**Who is Watching the Watchers? A Quest for Rule of Law in a World of Relentless Secret Intelligence Surveillance**

**Supplementary Paper**

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**Introduction**

This paper supplements my comments today regarding oversight of ASIS. While there is informed debate, at least in the United States, Britain and Europe about the pressing need for greater oversight there are few examples of how there can be practical oversight of the necessarily shrouded cloisters of the intelligence apparatus. It is in the public interest that I provide a practical illustration of the focus that an effective watchdog should bring to bear on complaints regarding allegations of improper conduct. Also demonstrated by the intense more than two-year study my office undertook before deciding on a path to a remedy in the current controversy is the need to adequately empower and resource an independent watchdog. Never again should an Australian law firm representing with integrity aggrieved intelligence staff (as has my firm over the years) be subjected to the ordeal dished out to my courageous staff in Canberra and London. If an effective watchdog existed the needs of intelligence personnel and the public interest may be met. Law firms would not be attacked for doing the job an independent watchdog could do.

At a time when the Governments in Washington and London have conceded the need to review and enhance the oversight of domestic intelligence agencies Australia has moved to put up the shutters. In defiance of the orders of the International Court police recently called at the Canberra home of a staff member who had accompanied me to meetings in Dili, Norway and the UK and other places and sought to question her as to the documentary evidence and substance of discussions I had with my instructors, potential witnesses and with Senior Counsel acting for Timor-Leste.

Intimidation and bullying tactics of the kind exposed today have no place in a democratic society. There is today in Australia a courageous witness with a deep sense of injustice. A decorated long-serving patriot. If the Australian Parliament is to mean anything it must step in and enquire into a government that will allow an Attorney-General not a judicial officer and not the police to issue search warrants empowered under 9/11 anti-terrorist legislation at the request of the same man named as directing an unlawful overseas intelligence operation the complaint about which concerned the Attorney’s own party and former Ministerial colleague.

Not an iota of evidence of any national security breach has emerged. Files containing other sensitive ASIS documentation remain secure in the custody of my office. No spy has been unmasked. My authority to act for the witness has not been withdrawn. Despite it being abundantly clear that unlawful activity cannot give rise to any of the offences[[1]](#footnote-1) so dramatically outlined to the International Court by Senator Brandis’ legal team Senator Brandis saw fit to instruct an attack on the witness and my legal team.

In one of life’s ironies just a few days ago with children and grand-children we cast a wreath of Australian wattle and eucalypt from a boat directly off The Hague in sight of the Peace Palace home of the International Court where an Illawarra farmer, my father, ditched and sank with his plane on fire after a determined attack exactly 70 years ago.[[2]](#footnote-2) Likewise, you can guess that in my mind there is no turning back in this current struggle for rule of law. We can only imagine how the Timorese people after all they have been through also yearn for an honest society giving them the necessities of life.

**Background**

1. While the 2002 Timor Sea Treaty (“the TST”) was the umbrella document the actual revenue sharing regime for the major gas field at Greater Sunrise was to be worked out in another document annexed to the treaty later to become known as the ‘International Unitisation Agreement’ (“IUA”).[[3]](#footnote-3) Accordingly, the Australian and Timor-Leste Prime Ministers also signed on the morning of Independence Day 20 May 2002 a Memorandum of Understanding in which they agreed to work ‘*expeditiously and in good faith*’ to conclude a unitisation agreement for Greater Sunrise.[[4]](#footnote-4)
2. The main prize for Australia was the Greater Sunrise Field. Woodside Petroleum claimed that Sunrise/Troubadour could probably produce 10 trillion cubic feet of gas, as opposed to the 3 or 4 trillion cubic feet from Bayu-Undan.[[5]](#footnote-5)
3. On any informed view of modern international maritime law, the Bay-Undan gas field, already well planned, was almost wholly within Timor-Leste’s sea boundaries. But Timor-Leste, bereft of funds and technical expertise needed large-scale international investment for Bayu-Undan to proceed. Australia held the key to the way forward. Under the Australian umbrella petroleum companies felt more assured of safe investment. This required passage of the TST and the IUA through the Australian Parliament.
4. Australia understood that once the gas was flowing from Bayu-Undan, Timor-Leste would become economically empowered and capable of securing expert advice. Events soon showed that Australia’s leverage over Timor-Leste was strengthened by delaying Bayu-Undan until favourable terms were secured for the Greater Sunrise Field.
5. Any doubt about this is dispelled by the candid admission by a senior DFAT official, Dr Geoffrey Raby, First Assistant Secretary of the International Organisations and Legal Division in the Department of Foreign Affairs and Trade, in his 14 October 2002 evidence before the Australian Parliamentary Joint Committee on Treaties: *[[6]](#footnote-6)*

