



# Timor Leste v. Australia

Questions relating to the Seizure and Detention of Certain Documents and Data

# Outline

## 1. Factual events leading ...

- a) to the proceedings before the ICJ
- b) to the Timor Sea Treaty Arbitration

## 2. Legal Issues before the ICJ

- a) the Parties' Position
- b) the Court's Position

## 3. The Court's Order

concerning the request for the indication of provisional measures (3 March 2014)

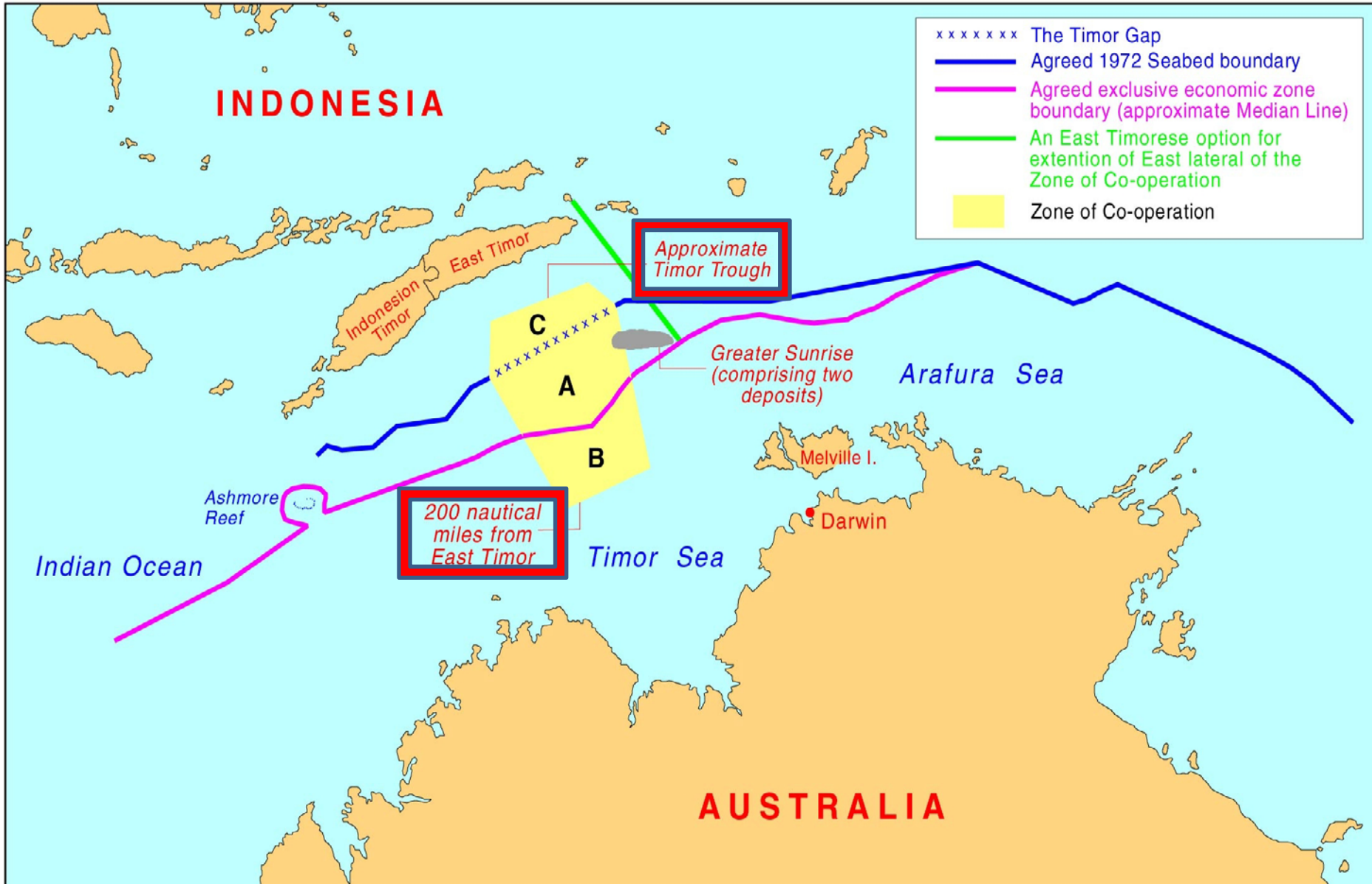
# AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979 - SECTION 25

