

18 June 2004

Bill Paterson,
First Assistant Secretary,
South and South East Asia Division,
Department of Foreign Affairs and Trade,
Canberra ACT 2600.

Dear Mr Paterson,

OXFAM TIMOR REPORT

Thank you for your letter of 4 June 2004 regarding our recent report "Two years on...What future for an independent East Timor?"

I would like to respond to the two key areas of concern you have raised. First, your allegation that the report contains a number of "errors of fact" and will "mislead the Australian public and the media" and secondly, your assertion that the report "lacks balance". Oxfam Community Aid Abroad disputes both these assertions.

1. Errors of Fact.

Oxfam has reviewed our report in light of your allegations and believe that your concerns are unsubstantiated. For clarity, I will go through each of the areas you have identified. I have included your concerns in bold italics, with our response directly below :

Australia's seabed claim is based on Article 76 of the 1982 UN Convention on the Law of the Sea and not on the 1958 Geneva Convention as Oxfam has asserted.

Information publicly available is that the Australian Government claims the seabed boundary to the extent of its continental shelf in line with the permanent maritime boundaries negotiated with the Republic of Indonesia in 1972 - this agreement being negotiated within the framework of the 1958 Convention rather than the 1982 Convention. Only recently (May 2004) has Australia submitted an intention to claim its extended continental shelf under the 1982 UNCLOS - "on 12 May 2004, the Permanent Mission of Australia to the United Nations confirmed that Australia intends to make a submission pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 1982 in relation to all relevant areas of the extended continental shelf off the coast of Australia and its external territories within the timeframe set out in article 4 of Annex II to the 1982 Convention, that is, by 16 November 2004." Commission on the Limits of the Continental Shelf ({ HYPERLINK http://www.un.org/Depts/los/clcs_new/submission_austr.htm })

As a result, Australia's claim under the 1982 UNCLOS will come into effect on the 16th November 2004. In addition to this recent claim under 1982 UNCLOS, Australia has also claimed a 200 nautical mile EEZ.

As Australia has only recently submitted its *intention* to claim under the 1982 UNCLOS, we do not believe that we have been misleading on this issue. The key issue raised in this section of the report is to highlight that there is an area of overlapping claim. Australia is claiming the prolongation of the continental shelf to delimit its maritime boundaries while Timor-Leste is claiming the equidistant line to measure its maritime boundaries thus resulting in an area of overlapping claim.

It is relevant to note that Australia has ratified the 1982 Convention which supersedes the 1958 convention while East Timor has not.

Timor-Leste is currently in a process of ratifying a range of international agreements and conventions. As you are aware, the ratification of international agreements must be in line with a nation's own legal framework and as a new country Timor-Leste is drafting, processing and debating legislation to develop that legal framework. In any event, Australia's March 2002 withdrawal from dispute mechanisms under UNCLOS make Timor-Leste's ratification of this convention a futile gesture for asserting its claim.

The Timor Trough is not a 'dip' in the continental shelf

The report quotes the Office of the President of Democratic Republic of Timor-Leste and a number of geologists' reports (available from the Office of the President). However the key point made by the Oxfam report is that the Timor Trough is irrelevant for the purpose of resolving the overlapping claims in the Timor Sea as the distance between the two nations is less than 400 nautical miles. *"Title to the continental shelf is now based on a distance criterion. The consequence of this must be that geological and geomorphological factors are all but irrelevant, in the case of states opposite each other and less than 400 metres apart"* – Churchill and Lowe, *The Law of the Sea*, 1999.

It is not correct to assert that international law and the 1982 International Convention require delimitation to be effected in all cases through the application of 'median line'.

This is a misrepresentation of our report. The report makes the following points: *"current international law recognises the median line argument"* and *"the East Timor Government has cited 60 maritime boundary agreements between countries to that have relied on the median line to resolve overlapping claims and a further 20 arbitrated settlements"*. The report also states that the *"Government of East Timor believes that they have a strong case under international law"*. We are confident that all of these statements are factually correct and are not misleading. Your assertion relates to delimitation in a general sense, whereas our report focuses on the process for resolving an overlapping claim in the Timor Sea and the specific issue of two nations within 400 nautical miles.

