

To: The Joint Standing Committee on Treaties

From: Timorese United Association Incorporated (TUA Inc.)

Date: 10th March 2017

Re Inquiry: *Consequences of termination of the Treaty between Australia and the Democratic Republic of Timor Leste on Certain Maritime Arrangements in the Timor Sea (CMATS)*

The Timorese United Association Incorporated members and community associated with it, are primarily based in Western Sydney. We are pleased to have the opportunity to make a submission to the Joint Standing Committee on Treaties (JSCOT) on the above matter regarding CMATS.

TUA Inc. in addressing the consequences of CMATS's termination shall also avail ourselves of this opportunity to raise other factors that led to CMATS. We do not view CMATS as a stand-alone arrangement, as it is emblematic of the broader history of Timor-Leste and the triumvirate arrangement it belongs to; namely The Timor Sea Treaty (TST) 2002 and the International Unitisation Agreement (IUA) 2007.

We are Timorese by birth and it remains our Motherland, but we are also Australians by circumstance and choice. Australia has become home to and has been a refuge for many Timorese. It makes us unhappy when our two countries are in conflict. People to people our relationships are very strong, with the unique situation that reciprocal friendship groups are found all over both countries. The government to government relationship has been challenging with successive Australian governments mostly out of step with the desires of the Australian community regarding Timor-Leste. 1999, when the Security Council mandated ADF InterFet went into Timor-Leste, was a time when the people and the government were in synch on public policy.

For Timorese the history is marked by dispossession and deprivation and the abandonment many feel by the Australian Governments. None felt that more though than many of the Australians themselves from Sparrow Force (early Commandos 2nd/2nd and 2nd/4th who were stationed in Timor-Leste) who were cared for and saved by the Timorese. Australia was not then able to save the tens of thousands of Timorese murdered by the invading Japanese Imperial Army, then the Indonesian Military in 1975 and the years thereafter.

Australians do feel it keenly with their own Australian citizens and residents murdered by the invading Indonesian Military in October 1975 with the slaughter

of the Balibo Five. This was followed by the murder of Roger East in December that year in Dili. All media men, doing their job, reporting. No one held accountable, but the NSW Coronial Inquiry in the death of Brian Peters of the Balibo Five, found that they were murdered. Another situation where the people of Australia and the Governments were and remain out of step.

The relationship between the two countries is further marked by the resources in the Timor Sea and Australia's single minded approach to secure and exploit those resources, seemingly at all costs. This story has been kept hidden largely from the public, including their elected representatives.

The relationship between our two countries cannot be in harmony until the conflict in the Timor Sea is completely resolved. It is not just about resources but about bigger issues, of sovereignty from the Timorese perspective. By resolved we mean the permanent settlement of the respective maritime boundaries done according to international law that is the drawing of the median line as the coastlines are under 400 NM.

Therefore not done according to Australia's expansive natural prolongation continental shelf claim, or Australia's historical claim or Australia not wanting to disturb Indonesia regarding the Australia-Indonesia boundary agreement of 1972; but in good faith with the close neighbour of Timor-Leste.

The consequences we cannot fully predict, but CMATS had become an albatross, and was not what it was claimed to be at the outset, which was a creative solution. Some would call this creative solution 'appropriation'. We see the main consequence of its termination to allow the now permanent settlement of maritime boundaries.

We noted the joint announcement of both countries in January this year, that they would work towards an agreement on maritime boundaries by the end of the Compulsory Conciliation Commission (CCC) process in September 2017, and that the CCC is helping both countries to create conditions conducive to the achievement of permanent maritime boundaries. To further that Timor-Leste agreed to discontinue the two cases with Australia. One arising out of the allegations of spying on the Timorese CMATS negotiating high level team by allegedly bugging the Government Palace in Dili and the other to do with interpretation of the TST as we understand it. Both are done privately, so little detail available.

