

**Sidley, Kristine (REPS)**TT May June 2003  
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**From:** rob wesley-smith [rwesley@ozemail.com.au]  
**Sent:** Friday, 13 June 2003 3:54 PM  
**To:** Committee, Treaties (REPS)  
**Cc:** Morris, Julia (REPS)  
**Subject:** IUA Submission

Julia Morris: I wish to have until midnight Friday 13th to fully complete this submission. But this may be it. Please withhold until later in the day. I just need to collect some more material and read it. If you receive nothing more from me, then this is IT! Thanks Rob Wesley-Smith 13th June 3.30pm

The Secretary,  
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13th June 2003

**re: Agreement between Govt of Australia and Govt RDTL relating to  
 Unitisation of Sunrise and Troubador fields, done Dili 6th March 2003**

Dear Chairperson and Members of the Treaties C'tee

The question of the reasons for and values behind the Ratification of the International Unitisation Agreement (IUA) between Australia and East Timor depends on your view of what has happened leading up to the agreement. A great deal of relevant evidence was placed before your committee in its Inquiry re the Timor Sea Treaty last year, but some developments since then will be mentioned here.

This IUA agreement does not seem to us in Australians for a Free East Timor to be at all necessary for the development of Bayu Undan, which is the first of the 2 large projects which impinge on the old Timor Gap zones of cooperation signed initially by Indonesia and Australia. That zone of cooperation agreement was squarely aimed at the theft of the undersea and water column resources of East Timor by both those governments. Annexe E of the TST was forced on East Timor by Australia in order to secure most of Greater Sunrise for itself, and is the basis for the IUA.

I discussed these type of issues with the chairperson last year, but we did not seem to understand each other. I was trying to make the point that perhaps the issues surrounding getting Bayu Undan off the ground were better dealt with first.

Bayu Undan is now well underway, pending some last decision making by the parties involved. The final decision for the lng plant development within Darwin Harbour has not been taken at the time of writing.

As far as we can see the only real reason for a unitisation agreement over Greater Sunrise is because the Australian government wants to own and control the development of this field. We believe and the East Timor government believes that under current international law of the sea this gas field

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would belong 100% or nearly 100% to East Timor. Authoritative opinions to that effect by world experts Carlton and Lowe, plus JJSmith opinion, and others, point to the same conclusion. I have attended presentations on boundary issues.

We believe that the Australian government believes this too, as this is why it has withdrawn from international law of the sea conventions for maritime boundary determinations. Australian Ministers and officials argue otherwise but we don't think anyone else much believes them. This should if necessary be tested in the ICJ. Unfortunately the current Australian government seems to believe it can select the UN agreements and declarations it can utilise or support at any given time, and trash others until it suits Australia's current intentions.

I recently received a letter from Dr David Engel, director, Indonesia section, dfat. In this he cautioned me against "uncritical acceptance of tendentious legal opinions purporting to ground an East Timorese entitlement to the Corallina and Laminaria fields. ... Thus the chances of its ever proving acceptable to Indonesia in the context of water column jurisdiction, let alone Australia as regards the seabed, are negligible." Well I agree with the caution, and I don't think I have done that. Australia does not seem to be prepared to provide its expert legal advice in front of the ICJ if necessary, perhaps because it knows its chances of winning are remote. I worry however that as time goes by existing boundaries may become accepted as correct. At least we can see dfat's attitude to East Timor's maritime boundary claims to the west of the jpda, with the tendentious view expressed by David Engel.

Further, myself for affet provided thorough evidence to the Treaties C'tee on the issue of the water column boundary. Again, despite an at times very sympathetic hearing, nothing changed.

David Engel also commented that Australia is not "refusing to negotiate permanent maritime boundaries with East Timor. Australia acknowledges its obligations under international law as reflected in the UNCLOS." Rather, Australia argues "the Timor Sea Treaty and *associated instruments* (my emphasis) should take priority." This seems to my unlearned self to be a tendentious way of saying that once enough agreement and treaty is in place to validate current jpda boundaries, and to imply acceptance of such boundaries, then negotiations can take place which are then bound to favour Australia. This is unacceptable to affet and the international solidarity movement generally, and I'm sure to the East Timor government.

