have advocated that the establishment of a frontal boundary along the median line would probably be the case,[81] but this opinion is not unanimous.[82] Nevertheless, it is difficult not to agree that, regarding the frontal boundary, a simple median line would most likely be an equitable solution,[83] notwithstanding possible arguments to minor adjustments that could be made by both parties: by Australia on the grounds of proportionality;[84] by Timor-Leste on the grounds of the existence of

conclusion to be drawn from case-law is, we submit, that the *factor of proportionality* as an aspect of equity operates . . . as a subsequent *ex post facto* proportionality test aimed at checking the equity of the delimitation arrived at.").

80. *See* Gillian Triggs & Dean Bialek, *The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap*, 3 MELB. J. INT'L L. 322, 355 (2002) (discussing the unpredictability of independent arbitration relating to the Timor Sea dispute). *See also* ANTUNES, MARITIME DELIMITATION, *supra* note 72, at 351–402 (analyzing Australia/Timor-Leste as a test-case on the conceptualization of maritime boundary delimitation).

81. ANTUNES, MARITIME DELIMITATION, *supra* note 72, at 389–402 (explaining that the weighing-up process "would not lead to adjustments of the 'frontal-equidistance'"); Onorato & Valencia, *supra* note 33, at 80 ("Indeed, if the boundary were to be renegotiated today, equidistance would probably prevail.").

82. *See e.g.*, R. D. Lumb, *The Delimitation of Maritime Boundaries in the Timor Sea*, 7 AUSTL. Y.B. INT'L. L. 72, 72–86 (1976) (arguing in the seventies for a delimitation based on geomorphologic arguments by which Australia would be given all of the area south of the Timor Trough); David M. Ong, *The New Timor Sea Arrangement 2001: Is Joint Development of Common Offshore Oil and Gas Deposits Mandated Under International Law?*, 17 INT'L J. MARINE & COASTAL L. 79, 85–90 (2002) (stating more recently that a "putative median line boundary between a new East Timor state and Australia would thereby also be moved northwards, as in the *Libya/Malta* case, to compensate for the disparity between the opposing coastal lengths of East Timor and Australia," which in practice could result in the maintenance of a current 90/10 resource split between Timor-Leste and Australia "achieved by the usual method of negotiating a single continental shelf boundary").

83. *See* ANTUNES, MARITIME DELIMITATION, *supra* note 72, at 396 ("Whilst it is assumed as purpose of this chapter to analyse the delimitation between Australia and East Timor, it must be emphasized that one should not expect an answer that refers to *the* boundary-line, but to *a* boundary-line. This is an inescapable corollary of the existence of a sphere of discretion. What one seeks to 'discover' is one solution amongst several possible solutions.").

84. *See e.g.*, *Libya/Malta*, *supra* note 63, at 56–57, ¶ 79; Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 65–70, ¶¶ 61–71 [hereinafter *Jan Mayen*] (explaining the ICJ's adjustments on the provisional line based on the disparity in the lengths of the relevant coasts of the parties and the distance between them). However, in *Jan Mayen*, the court, while making use of the two most extreme base points that contributed to the computation of the equidistance line, declared that "the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front." *Id.* at 69, ¶ 69. Regarding the Australia/Timor-Leste case, see Nuno Marques Antunes, *Spatial Allocation of Continental Shelf Rights in the Timor Sea: Reflections on Maritime Delimitation and Joint Development*, *in* NUNO MARQUES ANTUNES, ESTUDOS EM DIREITO INTERNACIONAL PÚBLICO 298 (2004) [hereinafter Antunes, *Spatial Allocation*] ("Should a

"special circumstances," such as access to natural resources (petroleum)[85] or a marked economic[86] or geographical[87] disadvantage.

At least one thing seems almost certain: the Australian "natural prolongation" claim would not stand if presented to the ICJ. Similar to the Timor Trough, between Libya and Malta, we can find the Malta Trough,[88] the Pantelleria Trough,[89] and the Linosa Trough.[90] In a border delimitation case between Libya and Malta, The Hague court gave no role to geomorphological factors:

> (1) the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result;
>
> (2) the area of continental shelf to be found to appertain to either Party not extending more than 200 miles from the coast of the Party concerned, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense.[91]

similar approach be followed in a delimitation between Australia and East Timor, the disparity of coastal length between these two states would be roughly 2.2:1 (Australia:East Timor). As the adjustments of the provisional equidistance line in the *Libya/Malta* and *Jan Mayen* cases were founded upon much larger disparities—i.e. 8:1 (Libya:Malta) and 9:1 (Greenland:Jan Mayen), it is (to say the very least) far from certain that a similar adjustment would be required in a delimitation between Australia and East Timor.").

85. *See, e.g.*, *Tunisia/Libya*, *supra* note 68, at 77–78, ¶ 107 (declaring that the presence of oil wells in an area to be determined "may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result"); *Libya/Malta*, *supra* note 63, at 41, ¶ 50 (instituting similar reasoning when holding that "[t]he natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation"). *But see* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, 447–448, ¶ 304 (using different reasoning and stating that "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account").

86. *But see Libya/Malta*, *supra* note 63, at 41, ¶ 50 (declaring—in what can be observed as an almost indisputable principle—that the relative economic position of the states is irrelevant when it is claimed "in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law").

87. *See, e.g.*, Antunes, *Spatial Allocation*, *supra* note 84 ("[U]nlike Australia and Indonesia, East-Timor's jurisdiction can never reach 200 [miles] from the coast. Its geographical location is such that its potential entitlement will have to be 'amputated' from all directions—a predicament that does not occur with either Australia or Indonesia. Most importantly, the maritime zones to be attributed to East Timor off its northern coast are primarily territorial sea areas. Only partially, and even then only marginally, will East Timor be attributed areas beyond 12 [miles]. Such a marked macrogeographical difference must be weighed-up in the overall balancing-up of equities. In the absence of objective reasons to the contrary, one would suggest, the continental shelf delimitation off its southern coast should—within the limits imposed by delimitation law—maximize the areas attributed to East Timor.").

88. *Libya/Malta*, *supra* note 63, at 34, ¶ 37.

89. *Id.*

90. *Id.*

91. *Id.* at 57, ¶ 79 (A).

A simple equidistant frontal line would have a substantial resource allocation impact, as Timor-Leste would have exclusive jurisdiction over all the known oil and gas fields found within the JPDA. The current distribution of resources would shift even more dramatically in favor of Timor-Leste if equitable adjustments were made to the JPDA lateral boundaries.[92] These lateral boundaries are currently defined by simplified equidistant lateral lines that cut the Greater Sunrise field in the east and run just three miles short of the Laminaria and Corallina fields in the west, which are both currently unilaterally exploited by Australia.[93]

Given the likely outcome of a maritime boundary delimitation legal dispute and the states *ipso facto* and *ipso jure* sovereign rights for exploitation of the continental shelf, pooling those rights and accepting joint jurisdiction is an undesirable bargain for Timor-Leste. The reasons the current JPDA came to be can only be fully comprehended if we take a deeper look into the initial negotiation positions of both states.

b. Political and Economical Constraints of Parties

Australia's position is politically hampered by the delimitation of its maritime borders that were previously established with Indonesia: how could it justify a delimitation of borders with Timor-Leste based on the median line and simultaneously keep a maritime border with Indonesia based on geographical factors?