We know that Timor-Leste is committed to this and we would hope that Australia has turned the corner and is also committed. The past obfuscation of Australia regarding negotiating permanent maritime boundaries does not give us full confidence, but we approach this cautiously optimistic. The three agreements in the Timor Sea, called provisional arrangements are the result of Australia's refusal to negotiate permanent maritime boundaries and a middle power approach to a small power country. Let us hope there is a recalibration. We note that the experts call it an asymmetrical relationship.

The approach taken by Australia to Timor-Leste and the ensuing three agreements on arrangements in the Timor Sea, represents also in our view, Australia's disregard for Timor-Leste's right to self-determination. A self-determination that Australia Governments paid lip service to over the years of occupation, separating that policy position from its policy position on doing business with Indonesia regarding resources in the Timor Sea that were and are Timorese.

Australia was also the only nation to give de jure recognition to Indonesia's illegal invasion and annexation of Timor-Leste. Australia's unsustainable grab for Timor Sea territory in the Timor Sea, and then its refusal to negotiate permanent maritime boundaries with Timor-Leste despite letters and the like from Prime Minister to Prime Minister on this, but in reality complete obfuscation, mistrust borne of allegations of spying, not being treated respectfully have led to CMATS being terminated.

Can you imagine what it was like in 1999 pre and post the popular consultation having resource companies and a middle power country bearing down on political leaders, who had no infrastructure and not yet even home to their motherland, to 'sort out' the Timor Sea. The political leaders and the government of Timor-Leste had little choice, no choice really, but to agree to firstly the TST 2002, then CMATS and the IUA. It was that or nothing. Given the first national budget was USD \$ 64 million, it was sign on the dotted line or go nowhere. Given that situation, the Timorese did well to wrest back some gains from Australia.

What Professor Clive Schofield of Wollongong University had to say about CMATS is worth restating here. (See attached article)

"East Timor's decision to enter into CMATS does, however, appear to have been born of real politik. Fundamentally, East Timor had few alternative options available. In order to secure access to substantial additional revenues derived from seabed resources, the deal had to be done. In short, in the

judgement of East Timor's negotiators, CMATS represent the best deal on offer with minimal prospects of an alternative materialising.

In this context it is important to acknowledge that Australia was holding most if not all of the cards. Fundamentally, gaining access to the resources of the Timor Sea can be viewed as a far more urgent and important issue for East Timor than for Australia. Australia was therefore able to adopt a relatively robust negotiating position and ensure that its key requirements were met with rather more success than East Timor could.

In particular, East Timor's access to an independent judicial resolution of the dispute was effectively blocked by Australia's withdrawal from the jurisdiction of the ICJ and LOSC dispute settlement provisions (such as ITLOS) in respect of the delimitation of maritime boundaries.

Although it is fair to observe that East Timor was not compelled to enter into CMATS and that it could have opted to prolong negotiations in the hope of securing a better deal, this must be regarded as a largely unrealistic hope, given the asymmetrical nature of the bilateral relationship and Australia's firm negotiating stance."

What Professor Schofield is referring to is Australia's withdrawal from the jurisdiction of the International Court of Justice (ICJ) and UNCLOS's International Tribunal on the Law of the Sea (ITLOS) for the express purpose of delimiting maritime boundaries. (See attached media release)

Many people ask why Australia has resolved its boundaries with all other neighbours but not Timor-Leste. It is the sixty million dollar question. Why indeed?

Some of the factors we have cited above and from what we can tell it has to do with Australia's unilateral interpretation of the Truman Proclamation of 1945 on the continental shelf, its unique interpretation of the 1958 Convention on the Continental Shelf, that the special circumstances mentioned there but not defined, to be Australia saying that its continental shelf was extensive and nearly to Timor-Leste. That was contested as well by many including Australian experts. This convention had however recognised that with opposing or adjacent coastlines the starting point was the median line. Australia has never been keen to embrace the law that is the median line in the Timor Sea, but has in all other delimitations.

This was followed by Australia's unilateral grant of exploration licences to resource companies in 1962 and 1963, grants that Australia has spent some now fifty-five years defending. (See attached map and note the median line location and this is Australia's map as well which speaks to their knowledge of where the median line should be).