It is incorrect to claim that an equidistant boundary would give East Timor sovereign rights over areas to the east and west of the Timor Sea Treaty's Joint Petroleum Development Area (JPDA).

Again, this is a misrepresentation of our report. The report focuses on the process of resolving the maritime boundary dispute rather than predicting the outcome and I have been unable to find any statement in the Oxfam report that states that *"an equidistant boundary would give East Timor sovereign rights"* over the areas to the east and west of the JPDA. The key point raised in the report is that there is an area of overlapping claim

and that the Government of Timor-Leste believes that lateral boundaries would be significantly wider than the area covered by the Timor Sea Treaty (www.timorseaoffice.gov.tp). Regarding lateral boundaries, the report recognises the importance of negotiation of the lateral boundaries "*East Timor also needs to negotiate its eastern and western (lateral) maritime boundaries with both Australia and Indonesia*". At the Development Partners meeting in May 2004, the Timor-Leste's Foreign Minister, Jose Ramos Horta stated that Timor-Leste and Indonesia intended to commence maritime boundary negotiations in the near future.

There is no 'right to independent arbitration' as the Oxfam report puts it.

As an agency with a rights based approach to development, Oxfam strongly believes in the right to fair and just negotiation of territorial borders by all nations including Australia and Timor-Leste. As a result of the disparity of power between Australia and East Timor in maritime boundary negotiations, we recommend that "*in the event that negotiations fail, the issue should be referred to the impartial, independent arbitration process set out within the International Tribunal on the Law of the Sea (ITLOS)*". We do not believe that this statement is misleading. Timor-Leste's right to independent arbitration has also been supported by 53 members of the United States Congress in a letter to the Australian Government in March 2004.

Contrary to your assertion maritime delimitation is not the single purpose for which Australia has qualified its acceptance of the ICJ's compulsory jurisdiction.

This is a direct quote from Mr William Campbell, General Counsel in the Attorney General's Department, as a witness to the Economics Legislation Committee, on Monday 22nd March 2004. (refer Hansards for Senate Committees - {HY PERLINK <http://www.aph.gov.au> }).

Suggestions that Australia's declaration in March 2002 to remove maritime delimitation from the ambit of its consent to the jurisdiction of the international courts and tribunals were motivated by a lack of confidence in its legal arguments are wrong.

The Australian Government's assertion that Australia withdrew from the dispute mechanisms with respect to maritime boundaries for the simple reason that Australia prefers to "negotiate rather than litigate" is not been supported by evidence and thus is difficult to accept at face value. The Australian Government has been negotiating boundaries with the New Zealand Government for decades and had not withdrawn from dispute recognition during this process. The timing of the decision to withdraw from the dispute mechanisms supports a reasonable conclusion that it was directed at Timor-Leste. To support your assertion I suggest the Australian Government release the advice and related papers from relevant departments that would have been provided for the March 2002 decision by Cabinet. This would assist in further clarifying this situation.

Claims that Australia is seeking to delay maritime boundary negotiations are untrue.

There have been numerous quotes in the media by Australian Government officials regarding the timeframe for negotiations. At the time of the November 2003 preliminary talks, 11th November 2003, *The Australian* quoted "Australian officials said yesterday this {3 year timeframe} was unrealistic as the history of establishing maritime boundaries suggested such negotiations could take up to 30 years to complete". *The Financial Times*, on 27th November 2003, quoted Australian officials "Canberra is busy with other sea boundary talks and its resources [are] so stretched that the discussions could take decades."

Claims that the Australian government could not provide a rationale for six monthly meetings.

The rationale provided in your letter is contrary to the rationale that Australian officials are reported to have given at the November 2003 preliminary meeting. It was reported that in the preliminary meeting, the Australian Government stated they did not have the resources to meet more than twice a year. These reports were not challenged by the Government as being incorrect.

Oxfam's claim that the current arrangements in the Timor Sea favour Australia is manifestly incorrect.