*Dr Raby: I think that gives us the comfort, if you like, that we have both elements together. The East Timorese element and interest is with the early development of Bayu-Undan. We have some interest in Bayu-Undan, but Australia’s bigger interest is demonstrably with the development of Greater Sunrise. To do the treaty without having concluded an IUA for Sunrise would leave us possibly in a situation of less confidence and less certainty than at present.* [[7]](#footnote-7)

*. . .*

*“Dr Raby: All I can say on that is that the government’s position is that Australia’s national interest is maximised through the development of all the fields and particularly by the development of Greater Sunrise.*

*Mr WILKIE: So it is the government’s view that the risk is worth taking?*

*Dr Raby: Yes. The bigger field is of great national interest to us.*

*Mr WILKIE: What I am trying to get clear here is that it is in the national interest—and it is the government’s position—that, even though we may be risking the $A2 billion that we are likely to earn from Phillips over the life of their project at Bayu-Undan, we should still hold out for ratification and unitisation at the same time to maximise the potential of all the fields across the JPDA?*

*Dr Raby: Yes. On Bayu-Undan, I would make the point also that it can be a question of timing—it may not be done this year; it could be done at some other stage—when you are taking a broad national interest view of this…*

1. The ‘broad national interest view’ evidently was not of the impoverished Timorese with the lowest per capita income in Asia and an appalling infant mortality rate. Nor was the ‘broad national interest’ consistent with Australian defence policy but more of this later.
2. The agenda issues for the Timor-Leste/Australia Ministerial meeting in October 2004 that involved the alleged clandestine monitoring by Australia of the Timor-Leste negotiating team’s out of session Cabinet In-Confidence deliberations included the question whether and on what terms the International Unitisation Agreement, signed in 2003, would be concluded (ratified). The unlawful monitoring breached the express undertaking in the Memorandum of Understanding made on 20 May 2002 by Australia to work in ‘*good faith’* to conclude an IUA.
3. On 9 July 2002 the National Parliament of Timor-Leste made clear in the passage of its *Maritime Zones Act* that in accordance with UNCLOS it claimed territorial sovereignty over the Timor Sea seabed out to a median line with Australia, and in accordance with laterals to be settled with Indonesia at each end of East Timor territory.[[8]](#footnote-8) Thus, East Timor left open its right to lay claim to all of the area designated within the joint petroleum development area including most of the Greater Sunrise field and oil and gas fields close to the other lateral known as Buffalo, Laminaria and Corrallina.
4. Notwithstanding this enunciation of Timor-Leste’s position in Parliament the petroleum companies, all capable of obtaining their own international law advice, made clear to Timor-Leste that they would negotiate with Timor-Leste only through the Australian Government with respect to the necessary unitisation agreement required pursuant to the 2002 Treaty so as to provide a formula for the distribution of revenue, royalties, excises and the imposition of taxes over the field that straddled the western boundary of the JPDA.
5. The TST was enacted, not without further controversy in the Australian Parliament, into Australian law as the *Petroleum (TST) Act 2003* (Cth).[[9]](#footnote-9) Although Australia timed passage of the TST with Timor-Leste’s signing of the IUA, both countries had to ratify the IUA and some hard bargaining lay ahead.
6. Negotiations for an IUA start-up (ratification) continued into 2004. After Woodside Petroleum as Project Operator for the Joint-Venture comprised of Woodside, ConocoPhillips and by its various affiliates, Royal Dutch/Shell Group and Osaka Gas Co. suspended work and withdrew exploration staff Timor-Leste gave in and agreed to a formula. Under the unitization formula Timor-Leste’s entitlement was to be 90 per cent of the 20.1 per cent of the field said to be under Timor-Leste seabed. Namely only 18.09 per cent of the defined Unit Area reserves. The support of Woodside Petroleum in the Australian economic pressure on Timor-Leste is apparent from the back-to-back media releases issued during this period by Foreign Minister Downer and Woodside.
7. Aware that international law placed practically all of the Greater Sunrise Field within Timor-Leste jurisdiction and consistent with his claim in the Timor-Leste Parliament when introducing National Parliament Law 7/2002 Prime Minister Alkatiri delayed Timor-Leste’s ratification of the IUA while talks commenced in relation to the Timor-Leste demand for further concessions including that the gas pipeline for Greater Sunrise be constructed to the economically depressed Timor-Leste south coast. In this dialogue between the two countries the prospect of a revised unitization formula arose.[[10]](#footnote-10)
8. The popular perception that the resource allocation from the Greater Sunrise Field to be shared under the IUA as 81.91 % to Australia and 18.09 % to Timor-Leste was changed by the CMATS Treaty to a 50:50 split is wrong. The 81.09:18.09 resource allocation stipulated in the IUA remains unchanged.[[11]](#footnote-11) The CMATS Treaty provided a formula for calculating the value of upstream exploitation of petroleum lying within the Unit Area as defined in Attachment I to the IUA. It is not “a field” as depicted on one-dimensional maps of Greater Sunrise. The Unit Area is a three-dimensional area depicted in Attachment 1 to the IUA as the cubic area of the two reservoirs located one above the other.
9. The formula allowed Australia to secure its revenue component by the application to 81.09 per cent of the upstream exploitation of petroleum of an Australian tax regime incorporating petroleum resource rent tax, company tax including capital gains tax, first tranche petroleum and profit petroleum under the TST. Australia agreed to make a payment to Timor-Leste equivalent to half the aggregate of the Australian revenue component and half the Timor-Leste revenue component calculated according to a Timor-Leste tax regime applied to 18.09 per cent of the upstream resource allocation. In other words the total tax revenues were divided equally after the application of a formula, albeit complicated to manage, that gave the commercial consortium the assurance that roughly 80 per cent of their tax liability would be calculated according to established Australian tax laws.
10. Although any non-pressure linked reservoir(s) at any other depth(s) in the Greater Sunrise Field would neither be subject to unitisation nor to the ‘phoenix’ clause in Article 12(3) of CMATS[[12]](#footnote-12) the CMATS Treaty Side-Letters ensued that such reservoirs not wholly within the JPDA would be Australia’s to exploit.
11. In a separate affront to Timor-Leste and while the Bayu-Undan and Sunrise gas field negotiations were taking place the Australian Government issued licenses despite protests by Timor-Leste,[[13]](#footnote-13) to permit the exploitation of oil fields wholly or partly in Timor-Leste sovereign territory in the Buffalo, Laminaria and Corralina oil fields at a claimed loss by the end of 2004 to the East Timorese of $2.5 billion.[[14]](#footnote-14) The Side Letters to the subsequent CMATS Treaty effectively absolved Australia from reparation payments.[[15]](#footnote-15)
12. Apart from this multi-billion let-out to the parties including Australia either directly or by cross-claim that may have been liable for reparation payments the Side-Letters enabled Australia to initiate a so-called ‘ *Offshore Energy Security Program’* explained in a subsequent Geoscience Australia publication as petroleum exploration focused:

*Geoscience Australia's Offshore Energy Security Program, which commenced in 2006 and extends to 2011, will provide high-quality pre-competitive data and information to help stimulate petroleum exploration in Australia. The forward program, developed in consultation with industry will focus on three offshore frontier regions:*

*Remote eastern frontiers, offshore eastern Australia*

*Southwest margin*

*Southern margin.*

*Petroleum systems modelling in the current producing regions will form part of Geoscience Australia’s ongoing core petroleum program. These studies are aimed at improving resource estimates and stimulating further exploration. Negotiations are currently underway with a number of organisations to partner with Geoscience Australia to deliver these models.*

*Most of the exploration areas offered to market via the acreage release program are in producing regions of the North West Shelf, Otway and Gippsland basins …As those areas continue to mature and areas are returned to market after industry relinquishment, it is essential that new information be provided to support their re-release.[[16]](#footnote-16)*

1. There exists no credible data or other information to suggest that Australia’s own energy security could in 2004 have been dependent upon Timor-Sea petroleum reserves. Although, for example, the vast reserves of the Browse Basin had been identified there was no suggestion recently when Woodside withdrew from that export oriented project that Australia’s national energy security was affected.
2. The National Resistance leaders, and later successive Timor-Leste governments, stood firmly to the view that the 1989 Timor Gap Treaty was an unlawful treaty. The 2002 Treaty between Australia and East Timor, which largely replicated the 1989 arrangements, was acquiesced at a time when the nascent East Timor government was wholly dependent upon aid donors. Nevertheless, no concessions were made with respect to maritime boundary lines. All that was further agreed were the commercial production sharing arrangements oversighted by Timor-Leste and Australia under joint venture arrangements.
3. Despite early calls by the Timorese leadership for maritime boundary negotiations to commence, Australia did not enter into negotiations. The Timorese leadership was caught between the need for a revenue stream and the reluctance of Australia to discuss maritime boundaries. On several occasions, the Australian Foreign Minister and his officials declared a ‘*take it or leave it’* approach to the agreed 2003 unitisation agreement that would commence a revenue flow to Timor-Leste, declaring that if the Timorese wanted money it should enter into the unitisation agreement.[[17]](#footnote-17) At that time and continuing today, Timor-Leste’s only significant revenue source was from gas and oil.
4. With the IUA still not ratified, the first round of talks between Australia and Timor-Leste was held at Dili between 19 and 22 April 2004. Mr Peter Galbraith, who had headed the UNTAET “negotiation” team in 2002, was now leading the Timor-Leste delegation. As the Australian delegation entered Hotel Timor, protestors threw eggs and flour. The talks ended in acrimony.
5. Mr Galbraith announced that although Timor-Leste wanted monthly meetings to negotiate the boundary, Canberra proposed the next meeting to be in Australia in September 2004. Mr Galbraith explained the urgency:

*“That is a matter to be negotiated both with Indonesia and with Australia, and, of course, East Timor wants to negotiate with both countries. But there's real urgency to the negotiations with Australia and there is no urgency with negotiations with Indonesia. Why is there urgency to the negotiations with Australia? Because, as we speak, Australia is pumping petroleum out of the area that is under dispute, the Government is getting $1 million a day, and so that already, since 1999, $1.5 billion is gone. Every day that we delay is $1 million less for this country.”*[[18]](#footnote-18)

1. Downer’s response to the imbroglio was extraordinary. As responsible Minister for the Australian Secret Intelligence Service (“ASIS”), Downer had statutory authority to task ASIS with intelligence gathering objectives. The Director-General of ASIS, David Irvine, transferred from diplomatic duties to head the spy agency a year earlier on Downer’s recommendation, instructed the agency to conduct a mission in Dili to ensure that the internal deliberations of the Timor-Leste negotiators could be clandestinely recorded.
2. ASIS succeeded in placing listening equipment in rooms at the Palacio Governo used by the Timor-Leste Prime Minister, Mari Alkatiri, and his Cabinet Ministers. Don Voelte, Chief Executive Officer of Woodside Petroleum and confidante of Downer, was in Dili to meet with Prime Minister Alkatiri on July 30 2004. After the meeting Woodside informed the media that the Timor-Leste Government had been warned that Woodside would suspend development on the Greater Sunrise field unless Timor-Leste and Australia resolved the deadlock over ratification of the IUA.[[19]](#footnote-19)
3. At the same time as Mr Voelte’s visit, the Australian Foreign Minister indicated that Timor-Leste would get no revenue from the Bayu-Undan and Greater Sunshine gas field if it pursued its claim for a maritime boundary set at the median point between the two countries. Timor-Leste’s leadership no doubt recalled that the Australian Foreign Minister had stated in 2002 that for technical and geophysical reasons, the land mass reserves in the Timor Sea were clearly associated with the Australian land mass and not Timor-Leste.[[20]](#footnote-20) Downer’s comments were leaked to the media:

*You have to face reality. If you are going to demand that all resources are Timor-Leste’s – your claim almost goes to Alice Springs – you can demand that for ever for all I care, you can continue to demand, but if you want to make money, you should conclude an agreement quickly.[[21]](#footnote-21)*

1. Nevertheless, the financial circumstances of the Timor-Leste Government were such as to place pressure upon it to defer to the Australian Government. In September 2004, Australia and Timor-Leste agreed to resume discussions on the boundary. The next round of negotiations was held at Dili between 24 and 27 October 2004. At those negotiations, Australia through its Foreign Ministry official, Douglas Chester, offered a cash gift to the Timorese in exchange for deferring discussions over the seabed boundary indefinitely.
2. After consultations in the Cabinet meeting room with his Prime Minister, Mari Alkatiri, Delegation Leader José Texeira rejected the offer and indicated that Timor-Leste wanted to link the maritime boundary issue with the Greater Sunrise development including a more significant share of the oil royalties from Greater Sunshine, and, a gas processing plant and pipeline servicing Greater Sunshine to be laid to the south coast of Timor-Leste, rather than terminating at Darwin.
3. Before and after the negotiations at Dili between 24 and 27 October 2004, Prime Minister Alkatiri and his National Resources Minister, José Texeira, outlined to their Cabinet colleagues the negotiating position of Timor-Leste and the importance of the issues affecting Timor-Leste.
4. Throughout 2004 and continuing in 2005, Prime Minister Mari Alkatiri was under pressure from his Cabinet colleagues to commence infrastructure programmes that would require an oil and gas revenue base. Dr Alkatiri’s Government did not want IMF loans stating that reliance on the IMF may lead to an IMF role in Timor-Leste’s economic governance. Dr Alkatiri’s government was also facing a re-election campaign in 2006-2007.
5. On 27 April 2005 the Australian Foreign Minister claimed that underpinning the Australian strategy was a desire to avoid change to the maritime boundaries it had set up with Indonesia:

*What Australia doesn’t want is to unravel all of our maritime boundaries which have been laboriously negotiated over many years with all our neighbours. If we can find a suitable settlement that keeps our principles intact, but ensures that East Timor gets a steady flow of revenue, then there should be honour on all sides.[[22]](#footnote-22)*