Australia had no wish to "unscramble the omelette."[94] However, negotiations of maritime boundaries are strongly influenced by the Law of the Sea, as states can predict the possible outcome of any third-party adjudication process by applying the basic UNCLOS principles.[95] Australia is well aware of the weakness of its legal position. On March 25, 2002, roughly two months before the scheduled independence of Timor-Leste, Australia excluded the jurisdiction of international courts in pleadings that might arise from Australian disputes concerning the delimitations of sea boundaries.[96] The purpose of this move was clear: to

92. Any adjustment of the JPDA lateral boundaries would also have to take into account legal claims of Indonesia.

93. In the legal doctrine we find distinct views on the delimitation of the lateral boundaries in the Timor Sea. Arguing for a possible adjustment of the equidistance line more favorable to Timor-Leste, see, e.g., Antunes, *Spatial Allocation*, *supra* note 84; ANTUNES, MARITIME DELIMITATION, *supra* note 72, at 366–402. With a different position, see Victor Prescott, *The Question of East Timor's Maritime Boundaries*, 7 IBRU BOUNDARY & SECURITY BULL. 72, 75–76 (2000) ("It is hard to see what arguments might be used to justify a divergence from the line of equidistance.").

94. Clive Schofield, *Minding the Gap: The Australia-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)*, 22 INT'L J. MARINE & COASTAL L. 189, 201 (2007) (quoting these illustrative words of Australia's Foreign Minister Alexander Downer).

95. Charney, *supra* note 69, at 228.

96. *See Declarations Recognizing the Jurisdictions of the Court as Compulsory: Australia*, INT'L CT. JUST. (Mar. 21, 2002), www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&

preserve the status quo of its maritime boundaries, namely the one with Timor-Leste, in order to force a political compromise.[97]

Australia had much to lose economically by establishing a permanent maritime border with Timor-Leste. Such delimitation could trigger compensation on resources unilaterally extracted in areas granted to Timor-Leste, both to the Timor-Leste state itself[98] as well as to the licensees,[99] as much of the oil that has been extracted in the Timor Sea over the last several decades came from oil fields given to Australia by a treaty that cannot be enforced against Timor-Leste, the Seabed Boundary Treaty,[100] or from a JDZ created by a treaty null and void

code=AU (explaining that on March 13, 1975, Australia made a declaration accepting the jurisdiction of the ICJ in relation to any states accepting the same obligations, in conformity with Article 36, paragraph 2 of the Statute of the ICJ); U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA, DECLARATIONS AND STATEMENTS: AUSTRALIA (Mar. 22, 2002), *available at* http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Australia%20after%20ratification (explaining that Australia chose to allow settlement of disputes to be handled by the ICJ, in conformity with Article 298, paragraph 1(a) of UNCLOS).

97. Schofield, *supra* note 94, at 201–02 ("This move, whilst wholly within Australia's legitimate rights, appears to have been designed specifically to frustrate any attempt by the government of East Timor to drag Australia before the ICJ in The Hague for a final and binding independent decision on the Timor Sea dispute."). The Australian government denied that the declaration on the exclusion of jurisdiction of international courts was linked exclusively to the Timor Sea and contended that it had been considering this course of action "for quite some time." Hamish McDonald, *Timor Gas Billions All at Sea*, SYDNEY MORNING HERALD (Mar. 27, 2002), http://www.smh.com.au/articles/2002/03/26/1017089535182.html. *See also* Gillian Triggs & Dean Bialek, *The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap*, 3 MELB. J. INT'L L. 322, 359 (2002) (arguing that had that not been the case, Timor-Leste could challenge the validity of Australia's declaration on the grounds that its access to the ICJ was denied in a way that amounts to a lack of good faith and an abuse of rights).

98. If delimitation occurred according to the UNCLOS—even when all the deposits have been exploited—should Australia have to compensate Timor-Leste for the resources unilaterally extracted (e.g. Buffalo and Laminaria fields) which may in the future be considered as being located in Timor-Leste's territory? This is a question of material damages and state responsibility. According to Rainer Lagoni, *Oil and Gas Deposits Across National Frontiers*, 73 AM. J. INT'L L. 215, 217 & n.7 (1979),

> [t]he rule that material damage to another state's territory gives rise to state responsibility has been developed mainly with regard to extraterritorial environmental effects, especially air and water pollution, but it appears to be equally applicable to the extraterritorial effects of mining operations. . . .
>
> There is no reason to distinguish between material damage caused by the on-surface operations of a mining corporation and material damage caused by its operations in the subsoil. Equally, one could not reasonably distinguish between material damage caused to the surface of a territory and damage caused in the subsoil. Hence, absent any state practice to the contrary, one has to apply this rule at least by analogy.

99. Here we are referring to the possible costs of the nullification of the oil operating permits in the Timor Sea due in the form of compensations to the licensees. On this topic, see 1 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS 214–18 (Hazel Fox ed., 1989).

100. Timor-Leste was not a party to the Treaty and cannot be considered a successor state because its integration in Indonesia in 1975 was in breach of "international law and, in particular, the principles of international law embodied in the Charter of the United Nations," namely the prohibition in art. 2, para. 4 of annexation by use of force. Vienna Convention on Succession of States in Respect of Treaties art. 6, Aug. 23, 1978, 1946 U.N.T.S. 3. *See also* U.N. Charter art. 2, para. 4.

under international law, the Timor Gap Treaty.[101] Any licenses granted under these treaties would also be void.[102]

Australian plans in the Timor Sea were based on a clever economic arrangement: to profit from most of the economic linkages of the oil activity, for instance, the benefits of the midstream and downstream industry arising from the construction of pipelines and gas processing plants in its Northern Territory province.[103] Australia expected that these revenues could be much higher compared to those based only on the upstream exploitation of oil.[104] Therefore, it wanted to reach a "reasonable" agreement concerning the upstream industry and, simultaneously, pave the way to a better deal regarding the midstream and downstream industries.

Australia was also not motivated by an existential need to explore the resources of the Timor Sea seabed. As the Australian Foreign Minister, Alexander Downer, told the Timorese Prime Minister at a meeting in November 2002 when the share allocation of the Greater Sunrise was being discussed: "We don't have to exploit the resources. They can stay there for 20, 40, 50 years. We don't like brinkmanship. We are very tough. We will not care if you give information to the media. Let me give you a tutorial in politics—not a chance."[105]

In this multidimensional scenario, the bargaining powers were extremely uneven in favor of Australia. Canberra did not want to discuss a maritime delimitation but was interested in getting a solution that would maximize its revenues. Through an intrinsically non-ethical *realpolitik* foreign policy, Canberra was thus interested "to offer" something more to Timor-Leste than the equal distribution of income agreed to with Indonesia in the Timor Gap Treaty.

