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TIMOR-LESTE V. AUSTRALIA: “GUERRILLA TACTICS” AND SCHOOLYARD BULLIES IN  
STATE ARBITRATION

By  
Sarah Whittington\*

I. INTRODUCTION

The requirement of “zealous advocacy” in adversarial adjudication proceedings has recently come under attack. While scholars acknowledge that power shifting tactics have always existed in dispute resolution, recent practice seems to require a new vocabulary to describe aggressive representation.<sup>1</sup> Recognizing the need to reframe the discussion, scholars and practitioners apply the term “guerrilla tactics” to define litigation misconduct that threatens to undermine the legitimacy of arbitration procedures.<sup>2</sup> The term refers to adjudication tactics that range from using dilatory tactics to criminal acts of violence,<sup>3</sup> which are being used with increasing frequency to frustrate the arbitral process.<sup>4</sup>

The notion that parties to an arbitration proceeding would use violence to frustrate procedures or avoid award enforcement is an obvious threat to the system and need not be elaborated for the purposes of this article. The recourse to arbitration is evidence of an

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<sup>1</sup> See, e.g., Günther J. Horvath & Stephan Wilske, *Chapter 6: Conclusion and Outlook*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 341, 341 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>2</sup> See, e.g., Robert Pfeiffer & Stephan Wilske, *Chapter 1, §1.01: An Etymological and Historical Overview*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 1, 3 (Günther J. Horvath & Stephan Wilske eds., 2013) (Wilske and Pfeiffer analogize conventional guerrilla warfare and “guerrilla tactics” in international arbitration as “a broad collective of unconventional means, which undermine the mechanism’s envisioned conventional mode of operation.”); Loretta Malintoppi, *Guerrilla Tactics in International Arbitration & Litigation A Fine Line—How to Counter and Employ*, *TRANSNAT’L DISP. MGMT.* 2 (Nov. 12, 2010), <http://www.transnational-dispute-management.com/article.asp?key=1611> (last visited May 4, 2014); Despina Fruth Oprisan, *Guerrilla Tactics, Romanian Experience*, *TRANSNAT’L DISP. MGMT.* 2 (Nov. 12, 2010), <http://www.transnational-dispute-management.com/article.asp?key=1616> (last visited May 4, 2014); Shai Wade & Reed Smith, *Guerrilla Tactics before Investment Tribunals: from Counsel’s Point of View*, *TRANSNAT’L DISP. MGMT.* 2 (Nov. 12, 2010), <http://www.transnational-dispute-management.com/article.asp?key=1609> (last visited May 4, 2014).

<sup>3</sup> The assault of a judge during the Iran-U.S. tribunal deliberations was the first example of extreme tactics. Other events include: the kidnapping of an arbitrator by Indonesia, the imprisonment of a Chinese arbitrator, and the possible murder of an arbitrator. For this and further examples see, e.g., CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 168-69 (1998); Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26 *ARB. INT’L*, no. 1, 2010, at 43, 49; Wu Ming, *The Strange Case of Wang Shenchang*, 24 *J. INT’L ARB.*, no. 1, 2007, at 63; Jacques Werner, *When Arbitration Becomes War*, 17 *J. INT’L ARB.*, no. 4, 2000, at 97.

<sup>4</sup> Wade & Smith, *supra* note 2.

attempt by disputing parties to resolve their dispute through civilized judicial means. This attempt, however, is quickly thwarted when one party employs “guerrilla tactics” against the opposing party. There are two main forms that “guerilla tactics” take: the overt, violent acts are extreme examples that draw attention, sanctions, and preventative measures; on the other hand, the more subtle dilatory or procedural “guerrilla tactics” may be more dangerous because they often go unnoticed and unsanctioned.<sup>5</sup> The increasing prevalence of such maneuvers raises questions about the role and ability of arbitral tribunals to sanction this behavior.<sup>6</sup>

The globalization of arbitration has led to an increase in the use of “guerrilla tactics.”<sup>7</sup> As the number of total participants in arbitral systems increased, accountability and the necessity to maintain an ethical reputation decreased.<sup>8</sup> The introduction of litigation specialists into commercial arbitration brought dilatory tactics and procedural maneuverings typical of traditional litigation.<sup>9</sup> From commercial arbitration, the use of sovereign power plays and “guerrilla tactics” has spread to investor-state arbitration, and *Timor-Leste v. Australia* exemplifies how similar tactics have now reached the realm of state-to-state arbitration.<sup>10</sup>

Currently, no adjudication system is safe from “guerrilla tactics,” and overzealous representation is creating a framework for an “ethical ‘race to the bottom.’”<sup>11</sup> The use of these tactics is especially troubling in investor-state or state-to-state arbitration, in which sovereign parties have unilateral access to extreme tactics resulting in power imbalances that make equitable resolution of any dispute unlikely.<sup>12</sup> Fortunately, the circumstances

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<sup>5</sup> Horvath & Wilske, *supra* note 1, at 340; Kolo, *supra* note 3, at 47-48.