1. During further discussions in Canberra between 8 and 10 March 2005, which resumed on 20 April 2005 and 13 May 2005 at Sydney, agreement was reached on a formula for revenue sharing and a deferral of maritime boundary issues. Australia offered to draft the terms of the agreement. Timor-Leste, by now becoming subject to civil disturbances principally by unemployed urban youth and bereft of expert international legal advice, agreed.
2. A combination of Article 4(2) of the CMATS Treaty and the exchange of Side Letters, both drafted by Australia, between Australia and Timor-Leste on 23 February 2007 permitted Australia and Timor-Leste to continue ‘activities’ including the authorisation of existing and new activities involving petroleum minerals outside the JPDA and south of the line agreed between Indonesia and Australia in 1972, so long as either party had legislation in place on 19 May 2002. Prior to independence on 20 May 2002, Timor-Leste could not have legislative control of its seabed but Australia did by virtue of the *Petroleum (Submerged Lands) Act 1967* (Cth) and the *Offshore Minerals Act 1994* (Cth) and successor legislation. And thus Australia secured all that it aimed for.
3. The deceitful and immoral misconduct ASIS was pushed into in 2004 so widely criticised after the US Watergate scandal strikes at the very heart of the rule of law. The law breaking was premeditated and carefully planned. It was outside the proper function of ASIS with no public or national interest imperative that could justify such conduct.[[23]](#footnote-23) The resources of ASIS should have been employed in protecting Australians and furthering our national interest. Officials could not pass the eavesdropping as somehow related to a national interest in ensuring, by treaty moratorium with Timor-Leste, that the boundary dispute did not encourage Indonesia to revisit its 1972 treaty boundaries with Australia. No such move is known to have been promoted in any quarter by petroleum-rich Indonesia.[[24]](#footnote-24)
4. Despite the priority Australia accorded to securing a favourable outcome for Australia over Greater Sunrise,[[25]](#footnote-25) there is no discernible national economic energy imperative to justify such a mission. Australia is massively endowed with petroleum resources by comparison with Timor-Leste. The principal economic beneficiary of petroleum exploitation of Greater Sunrise was, and is, the commercial consortium led by Woodside Petroleum for which Alexander Downer accepted a consultant’s retainer shortly after his retirement from parliament. Woodside is not a national oil company though treated as such by successive Australian governments.
5. The ASIS is not, or rather should not have been, an adjunct of an oil company or an ordinary participant in trade expansion.[[26]](#footnote-26) Relevantly, the *Intelligence Services Act 2001* (Cth) stipulated that ASIS must not undertake any activity unless the activity is, ‘…*necessary for the proper performance of its functions’* ,[[27]](#footnote-27) and that the Director-General must keep the agency ‘… *free of improper influence…’*[[28]](#footnote-28) Although introduced in a 2005 Bill after the 2004 ASIS bugging mission to Dili, an amendment to the *Intelligence Services Act 2001* (Cth) now specifically requires the Director-General of ASIS to take all reasonable steps to ensure that, ‘… *nothing is done that might lend colour to* *any suggestion that his or her agency is concerned to further or to protect the interests of any particular section of the community…’.[[29]](#footnote-29)*
6. As a defence ally of Australia, a stable democratic Timor-Leste utilising its naturally endowed resources to lift its peoples from poverty assists regional stability and offers a forward posture for defence of Australia’s vital sea-lanes.[[30]](#footnote-30) Apart from the Australian public interest in Australia’s observance of the rule of law, mutual defence interests alone should have excluded such unlawful conduct.
7. In Timor-Leste domestic law, agents of the Australian State committed criminal trespass in Timor-Leste. The conspiracy to breach the governing legislation of ASIS and to breach both Timor-Leste law and international law to which Australia adheres, emanated from Canberra where the instructions were given to the ASIS team. It had nothing to do with espionage in the national interest. The national interest was in upholding the rule of law including binding commercial obligations. It was a plan to cheat a commercial partner to the financial gain principally of third party commercial interests. It is immaterial whether the third party was aware, which I do not suggest, of the fiduciary breach. If conducted in Collins Street between rival company fiduciaries jail could be an outcome. Ironically, at this very time Mr Downer’s Department was working at the UN in support of an international treaty against corruption to which Australia put it’s signature in 2005.
8. In January 2014, the Australian Solicitor-General appeared before the International Court at The Hague and accused Timor-Leste of ‘complicity’ in a breach of official secrecy laws by the former ASIS employee (“Witness K”),[[31]](#footnote-31) who had allegedly disclosed the eavesdropping of the internal deliberations of the Alkatiri Cabinet during the 2004 treaty negotiations and myself. The Solicitor-General failed to address the common law background to the legislation governing ASIS[[32]](#footnote-32) and the necessary antecedent question as to whether ASIS was acting within its power when the spy missions took place.
9. By making grave accusations against me on the instructions of Senator Brandis[[33]](#footnote-33) before any evidence had been adduced beyond media reports and before either knew that Witness K and I had authorisation, the Solicitor-General has created a situation for himself and Senator Brandis that in due course may make them amenable to professional oversight. Accusing a fellow practitioner at the Bar Table of criminal conduct was a bold step and the consequences must have been anticipated. I have had no choice as any practitioner knows but to withdraw from the case.
10. The Solicitor-General also accused Timor-Leste of ‘complicity’ with me in the alleged breaches of secrecy laws. Timor-Leste is a young nation reliant in many ways on Australia and respectful of Australia. The allegation of complicity, as the record shows an absolute nonsense proposition, has, understandably, resulted in an abundantly cautious Timor-Leste terminating this aspect of my retainer. Once again the Solicitor-General knew or should have known the likely consequences of his allegations. The basis upon which the Solicitor-General embarked on his course of conduct awaits due enquiry.
11. Despite the exigencies of sudden interlocutory litigation it takes a brave, some may say foolhardy, practitioner to point the finger down the Bar table and allege crime. The more so without a Brief of Evidence. And the more so in light of the standard we all know that applies. Standing like a beacon before the Solicitor-General’s eyes was the last celebrated case involving ASIS where, relevantly, Chief Justice Gibbs addressed the strength of evidence required to justify an allegation (in that case on the question of privilege):