Further, in the east we believe it is not in East Timor's national interest to hasten the development of Greater Sunrise. To do so would just about wipe out its undersea resources, and leave little for the future. Unless those revenues were to be handled with great dexterity and honesty there is a great danger East Timor could end up underdeveloped and broke and with few ongoing resources. So the push to develop Greater Sunrise, and to claim ownership before Maritime Boundaries can be determined, is clearly Australia's.

This can be seen from the pressure the Australian Prime Minister Howard and Foreign Minister Downer applied to the East Timor Prime Minister Mari Alkatiri to complete these negotiations during late last year and leading to the signing of the Agreement during March. The atmosphere could be cut with an icepick at the signing ceremony.

I can supply more evidence of the bullying behaviour if required.

eg "East Timor bows to PM on Gas" The Age 6 March 2003 Mark Baker. eg Senator Bob Brown described the process as "blackmail".

eg WSWS : News & Analysis : Asia : East Timor "Australian government blackmails East Timor into ratifying oil and gas deal" by Rick Kelly, 12th March 2003. He wrote:

"The thuggish nature of the 'negotiations' was laid bare last week when the transcript of a meeting last November between Australia's foreign minister, Alexander Downer, and East Timor's chief minister, Dr. Mari Alkatiri, was leaked and published on the internet. In the meeting, Downer explicitly linked Australia's ratification of the TST to East Timor's agreement on the separate IUA

covering the Greater Sunrise reserves. 'We can stop everything,' Downer repeatedly threatened." eg The Australian March 7, 2003 Steve Lewis and Nigel Wilson "Gas deal widens gap in relations" - "Relations between Australia and East Timor have deteriorated even as they signed a breakthrough agreement ..."

Is this the Agreement therefore and the circumstances leading up to it which suggests to this Committee that it should endorse the Government of Australia ratifying this agreement? We believe not. Can an agreement signed under such duress stand up to international scrutiny? We believe not.

\* We believe this IUA is fundamentally flawed and unfair and as such should not be ratified at all.

\* If this is not accepted, then we believe this Committee should pressure the Australian government to begin serious and effective, and timely, Maritime Boundary negotiations with East Timor before this Agreement is recommended for Ratification.

\* If it does recommend immediate Ratification then there should be a strong recommendation to the Australian government to begin meaningful Maritime Boundary negotiations with East Timor by the end of this year.

The Annex E agreement on unitisation is stated to be "without prejudice" to a future delimitation of boundaries, despite the fact that no method is specified to ensure this. However the East Timor government puts great store on the "without prejudice" clause, and this cannot be acted on unless Maritime Boundary negotiation starts soon. Alexander Downer after May 20th 2002 said that East Timor can seek all it likes but Australia will not change its position on boundaries. There is also no obligation to agree to a revision of the unitisation formula.

\* Another option which would provide Australia with more benefits than it might expect under an ICJ determination would be to deem that East Timor owns say 80% of Greater Sunrise. We would recommend this to the Treaties Committee as a fallback position if Maritime Boundaries are not to be negotiated under UNCLOS rules in the near future, or if Australia, as we suspect, will claim that the boundaries determination will not be allowed to change any agreements once ratified.

Instead Australia is exacerbating its bully role by unilaterally doling out new oil and gas explorations concessions in the disputed area south of Greater Sunrise These unilateral dealings definitely conflict with East Timor's claimed EEZ.

What hope is there for East Timor to get maritime boundaries that accord with UNCLOS rules given this arrogant attitude by Australia?

Dean Bialek in his submission to you last year stated that a permanent delimitation of Maritime Boundaries between Australia and East Timor would automatically terminate the Timor Sea Treaty. If so then one can see the reason for the reluctance of the Australian government to pursue this course, and as this is against the spirit of the words of the TST, unfair to a small impoverished neighbour, (rated the poorest in SE Asia), and quite immoral, one cannot imagine the Treaties C'tee endorsing ratification without comment or without seeing Boundary negotiations start. One can read that this is what Mari Alkatiri is waiting for himself.