<sup>6</sup> Horvath & Wilske, *supra* note 1, at 343.

<sup>7</sup> Robert Pfeiffer & Stephan Wilske, *Chapter 1, §1.03: The Emergence of the Guerrilla Tactics Phenomenon in International Arbitration*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 16, 17-19 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>8</sup> William J. Rowley, *Chapter 1, §1.04: Guerrilla Tactics and Developing Issues*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 20, 20 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>9</sup> Herfried Wöss, “*Guerrilla Tactics*”: *Litigation and Arbitration in Mexico*, *TRANSNAT’L DISP. MGMT.* 2 (Nov. 12, 2010), <http://www.transnational-dispute-management.com/article.asp?key=1615> (last visited May 4, 2014).

<sup>10</sup> Press Release, International Court of Justice, *Timor-Leste Institutes Proceedings Against Australia and Requests the Court to Indicate Provisional Measures (Timor-Leste v. Australia)* (Dec. 18, 2013).

<sup>11</sup> Horvath & Wilske, *supra* note 1, at 341-42 (quoting Catherine Rogers to explain that the outcome-driven practice of some arbitration litigators sacrifices ethical choices because of competition for clients).

<sup>12</sup> Pfeiffer & Wilske, *supra* note 7, at 19; Malintoppi, *supra* note 2, at ¶¶ 4 and 6. *See also*, Pfeiffer & Wilske, *supra* note 2, at 3 (noting that “guerrilla tactics” may be used by both parties regardless of their conventional strength because the definition of strength in arbitration will be determined by which party has the stronger substantive argument and the means to argue it before the tribunal. The weaker party in a case will use “guerrilla tactics” to avoid the central legal dispute at issue).

surrounding the *Timor-Leste* case provide an opportunity for scholars and practitioners to gain awareness about “guerrilla tactics” and their implications. Moreover, *Timor-Leste* will aid scholars and practitioners in developing a vocabulary for the phenomenon that may prove useful in prospectively preempting the use of “guerrilla tactics” to frustrate legitimate arbitral proceedings.<sup>13</sup>

Allegedly, Australia has engaged in “guerrilla tactics,” as the stronger party, prior to and during the arbitral proceedings. The dispute concerns the formation and continued application of treaties that apportioned revenue and control of oil-rich areas of the Timor Sea between the two nations. This case will not only bring to light the prevalence of “guerrilla tactics” in investment and state-to-state arbitration, but may also allow for a greater understanding of the motivations behind such actions, especially by state-actors who generally wield more power in negotiations. Ultimately, this case could provide international courts, state actors, investors, and practitioners a better understanding of what will constitute “guerrilla tactics” in investment arbitration moving forward, what the defenses to allegations of “guerrilla tactics” may be, and what sanctions can be expected or are available depending on the outcome of the case and the analysis the court uses.

## II. BACKGROUND OF THE TREATY DISPUTE BETWEEN TIMOR-LESTE AND AUSTRALIA

*Timor-Leste v. Australia* is an ongoing dispute being adjudicated before the International Court of Justice (“ICJ”).<sup>14</sup> Timor-Leste alleges, among other things, that Australia engaged in “guerrilla tactics” to frustrate an arbitration proceeding that was initiated to adjudicate a state-to-state dispute over ownership and possession of oil-rich territories within the Timor Sea. Prior to the dispute, Timor-Leste and Australia enjoyed close diplomatic and economic ties after Timor-Leste achieved its independence from Indonesia.<sup>15</sup> Timor-Leste strained the relationship when it notified Australia on April 23, 2013, that it was seeking arbitration regarding the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (“CMATS”).<sup>16</sup> Timor-Leste alleges that the negotiations

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<sup>13</sup> Horvath & Wilske, *supra* note 1, at 342 (citing, William Rowley, *supra* note 8; Lucy Reed, *Tools Available to the Arbitral Tribunal*, Ch. 2, §2.04[A], in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 93, 93 (Günther J. Horvath & Stephan Wilske eds., 2013) (explaining that some scholars desire a “universal code of ethical conduct” applied to international practitioners in order to limit and sanction “guerrilla tactics,” but others believe that the infractions should be handled on a case-by-case basis and overregulation will damage international arbitration as well. The authors pose many questions, but admit to not having a solution to the problems beyond providing knowledge and useful tips for practitioners).