Oxfam fundamentally disagrees with your assertion. As you are aware, Timor-Leste's territorial claim within the Timor Sea extends beyond the area of the JPDA, covered by the Timor Sea Treaty. It is estimated by the Timor-Leste Government and international institutions that the interim arrangements will only give access to one third of the upstream revenue that would likely fall to Timor-Leste under a permanent boundary. This is due to fields just outside the JPDA, including Laminaria-Corallina and the larger part of Greater Sunrise being excluded under the interim arrangements. Australia is also the beneficiary of 100 per cent of tax revenue and economic benefit from onshore processing.

Greater Sunrise does not make revenue sharing subject to a final agreement on maritime boundaries

The preamble to the International Unitisation Agreement makes explicit reference to Timor-Leste maritime rights. When the agreement was signed both sides indicated that the two countries would enter into negotiations in good faith to secure a permanent boundary. The preamble of the IUA, which is quoted in the report, makes clear that the agreement is subject to a final boundary settlement.

In a meeting, a senior Australian Government official in Timor-Leste told Oxfam staff that the IUA was "legally unrelated" to the Timor Sea Treaty. However, we acknowledge that Annex E of the Treaty foreshadows the IUA, although we understand that they are two separate agreements that have no legal bearing on each other.

The area outside the JPDA is an area of exclusive Australian jurisdiction

Oxfam disagrees with your assertion. The claim that 79.9 per cent of Greater Sunrise is in an area of exclusive Australian jurisdiction is incorrect and is contrary to the IUA. The IUA states that this proportion is “attributed to Australia”, and the preamble notes that the field lies in an area claimed by both countries.

Australia has never as your report suggests, sought to link the outcome of maritime boundary negotiations with our bilateral aid program.

This is a misrepresentation of our report. Our report does not suggest that the Australian Government has linked the outcome of maritime boundary negotiations with the Australian bilateral aid program. The report recommends the Australian Government negotiates maritime boundaries in good faith and not link them in any way to development assistance or support for security. This is a recommendation and does not suggest that this has happened. The report also recommends the Government of Timor-Leste provide access to information and facilitate the necessary political space for the effective scrutiny of the management of the Timor Sea oil and gas revenues.

There is little prospect of Australia and the international community allowing East Timor to become a failed state.

The “failed state” analogy has been used by the President of Democratic Republic of Timor-Leste, to describe his concerns at the consequences of the maritime boundary dispute. Rather than being emotive, Oxfam’s intention is to draw attention to the social and economic implications of a government being unable to meet the basic needs of its people. In our report we aim to draw the linkages between a fair and just process for a nation to negotiate its maritime boundaries and the economic, social and political implications for Timor-Leste of continuing uncertainty over future revenue flows from the Timor Sea resources. As stated in our report, recognising the importance of the resources of the Timor Sea as a major contributor to Timor-Leste’s future, Oxfam has sought to identify, review and analyse the complex issues and dynamics of the negotiations regarding the resources of the Timor Sea. Our aim is to monitor and where appropriate contribute to a wider understanding of the negotiation process between Australia and Timor-Leste in order to find a solution that is fair to all parties and consistent with international law.

2. Lack of Balance.

Our report does not advocate an outcome for the maritime boundary negotiation, which is an issue for negotiation between the governments of Australia and Timor Leste. Instead, the report focuses on the process of negotiations. If it appears that the report does not provide ample information about the position of the Australian Government, this reflects the inability of the Australian Government to outline publicly its position on the negotiation of maritime boundaries with Timor-Leste. Lack of information from the Australian government is also reflected in recent comments by Mr Downer in an interview published in *The Australian* on May 29, where Mr Downer said that Australia has been “tardy” in putting forward its position and that he had asked DFAT to prepare a document on the issue - “*instructed his department to get on the front foot over the maritime boundary dispute with East Timor. Although Downer does not agree the David*

and Goliath case promoted by East Timor is damaging Australia's international image, he does concede Australia has been tardy in putting its case.”

Finally, the issues under discussion are of critical importance, most obviously to the people of Timor Leste, but also to Australia's relations with this new country. In the interests of transparency, I have instructed my staff to make available on our website your critique of our report together with this response.

Yours sincerely,

ANDREW HEWETT
EXECUTIVE DIRECTOR