
Submission from: **The Timor Sea Justice Campaign**

To: The Senate Standing Committees on Foreign Affairs
Defence and Trade

Regarding: Australia's declarations made under certain
international laws

11 October 2019

Timor Sea Justice Campaign

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About the Timor Sea Justice Campaign

The Timor Sea Justice Campaign was a 15 year long, people-powered campaign that successfully helped to pressure the Australian Government to set permanent maritime boundaries with Timor-Leste.

The campaign's social media channels are now used to share information about the prosecution of Witness K and Bernard Collaery.

This submission was prepared by Tom Clarke, the campaign's spokesperson, and Monique Hurley, a human rights lawyer.

Summary

The Australian Government has utilised a range of reprehensible tactics to take revenue from natural resources belonging to its neighbour Timor-Leste.

Underpinning these efforts to rip-off our neighbour was a series of decisions made by the Howard Government in 2002 to withdraw Australia's recognition of the maritime boundary jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea.

The Australian Government's withdrawal of recognition happened just two months before Timor-Leste became an independent nation, knowing that the Timorese would want to negotiate – as is their right – permanent maritime boundaries with their neighbours in accordance with international law.

The withdrawal meant the Government of Timor-Leste had limited avenues to challenge the Australian Government's attempts to stonewall its requests to establish permanent maritime boundaries or challenge Australia's unilateral depletion of contested resources.

Turning your back on the independent umpire is a pretty clear sign that you do not intend to play by the rules. The Australian Government shunned international law and bullied its way into a series of temporary resource sharing arrangements that significantly short-changed Timor-Leste.

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During that period, the Australian Government bugged an East Timorese cabinet room during sensitive negotiations in 2004 about the Greater Sunrise gasfield, which sits in the contested zone. The Australia Government is currently prosecuting Witness K and his former lawyer Bernard Collaery for the role they played in bringing this to light.

Although details about the prosecutions on the public record are limited, it appears that they centre around the preparation of a sworn affidavit that was to be used in a proceeding in The Hague that the East Timorese Government had initiated against the Australian Government.

The Australian Government's tactic of snubbing international law eventually began to crumble, when Timor-Leste launched a "compulsory conciliation" procedure at the United Nations. It is a mechanism that had never been used before and exists specifically for situations where one country refuses to recognise the jurisdiction of the independent umpire that would normally settle disputes.

Fortunately, the United Nations conciliation process produced a new treaty which will finally set permanent maritime boundaries in the Timor Sea.

There is, however, still some unfinished business that needs to be addressed.

Namely:

1. The Australian Government has not resubmitted its recognition of the maritime boundary jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea;
2. The Australian Government has not repaid revenue from oil and gas fields that it now concedes belong to Timor-Leste; and
3. The Attorney-General has allowed the prosecutions against Witness K and his former lawyer Bernard Collaery to proceed.

There is no doubt that Australia's reputation in the region took a blow because of the actions of successive Australian Governments on these matters.

Because the Australian Government still does not recognise the full jurisdiction of the International Court of Justice and the International Tribunal for the Law of

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the Sea, Australian foreign ministers continue to have a serious credibility gap when they call on countries, like China, to follow international maritime law and heed various court rulings, when we ourselves do not fully recognise those same courts.

Respect for international law and the role of independent arbitration in settling disputes between countries is vital for Australia's security and reputation. We therefore urge the Committee to recommend that the Australian Government immediately resubmit its recognition to the complete jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea.

Background details

When Timor-Leste declared independence on 20 May 2002, Australia and Timor-Leste signed the Timor Sea Treaty, which entered into force in April 2003. This centred on a joint development area to enable activities to continue in the zone pending final determination of the maritime boundary.

The Timor Sea Treaty was a temporary arrangement put in place until permanent maritime could be set. However, until recently – August 2019 – the Australian Government refused to establish permanent maritime boundaries between Australia and Timor-Leste because the Australian Government wanted to advance its own economic interests in territory that it now concedes belongs to Timor-Leste.