<sup>14</sup> Press Release, International Court of Justice, *supra* note 10.

<sup>15</sup> See, e.g., Dennis Wilson, *International Law, History, and the Development of Sovereign Claims by Timor-Leste and Australia in the Timor Sea*, [http://www.academia.edu/3847245/An\\_update\\_on\\_the\\_2013\\_Treaty\\_Arbitration\\_between\\_Timor\\_Leste\\_and\\_Australia](http://www.academia.edu/3847245/An_update_on_the_2013_Treaty_Arbitration_between_Timor_Leste_and_Australia) (last visited Jan. 28, 2014); *The La’o Hamutuk Bulletin*, THE TIMOR-LESTE INSTITUTE FOR RECONSTRUCTION MONITORING AND ANALYSIS, Vol. 7, No. 1 (April 2006), available at <http://www.laohamutuk.org/Bulletin/2006/Apr/bulletinv7n1.html> (last visited Jan. 28, 2014).

<sup>16</sup> The CMATS Treaty divided the disputed sea floor in the Joint Petroleum Development Area (“JDPA”) of the Timor Sea not previously allocated to either Timor-Leste or Australia. CMATS further allocated

were not conducted in good faith.<sup>17</sup> Australia denied these claims.<sup>18</sup> Soon after notification of arbitration, however, Timor-Leste reaffirmed its commitment to a strong relationship with Australia but acknowledged that the relationship was evolving.<sup>19</sup>

The 2006 CMATS treaty was executed on February 23, 2007, along with the 2003 International Unitisation Agreement for Greater Sunrise (“IUA”).<sup>20</sup> These two treaties reinforced the 2002 Timor Sea Treaty.<sup>21</sup> Timor-Leste now seeks to invalidate both treaties because it claims to have statements from whistleblowers and former Australia Security Intelligence Organisation (“ASIO”) agents who participated in the bugging of a meeting room of Timor-Leste’s cabinet during the 2004 treaty negotiations.<sup>22</sup> If these

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revenues in the JDPa and Greater Sunrise Unit Area between Timor-Leste and Australia for exploration or production of petroleum. Although the language and apportionment ratios appear to favor Timor-Leste (Timor-Leste receives 90% of the extraction revenue within the JDPa, for example), the division may actually be a greater benefit to Australia because the treaty postponed delimiting the maritime boundaries between Timor-Leste and Australia. Under CMATS, Timor-Leste and Australia will not make maritime boundary claims for fifty years. Some scholars believe that the boundaries will assign the shared areas to Timor-Leste according to the United Nations Convention on the Law of the Sea (UNCLOS). Another benefit to Australia is the stipulation that Australia receives all revenue from “downstream” production tax revenues which will generate more money over the course of the treaty than the “upstream” extraction revenue that Timor-Leste was apportioned. *See* Treaty Between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS), Austl.-Timor-Leste, Jan. 12, 2006, [2007] A.T.S. 12; United Nations Convention on the Law of the Sea art. 2 and 15, Dec. 10, 1982, 1833 U.N.T.S. 397. For an in-depth explanation of the timeline of events surrounding treaty negotiations between Timor-Leste and Australia regarding oil reserves in the Timor Sea and the division of revenue and areas, *see The La’o Hamutuk Bulletin*, *supra* note 15, at 3-7; Wilson, *supra* note 15; AUSTRALIA DEP’T OF FOREIGN AFFAIRS AND TRADE, *Australia-Timor-Leste Maritime Arrangements*, [http://www.dfat.gov.au/geo/timor-leste/fs\\_maritime\\_arrangements.html](http://www.dfat.gov.au/geo/timor-leste/fs_maritime_arrangements.html) (last visited Jan. 29, 2014).

<sup>17</sup> *See, e.g.*, Joint Media Release, Senator Hon. Bob Carr, Minister of Foreign Affairs, and Hon. Mark Dreyfus QC MP, Attorney General, Arbitration Under the Timor Sea Treaty (May 3, 2013), [http://foreignminister.gov.au/releases/2013/bc\\_mr\\_130503.html](http://foreignminister.gov.au/releases/2013/bc_mr_130503.html) (last visited Jan. 28, 2014).