In the negotiations with Australia, Timor-Leste was constrained by severe political and economic factors:

> East-Timor was in no position to either jeopardi[z]e its status as a credible partner for future investments (by refusing to agree on a solution that would deal with the problem of the existing investments), or to forsake (in the immediate future) the revenues

101. Timor Gap Treaty, *supra* note 37.

102. Ian Townsend-Gault, *The Impact of a Joint Development Zone on Previously Granted Interests*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 171, 181–82.

103. *See* Mari Alkatiri, *All East Timor seeks is a fair go*, THE AGE (Nov. 3, 2004), http://www.theage.com.au/articles/2004/11/02/1099362140225.html?from=storylhs (stating that Timor-Leste is receiving "nothing from the onshore processing" of the JPDA resources).

104. Antunes, *Spatial Allocation*, *supra* note 84.

105. Paul Cleary, *The 40-year Battle Over Timor's Oil*, THE AUSTRALIAN (Dec. 5, 2013), http://www.theaustralian.com.au/news/features/the-40-year-battle-over-timors-oil/story-e6frg6z6-1226775440722# (quoting Australian Foreign Minister Alexander Downer's statements from 2002).

> from ongoing and future exploitation of natural resources in the 'Timor Gap.'[106]

Even if the costs of the nullification of the oil operating permits in the Timor Sea would be incurred by Australia alone, industry confidence was also a factor. For Timor-Leste, the efforts to appear as a reliable host country were of the utmost importance, and thus accepting the existing investments seemed a logical solution.[107]

Timor-Leste also had some undeniable advantages in having Australia as an upstream partner, at least following independence. The relation with Australia would grant future investors a solid base of trust and give Timor-Leste access to know-how and upstream industry best practices.

Moreover, by excluding the jurisdiction of the ICJ and the International Tribunal for the Law of the Sea (ITLS) in pleadings that might arise from disputes concerning sea boundaries delimitations, Australia left a painful political compromise as the only possible solution for Timor-Leste. The postponement of such a compromise until a proposal consistent with international law was on the negotiating table could have had devastating social and economic consequences, as it would cut the only sources of income that the Timorese state could realistically count on.

(1) The Timor Sea Treaty

On May 20, 2002, Australia and Timor-Leste adopted the Timor Sea Treaty between the Government of East-Timor and the Government of Australia (Timor Sea Treaty).[108] The treaty perpetuated Area A of the Timor Gap Treaty, now renamed the Joint Petroleum Development Area (JPDA).[109] A Joint Commission and a Designated Authority were established as a repository of the pooled rights of both states, with a large spectrum of rights, including the granting of licenses and contracts.[110] However, some changes in the distribution of revenues from the former Area A of the Timor Gap Treaty were agreed upon: the revenue was given 90% to Timor-Leste and 10% to Australia.[111] This split was a much more generous revenue split than the 50/50 split in force during the

106. Antunes, *Spatial Allocation*, *supra* note 84, at 296. *See also* PARLIAMENT OF AUSTL., STEPHEN SHERLOCK, THE TIMOR SEA TREATY: ARE THE ISSUES RESOLVED?, RESEARCH NOTE NO. 45 (June 18, 2002).

107. On this topic, see Ian Townsend-Gault, *The Impact of a Joint Development Zone on Previously Granted Interests*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 184.

108. Timor Sea Treaty, *supra* note 14.

109. *Id.* art. 3.

110. *Id.* art. 6.

111. *Id.* art. 4.

Indonesian occupation. Timor-Leste was also given prevalence in the administration and management of the JPDA.[112]

Regarding the choice of the petroleum development framework,[113] the production sharing contract regime was kept from the Timor Gap Treaty, and thus a new model contract was approved to be applied on the JPDA.[114] Within this framework, the production of petroleum in the JPDA is to be "carried out pursuant to a contract between the Designated Authority and a limited liability corporation or entity with limited liability specifically established for the sole purpose of the contract,"[115] "under which production from a specified area of the JPDA is shared between the parties to the contract."[116]

Regarding delimitation of maritime borders, the treaty included the so-called "without prejudice clause": "Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on, or rights relating to, a seabed delimitation or their respective seabed entitlements."[117]

The Timor Sea Treaty also foresaw the unitization of any other new cross-border petroleum reservoirs.[118] Unitization "is the cooperative exploitation of a reservoir by all interest owners so that the reservoir is developed as if it were owned and controlled by a single entity."[119] When unitization involves two states, instead of a unitization agreement between the licensees and contractors, it requires a treaty between the states that share the common deposit in order to put in place the single unit treatment of the identified trans-boundary deposit.[120]

(2) The Unitization Agreement

Because the JPDA included parts of two important oil deposits typically known as the Greater Sunrise, on March 6, 2003, Australia and Timor-Leste signed the Agreement relating to the Unitization of the Sunrise and Troubadour Fields (Unitization Agreement).[121]

112. *Id.* art. 6.

113. On the topic, see Kamal Hossain, *Choice of Petroleum Development Regime*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 72, 72–76.

114. LA'O HAMUTUK, PRODUCTION SHARING CONTRACT FOR THE JOINT PETROLEUM DEVELOPMENT AREA (last visited May 1, 2015), *available at* www.laohamutuk.org/Oil/PetRegime/ JPDA%20PSC%208-05.pdf.

115. Timor Sea Treaty, *supra* note 14, art. 3, ¶ c.

116. *Id.* art. 1, ¶ o.

117. *Id.* art. 2, ¶ b.

118. *Id.* art. 9 & Annex E.

119. SMITH, *supra* note 76, at 167.

120. *Id.*

121. Agreement relating to the Unitization of the Sunrise and Troubadour Fields, Austl.-Timor-Leste, Mar. 6, 2003, 2483 U.N.T.S. 317 (entered into force Feb. 23, 2007) [hereinafter Unitization Agreement].

Since the start of the negotiations, Australia conditioned any global agreement over the Timor Sea to a previous agreement over the unitization of the Greater Sunrise. That also meant an agreement to a production share coefficient between the two states. For that reason, prior to the entry into force of the Timor Sea Treaty, the parties adopted two transitional agreements: the Exchange of Notes Constituting an Agreement concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between East-Timor and Australia[122] and the Memorandum of Understanding Concerning an International Unitization Agreement for the Greater Sunrise Field.[123]

The Unitization Agreement established a division of revenues of 20.1% to the JPDA and 79.9% to Australia.[124] This division of resources could be open to future revision.[125]

Another relevant element of the agreement was the clause that safeguarded future claims on the delimitation of maritime borders.[126] Both the Unitization Agreement and the Timor Sea Treaty state that the share of resources established between the parties could not be interpreted as a border delimitation.[127] They were instruments of "practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law."[128]

(3) The Treaty on Certain Maritime Arrangements in the Timor Sea

In order to ward off the shadow of a fair and definitive maritime boundary settlement, Australia proposed the revision of the share of production coefficient of the Greater Sunrise with the condition of acceptance by Timor-Leste of a moratorium regarding claims to maritime boundaries. That led to the adoption of the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS), signed on January 12, 2006.[129]

Although the CMATS reorganized the regulatory architecture of the Timor Sea, it also established an equal sharing of revenues derived

122. Exchange of Notes Constituting an Agreement Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea Between Australia and East Timor, Austl.-Timor-Leste, May 20, 2002, [2002] A.T.S. 11.