Jeffrey Smith, Barrister and Maritime Boundaries expert, in a paper "The offshore jurisdiction of Timor Leste in the Timor Sea" March 2003 stated:

"Timor Leste's maritime jurisdiction, both north and south of its territorial land areas, remains to be defined. The new State's jurisdiction is capable of certain determination with the application of criteria found in several decisions of the International Court of Justice, arbitration awards, State practice and developments in customary international law. The recent decisions in the Eritrea/Yemen and Qatar/Bahrain cases support the delimitation of Timor Leste's maritime boundaries in areas outside of the restrictive Timor Gap Treaty Zone of Cooperation, now the Joint Petroleum Development Area of the pending Timor Sea Treaty. ...

"There are obvious flaws in the locations of the 1972 continental shelf boundary and the closing lines that define the Zone of Cooperation, now the Joint Petroleum Development Area of the Timor Sea Treaty. Those flaws are not supportable under international law as it now applies. The 1972 boundary encroaches spatially on Timor Leste's continental shelf entitlement. That an independent Timor Leste has an entitlement to an exclusive economic zone (EEZ) larger than the Timor Gap and the present Zone of Cooperation (4) is evident from geography, decisions of the International Court of Justice and the past conduct of Australia and Indonesia in the Timor Sea. ...

"The criterion for maritime boundary delimitation, and therefore the determination of offshore jurisdiction, is overwhelmingly distance based. At play is the geography of the coastlines at issue. Maritime states are entitled to claim EEZs up to 200 nautical miles from their shores. Conceptually and legally, the EEZ extent of a state is defined by different criteria than is the continental shelf."

Jeffrey Smith's full paper gives details for realignments etc which I will not quote here. I understand that as someone who has practiced in the ICJ his expertise cannot lightly be discounted. He concludes that the preferred result would be a negotiated delimitation, desirable under the 1982 Law of the Sea Convention and a result to be achieved by conciliation or the good offices of a fourth state. This is hardly a radical position - it is Australia by denying or long delaying negotiation which is radical and operating solely on the basis that might is right.

Although Australia has forced an agreement which provides it with 80% of the resource, the agreement may not stand up. Illegal, unfair or immoral agreements, particularly if forced by one powerful partner on a weaker one, have the habit of falling over. eg The Indonesian invasion of East Timor, despite Australian governments supporting this for 24 years, fell over eventually.

This issue is not only about Law, but goes to the heart of the kind of country we want to be - in fact that we have become.

The TST and the present IUA, if left in place long enough, could compromise East Timor's claims. That is why getting Boundary negotiations happening expeditiously is important for East Timor. Affet believes your Treaties C'tee and both major political parties should not accept the bullying and deceptive behaviour of the Howard/Downer government on this issue. No one fought harder to achieve an Interfet type intervention than myself/affet, but Interfet does not give Australia any moral rights over East Timor's resources. After all Australian governments of both persuasions for 24 years were prepared to sacrifice East Timorese to the Indonesians. We now see what East Timor suffered being visited on the Acehnese and West Papuans at present, again with outrageous Australian government support. Oil before blood, business as usual.

To conclude this paper, affet has presented this sort of evidence and view to the Treaties C'tee and to others, and despite my frosty reception last time, (apart from the chairperson), we still believe the Treaties C'tee should not recommend such an unfair agreement be ratified, rather that maritime boundaries be negotiated fairly and under UNCLOS principles without further prevarication.

I would be happy to provide further evidence orally or in writing. I would need financial support to attend the Canberra hearings. We would like to see the C'tee visit East Timor to hear first hand the views of the people of the other party to these agreements. You might also benefit from first hand experience of the grinding poverty of most East Timorese. We would also like to make this submission public as soon as you agree, and wish you to make it public also. I have seen a near final draft of the Lao Hamutuk submission (affet is a member of IFET which sponsors LH) and I wish to say I agree with all contained therein.

Yours sincerely,

18/06/2003

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