

The Honourable
STEVE BRACKS AC

Committee Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

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Dear Committee Secretary

Please find attached my submission to the Senate Foreign Affairs, Defence and Trade Committee inquiry into *Australia's declarations made under certain international laws*.

I am available to attend a public hearing, and am happy for my submission to be published.

Yours sincerely



Hon Steve Bracks AC

Why is Australia afraid of an international umpire?

I was Premier of Victoria from 1999 to 2007. I have had a life-long interest in Australia's relationship with our close neighbour Timor-Leste. Following my retirement as Premier in mid 2007 I became a pro bono adviser to the then Prime Minister of Timor-Leste, Xanana Gusmao. Over the following ten years I made over forty visits to Timor-Leste. While my formal role advising Xanana Gusmao has ended, I maintain a personal, and very active interest in Timor-Leste's affairs.

I believe Australia's declarations made under articles 287(1) and 298(1) of UNCLOS and article 36 of the Statute of the International Court of Justice (ICJ) in March 2002 should be revoked.

Foreign minister Downer's declarations had the immediate effect of denying the Timorese people access to an independent umpire to determine maritime boundaries between Australia and the soon to be independent state of Timor-Leste. Minister Downer's declarations were made just two months before Timor-Leste's independence, and just weeks after American company, Oceanic Exploration offered to fund litigation in the ICJ on behalf of Timor-Leste so that a panel of judges could determine a fair and equitable maritime boundary in the Timor Sea.¹

The Howard government's refusal to allow the Timorese people access to an independent umpire was directly linked to fears Australia would lose purported rights to revenue from hydrocarbons in the Timor Sea.²

Australia's claim to rights to revenue from hydrocarbons in the Timor Sea north of the median (or halfway) line between Australia and Timor-Leste were based on the Timor Gap Treaty, that was signed in a jet flying over the Timor Sea by Australian and Indonesian foreign ministers Gareth Evans and Ali Alitas in December 1989. Indonesia and Australia had been unable to agree on a maritime boundary. Instead, they negotiated a 'resource sharing' treaty that gave Australia rights to oil and gas reserves north of the median line.

Five years after the Timor Gap Treaty was signed, Australia ratified the United Nations Convention on the Law of the Sea (UNCLOS). This enabled Australia to claim one the world's biggest Exclusive Economic Zones (EEZs), that gave Australia sovereignty over the seabed and water column up to 200 nautical-miles (nm) from the coast.³

When Timor-Leste became independent after Indonesia's violent withdrawal in September 1999, Indonesia immediately lost all authority to exercise rights off the coast of Timor-Leste.⁴ This meant the 1989 Timor Gap Treaty ceased to exist. It also meant the new nation of Timor-Leste would have rights to a 200 nm EEZ. The Timor Sea is only 260 nm wide which meant the EEZ rights of Timor-Leste and Australia overlapped, in which case a median line

¹ Alexander Munton, 'A Study of the Offshore Petroleum Negotiations between Australia, the UN and East Timor', PhD Thesis, (Australian National University, 2006). p. 193

² See generally, Kim McGrath, *Crossing the Line: Australia's Secret History in the Timor Sea*, (Carlton, Victoria Schwartz Publishing 2017), <https://www.blackincbooks.com.au/books/crossing-line>

³ Approximately 370 kilometres. Geoscience Australia, <https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/oceans-and-seas>

⁴ Gregory French, 'The Timor Gap Treaty in Transition', *Australian Mining and Petroleum Law Journal*, 18 (1999)

would apply. This would put the oil and gas rich areas of the Timor Sea north of the median line, in Timorese waters.⁵

Between October 1999 and May 2002, Timor-Leste was administered by the United Nations East Timor Temporary Administration (UNTAET). During this period the Howard government, issuing permits under the terms of the Timor Gap Treaty, successfully pressured UNTAET to keep the terms of the 'revenue sharing' Timor Gap Treaty alive.⁶

The Timorese were recovering from a brutal 24-year occupation during which up to a third of the population died.⁷ The oil and gas reserves in the Timor Sea were the only significant revenue source available to them. I believe that after Timor-Leste's independence in May 2002 it would have been in Australia's national interest to acknowledge that under UNCLOS the median line would be the Timor Sea maritime boundary. That would have consolidated Australia's relationship with a close, strategically placed neighbour. It would have been in Australia's national interest to have offered to negotiate a fair and equitable transition arrangement for the companies with permits issued under the illegal Timor Gap Treaty.