Disputes about maritime boundaries are covered by the United Nations Convention on the Law of the Sea (**the Convention**). Australia ratified the Convention on 5 October 1994. Pursuant to the Convention, countries like Australia can make declarations choosing one or more of the means for the settlement of disputes concerning the interpretation or application of the Convention.

On 22 March 2002, the Australian Government made a declaration under articles 287 and 298 of the United Nations Convention on the Law of the Sea as follows:

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The Government of Australia declares, under paragraph 1 of article 287 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention, without specifying that one has precedence over the other:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention; and
- (b) the International Court of Justice.

The Government of Australia further declares, under paragraph 1 (a) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.

These declarations by the Government of Australia are effective immediately.

Part XV of the Convention relates to the Settlement of Disputes and establishes a dispute settlement system in order to promote compliance with the Convention's provisions and to ensure that disputes are settled by peaceful means. The Convention also creates the International Tribunal for the Law of the Sea, which can be nominated as a body to settle such disputes.

The International Court of Justice (**ICJ**), referred to in the above declaration, is the principal judicial body of the United Nations. It decides disputes between countries which have agreed to accept its jurisdiction. On 1 November 1945, Australia ratified the Statute of the International Court of Justice and, in March 1975, Australia accepted the compulsory jurisdiction of the ICJ.

On 22 March 2002, so the same day as the above declarations, Australia lodged a declaration under Article 36(2) of the ICJ Statute, excluding sea boundary delimitation disputes from the ICJ's jurisdiction as applicable to Australia.

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The effect of this was that, even if Timor-Leste were able to fulfil the requirements to invoke the ICJ's jurisdiction, it would not be able to institute proceedings before the ICJ as Australia specifically excluded sea boundary delimitation disputes in its declaration.

Together, these actions had the sneaky effect of withdrawing the Australian Government's recognition of the maritime boundary jurisdiction of the International Tribunal of the Law of the Seas and of the ICJ. This meant that the East Timorese Government had limited recourse to the rule of law because there was no place they could go in order to seek a final determination of the maritime boundary.

Human rights principles at stake

United Nations conventions like the Convention on the Law of the Sea play an important role in setting rules that should apply to all countries fairly and equally, regardless of whether the countries involved are large or small, rich or poor, old or new.

The Convention provides a universal legal framework for settling disputes about maritime boundaries and is the central instrument for promoting stability and peaceful uses of the seas and oceans. But for Conventions like this to work, they need to be equally enforced and independently adjudicated.

The Australian Government's decision to make the declarations set out above undermined the purpose of the Convention. The Government's decisions were deliberately aimed at maintaining instability and frustrating the process of reaching a final determination of the maritime boundary.

As noted by Australia's own Joint Standing Committee on Treaties:

This action was not made public prior to it being taken to ensure the effectiveness of the declaration was maintained. Public knowledge of the proposed action could have led other countries to pre-empt the declaration by

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commencing an action against Australia in relation to sea boundary delimitation that could not be made once the declaration under [the Convention] was made.¹

This demonstrates that the actions of the Australian Government were those similar to a bully who changes the rules to serve their own self-interest. A good government would have upheld the principles of international law and been a good neighbour to the (then) newest country in the world.

It is incredibly poor form for the Australian Government – who is currently sitting on the United Nations Human Rights Council – to choose not to play by international rules simply when it does not suit them.

TSJC's recommendations

1. The Australian Government should revoke the declarations referred to in this submission and accept the jurisdiction of the International Tribunal for the Law of the Sea and the ICJ for resolving international maritime boundary disputes.
2. The Australian Government should voluntarily return the money it has received as a result of activities that took place in territories that the Australian Government now concedes belongs to Timor-Leste. We note that, in previous submissions, we urged the Australian Government to hold contested revenue in a trust fund to be distributed once the boundaries had been settled.
3. The Attorney-General drop the prosecutions against Witness K and his former lawyer Bernard Collaery.

Contacts

Follow us on social media for updates at:

¹ National Interest Analysis for the declarations relating to UNCLOS and the declaration relating to the ICJ: Two Declarations by Australia (18 June 2002).

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