<sup>18</sup> *Id.*

<sup>19</sup> EAST TIMOR LAW AND JUSTICE BULLETIN, *Statement by Government of Timor-Leste Regarding the Pending Arbitration Between Timor-Leste and Australia on CMATS Treaty*, June 10, 2013 [ed. Warren Wright], <http://www.easttimorlawandjusticebulletin.com/2013/06/statement-by-government-of-timor-leste.html> (last visited Jan 29, 2014).

<sup>20</sup> AUSTRALIA DEP’T OF FOREIGN AFFAIRS AND TRADE, *supra* note 16.

<sup>21</sup> Carr and Dreyfus, *supra* note 17 (all treaties delineated boundaries for petroleum exploration and extraction and divisions of revenue).

<sup>22</sup> *Id.*; Sebastian Perry, *Australia Targets Witness and Counsel in East Timor Spying Case*, GLOBAL ARB. REV. (Dec. 4, 2013), <http://globalarbitrationreview.com/news/article/32101/australia-targets-witness-counsel-east-timor-spying-case/> (last visited Jan. 28, 2014); Nick Miller, *East Timor Seeks to Scrap Oil Treaty with Australia in The Hague Over Spying Allegations*, THE SYDNEY MORNING HERALD (Dec. 6, 2013), <http://www.smh.com.au/federal-politics/political-news/east-timor-seeks-to-scrap-oil-treaty-with-australia-in-the-hague-over-spying-allegations-20131206-2yufv.html> (last visited Jan. 28, 2014).

allegations are true, this will likely damage Australia's international reputation because it is a developed country subjugating a weaker nation for economic gain, similar to former colonial relationships.<sup>23</sup> To invalidate the treaty, Timor-Leste must prove that Australia used the information gained through espionage to improve its bargaining position and the outcome of the treaty. Although the 2006 CMATS treaty does not have a provision for arbitration, Timor-Leste wants to use the 2002 Timor Sea Treaty's dispute resolution language to bring this case before an arbitral tribunal.<sup>24</sup>

After Timor-Leste's announcement seeking arbitration, ASIO agents raided the offices of Timor-Leste's legal counsel and the home of a former ASIO officer to seize documents, electronic materials, and passports. The seizure was executed the day before the arbitral tribunal was to convene; however, a continuance was required because the witness and counsel could not travel.<sup>25</sup> Timor-Leste's attorney immediately condemned the seizure because all the materials taken were privileged communications, and the passport seizure was a dilatory tactic to prevent arbitration.<sup>26</sup> The Australian Attorney-General responded that the documents were seized because of national security interests and denied the warrants were intended to "impede or subvert" the arbitration.<sup>27</sup>

Timor-Leste instituted proceedings before the ICJ on December 17, 2013, requesting the return of all seized documents regarding the pending arbitration against Australia.<sup>28</sup> During hearings before the ICJ in January 2014, Australia announced plans to contest the jurisdiction of the arbitral tribunal to hear the case because Australia now denounces arbitral jurisdiction of investment claims and has withdrawn consent to the ICJ for disputes related to delimitation of maritime boundaries.<sup>29</sup> The ICJ declined to stay its

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<sup>23</sup> Paul Daley, *Timor-Leste Spying Claims: Australia has a History of Bugging its Neighbour*, THE GUARDIAN (Nov. 22, 2013), <http://www.theguardian.com/world/2013/nov/29/east-timor-spying-claims-australia-bugging> (last visited May 4, 2014).

<sup>24</sup> Wilson, *supra* note 15, at ¶ 30.

<sup>25</sup> Ministerial Statement, Sen. Hon. George Brandis, QC, Execution of ASIO Search Warrants (Dec. 4, 2013), <http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Fourth%20quarter/4-December-2013--Ministerial-Statement--Execution-of-ASIO-Search-Warrants.aspx>, (last visited Jan. 29, 2014); Perry, *supra* note 22.

<sup>26</sup> Perry, *supra* note 22.

<sup>27</sup> Ministerial Statement, *supra* note 25. The Attorney-General cited the ASIO Act of 1979 which allows him to issue search warrants, at the request of the ASIO, if there are "reasonable grounds" to believe the documents contain critical security intelligence and further defines security to apply to this situation. The Attorney-General also noted that lawyer-client privilege is not a defense for violations of security.

<sup>28</sup> Press Release, International Court of Justice, *supra* note 10. Timor-Leste asked the Court to declare that Australia's acts violated Timor-Leste's sovereignty under international and domestic law, that the documents should be returned and any copies destroyed, and that Australia issue a formal apology. Timor-Leste also requested provisional measures to protect the information seized.