But the Howard government did not act in Australia's national interest. It put short term economic interests above long-term national interests. Given the power disparity between Australia and the desperately impoverished and traumatised half-island nation, allowing the ICJ or the International Tribunal on the Law of the Sea (ITLOS) to determine a maritime boundary according to international law, would have been an honourable and fair way to settle a Timor Sea boundary. Yet Australian foreign minister Downer asserted in a media statement announcing Australia's withdrawal from the maritime jurisdiction of the ICJ and the ITLOS in March 2002, that 'Australia's strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation'.⁸

Foreign minister Downer's statement is difficult to reconcile with Australia's purported support for the international rules-based system. It is difficult to reconcile with Australia's decision to take action to stop Japanese whaling at the ICJ.⁹ It is also difficult to reconcile with Australia's criticism of China's nine-dot line claim in the South China Sea.¹⁰

Australia's sudden withdrawal from the maritime jurisdiction of the ICJ and ITLOS in March 2002 is explained by one simple factor: unlike negotiations, litigation involves an independent umpire. Australia had good reason to expect that an international tribunal

⁵ Christopher Ward, 'The Maritime Boundaries of East Timor: The Role of International Law', (Northern Territory Bar Association Conference, Dili, 11 July 2014)

⁶ Paul Cleary, *Shakedown: Australia's Grab for Timor Oil*, (Crows Nest, NSW.: Allen & Unwin, 2007), Jonathan Morrow and Rachel White, 'United Nations in Transitional East Timor: International Standards and the Reality of Governance, The', *Aust. YBIL*, 22 (2002)

⁷ *Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation*, International Center for Transitional Justice, (2005 & 2013), Clinton Fernandes, 'Accomplice to Mass Atrocities: The International Community and Indonesia's Invasion of East Timor', *Politics and Governance* 3, 26 November 2015

⁸ Foreign Minister Alexander Downer, media release, 'Changes to International Dispute Resolution', 25 March 2002, http://www.foreignminister.gov.au/releases/2002/fa039j_02.html

⁹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* ICJ 31 March 2014, <https://www.icj-cij.org/en/case/148>

¹⁰ Dr Cameron Hill, Foreign Affairs, Defence and Security, 'Australia and the South China Sea: debates and dilemmas', *Parliamentary Library Briefing Book*, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/SouthChinaSea

would support a median line outcome in the Timor Sea, and not Australia's extreme claim for a boundary line north of the median line that gave Australia sovereignty over hydrocarbon rich areas of the Timor Sea that under UNCLOS, would belong to Timor-Leste.

Why was Australia prepared to risk our international reputation by denying the new nation of Timor-Leste access to an international umpire? What was at stake for Australia? The maxim 'follow the money' provides the answer. Australia was reaping billions of dollars in oil and gas revenue from companies that held permits unilaterally issued by Australia in areas of the Timor-Sea on the Timorese side of the median line.¹¹

The cynicism of Australia's declarations withdrawing from the maritime jurisdiction of the ICJ and ITLOS is yet another example of a pattern of extreme pragmatism and self-interest in Australia's foreign policy in regard to Timor-Leste. This pattern dates back to the Whitlam government's failure to protest the murder by Indonesian military forces of five young journalists working for Australian television networks at Balibo just before Indonesia invaded in 1975.¹² As Kim McGrath has documented in her book, *Crossing the Line, Australia's Secret History in the Timor Sea*, Australia's economic interests in oil and gas reserves in the Timor Sea has driven a pattern of immorality in our foreign policy concerning the Timorese.¹³