It would be necessary to show, at the very least, that there is reasonable ground to believe that any plaintiff whose identity it is sought to disclose is implicated in the commission of an offence. Put in another way, at least what has to be shown prima facie is that there is "a bona fide and reasonably tenable charge of crime" against any plaintiff whose identity is sought to be disclosed. [[34]](#footnote-34)

1. The common law background to the role for ASIS is well known to all the actors in this affair. The Director General of ASIS Irvine could not have been unaware of the notorious “ASIS Sheraton Hotel” case that led to the placing of ASIS on a statutory footing following a training operation debacle on 30 November 1983 in Melbourne, Australia when ASIS agents allegedly committed criminal trespass and other offences during a training exercise. Victoria police action led to an important High Court decision, excerpts of which resonate with the facts concerning the 2004 Dili mission 20 years later, namely:

*Gibbs CJ: It is fundamental to our legal system that the Executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[[35]](#footnote-35)*

1. Mason J put the issue more succinctly:

*For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law. [[36]](#footnote-36)*

1. Mason J went on to state definitively the following:

*The conduct in Victoria out of which the case arose was apparently intended as training for what might be done by an Australian-directed group in other countries. The plaintiffs' case as first presented appeared to assume that without Parliament's authority, the Government (or its officers or agents) can authorise persons, whether officers of the Commonwealth or not, to engage in other countries in conduct which is against the laws of those countries (apart from what is authorised by international law). Neither the Commonwealth nor any of its Ministers, officers or agents, military or civilian, can lawfully authorise the commission by anyone in another country of conduct which is an offence against the laws of that country and is not authorised by international law (for example, by the laws of war). Whether Parliament could empower such authorisation does not arise for decision; it has never purported to do so. Under our Constitution and laws, Australia is a law-abiding member of the community of nations.[[37]](#footnote-37)*

1. Brennan J, prophetically, went to considerable lengths to ensure that the Director-General of ASIS would never again believe he/she had some authority to breach laws. His Honour’s remarks are worth quoting at length:

*The incapacity of the Executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes" (Chitty Prerogatives of the Crown (1820), p.95). James II was the last King to exercise the prerogative dispensing power (see Holdsworth A History of English Law, vol.vi, pp.217-225), and the reaction to his doing so found expression in the Declaration of Right. It was there declared that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal". By the Bill of Rights the power to dispense from any statute was abolished (1 Will. & Mar. Sess.2, c.2, s.XII). Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and ministers ought to serve the Crown according to the laws. It is expressed more appropriately for the present case by Griffith C.J. in Clough v. Leahy [1904] HCA 38; (1904) 2 CLR 139, at pp 155-156:*

*“If an act is unlawful - forbidden by law – a person who does it can claim no protection by saying that he acted under the authority of the Crown.”*

*This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when Executive Governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the courts "that sometimes people be reminded of this and of the fate of James II, as Scrutton L.J. reminded the London County Council" in R v. The London County Council. Ex parte The Entertainments Protection Association (1931) 2 KB 215, at p 229 (per Windeyer J. in Cam and Sons Pty. Ltd. v. Ramsay [1960] HCA 82; (1960) 104 CLR 247, at p 272).*

*These parts of the stated cases seem calculated to raise, perhaps obliquely, the plea of superior orders sometimes raised by military personnel (cf. O'Connor and Fairall Criminal Defences (1984) pp.136-138; Oppenheim's International Law 7th ed. (1967), pp.568-572). It may be that the ASIS officers who induced the beliefs stated and who issued the "exercise cards" regarded ASIS as a para-military force and encouraged the plaintiffs so to regard it. That may be a correct view. But if that view engenders the proposition that participation in an ASIS exercise exempts ASIS officers from obedience to the ordinary laws of the land, the proposition must meet with the same reply that Hale C.J. gave some 300 years ago to a captain of military who asserted exemption from the jurisdiction of the ordinary courts:*