Since this early time Australia has not deviated from this position, despite being aware of the various counter-arguments as early as 1965 (even before) when Minister for National Development, David Fairbairn, unsuccessfully made a Cabinet Submission in support of a Median Line. The two quotes below are found in Mr. Robert King's submission cited below and attached to this submission.

“The Minister for National Development, David Fairbairn, had unsuccessfully argued in a November 1965 Cabinet submission in favour of falling back to the median line, on the ground that the time would soon come when it would be possible to argue that there was a common continental shelf between Australia and Timor and that therefore the applicable international rule was the median line. Indonesia could adopt this argument and supported it by a ‘Confrontation’ policy consisting of the issue of permits and authorities either to Indonesian or foreign oil search organizations. In such a case, Australia would be faced with a decision whether to go to war with Indonesia over a doubtful claim (perhaps for the benefit of a foreign oil company) or whether to repudiate its claim.¹⁶ Cabinet did not accept Fairbairn's submission, preferring to press Australia's claim to all of the continental shelf on the Australian side of the Timor Trough.” [*Cabinet submission No.1165, ‘Off-Shore Petroleum’, 25 November 1965, p.8, NAA A5827/1, Vol.37; NAA A1838/1, 752/1/23, pt.1, pp.8-9.*]

“A plea for an Australian position based on a wider consideration of national interests was made in June 1971 by C.R. (Robin) Ashwin, Minister at the Australian Mission to the United Nations, who wrote: ‘I do not think it can be other than a source of great irritation to the Indonesians in the future if we are extracting oil and other minerals to our great economic advantage only some 30 or so miles from the Indonesian coast but well over 100 miles from Australia’. Keith Brennan, Senior Assistant Secretary, International Legal Division, replied to Ashwin that the Australian position reflected ‘a recent and quite uncompromising reaffirmation by Ministers of the Government's stand on the matter. The fact that the Department of National Development believes the Timor Sea to hold particular promise for seabed exploitation makes any concession in the area more than usually difficult’.” [*Ashwin to Brennan, 29 June 1971 and Brennan to Ashwin, 12 July 1971, NAA A1838/1, 752/1/23, pt.8, pp.155-6, 163.*]

Australia still today asserts that its continental shelf goes nearly to Timor-Leste's coastline, within some thirty nautical miles and that gives them some entitlement. It does no such thing, in terms of geography or law. However the Federal Attorney-General still puts forward the position, that an extensive continental shelf means something and that it gives Australia greater rights.

The Attorney-General Senator the Hon. Mr George Brandis made comments on the continental shelf as recently as 2014 when speaking in the Senate. They are quoted as follows and those learned in the law of the sea find the Sky News comment surprising. Senator Brandis in responding to a question without notice (9th September 2014) said that "The Australian continental shelf to the north-west of Western Australia runs beneath the Timor Sea very close to the coastline of East Timor." Earlier in the year Senator Brandis went in an interview with Tom Connell on Sky News regarding ICJ Timor-Leste v Australia, News said: "The law of the sea, and international law, provide for different rules for the delimitation of boundaries between states...the continental shelf principle [gives] the littoral state whose continental shelf it is greater rights than other states, albeit states that might be in closer physical proximity

Australia did this with the 1972 Seabed Boundary Agreement with Indonesia and eventually a compromise was reached, but Indonesia would not do that next time round and the 1997 maritime boundary agreement (known as the Perth Treaty) marked the boundary at the median line.

That treaty has not been ratified by the Indonesian Parliament, but it does signify what both countries believe their entitlements to be, giving up all claims outside certain areas, as did the 1972 Seabed Boundary Agreement.

Everything we have read about the law of the sea and we are not experts makes it clear that in a situation like ours, with Australia and Timor-Leste having close coastlines-never reaching 400 nautical miles, means that a maritime boundary would be drawn starting at the median line.

Australia must know this despite pursuing its unbelievable continental shelf position. Surely the legal advice makes this clear, unless Australia has poor legal advice.