This pattern is consistent with the Australian Security and Intelligence Service (ASIS) being directed by the Howard government to plant listening devices under cover of an aid project, in the room being used by the Timorese maritime boundary negotiating team in 2004. In September that year, as Professor Clinton Fernandes recently observed in *The Saturday Paper*, 'Jemaah Islamiyah terrorists succeeded in bombing the Australian embassy in Indonesia'.¹⁴

Surely our ASIS resources should have been targeting the 'War on Terror', and not facilitating Australia's economic exploitation of a friendly, desperately poor and recently traumatised neighbour? Yet it seems the Howard government believed it was in Australia's national interest to divert ASIS resources from protecting Australians from the threat of Muslim extremists and instead spy on the Timorese to gain an even stronger advantage in maritime boundary negotiations. It also appears the Howard government believed it was in Australia's national interest to risk the lives and reputation of Australian aid workers around the globe by approving the bugging operation under the cover of an Australian aid program.

The maritime boundary negotiations targeted by ASIS, resulted in a treaty in 2006 known as the CMATS treaty.¹⁵ At the start of the negotiations Timor-Leste sought a median line boundary, while Australia demanded a boundary north of the median line. The end result was a 'resource sharing' treaty rather than a maritime boundary treaty. The CMATS treaty gave Australia rights to revenue from oil and gas fields on the north of the median line for fifty years. It was a big win for Australia.

¹¹ McGrath, *Crossing the Line*, pp. 152 - 17

¹² Magistrate Dorelle Pinch, 'Inquest into the Death of Brian Raymond Peters', (NSW Coroner's Court, 2007)

¹³ McGrath, *Crossing the Line*, pp. 186 - 192

¹⁴ Clinton Fernandes, 'The Witness K Case and Government Secrecy', *The Saturday Paper*, 28 September 2019, <https://www.thesaturdaypaper.com.au/opinion/topic/2019/09/28/the-witness-k-case-and-government-secrecy/15695928008833>

¹⁵ 'Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea', signed 12 January 2006 (Not in Force)

After the Australian government made the spying allegations public in 2013, Timor-Leste sought to terminate CMATS at the Permanent Court of Arbitration at The Hague, arguing Australia had acted in bad-faith.¹⁶ A former ASIS operative known only as Witness K, was prepared to give evidence. Australian media has reported that Witness K believed the 2004 bugging operation was “immoral and wrong” because it served not the national interest, but the interests of big oil and gas.¹⁷ In December 2013, on the eve of the first directions hearing at The Hague, the home of Witness K, and the office of his lawyer Bernard Collaery, both in Canberra, were raided by the Australian Secret Intelligence Service and Australian Federal Police.¹⁸ Bernard Collaery also acted for Timor-Leste and many documents belonging to Timor-Leste were taken in the raids. This was an extraordinary breach of diplomatic immunity and lawyer client privilege.

Australia refused requests to return the documents, prompting Timor-Leste to take action against Australia in the general division of the ICJ.¹⁹ Following an interim hearing in March 2014, the ICJ ordered Australia to seal the documents and not to spy on Timor's lawyers pending a full hearing at a later date. It was Australia's first loss at the ICJ.

Pending the full ICJ hearing, in April 2016, Timor-Leste became the first nation to invoke the Compulsory Conciliation provisions of UNCLOS.²⁰ Australia challenged the jurisdiction of the Compulsory Conciliation Commission and lost. In the process of the Conciliation, Timor-Leste agreed to withdraw from the embarrassing ICJ and arbitration proceedings in return for Australia's long-awaited committing to negotiate a permanent maritime boundary.