*“Whatever you military men think, you shall find that you are under civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it.” (The Case of Captain C (1673) 1 Ventris 250, at p.251 (86 E.R.167, at p.168)).*

*The Commonwealth Parliament has made no law granting to ASIS officers exemption from any law; it is unnecessary to consider whether its constitutional powers could support such a law in times of peace. It is sufficient to say that none of the approvals given is capable of affecting any criminal responsibility which a particular plaintiff may have incurred in the exercise at the Sheraton Hotel. The exercise cards with which they were issued were no passport to immunity from the operation of the ordinary laws of Victoria.[[38]](#footnote-38)*

1. Brennan J completed his review by citing the opinion of the Supreme Court of the United States in *Mapp v Ohio [1961] USSC 142*:

*Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.*

*…*

*No agency of the Executive Government is beyond the rule of law. ASIS must obey the law and, if its officers do not, the Executive Government must be free to do what it thinks right in the public interest in the circumstances as they occur.[[39]](#footnote-39)*

1. It may be unsurprising that the language of the subsequent *Intelligence Services Act 2001* employs almost as a *lief motiv* the word ‘*proper’* in relation to functions. I shall return to this with some detail but first on the question of oversight: In her response to the alleged ASIS Dili mission the Australian Inspector-General of Intelligence and Security (“IGIS”) Ms Vivienne Thom told Senator Xenophon that she did not intend to conduct an enquiry at this time into the matter.[[40]](#footnote-40) Asked about the lawfulness of commercial espionage Ms Thom said that she would look first as to whether it met the government’s requirements set by Cabinet’s National Security Committee and then whether it came within the three statutory tests, namely, national security, foreign affairs or national economic well-being. Ms Thom observed that these elements might overlap and that the issues could be complex.
2. Ample, though complex, public domain sources of enquiry into the lawfulness of the 2004 Dili mission were available to my office in 2008-2010 when we evaluated the complaint while searching for a remedy for our client who (together with my firm) had been authorised by the Inspector-General’s predecessor to, *inter alia*, ‘…*take private legal actio*n’. The Inspector-General’s reluctance to enquire, even now, ten years later, sustains us in our eventual advice that confidential international arbitration was the appropriate path to a remedy.
3. The IGIS in reporting to its Minister lacks independence especially when it is the responsible Minister who has driven the unlawful conduct. It would have been an easy matter for Ms Thom to enquire into the documentary records of the Dili mission to determine whether the Dili mission met the then Cabinet’s National Security Committee’s requirements. I doubt whether she would have found that my classmate Phillip Ruddock then Attorney-General and member of the Committee had approved the Dili mission.
4. A first step in the analysis which in my view a Parliamentary or Judicial Inquiry into the Australian Government misconduct in 2004 and 2013 must now undertake may start with the *Intelligence Services Act 2001 (“ISA”) as it was in 2004.* Section 11 of the *ISA* declares that:

*The functions of the agencies are to be performed only in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well‑being* ***and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia. (***emphasis added***)***

***How was ‘Australia’s national security… affected by’ Prime Minister Alkatiri and his Cabinet?***

1. The instructions allegedly given by the Director General were to ensure that there was a clandestine recording of discussions to be held by the Timor-Leste negotiating team before and after negotiating sessions with the Australian team.
2. The central issue for the negotiation was the ratification of the IUA held up over Timor-Leste’s dissatisfaction with the 18.1% revenue split agreed to in the 2003 agreement. Australia’s interest in the negotiation was explained by a senior DFAT official, Geoffrey Raby, during testimony before an Australian Parliamentary Committee:

***Dr Raby****: On the first question of the relationship between the IUA and the treaty, the question, as I recall it, was: what was in Australia’s national interests? As I said last time, from the government’s point of view Australia’s national interest will be maximised and preserved if the treaty, the IUA and all other instruments, including the PSCs, come into effect simultaneously.[[41]](#footnote-41)*

*…*

***Mr Wilkie****: Would it be more or less beneficial for East Timor to have ratification prior to or at the same time as unitisation?*

***Dr Raby****: I think both sides would benefit from ratification and unitisation being agreed at the same time.*

***Mr Wilkie:*** *Equally?*

***Dr Raby****: No. As I said last time, our interest in this package is different. The big Australian interest is with Sunrise and, as we have just heard from one of the commercial partners, we need a unitisation agreement to realise that interest.*

***Mr Wilkie:*** *You made the statement that Australia’s interests are maximised and preserved if treated simultaneously. What I want are reasons as to why you have made that statement. Why is that the case?*