## Section 25 Search warrants

### *Test for issue of warrant*

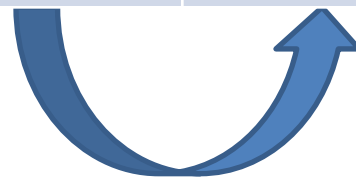
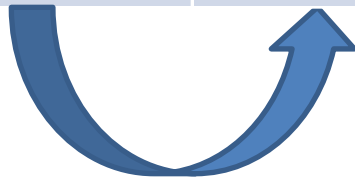
(2) The Minister is only to issue the warrant if he or she is satisfied that there are reasonable grounds for believing that access by the Organisation to records or other things on particular premises (the ***subject premises***) will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the ***security matter***) that is important in relation to security.

# The Timor Gap



# The Legal History of the Timor Gap

| Indonesia – Australia   | UNTAET – Australia   | Timor-Leste – Australia  |
|---|--|--|
| <ul style="list-style-type: none"><li>- Treaties “Establishing Certain Seabed Boundaries” (1971/72)</li><li>- Timor Gap Treaty (11 December 1989)</li></ul> | <ul style="list-style-type: none"><li>- Memorandum of Understanding (10 February 2000)</li><li>- Timor Sea Arrangement (5 July 2001)</li></ul> | <ul style="list-style-type: none"><li>- Timor Sea Treaty (20 May 2002)</li><li>- <b>Treaty on Certain Maritime Arrangements in the Timor Sea (12 January 2006)</b></li></ul> |