<sup>29</sup> Press Release, International Court of Justice, Questions Relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*) Conclusion of the Public Hearings on the Request for the Indication of Provisional Measures Submitted by Timor-Leste (Jan. 22, 2014) (Australia argued the Court should refuse Timor-Leste's requests and that ICJ proceedings be stayed until the pending treaty arbitration

proceedings pending arbitration, which is scheduled to begin in September 2014. Instead, the ICJ set time-limits for the initial pleadings by finding this dispute distinct from the dispute before the arbitral tribunal.<sup>30</sup> The ICJ also determined it has jurisdiction to determine if Australia must return the seized materials.<sup>31</sup> On March 3, 2014, the ICJ announced provisional measures that require Australia to keep all seized materials sealed until further notice from the Court and to not interfere with communications between Timor-Leste and its lawyers in any pending or future litigation.<sup>32</sup>

### III. TIMOR-LESTE AND AUSTRALIA'S ALLEGED USES OF "GUERRILLA TACTICS"

#### A. *Timor-Leste*

Timor-Leste needs the arbitral tribunal to declare that the CMATS Treaty was negotiated in bad faith so Timor-Leste can renegotiate for a more equitable share of the downstream oil revenue allocated in the treaty.<sup>33</sup> Under the current treaty, Australia estimates that Timor-Leste could receive US\$15 billion from revenue sharing, but that is significantly less than the US\$40 billion projected for Australia's profit.<sup>34</sup> If Timor-Leste had a more equitable division of downstream revenue it would be able to receive tax revenue from refining plants that are currently earning Australia US\$2.5 billion.<sup>35</sup>

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is settled before the tribunal). *See, e.g.*, INTERNATIONAL COURT OF JUSTICE, DECLARATIONS RECOGNIZING THE JURISDICTION OF THE COURT AS COMPULSORY, Australia, (Mar. 22, 2002) <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU>); Luke Nottage, *The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement,"* TRANSNAT'L DISP. MGMT. 5 (2011), <http://www.transnational-dispute-management.com/article.asp?key=1767>) (quoting the Minister of Trade's pronouncement that Australia would no longer be including investor-state dispute resolution in trade agreements); Wilson, *supra* note 15, at ¶ 28.

<sup>30</sup> Questions Relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*) 2014 I.C.J. 156 (Jan. 28) (order fixing the time-limits for the filing of written pleadings).

<sup>31</sup> *Id.*

<sup>32</sup> Questions Relating to the Seizure and Detention of Certain Documents and Data, Request for the Indication of Provisional Measures Order, (*Timor-Leste v. Australia*) 2014 I.C.J. 156 (Mar. 3).

<sup>33</sup> As stated previously, Timor-Leste receives no "downstream" revenue from the JDPA, although there is a provision in Art. 5 ¶ 9 that requires Australia to pay Timor-Leste "half the aggregate of the Australian revenue component...less the Timor-Leste revenue component." Certain Maritime Arrangements in the Timor Sea, *supra* note 16, at ¶ 9. Since the treaty went into effect in 2007 Timor-Leste has received ninety percent of the "upstream" revenue, but Australia has been in control of the Bayu-Undan processing project which began in 2004 and includes a pipeline directly to a processing plant in Darwin, Australia. CONOCOPHILLIPS AUSTRALIA: OUR PROJECTS, BAYU-UNDAN, <http://www.conocophillips.com.au/our-business-activities/our-projects/Pages/bayu-undan.aspx> (last visited Jan. 29, 2014).

<sup>34</sup> AUSTRALIA DEP'T OF FOREIGN AFFAIRS AND TRADE, *supra* note 16.

<sup>35</sup> *The La'o Hamutuk Bulletin*, *supra* note 15.

Finally, Timor-Leste is now more stable and developed than in 2006, and, therefore, better equipped to contest questionably predatory provisions within a treaty that arguably apportion its rightful maritime territory.<sup>36</sup>

Timor-Leste's clear motive for wanting to change the current revenue sharing model requires forcing arbitration on Australia, which may be a "guerrilla tactic" in its own right. Timor-Leste has no recourse to arbitration through the CMATS treaty alone and must use the initial Timor Sea Treaty from 2002, which contained an arbitral clause and was incorporated by the CMATS treaty, to obtain jurisdiction.<sup>37</sup> The recourse to arbitration is meant to be based on an agreement between the parties, but Australia denounces investment arbitration. If termination of the treaty was all that Timor-Leste sought, it had other means available.<sup>38</sup> The only way for Timor-Leste to renegotiate the treaty or assert its sovereign rights and delimit its maritime border with Australia, however, is to use arbitration as a weapon against Australia. It needs an international, binding award from the arbitral tribunal declaring the CMATS Treaty invalid. Although Timor-Leste seeks a change in the treaty, it does not appear that it seeks to change its relationship with Australia in any substantive way.<sup>39</sup>