Some have said that Australia gave de jure recognition to be able to 'Close the Gap', that is by simply linking up two points of the 1972 boundary agreement with Indonesia and secure rights to the oil and gas in the Timor Sea. Well that

did not happen but Australian still got access to resources through other creative means namely the 1989 Timor Gap Treaty (TGT), done by Australia with Indonesia despite the illegal annexation. Portugal was still the administering power of Timor-Leste at that time and it was ignored.

The ground was set for de jure recognition after the 1972 Seabed Boundary Agreement and before the 1975 invasion. In 1974 government officials stated: "Indonesian absorption of Timor makes geopolitical sense. Any other long-term solution would be potentially disruptive of both Indonesia and the region. It would help confirm our seabed agreement with Indonesia. It should induce a greater readiness on Indonesia's part to discuss Indonesia's ocean strategy." ¹

That statement speaks for itself, and de facto recognition followed in 1978, quickly made de jure recognition in 1979.

We reiterate that the consequences of CMATS terminating can be that it allows Australia and Timor-Leste to push the restart button for negotiations to settle permanent maritime boundaries, finally bringing certainty into the Timor Sea that is needed and has so long been absent, due to this dreadful history.

In doing some research for our submission, we came across submissions to nearly all inquiries the Federal Parliament has undertaken regarding Timor-Leste and associated matters. One that stood out was that of a Mr. Robert King who is not known to the Timorese diaspora but whose work is profound. As someone who is not an activist or advocate his work is even more astonishing. We have attached his latest submission to an inquiry of 2013 undertaken by the JSCFDT. We consider it essential reading for anyone involved in this matter.

In the National Interest Analysis [2017] ATNIA 8 paragraph 9 says: "Australia's interests are served by fulfilling its commitment to implement the package of measures agreed with Timor-Leste, including the shared understanding between the Parties on the consequences of termination of the CMATS Treaty. Australia has committed to engage in the conciliation in good faith, reflecting our commitment to settle disputes peacefully and consistently with international law, including UNCLOS."

TUA Inc. has to ask why Australia as an older, established government with a fully functioning state needs a third party to help it do what it says it take pride

¹ Wendy Way, ed., *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-1976*, p 58, Canberra: <http://dfat.gov.au/geo/timor-leste/pages/timor-leste.aspx>

in, settling matters bilaterally.

Better late than never we say, but TUA Inc. also has to ask why Australia has forced Timor-Leste to expend both time and money that could be better deployed in its state building programme. It is ironic that Australia aids Timor-Leste yet forces this expenditure by its obstinate and legally incorrect assertion of rights in the Timor Sea and has put Timor-Leste in this position.

TUA Inc. read that Australia is worried about Indonesia in this and do not want to 'unscramble the egg' or words to that effect used by Mr. Downer when he was Foreign Minister. Well Timor-Leste did not cause the eggs to be scrambled.

Timor-Leste cannot keep paying for Australia's incorrect de jure recognition to Indonesia's illegal invasion and annexation of Timor-Leste and by its unsustainable natural prolongation continental shelf claim. We are told that legally the 1972 Seabed Boundary Agreement is boundary done and dusted. There may be some cause to adjust what are called the laterals but what is north and south of that boundary is what is. That is a matter for Australia and Timor-Leste, so it seems like a bit of scaremongering on Australia's part.

TUA Inc. also has to ask why Australia withdrew from the jurisdiction of the International Court of Justice (ICJ) and the International Tribunal of the Law of the Sea (ITLOS) cutting off the means of recourse to the judicial umpire as they did on the eve of Timor-Leste's restoration of independence which was May 2002. The withdrawal was March 2002. (See media release attached)

Since independence, East Timor has argued in favour of a median or equidistance line between Timor-Leste and Australia's opposite coasts, arguing that such a line would be consistent with the prevailing international law and UNCLOS. This is supported by ICJ, ITLOS and international law.