123. Memorandum of Understanding concerning an International Unitization Agreement for the Greater Sunrise Field, Austl.-Timor-Leste, May 20, 2002, http://www.austlii.edu.au/au/other/dfat/ special/etimor/MOU-EastTimor_17_May_02.html.

124. Unitization Agreement, *supra* note 121, art. 7.

125. Unitization Agreement, *supra* note 121, art. 8; Timor Sea Treaty, *supra* note 14, Annex E, ¶ b.

126. Unitization Agreement, *supra* note 121, art. 2; Timor Sea Treaty, *supra* note 14, arts. 2, 22 & Annex E, ¶ c.

127. Unitization Agreement, *supra* note 121, art. 2; Timor Sea Treaty, *supra* note 14, art. 2.

128. Timor Sea Treaty, *supra* note 14, art. 2, ¶ a.

129. Treaty on Certain Maritime Arrangements in the Timor Sea, Austl.-Timor-Leste, Jan. 12, 2006, [2007] A.T.S. 12 (entered into force Feb. 23, 2007) [hereinafter CMATS Treaty].

directly from the production of petroleum lying within the Unitization Area, insofar as the revenue relates to the exploitation of that petroleum.[130] Previously, Timor-Leste was only entitled to 90% of 20.1% of the Greater Sunrise production.[131]

The CMATS also expressly revokes Article 22 of the Timor Sea Treaty and sets the duration of the two unitarily.[132] That is, both treaties shall remain in force for fifty years or until five years after the exploitation of the Unitization Area ceases, whichever occurs earlier. This period may be extended by agreement.[133]

The CMATS is also the first treaty to establish jurisdiction over the water column by applying the south border of the JPDA as the dividing line[134]—an obvious application of the median-line criterion for the delimitation of maritime zones.[135] Moreover, the parties can no longer use the possibility, given by Article 8 of the Unitization Agreement, of reapportionment (technical or by agreement) of the production ratio of the Greater Sunrise.[136] In other words, the CMATS Treaty crystallizes a 50/50 split.

Finally, the parties cannot claim a permanent maritime boundary while the Treaty is in force—fifty years, or until five years after the exploitation of the Unitization Area ceases.[137] This provision, which survives even the termination of the Treaty,[138] postponed the boundary delimitation issue until the expiration of the Treaty.[139] This meant that Timor-Leste gave

130. CMATS Treaty, *supra* note 129, art. 5, ¶ 1. However, it is not clear what ratio or share principle, if any, will be applied in the CMATS to the revenues coming from the mid to downstream activities. It seems that the outcome will be drastically influenced by a commercial decision of the consortium led by Woodside Energy Ltd. *See* Schofield, *supra* note 94, at 212. Recent positions are exposed in *Information about the Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS)*, LA'O HAMUTUK, www.laohamutuk.org/Oil/Boundary/CMATSindex.htm (last updated Apr. 17, 2015).

131. Timor Sea Treaty, *supra* note 14, art. 4 & Annex E, ¶ a.

132. CMATS Treaty, *supra* note 129, art. 12, ¶ 1.

133. *Id.* art. 12, ¶ 5.

134. *Id.* art. 8 & Annex II.

135. Australia has been adopting the median-line principle to settle some of its maritime boundaries. *See, e.g.*, Treaty Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, Austl.-Indon., Mar. 14, 1997, [1997] A.T.N.I.F. 4 (signed but not yet into force).

136. CMATS Treaty, *supra* note 129, art. 10.

137. *Id.* art. 4, ¶ 1 ("Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty."). *See also id.* art. 4, ¶¶ 4–7; 6 INTERNATIONAL MARITIME BOUNDARIES 4369 (David A. Colson & Robert W. Smith eds., 2011) (mentioning that the CMATS will also permit "Australia to unilaterally exploit continental shelf resources south of the line established in its continental shelf boundary with Indonesia and outside the JPDA and the Greater Sunrise").

138. CMATS Treaty, *supra* note 129, art. 12, ¶ 4(b).

139. A similar clause is foreseen in the Model Agreement of the British Institute of International & Comparative Law. *See* 1 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 91, at 380.

up any claim to a permanent maritime delimitation until probably all hydrocarbon reserves in the Timor Sea subsoil are exhausted.

III. OFF TO COURT: TIMOR-LESTE'S RESPONSE TO AUSTRALIA'S MISBEHAVIOR

A. The Application of the Treaty on Certain Maritime Arrangements in the Timor Sea

The CMATS Treaty entered into force on February 23, 2007.[140] This treaty gives Timor-Leste a better deal on the "big prize" of the Timor Sea: the Greater Sunrise. In order to secure effective revenues, the Treaty states that any plan for the Greater Sunrise had to be approved within six years.[141] If not, either party has the right to terminate the treaty.[142] The same applies if the production of petroleum in the Greater Sunrise does not start within ten years.[143] The six-year mark passed on February 23, 2013, without even a hint of a development plan being approved.

Timor-Leste chose not to terminate the treaty. Two different sets of reasons may have justified this option. First, if termination was asked based on the absence of a development plan to the Greater Sunrise, but subsequently oil production started in this oil field, the Treaty would automatically come back into force.[144] Secondly, even if the CMATS Treaty was terminated, some provisions would still survive, namely the last sentence of Article 4, paragraph 5 that establishes that any comments or findings of courts, tribunals, or dispute-settlement bodies regarding the maritime boundary or delimitation of the Timor Sea shall be of no effect.[145] Thus, the exercise of the right of termination would be of little value to Timor-Leste, because it would not allow any changes to the status quo through a judicial resolution on the definition of the maritime borders with Australia.

In order to force an agreement on the definition of the maritime boundaries, a right that is conferred by UNCLOS Article 83, Timor-Leste decided to initiate arbitral proceedings to invalidate the CMATS Treaty. It is not a usual move, since "state against state arbitration usually carries too much of an antagonizing momentum than most states are ready to

140. CMATS Treaty, *supra* note 129.
141. *Id.* art. 12, ¶ 2(a).
142. *Id.* art. 12, ¶ 2.
143. *Id.* art. 12, ¶ 2(b).
144. *Id.* art. 12, ¶ 3.
145. *Id.* art. 12, ¶ 4(b).

accept."[146] But if successful—that is, if the Treaty is found to be invalid—all of its provisions will have no effect, including the moratorium on the determination of the maritime boundary. That would also mean forfeiting—for a while—the improved allocation of revenues in the Greater Sunrise given to Timor-Leste in the CMATS Treaty, but this is a risk that the country is now more prepared to endure given the fact that since 2002 it has been able to accumulate an oil fund valued at $16.6 billion, as of June 30, 2014.[147]

B. The Case Before the Permanent Court of Arbitration

1. Jurisdiction

On April 23, 2013, Timor-Leste instituted arbitral proceedings against Australia at the Permanent Court of Arbitration.[148] The details of the arbitration are not known, but according to the Australian Minister for Foreign Affairs, Bob Carr, Timor-Leste is seeking the invalidation of the CMATS Treaty on the ground that Australia did not conduct treaty negotiations "in good faith by engaging in espionage."[149]

The arbitration path was chosen because Timor-Leste did not have the option to present its case before any international court. The CMATS treaty relates to a dispute on sea boundaries, and Australia excluded any jurisdiction of international courts in these matters.