### *B. Australia*

Unlike Timor-Leste's possible "guerrilla" intentions, the alleged "guerrilla tactics" employed by Australia are more traditional and more maliciously motivated. Australia appears to be the diplomatically stronger and economically richer bully in this situation. If the allegations of espionage during the 2004 treaty talks are substantiated, Australia may suffer international embarrassment and lose prestige among economic and diplomatic partners.<sup>40</sup> This begs the question, why would a powerful, developed country,

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<sup>36</sup> See Certain Maritime Arrangements in the Timor Sea, *supra* note 16, at Art. 4 ¶ 2. This allows domestic legislation to supersede the treaty and activities related to petroleum and other resources to continue in the area governed by the treaty if sanctioned by domestic legislation in effect as of May 19, 2002. Timor-Leste's independence was recognized on May 20, 2002, so it has no domestic legislation regarding oil or fishing rights in the Timor Sea, but Australia does. See also Wilson, *supra* note 15, at ¶ 28; *The La'o Hamutuk Bulletin*, *supra* note 15.

<sup>37</sup> See Press Release, International Court of Justice, *supra* note 10; Ministerial Statement, *supra* note 26; Wilson, *supra* note 15, at ¶ 30.

<sup>38</sup> Certain Maritime Arrangements in the Timor Sea, *supra* note 16, at Art. 12 ¶ 2a-2b. Either party could terminate the treaty with three months notice if there was no agreed upon development plan for the Sunrise IUA Unit Area in 2013. If the area were developed in the future, however, the treaty would come back into force for the duration of the agreed upon time.

<sup>39</sup> *Statement by Government of Timor-Leste*, *supra* note 19.

<sup>40</sup> Kate Lamb, *Timor-Leste v. Australia: What Each Country Stands to Lose*, THE GUARDIAN, (Jan. 23, 2014), <http://www.theguardian.com/world/2014/jan/23/timor-leste-v-australia-analysis> (last visited May 4, 2014). The author also realizes that this is speculative, but if the recent disclosure of the United States' wiretapping program by the National Security Agency (NSA), for a similar reason of "national security," is analogous, then Australia may be facing a response of its allies similar to that endured by the U.S. See, e.g., Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN



like Australia, employ “guerrilla tactics” to bully a weaker, dependent nation? Australia’s self-interested actions during treaty negotiations may be domestically defensible, but its new “guerrilla tactics” are attempting to perpetuate dominance in the name of national security and international reputation. Left unsanctioned this will set a dangerous precedent for allowable actions by stronger parties in investment treaties.

Australia is using “guerrilla tactics” to avoid an arbitral decision that condemns its previous actions and invalidates a treaty that favors Australia’s economic interests.<sup>41</sup> Australia will attempt to withdraw consent to the ICJ to hear the dispute.<sup>42</sup> Without consent, the ICJ will be unable to rule on the merits and determine if Australia’s actions were condemnable. Australia also plans to challenge the jurisdiction of the arbitral tribunal, rendering it unable to determine if the treaty should be terminated.<sup>43</sup> Australia wants to defend and increase its oil revenue from the treaty, and “guerrilla tactics” accomplish this goal. If Australia’s tactics work, Timor-Leste will be left with no other recourse to renegotiate.<sup>44</sup>

If jurisdiction is accepted, Australia will argue that its national security interests are at stake and it must protect its ASIO methods and agents from accountability.<sup>45</sup> Australia needs to use dilatory tactics because it seems to have no substantive legal defense to justify the information confiscated from the former ASIO agent and Timor-Leste’s counsel.<sup>46</sup> If the tribunal accepts Australia’s national security argument, which is often received deferentially,<sup>47</sup> there will be no evidence of espionage and Timor-Leste cannot prove its claims.

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(Jun. 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> (last visited May 4, 2014).

<sup>41</sup> Perry, *supra* note 22. *See, e.g.*, Horvath & Wilske, *supra* note 1, at 341.

<sup>42</sup> Press Release, Questions Relating to the Seizure and Detention of Certain Documents and Data, *supra* note 29. Australia has moved away from arbitral clauses in investment treaties in order to protect domestic business. *See also* Nottage, *supra* note 29.