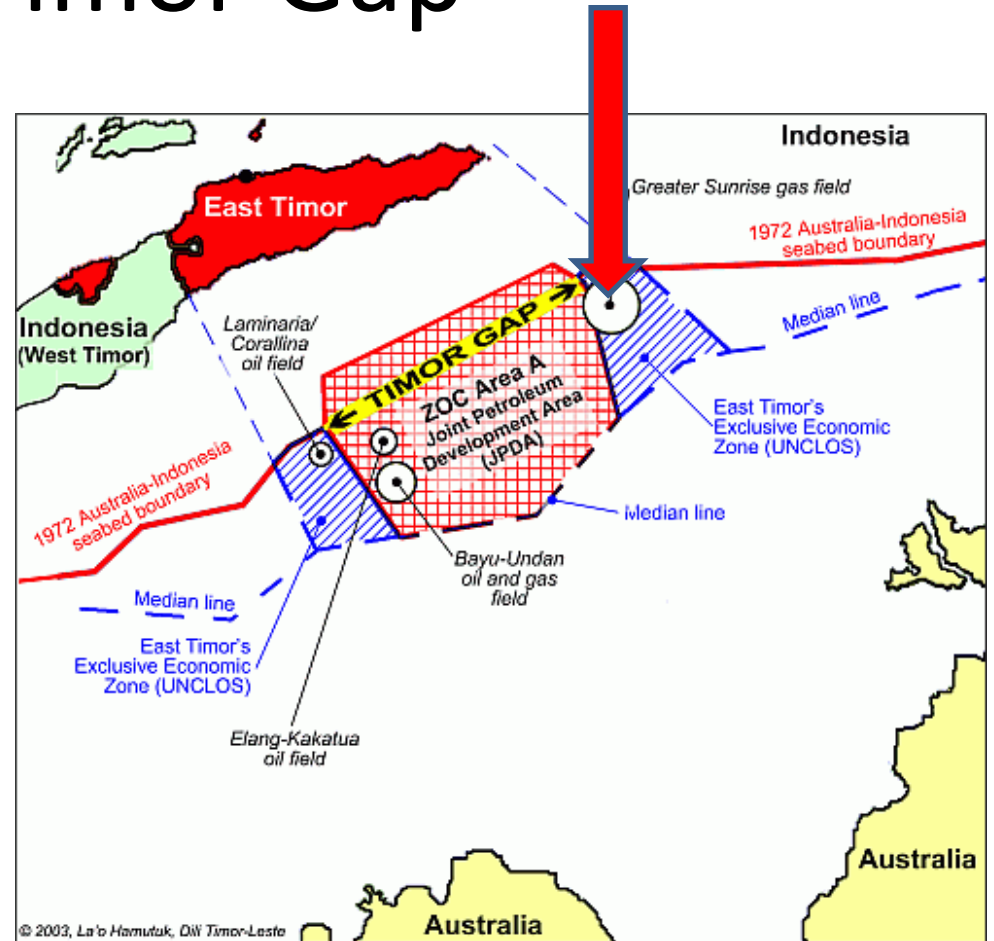


# The Timor Gap

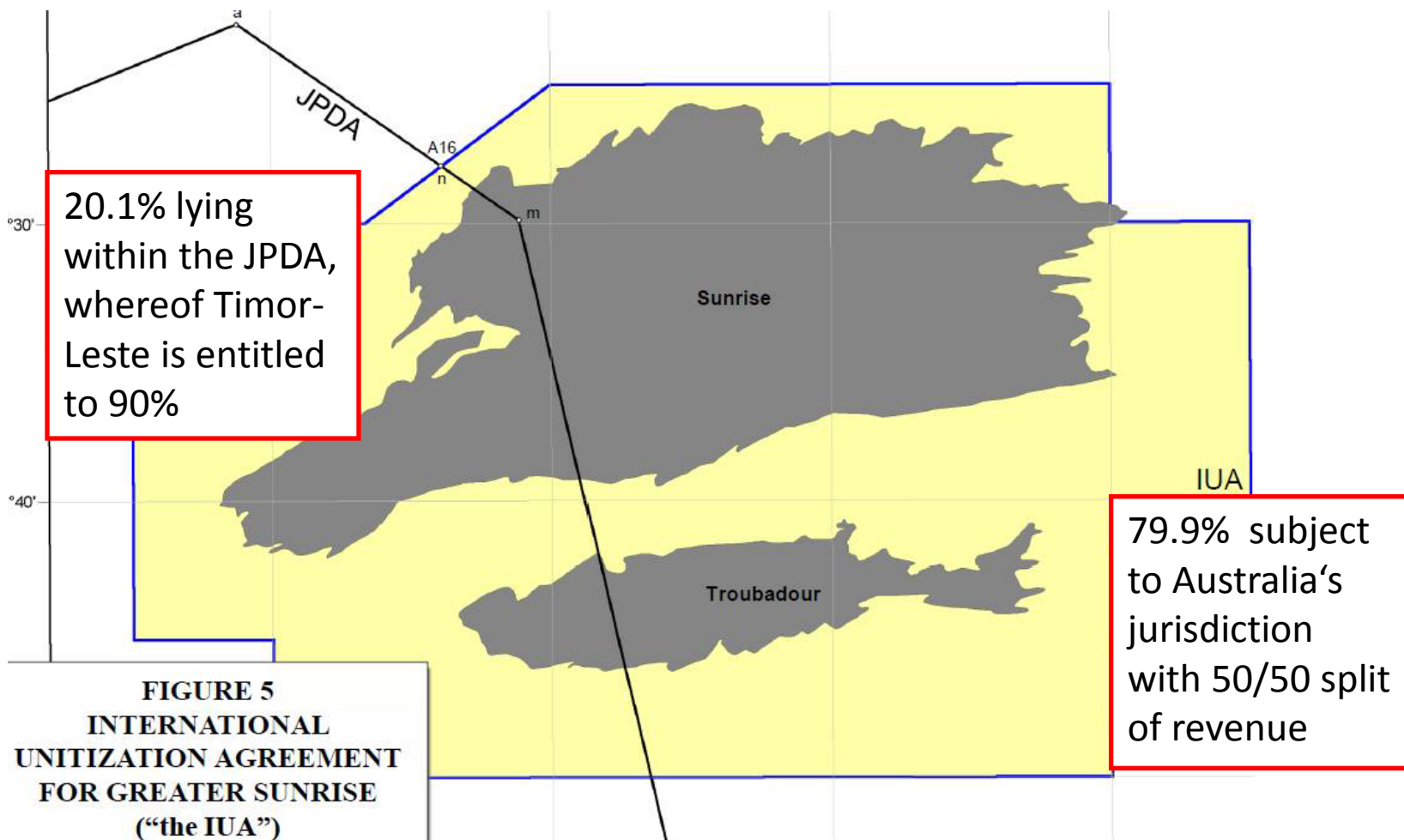
## ARTICLE 4 (MORATORIUM)