Arbitration under the CMATS Treaty could also prove contentious since dispute settlement under this treaty is limited to consultation or negotiation.[150] However, Timor-Leste is invoking only invalidity and not submitting a dispute concerning the Treaty. Moreover, the claim refers to a dispute that arises from the application of the Timor Sea Treaty. In fact, Article 9, paragraph (b) of the Timor Sea Treaty mentions that parties must seek an agreement on the equitable sharing of resources coming from reservoirs of petroleum that extend across the boundary of

146. Thomas H. Wälde, *Financial and Contractual Perspectives in Negotiating Joint Petroleum Development Agreements*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 156, 166.

147. Press Release, Banco Central de Timor-Leste, Petroleum Fund Quarterly Report (June 30, 2014), http://www.bancocentral.tl/Download/Publications/Press-Release36_ en.pdf.

148. *See* Arbitration under the Timor Sea Treaty (Timor-Leste v. Austl.), (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1403. The Permanent Court of Arbitration was established by the 1899 Convention for the Pacific Settlement of International Disputes, concluded at The Hague during the first Hague Peace Conference. It is not a court but an administrative organization located in The Hague's peace palace that has the scope of facilitating arbitration and other forms of dispute resolution between states. Thus, it will work as registry of the arbitration.

149. Press Release, Bob Carr, Austl. Minister for Foreign Affairs, Arbitration Under the Timor Sea Treaty (May 3, 2013), http://foreignminister.gov.au/releases/2013/bc_mr_130503.html.

150. CMATS Treaty, *supra* note 129, art. 11.

the JPDA.[151] Section (b) of Annex E of the Timor Sea Treaty establishes a production-sharing formula, but at the same time allows the parties to request a review of that formula through a new agreement.[152] The CMATS and the Unitization Agreements are, therefore, "spin offs" of the Timor Sea Treaty. Thus, arbitration on disputes concerning their validity is always an option according to Article 23, paragraph (b) of the Timor Sea Treaty.[153]

2. Claim

Timor-Leste bases its claim for invalidity of the CMATS Treaty on the fact that "Australia did not conduct negotiations in 2004 . . . in good faith by engaging in espionage."[154] According to one of its lawyers, Bernard Collaery, the Timorese were wiretapped during negotiations after Australian intelligence services installed listening devices into the wall of the negotiation room under the guise of an Australian aid program concerning renovation and construction of cabinet offices.[155]

The validity of a treaty or of the consent of a state to be bound by a treaty may only be impeached based on the Vienna Convention on the Law of Treaties.[156] Failing to negotiate in good faith is not one of the grounds mentioned in Part V of the VCLT,[157] but Timor-Leste could argue this is tantamount to acting fraudulently. Article 49 of the VCLT foresees that an injured party can invoke fraud as a motive to invalidate its consent: "[i]f 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."[158]

According to the International Law Commission, "fraudulent conduct" includes "any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given."[159]

151. Timor Sea Treaty, *supra* note 14, art. 9, ¶ b.
152. *Id.* Annex E, ¶ b.
153. *Id.* art. 23, ¶ b.
154. *See* Press Release, Bob Carr, *supra* note 149.
155. Paul Cleary, *The 40-year battle over Timor's oil*, THE AUSTRALIAN (Dec. 5, 2013), http://www.theaustralian.com.au/news/features/the-40-year-battle-over-timors-oil/story-e6frg6z6-1226775440722# (quoting Bernard Collaery's description of the issue: "So it was a Watergate situation. They broke in and they bugged, in a total breach of sovereignty, the cabinet room, the ministerial offices of then prime minister (Mari) Alkatiri and his government. They placed clandestine listening devices in the ministerial conference room, we call it a cabinet room").
156. Vienna Convention on the Law of Treaties art. 42, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
157. *Id.* Part V.
158. *Id.* art. 49.
159. *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, at 1, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 245, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

Does surveillance in the negotiation room of one party amount to a "deceitful action"? A Timor-Leste high official used the analogy of insider trading,[160] an unfair behavior that is unlawful in most national legal systems.[161] However, although information gathered through espionage certainly gave Australia an unfair advantage, Timor-Leste has to demonstrate that good-faith obligations are applicable during treaty negotiations.

Good faith is a principle difficult to define in the abstract because it "combines moral standards such as trust, honesty, conscientiousness, and loyalty with strict or at least more precise legal contents."[162] Good faith is perhaps the most important of the general principles of international law, as it underpins other international rules and principles.[163]

Regarding the law of the treaties, good faith is the very foundation of the *pacta sunt servanda* principle.[164] Parties to a treaty are expected to deal honestly and fairly. Otherwise, the effects of their consent would not be effectively accomplished. Thus, references to good faith are a common thread in the VCLT: an obligation not to defeat the object and purpose of a treaty prior to its entry into force and to interpret and perform a treaty in good faith.[165]

The question remains, however, whether good-faith obligations exist during the negotiation of a treaty. In other words, is good faith a prerequisite or only a consequence of *pacta sunt servanda?* The latter answer was given by a national court in a contract law case: the "duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations"; each

160. Peter Lloyd et al., *East Timor accuses Australia of spying for commercial gain during Timor sea negotiations*, ABC NEWS (Dec. 3, 2013), http://www.abc.net.au/news/2013-11-27/east-timor-says-australia-spied-for-commercial-gain/5120738. Agio Pereira, the Minister of Presidency of the Council of Ministers of Timor-Leste, made the following comment to the Australian press: "Insider trading in Australia is a crime. And when you bug the negotiating team's evaluation of the impact of their negotiations, you do have an advantage . . . . It's more than unfair, it actually creates [an] incredible disadvantage to the other side and according to international law, the Vienna Convention and the law of treaties, you're supposed to negotiate in good faith." *Id.*

161. See, e.g., in the United States of America, 17 C.F.R. § 240.10b-5 (2014), which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

162. Markus Kotzur, *Good Faith (Bona fide)*, *in* 4 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 508, 514, ¶ 22 (Rüdiger Wolfrum ed., 2012).

163. MALCOLM M. SHAW, INTERNATIONAL LAW 73 (7th ed. 2014).

164. Walford v. Miles, [1992] 2 A.C. 128 (appeal taken from Eng.); Michel Virally, *Review Essay: Good Faith in Public International Law*, 77 AM. J. INT'L L. 130, 132 (1983).