<sup>43</sup> *See* INTERNATIONAL COURT OF JUSTICE, DECLARATIONS RECOGNIZING THE JURISDICTION OF THE COURT AS COMPULSORY, *supra* note 29; Nottage *supra* note 29.

<sup>44</sup> Wilson, *supra* note 15, at ¶ 28.

<sup>45</sup> Ministerial Statement, *supra* note 25.

<sup>46</sup> For motives behind states’ use of “guerrilla tactics” *see, e.g.*, Kolo, *supra* note 3, at 47.

<sup>47</sup> *See, e.g.*, Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonwealth*, J. OF INT’L ECON. L., at 7, first published online Aug. 22, 2013, <http://jiel.oxfordjournals.org/content/early/2013/08/22/jiel.jgt022.full.pdf+html>; William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 312-13 (2010) (authors outlining that evidence of “ulterior economic motives” or a distant connection between interests and actions could allow a tribunal to not give deference to the state).

#### IV. ARBITRAL SYSTEMS' CURRENT RESPONSES TO "GUERRILLA TACTICS"

Recent studies of "guerrilla tactics" in arbitration present divergent views on how to effectively sanction or prevent these actions.<sup>48</sup> Although many authors cite examples of "guerrilla tactics," there are fewer examples of tribunal sanctions.<sup>49</sup> The arbitral tribunal's and the ICJ's decisions in *Timor-Leste v. Australia* may set a strong precedent for future sanctions in state-to-state investment disputes.

Currently, there are no adopted international arbitration rules for ethical behavior. Therefore, for the sake of predictability, many tribunals apply the national standards of the seat of arbitration when sanctioning behavior.<sup>50</sup> The other option is for parties, tribunals, or administering agencies to develop their own standards for ethical behavior to govern the dispute. This option would result in sanctions based on precedent, but it would be less predictable, consistent, and binding.<sup>51</sup>

In the common law system there are several examples of courts sanctioning lawyers and firms for frivolous, dilatory actions.<sup>52</sup> In the United States, courts rely on 28 U.S.C. §1927, which requires attorneys unreasonably extending proceedings to bear the costs personally.<sup>53</sup> Courts will also affirm arbitral sanctions for bad faith conduct, even when it contradicts stipulations in the contract.<sup>54</sup> If the frivolous behavior was especially egregious, firms may be required to comply with shaming sanctions.<sup>55</sup> Nevertheless, there is no uniformity to the sanctions across jurisdictions. Courts recognize the necessity of sanctions because the recourse to arbitration is meant to be a more efficient alternative to the courts.<sup>56</sup> The majority of sanctions, however, are for obvious tactics, and there are

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<sup>48</sup> For authors who believe in the need for enforceable universal international ethical standards, *see, e.g.*, Rowley, *supra* note 8; Wade, *supra* note 2. For authors who disagree and believe that the use of "guerrilla tactics" needs to be evaluated on a case-by-case basis, *see, e.g.*, Malintoppi, *supra* note 2; Lucy Reed, *supra* note 13.

<sup>49</sup> *See, e.g.*, Horvath & Wilske, *supra* note 1; Kolo, *supra* note 3; Wade, *supra* note 2.

<sup>50</sup> Gunther J. Horvath & Stephan Wilske, *Chapter 3, §3.01: The "Bag and Baggage" of National Systems and its Impact on International Arbitration*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 117, 117-18 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, Hagit Elul, *Chapter 3, §3.02: Guerrilla Tactics and How-to-Counter Them in National Litigation: [A] Experiences from the Common Law System*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 118, 131-33 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>53</sup> *Id.* at 133 (citing *Emnon v. Prospect Capital Corp.*, 675 F. 3d 138 (2d Cir. 2012)).

<sup>54</sup> *Id.* (citing *Reliastar Life Ins. Co. of New York v. EMC National Live Co.*, 564 F. 3d 81 (2d Cir. 2009)).

<sup>55</sup> Elul, *supra* note 52, at 133.

<sup>56</sup> *Id.* at 132.

few examples of sanctions for overly-zealous representation.<sup>57</sup> Recognition of “guerrilla tactics” is not enough to prevent the behavior without a broadly applicable solution.

There is a greater range of “guerrilla tactics” in civil law systems because of the highly procedural nature of the adjudication system. Therefore, any attempt to thwart or delay fair proceedings may be considered a “guerrilla tactic.”<sup>58</sup> For example, the Mexican arbitral system saw an increase in “guerrilla tactics” when domestic litigators began to arbitrate and engaged in dilatory tactics, the destruction of court evidence, and criminal intimidation.<sup>59</sup> Mexico attempts to protect an individual’s constitutional rights through procedural rules and review standards, but such protections do not protect the arbitral system itself.<sup>60</sup> In Mexico, sanctions for “guerrilla tactics” are generally limited to awarding costs, which some believe addresses the problem without addressing the litigators’ behavior.<sup>61</sup> Regardless of the possible “correct” results reached by tribunals, the system is not addressing the root cause of “guerrilla tactics,” so such behaviors are likely to continue.