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.

2. Paragraph 1 of this Article **does not prevent a Party from continuing activities** [...] in relation to petroleum or other resources of the seabed and subsoil.



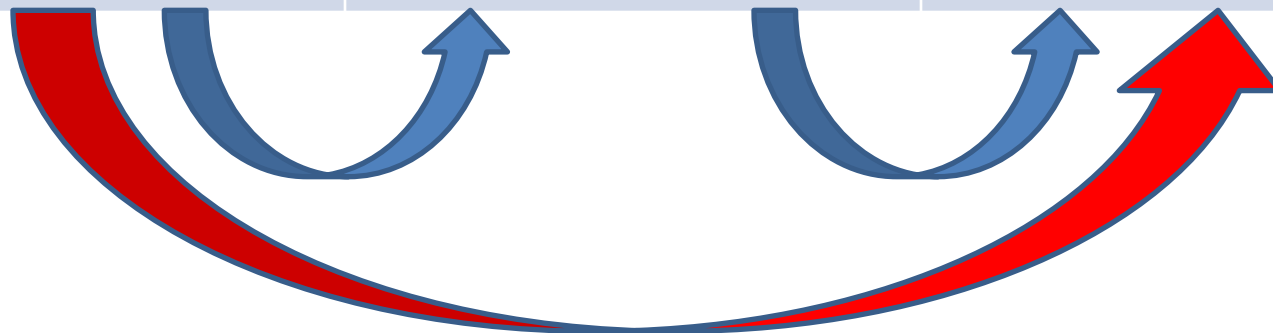
# Estimated US\$ 40 billion worth of oil and gas reserves



# The Legal History of the Timor Gap

## - Timor-Leste's View -

| Indonesia – Australia   | UNTAET – Australia  | Timor-Leste – Australia  |
|---|---|--|
| <ul style="list-style-type: none"> <li>- Treaties “Establishing Certain Seabed Boundaries” (1971)</li> <li>- Timor Gap Treaty (11 December 1989)</li> </ul> | <p>Australia withdrew its recognition of the maritime boundary jurisdiction of the ITLOS (June 2011) and the ICJ (March 2012)</p> | <ul style="list-style-type: none"> <li>- Timor Sea Treaty (20 May 2002)</li> <li>- Treaty on Certain Maritime Arrangements in the Timor Sea (12 January 2006)</li> </ul> |





# The Legal History of the Timor Gap

## - Australia's View -

“It is surprising that despite the fact that Timor-Leste consistently pursued the key elements of CMATS, it now claims it never wanted the treaty and that it was somehow forced upon Timor-Leste.”