165. *See* VCLT, *supra* note 156, arts. 18, 26, 31.

party "is entitled to pursue his (or her) own interests, so long as he avoids making misrepresentations."[166] However, international agreements[167] and even the ICJ seem to have chosen another position. In the *Nuclear Tests* case the ICJ declared that good faith is "[o]ne of the basic principles governing the *creation* and performance of legal obligations."[168]

In delimitating the continental shelves in the Timor Sea, both Timor-Leste and Australia were under an obligation to negotiate[169] and had the duty "to do so in good faith, with the intention to achieve a positive result."[170] As Hugh Thirlway stated in his seminal study, "to negotiate otherwise than in good faith is surely not to negotiate at all."[171]

If Timor-Leste's allegations are proven true, by engaging in espionage of the Timorese negotiation room, Australia breached one of the substantive and objective dimensions of the good-faith principle, which states that no one can derive an advantage from his own wrong (*nemo ex propriam turpitudinem commodum capere potest*).[172] Acts of espionage are a criminal offense according to Article 200 of the Timorese criminal code.[173] Since this case concerns acts allegedly committed by Australian agents occurring in Dili, the capital of Timor-Leste, these acts constitute a violation of the fundamental principles of international law of sovereign equality, territorial integrity, and political independence of Timor-Leste[174] and are also an interference in domestic affairs forbidden by Article 2, paragraph 7 of the United Nations Charter.[175] Accordingly,

166. *Walford*, [1992] 2 A.C. 128.

167. *See* Convention on the Law of the Non-navigational Uses of International Watercourses art. 4, ¶ 2, *opened for signature* May 21, 1997, 36 I.L.M. 700 (entered into force Aug. 17, 2014) ("A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected.") (emphasis added).

168. Nuclear Tests (Austl. v Fr.), Judgment, 1974 I.C.J. 253, 268 (Dec. 20) (emphasis added).

169. UNCLOS, *supra* note 11, art. 83.

170. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v U.S.), 1984 I.C.J. 246, at 292, ¶ 87 (Jan. 20).

171. HUGH THIRLWAY, 1 THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 23 (2013).

172. For further development on this dimension of the good faith principle, see Robert Kolb, *La Bonne Foi en Droit International Public*, 31 REVUE BELGE DE DROIT INT'L 661, 724–726 (1998) (Belg.).

173. Penal Code art. 200 (Timor-Leste).

174. U.N. Charter art. 2, paras. 1, 4. *See also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("[T]he first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state.").

175. U.N. Charter art. 2, para. 7. However, this conclusion is not unanimous in the legal doctrine. Most authors agree that the principle of territorial integrity prohibits espionage in the territory of a third state. *See, e.g.*, Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW, 3, 12–13 (Roland J. Stranger ed., 1962) ("[I]n time of peace, however, espionage . . . is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and

Australia acted in bad faith if it is proved that in fact it had spied on Timor-Leste. This disloyal behavior is tantamount to a deceitful action and constitutes "fraudulent conduct" in the sense of Article 49 of the VCLT.[176]

No state has ever succeeded in invoking the fraud provision, probably because Article 49 of the VCLT demands that the injured party demonstrate that it was "induced" to conclude the treaty.[177] Not only does Timor-Leste have to prove that it was the victim of espionage by Australia, it also has to show that it was persuaded to conclude the CMATS Treaty through the information gathered illegally. This burden became substantially heavier after Australia detained for questioning a key witness in the case brought before the Permanent Court of Arbitration and raided and apprehended documents in the offices of one of Timor-Leste's lawyers in Canberra.[178]

political independence of other states."); Manuel R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offences Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79–80 (1964) ("[P]eacetime espionage is regarded as an international delinquency and a violation of international law."); JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE 83–88 (David Turns ed., 1995) ("Each state exercises control over its national territory to the exclusion of all other States . . . ."). A minority consider that espionage is a state sovereign right. Thus, international law does not forbid intelligence collection during peacetime because that has been the state practice since the adoption of the United Nations Charter. *See* Glenn Sulmasy and John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L. L. 625, 628–629 (2007) ("State practice throughout history also supports the legitimacy of spying. Nowhere in international law is peaceful espionage prohibited. Domestic law punishes captured spies not because they violate some universal norm against espionage, but because they have engaged in intelligence operations against national interests."). This is not the place to discuss this topic thoroughly, but some comments are in order, especially at a time when electronic eavesdropping scandals are agitating international relations between states. Although states' intelligence services most likely use them abroad, the existence of a uniform state practice of spying abroad is not enough to prove a customary international norm capable of derogating U.N. Charter art. 2, paras. 1, 4, 7. It lacks the necessary *opinio juris*. States vigorously protest every time they have knowledge of being spied on. Just in 2013, Timor-Leste joined the ranks of India, Russia, and Germany. *See* Shishir Gupta, *India protests against US spying*, HINDUSTAN TIMES (Dec. 4, 2013), http://www.hindustantimes.com/india-news/india-protests-against-us-spying/article1-1158839.aspx; Kathy Lally, *Russia protests to U.S. over alleged spy*, WASH. POST (May 15, 2013), http://www.washingtonpost.com/world/europe/russia-protests-to-us-over-allegedspy/2013/05/15/127ab214-bd6a-11e2-9b09-1638acc3942e_story.html; Patrick Donahue, *Germany Seeks Spy Probe as Spain Protests U.S. Tapping*, BLOOMBERG (Oct. 28, 2013), http://www.bloomberg.com/news/articles/2013-10-28/spy-probe-sought-by-germany-as-spain-protests-u-s-phone-tapping.

176. VCLT, *supra* note 156, art. 49.

177. *Id.*

178. Peter Lloyd, *ASIO raided office of lawyer representing East Timor in spying case*, ABC NEWS (Dec 4, 2013), http://www.abc.net.au/news/2013-12-03/asio-raided-lawyer-representing-east-timor-in-spying-case/5132486.

C. The Case Before the International Court of Justice

1. Facts

On December 3, 2013, agents of the Australian Security Intelligence Organization searched the Canberra law offices of Bernard Collaery, a member of the legal team representing Timor-Leste in the Permanent Court of Arbitration.[179] Several documents and electronic devices were seized.[180]

Almost simultaneously, a retired Australian secret service officer and his wife were detained for questioning in their home in Canberra.[181] Media reports later revealed that the officer was a key witness in the espionage case involving Timor-Leste and Australia in the Permanent Court of Arbitration.[182] Australian authorities confiscated his passport, searched his house, and seized several documents.[183]

The Australian Attorney General George Brandis stated to the press that he had approved the warrants under which the searches had been carried in order to protect "Australia's territorial integrity."[184]

2. Allegations of Parties

In the late afternoon of December 17, 2013, Timor-Leste instituted proceedings against Australia in the ICJ.[185] The request related solely to the seizure and subsequent detention by agents of Australia of documents and data containing correspondence between Timor-Leste and its legal advisers, notably documents relating to the pending arbitration under the 2002 Timor Sea Treaty.[186] Timor-Leste argued that these actions were a breach of its rights as a sovereign state under international law: (i) to the ownership and property over the seized material; (ii) to the inviolability and immunity of this property (in particular, documents and data); and (iii) to the confidentiality of communications with its legal advisers.[187] The ICJ was thus requested to