Romania, as compared to Mexico, recognizes bad faith behaviors and has rules to counteract such “guerrilla tactics.”<sup>62</sup> The sanctioning rules are explicit and limit the definition of unacceptable behaviors, but there is a high burden of proof that is difficult to meet when evidence is unavailable.<sup>63</sup> Unlike Mexico, Romania’s procedural rules can be used to prevent or sanction “guerrilla tactics.”<sup>64</sup> Romanian law emphasizes the importance of identifying and sanctioning “guerrilla tactics” whenever possible to protect arbitration and thereby prevent future wrongdoing.

The ICJ will likely be reluctant to impose sanctions for “guerrilla tactics” in *Timor-Leste v. Australia* because it must be deferential to States to maintain consent to

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<sup>57</sup> Elul, *supra* note 52, at 131-33.

<sup>58</sup> Bernard F. Meyer-Hauser & Martina Wirz, *Chapter 3, §3.02: Guerrilla Tactics and How-to-Counter Them in National Litigation: [B] Experiences from the Civil Law System*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 134, 134-35, (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>59</sup> *See, e.g.*, Wöss, *supra* note 9 (the author also noted that such tactics were seen more frequently in adjudication involving political issues).

<sup>60</sup> *Id.* The author explains procedural safeguards include application of the UNCITRAL rules for the burden of proof and the “indirect amparo” proceeding for awards.

<sup>61</sup> *Id.*

<sup>62</sup> Oprisan, *supra* note 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* These sanctions include: continuing proceedings even if one party is non-participatory, interim measures to protect assets, and awarding costs.

jurisdiction.<sup>65</sup> The ICJ also frequently avoids sanctioning behavior because such a qualification is a culturally-biased determination.<sup>66</sup>

## V. CONCLUSION

The dispute between Timor-Leste and Australia provides the ICJ with an opportunity to enter the international debate about the efficacy, enforceability, and application of universal ethical standards.<sup>67</sup> The greatest concern in this case is that the stronger party used its sovereign powers to exploit a weaker party for economic gain. The outcomes of these cases may establish the appropriate protections for treaty negotiations between unbalanced parties. This case brings the idea of “guerrilla tactics” to the forefront of state-to-state arbitration and is likely to enhance the discussion of control and response to such actions in adjudicatory proceedings.<sup>68</sup> Further allegations against Australia may be evidence of a consistent pattern of the use of “guerrilla tactics” in international affairs.<sup>69</sup>

The extreme examples of “guerrilla tactics” receive the most attention, but dilatory tactics that turn arbitration into a dispute of attrition decided by wealth is inherently more dangerous. The acceptance of such tactics could mean the downfall of arbitration internationally. *Timor-Leste v. Australia* is an opportunity for the international arbitration community to acknowledge and accept responsibility for preventing “guerrilla tactics” in all its forms and sanctioning it strongly when it does occur. What some authors are calling an epidemic must be brought under control so that such behaviors do not become the norm in future arbitration proceedings.<sup>70</sup>

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<sup>65</sup> Robert Volterra, *Chapter 3, §3.03: Guerrilla Tactics at International Courts and Institutions: [A] Experiences from the International Court of Justice*, in GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 238, 249-50 (Günther J. Horvath & Stephan Wilske eds., 2013).

<sup>66</sup> *Id.* at 239.

<sup>67</sup> See, e.g., International Bar Association, [IBA], *Guidelines on Party Representation in International Arbitration*, (May 25, 2013), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#partyrep](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#partyrep) (last visited May 4, 2014).

<sup>68</sup> See generally Horvath & Wilske, *supra* note 1, at 343-50. The editors suggest possible solutions using the arbitral clause, institutional rules, and national courts to sanction and deter this behavior.

<sup>69</sup> Bridie Jabour & Martin Pengelly, *Australia Spied on Indonesia Talks with U.S. Law Firm in 2013*, THE GUARDIAN (Feb. 15, 2014), <http://www.theguardian.com/world/2014/feb/16/australia-spied-indonesia-talks-us-firm> (last visited May 4, 2014).

<sup>70</sup> Horvath & Wilske, *supra* note 1, at 342.