Australia, Counter Memorial, Appendix [31]

# Timor Sea Treaty Arbitration

Timor Leste claims that CMATS is invalid because

- conduct of Australia violated CIL in that it was manifestly done in bad faith, contrary to the requirement of good faith as a recognised fundamental principle of law
- behaviour analogous to fraud or corruption
- violation of Timor-Leste's sovereignty by Australian officials

# The Proceedings before the ICJ



# Legal Issues – The Positions

| Timor-Leste  | Australia   |
|--|---|
| ownership and property rights over the seized material, entailing the rights to inviolability and immunity of this property                                  | there is no general principle of immunity or inviolability of State papers and property   |
| right to the confidentiality of communications with its legal advisers   | there is no principle in international law whereby any State is entitled to the confidentiality of all communications with its legal advisers |
| confidentiality of communications between legal counsel and client is covered by legal professional privilege, which it states is a general principle of law | in any case, that principle is not absolute and does not apply when the communication constitutes a threat to national security               |

# Timor-Leste's Request

Timor-Leste asks the Court to indicate the following provisional measures:

- All of the documents and data seized by Australia be immediately sealed and delivered into the custody of the International Court of Justice
- Australia destroy beyond recovery all copies of the documents and data
- Australia give an assurance that it will not intercept in the communications between Timor-Leste and its legal advisers

# Order of 3 March 2014

## Legal Basis of the Issues

- the right to communicate with legal advisors might be derived from the principle of the sovereign equality of States (Art. 2 (1) UNCh)
- equality of the parties must be preserved when they are involved in the process of settling an international dispute by peaceful means (Art. 2 (3) UNCh)
- a State would expect to undertake these arbitration proceedings in a peaceful settlement of a dispute without interference by the other party

Accordingly, the Court considers that the right to conduct arbitration proceedings without interference is plausible.

# Risk of Irreparable Prejudice

## Timor Leste's Position

- Australia's actions create a real risk of irreparable prejudice to its rights
- by its conduct, "Australia has placed itself in a position of considerable advantage in the pending Arbitration"
- the risk of irreparable prejudice is imminent because it is currently considering which strategic and legal position to adopt *vis-à-vis* Australia in relation to the 2002 Timor Sea Treaty Arbitration.

# Risk of Irreparable Prejudice

## Australia's Position

- there is no risk of irreparable prejudice to Timor-Leste's rights
- the comprehensive undertakings provided by the Attorney General of Australia demonstrate that any rights which Timor Leste may be found to possess are sufficiently protected:
  - the search warrants had been issued “at the request of ASIO, on the grounds that the documents contained intelligence relating to national security matters”
  - “the material [was] not under any circumstances to be communicated to those conducting the [arbitration] proceedings on behalf of Australia”
  - the Attorney General would not seek to inform himself of the content of the material



# Risk of Irreparable Prejudice

## The Court's Position

- the right of Timor-Leste to conduct arbitral proceedings without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material
- there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration should the seized material be divulged to any person involved in that arbitration
- any breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information

# Risk of Irreparable Prejudice

## The Court's Position

Accordingly,

there remains a risk of disclosure of the potentially highly prejudicial information as Australia envisages the possibility of making use of the seized material in circumstances involving national security

therefore,

the undertaking by Australia does not remove the imminent risk of irreparable prejudice to Timor-Leste's rights entirely

# The Provisional Measures

**(1)** Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded (by 12 to 4)

**(2)** Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court (by 12 to 4)

**(3)** Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty [...] (by 15 to 1)

# The Return of the Documents

- Australia returned the documents on 12<sup>th</sup> May 2015
- Timor-Leste:
  - Application's purpose successfully achieved
  - implicit recognition by Australia that its actions were in violation of Timor-Leste's sovereign rights
- Australia:
  - affirmation of its commitment to the peaceful settlement of the dispute
  - return in good faith without acknowledgment that Australia had violated Timor-Leste's sovereign rights
- Case removed from List on 11<sup>th</sup> June 2015 at request of Timor-Leste