179. *Id.*
180. *Id.*
181. *Id.*
182. Katharine Murphy & Lenore Taylor, *Timor-Leste spy case: 'witness held, and lawyer's office raided by ASIO*,' THE GUARDIAN (Dec. 3, 2013), http://www.theguardian.com/world/2013/dec/03/timor-leste-spy-witness-held-lawyers-office-raided-asio.
183. Katharine Murphy, *Timor-Leste spy case: George Brandis denies overstepping his powers*, THE GUARDIAN (Dec. 4, 2013), http://www.theguardian.com/world/2013/dec/04/timor-leste-spy-case-george-brandis-denies-overstepping-his-powers.
184. *Id.*
185. Press Release, I.C.J., Timor-Leste institutes proceedings against Australia and requests the Court to indicate provisional measures (Dec. 18, 2013), http://www.icj-cij.org/docket/files/156/17844.pdf [hereinafter Press Release, I.C.J. Dec. 18].
186. *Id.*
187. *Id.*; Massimo Fabio Lando, *Case Note: Questions Relating to the Seizure and Detention of Certain Documents and Data*, 3 CAMBRIDGE J. INT'L & COMP. L. 616, 618 (2014).

order Australia: (i) to return the seized documents; (ii) to destroy any copies made of them; (iii) to justly and satisfactorily apologize; and (iv) to pay legal costs.[188]

The court was also asked to grant provisional measures in accordance with Article 41 of the Statute: (i) to order that all documents and data seized by Australia be placed in the custody of the Court pending disposal of the case; (ii) to order Australia to provide Timor-Leste and the Court with lists of all copies of documents and data seized and to destroy all such copies; and (iii) to order Australia to give assurances that "it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers."[189]

Pending the decision on the provisional measures, Timor-Leste also asked the President of the Court to exercise his powers under Article 74, paragraph 4 of the Rules of the Court to order Australia (i) to provide Timor-Leste and the Court with a list of all the seized documents and electronic data files; (ii) to seal such documents and data (and any copies thereof); (iii) to immediately deliver the sealed documents and data to the Court or to its lawyers; and (iv) to not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers in relation to the case.[190]

The President of the ICJ subsequently did the only thing that Article 74, paragraph 4 of the Rules of the Court allows him to do, which is to "call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."[191] Australia was thus asked to "refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste."[192]

During the public hearings on the request for the indication of provisional measures submitted by Timor-Leste, Australia requested the stay of the proceedings until the Arbitral Tribunal rendered its judgment in the Timor Sea Treaty Arbitration by arguing that the outcome of the latter could have an impact in the case before the Court.[193]

188. Press Release, I.C.J. Dec. 18, *supra* note 185.

189. Press Release, I.C.J., Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.) (Jan. 22, 2014), http://www.icj-cij.org/docket/files/156/17924.pdf [hereinafter Press Release, I.C.J. Jan. 22].

190. Press Release, I.C.J. Dec. 18, *supra* note 185.

191. Rules of Court, 1978 I.C.J. Acts & Docs 91, art. 74, ¶ 4.

192. Press Release, I.C.J., Proceedings instituted by Timor-Leste against Australia (Dec. 20, 2013), http://www.icj-cij.org/docket/files/156/17846.pdf.

193. Press Release, I.C.J. Jan. 22, *supra* note 189.

The ICJ denied the request in an order on January 28, 2014, where it concluded that the dispute was sufficiently distinct from the dispute before the Arbitral Tribunal.[194]

3. The Court's Decision on Provisional Measures

On March 3, 2014, the ICJ delivered an order on the request made by Timor-Leste for the indication of provisional measures.[195] As expected, as even Australia did not raise any question on jurisdiction, the Court concluded that the declarations made by both parties under Article 36, paragraph 2 of the Court's statute appear, prima facie, provided "a basis on which it might have jurisdiction to rule on the merits of the case."[196] Since it had to decide over provisional measures and not on the merits of the case, the Court then analyzed whether the conditions were met for the establishment of those measures.[197]

The first concerned whether the rights invoked by Timor-Leste were plausible under international law and whether there was a link between these rights and the provisional measures sought.[198]

The ICJ declared the plausibility of the Timorese claim of the right to communicate with its counsel and lawyers in a confidential manner regarding issues forming the subject matter of the pending arbitral proceedings and future negotiations between the parties.[199]

The Court stated that from the principle of sovereign equality between states foreseen in Article 2 of the U.N. Charter derives the right of the states to confidentiality and non-interference in their communications with their legal advisors when engaging in arbitral proceedings or negotiations.[200] Moreover, this right claimed by Timor-Leste under international law was linked to the measures requested insofar as they sought to prevent interference by Australia with Timor-Leste's communications with its lawyers.[201]

The second condition scrutinized by the Court in order to grant provisional measures relates to the evaluation of the risks of irreparable prejudice to the applicant's rights and to the urgency of that threat.[202]

194. Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Order, at 2 (Jan. 28, 2014), *available at* http://www.icj-cij.org/docket/files/156/17990.pdf.

195. Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures Order, (Mar. 3, 2014) [hereinafter Provisional Measures Order], *available at* http://www.icj-cij.org/docket/files/156/18078.pdf.

196. *Id.* ¶¶ 20–21.

197. *Id.* ¶¶ 22–23.

198. *Id.*

199. *Id.* ¶¶ 27–28.

200. *Id.* ¶ 27.

201. *Id*. ¶ 30.

202. *Id.* ¶¶ 31–32.

Australia argued that there were no such risks or urgency. At the oral hearings, the Court was presented with several positions taken by Australia's Attorney General. Some were included in a December 23, 2013 letter dated to the Director General of the Australian Security Intelligence Organization that ordered the documents seized to be sealed and kept inaccessible until the ICJ rendered a decision on provisional measures.[203] Others were included in a written statement that declared that (i) until the closure of the Court's proceedings the materials would only be inspected for purposes of national security and (ii) that no communication of the materials or contents would occur for any purpose in connection with the exploitation of resources in the Timor Sea or related negotiations, or in connection with the case before the ICJ or the Timor Sea Treaty Arbitration.[204]

The ICJ stated that the written statement mitigated but did not extinguish the risks that Timor-Leste could face in the arbitral proceedings and in future maritime negotiations.[205] Although the Attorney General has the authority to bind Australia in matters of international law, under that statement Australia specifically reserves the right to inspect the materials in certain circumstances involving national security. Thus, a risk of disclosure of their contents still exists and, once disclosed and confidentiality breached, the injury suffered by Timor-Leste's rights to conduct arbitral proceedings and negotiations without interference would be irreparable.[206] Accordingly, the Court ordered Australia to (i) ensure that there was no disclosure of the materials to any persons to the disadvantage of Timor-Leste until the conclusion of the proceedings (by twelve votes to four); (ii) continue to hold the seized materials under seal until further decision (by twelve votes to four); and (iii) not interfere in any way with communications between Timor-Leste and its legal advisers in connection with the proceedings before it, the Timor Sea Treaty Arbitration, or any future bilateral negotiations (by fifteen votes to one).[207]

The ICJ's decision is a considerable boost for Timor-Leste's legal chances both on the merits of this case and in the pending Timor Sea Treaty Arbitration. Although the Court did not request the delivery to its custody of the seized material, it has ordered Australia to hold it under seal. That will prevent any further leak that could harm Timor-Leste in

203. *Id.* ¶¶ 35–37.