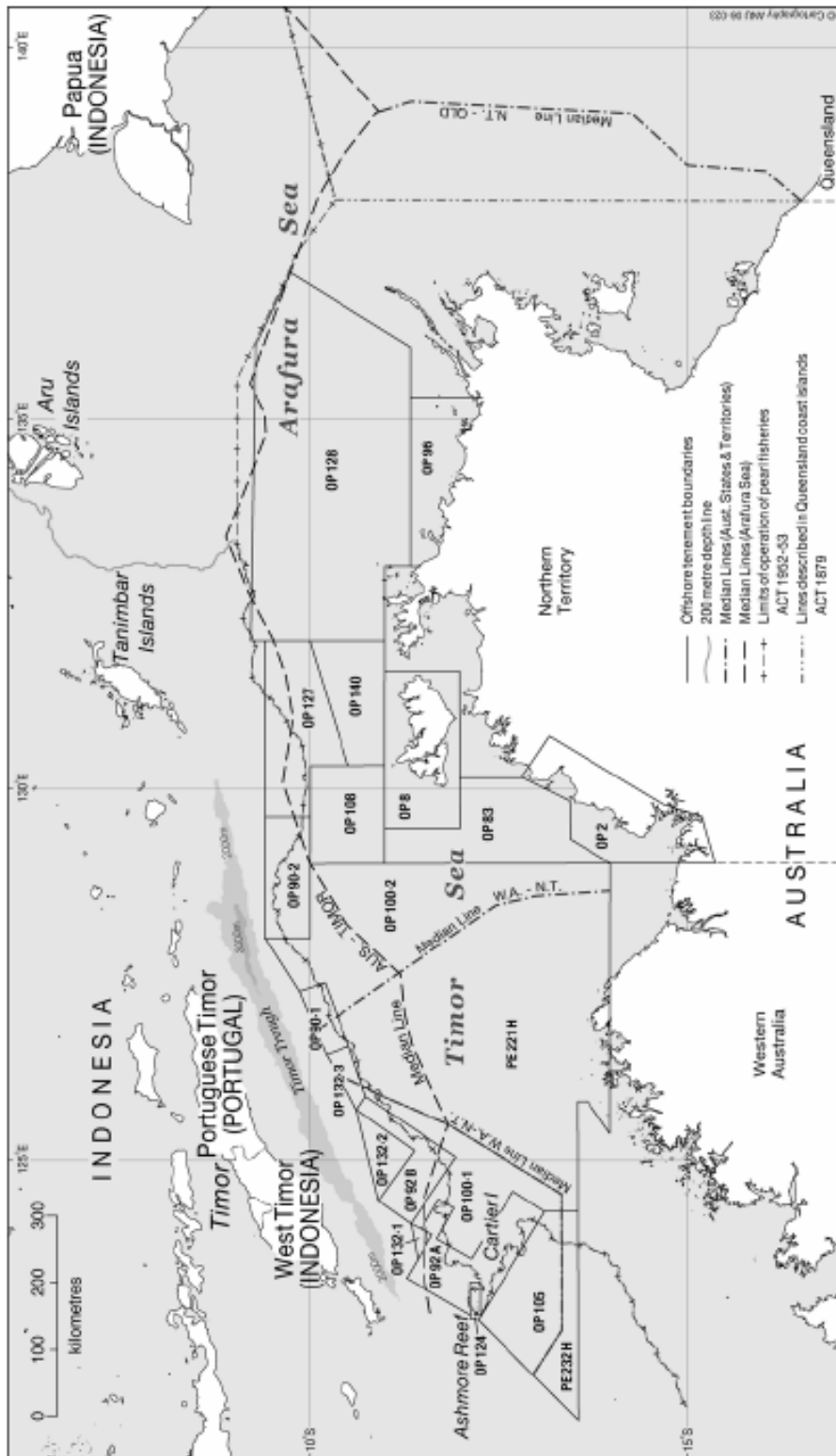


Figure 13

Figure 13: Adjacent Area Boundary of the Petroleum (Submerged Lands) Act, 1967 and Offshore Petroleum Exploration Permits, c.1965*

*The Adjacent Area Boundary coincided with the outer edges of the petroleum permits. The map provides a vivid illustration of how extensive Australia's claims in the Timor Sea were. They extended well beyond both the notional median line and the 200 metres depth-line to within a short distance of Indonesian and Portuguese territory.