Sixteen years after foreign minister Downer's declarations withdrawing Australia from the maritime jurisdiction of the ICJ and ITLOS, Australia finally agreed on a Timor Sea boundary that essentially followed a median line. The treaty was signed at the United Nations in New York in March 2018.²¹ During that 16 years, while Timor-Leste was dealing with the aftermath of a brutal 24 year occupation and struggling to build a new nation, Australia continued to receive billions of dollars of revenue from oil and gas fields that, under the treaty, are now recognised as being in Timor-Leste's waters.²² Australia continues to receive revenue from the Laminaria and Corallina fields on Timor-Leste's side of the median line,

¹⁶ Bob Carr, Minister for Foreign Affairs, media release, 3 May 2013, 'Arbitration under the Timor Sea Treaty', http://foreignminister.gov.au/releases/2013/bc_mr_130503.html; Leo Shanahan, 'Aussie spies accused of bugging Timor cabinet', *The Australian*, 29 May 2013; Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia) 2013-16, The Permanent Court of Arbitration, <https://pca-cpa.org/en/cases/37/>

¹⁷ Peter Lloyd, 'Brandis orders ASIO raids related to East Timor spying case', *ABC Radio, AM Program*, 4 December 2013

¹⁸ Tom Allard, 'ASIO Raids Office of Lawyer Bernard Collaery Over East Timor Spy Claim', *Sydney Morning Herald*, 3 December 2013

¹⁹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, International Court of Justice, 3 March 2014, <https://www.icj-cij.org/en/case/156>

²⁰ *Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, Permanent Court of Arbitration, 11 April 2016, <https://pca-cpa.org/en/cases/132/>

²¹ 'Timor-Leste's maritime boundary treaty with Australia', Timor-Leste Maritime Boundary Office, *Fact Sheet March 2018*, http://www.gfm.tl/wp-content/uploads/2018/03/16383-MBO-Factsheet-March-2018_v2.pdf

²² Helen Davidson, 'Australia accused of "siphoning" millions in Timor-Leste oil revenue', *The Guardian*, 16 April 2019, https://www.theguardian.com/world/2019/apr/16/australia-accused-of-siphoning-millions-in-timor-lestes-oil-revenue?CMP=share_btn_tw

that under the treaty could end up on Timor-Leste's side of the lateral boundary line only *after* they are depleted.²³

In June 2018 Australia's attorney-general Christian Porter approved charges being laid against Witness K and Bernard Collaery under legislation introduced during the 'War on Terror', to prosecute terrorists - the *National Security Information (Criminal and Civil Proceedings) Act 2004*. It seems the minister waited until after the treaty was signed before approving these charges. In Timor-Leste, Witness K and Bernard Collaery are heroes.²⁴ I have no doubt that Timor-Leste's Chief Negotiator, Xanana Gusmao would not have signed the treaty if he was aware Witness K and Bernard Collaery were to be prosecuted by Australia authorities. The Australians who should be prosecuted, are those who gave the instructions to install the listening devices in Dili, diverting intelligence resources away from the very real threat to Australians from acts of terror at the time.

We need a Royal Commission into the way the Department of Foreign Affairs and Trade conducted Australia's Timor Sea negotiations with Timor-Leste. In the meantime, revoking Australia's declarations made under articles 287(1) and 298(1) of UNCLOS and article 36 of the Statute of the ICJ would send a signal to the world that Australia is a cooperative global citizen and a willing participant in the international rules-based order.

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11 October 2019

²³ The Timor-Leste-Australia Maritime Boundary Treaty, 21 March 2018, *La'o Hamutuk*, <https://www.laohamutuk.org/Oil/Boundary/Treaty/18TreatyArticleEn.htm>

²⁴ Helen Davidson, Timor-Leste activists "shocked" by prosecution of spy Witness K and lawyer, *The Guardian*, 22 July 2018, <https://www.theguardian.com/world/2018/jul/22/timor-leste-activists-shocked-by-australias-prosecution-of-spy-witness-k-and-lawyer>