204. *Id.* To view the written statement, see Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia (Jan. 21, 2014), *available at* http://www.icj-cij.org/docket/files/156/17974.pdf.

205. Provisional Measures Order, *supra* note 195, ¶ 47.

206. *Id.* ¶¶ 46–48.

207. *Id*. ¶ 55.

the proceedings at the ICJ and at the Permanent Court of Arbitration. More important for Timor-Leste was that the Court noted that the Parties did not dispute the facts "that at least part of the documents and data seized by Australia relate to the Timor Sea Treaty Arbitration or to possible future negotiations on maritime delimitation between the Parties, and that they concern communications of Timor-Leste with its legal advisers."[208] Provisional measures were thus conceded on the argument that a real risk existed that these materials could be leaked to any of Australia's legal staff involved in the Timor Sea Treaty Arbitration or in future negotiations on behalf of Australia. If that happened, Timor-Leste's right under international law to conduct arbitral proceedings and negotiations without interference from Australia would be breached.[209]

Timor-Leste's allegations in the Timor Sea Treaty Arbitration are based on a similar line of argument. If the tapping of the negotiation room by Australia is proven, Timor-Leste can argue that the ICJ's decision confirmed that this too is a violation of the right of states to conduct negotiations without interference that derives from the principle of sovereign equality between states foreseen in Article 2, paragraph 1 of the U.N. Charter.[210] The information gathered illegally by Australia gave it an unfair advantage in the negotiations and, as explained above, can qualify as a "deceitful action" capable of forming the basis for the invalidation of the CMATS Treaty.

IV. CONCLUSION

The division of the Timor Sea should be an issue of delimitation of maritime boundaries between two states with opposite coasts. Instead, Australia and Timor-Leste chose to cooperate through the creation of a JDZ. The latter is not, however, a panacea for solving maritime boundary disputes.[211] It is a contractual mechanism used as a temporary solution to allow states to establish the necessary framework for the exploitation of natural resources that lie within areas of overlapping claims. Nonetheless, a JDZ may remain in force for a long period of time. In the case of the Timor Sea, it will probably materially affect Timor-Leste's entitlement to its fair share of petroleum resources.

International law obliges states with conflicting continental shelves to negotiate to reach an equitable outcome. Sovereigns must do so in good faith, and that means making every effort to conclude a successful

208. *Id.* ¶ 27.
209. *Id.* ¶ 42.
210. *See* U.N. Charter art. 2, para. 1.
211. R.R. Churchill, *Joint Development Zones: International Legal Issues*, *in* 2 JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, *supra* note 42, at 55, 67.

negotiation.[212] Sovereign states are also under an obligation to restrain from unilateral exploitation of the contested area.[213] But a state has no duty to actually resolve a boundary, being that the timing for the beginning of negotiations is something left entirely at its discretion. This latter limitation opens the path for "states with stronger bargaining positions to end up with more than their fair share of the continental shelf and its resources at the expense of others."[214]

As in David and Goliath, the odds are still in Australia's favor. Like David, however, Timor-Leste found a solution to fight its more powerful opponent through applications in the Permanent Court of Arbitration and in the ICJ. Will this be Timor-Leste's slingshot?

If Timor-Leste succeeds in proving that Australia bugged its negotiation room and that the information gathered through that tapping enabled Canberra to induce Dili into signing an international agreement, the CMATS Treaty will fall. This, however, will be a monumental task because Timor-Leste's key witness against Australia may not be able to testify, and because the decision of the Permanent Arbitral Tribunal will probably be given before the decision of the ICJ,[215] which means that the documents seized by Australia will also not be available for Timor-Leste's defense in The Hague.

The best-case scenario for the Timorese is that the Arbitration Court decides in Timor-Leste's favor. That will mean that the Timor Sea Treaty will re-enter into force. The Timor Sea Treaty has an allocation of resources even more unbalanced for Timor-Leste than the CMATS Treaty, but it reopens the obligation of negotiating the delimitation of the continental shelf between the parties, as the Treaty does not impose any moratorium on the definition of maritime borders. In the worst-case scenario for Timor-Leste, the Arbitration Court will rule against Timor-Leste but Dili will still win the hearts of the international community if it

212. *See* Lagoni, *supra* note 98, at 238 (emphasizing that "[a]t any rate, the obligation to negotiate in good faith does not imply an obligation to obtain consent from the neighboring state; neither does it imply a duty to reach agreement").

213. *See, e.g.*, Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, 2 MARITIME BRIEFING 1, 4 (Clive Schofield ed., 1999) ("[T]he obligation of interested states to abstain from unilateral development of the resource concerned."); David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?*, 93 AM. J. INT'L L. 771, 802 (1999) ("[I]ncreasing state practice on joint development suggest that certain aspects of the general requirement to cooperate have transcended its status as a general principle and acquired the imperative of customary international law.").

214. Bastida et al., *supra* note 38, at 368.

215. That will most likely be the case after the postponement *sine die*, on request of the parties, of the oral hearings of the case on September 3, 2014. *See* Press Release, I.C.J., Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Sept. 5, 2014), http://www.icj-cij.org/docket/files/156/18364.pdf.

succeeds, as seems likely, in the ICJ.[216] This seems to be the endgame of Timor-Leste's efforts in the international courts and tribunals: to politically force Australia to negotiate a definitive solution of maritime borders based on the applicable international law.[217]

216. Pressure on Australia has been made by international public opinion groups. *See, e.g.*, TIMOR SEA JUSTICE CAMPAIGN, http://www.timorseajustice.com (last visited Apr. 17, 2015); LA'O HAMUTUK, www.laohamutuk.org (last visited Apr. 17, 2015); *Congress Tells Australia to Treat East Timor Fairly, Urges Expeditious Talks on Permanent Maritime Boundary*, EAST TIMOR ACTION NETWORK (Mar. 5, 2004), http://www.etan.org/news/2004/03houseltr.htm.

217. There are some signs that this strategy may be working. In a speech called "Managing Strategic Tensions," Australia's Defence Minister David Johnston urged states to pursue matters "in accordance with international law including the 1982 United Nations Convention on the Law of the Sea." Press Release, Government of Timor-Leste, Australia changes position on maritime boundaries (June 5, 2014), http://timor-leste.gov.tl/?p=10156&lang=en. The minister inferred that boundary delimitation "should be resolved through international means available for 'the collective good of all nations in the region.'" *Id.* According to media reports, in October 2014 both parties agreed to suspend the arbitral proceedings in The Hague for six months and start negotiations on the definition of their maritime borders. *See* Tom Allard, *Australia and East Timor restart talks on maritime boundary*, SYDNEY MORNING HERALD (Oct. 28, 2014), http://www.smh.com.au/federal-politics/political-news/australia-and-east-timor-restart-talks-on-maritime-boundary-20141027-11ckhb.html.