***Dr Raby****: I think that gives us the comfort, if you like, that we have both elements together. The East Timorese element and interest is with the early development of Bayu-Undan. We have some interest in Bayu-Undan, but Australia’s bigger interest is demonstrably with the development of Greater Sunrise. To do the treaty without having concluded an IUA for Sunrise would leave us possibly in a situation of less confidence and less certainty than at present.[[42]](#footnote-42)*

1. The potential value to the respective State tax revenues of the Greater Sunrise Field depended upon the estimated gas yield and net return after all development and production costs incurred by the commercial contractors with whom both Australia and Timor-Leste had, under the JPDA structure, subsisting Production Sharing Contracts (“PSCs”). Therefore, Timor-Leste and Australia met as existing joint-venture partners with consequent mutual fiduciary duties to renegotiate the Greater Sunrise revenue split in good faith.
2. The anticipated tax revenues calculated by the Treasury[[43]](#footnote-43) were not of any dimension relative to Australia’s GNP so as to ‘affect’ Australia’s national security. Not so Timor-Leste, which, without any other long-term revenue source, had a vital national security concern with the negotiations both as to revenue and an expectation derived from Article 8 in the Exchange of Notes,[[44]](#footnote-44) which came into force on 10 February 2000, and the replicate Article 8 in the 2002 TST, that a second gas pipeline would land in Timor-Leste and boost the local economy in a manner commensurate with the way the Bayu-Undan Pipeline had boosted the Australian Northern Territory economy.
3. However, the commercial contractors wished to avoid the construction of a second pipeline and, in working closely with the Australian Government, expected Australia to keep the pipeline issue off the table in negotiations with Timor-Leste. In fact, Royal Dutch Shell as part of the contractor consortia, already favoured a Floating Liquid Natural Gas (“FLNG”) processing facility. But Timor-Leste remained in hope for a pipeline to land in Timor-Leste.
4. In this context, the interest of the Government of Timor-Leste in securing upstream secondary industrial advantages from the piping of gas and oil to its mainland has met with counter-arguments by the Australian Government and Woodside Petroleum, arguing that a pipeline to East Timor traversing the Timor Trough was not a feasible prospect. Woodside published illustrated diagrams showing the trough to be steep-sided and impractical to traverse. On numerous occasions, Foreign Minister Downer, endorsed Woodside’s assertions.
5. In 2010 and 2011, well after the 2004 treaty negotiations that took place against assertions by the Woodside-led consortium backed by Mr Downer that it was not technically feasible to cross the Timor Trough by pipeline, Timor-Leste commissioned an independent bathymetric survey of the seabed areas embracing the Timor Trough adjacent to the south coast. Contrary to the assertions by Woodside Petroleum and Australia, the seabed survey revealed gradients in and around the trough that, according to current pipeline technology, may accommodate a gas pipeline without significant challenge.[[45]](#footnote-45)
6. Both parties understood that the maritime boundary delimitation dispute between them would remain in abeyance as agreed in the 2002 TST. However, there was a live question as to how long the boundary dispute would remain off the table. Nevertheless, there had never been any suggestion by Australia that the maritime boundary issue between Timor-Leste and Australia had any national security implication. The area of the Timor Sea in dispute contains no natural feature that would affect Australia’s national security in the accepted meaning of the words in ordinary English language understood in the statutory context.
7. In terms of Australia’s ‘energy security’, there is no provision in any of the Timor Sea suite of treaties between Timor-Leste and Australia allowing either government to requisition, in circumstances of emergency, any of the petroleum product. The Production Sharing Contracts are equally silent in respect of any emergency power. All of the LNG flowing to Darwin via the Bayu-Undan Pipeline is exported. Whilst there is a national gas grid connection at Darwin, this is a back-up export facility. In any event, Australia is massively endowed with natural gas resources. Moreover it is to be recalled that Australia’s energy security program had come a long way since the 1972 OPEC crisis and is now conducted by Geoscience Australia with an export trade focus.
8. The likely conclusion is that there was no ‘national security’ imperative ‘affected by’ the Timor-Leste Cabinet to justify the clandestine eavesdropping mission. Indeed, if there was any declared national security imperative *vis a vis* Timor-Leste, successive Australian Defence White Papers have emphasised that Australia’s broad national security interests are served by a stable prosperous Timor-Leste in the Region.[[46]](#footnote-46) Indeed, the trade policy objectives outlined by Mr Downer and his officials in evidence to Parliamentary committees raise the question whether the emphasis given to levering the private commercial joint-venture into an advantageous position to the detriment of Timor-Leste’s long term economic future was compatible with Australia’s long-term national security interests.

***Were ‘Australia’s foreign relations … affected by…’ Prime Minster Alkatiri and Cabinet?***

1. On the ABC *Four Corners* programme on 17 March 2014, the former Foreign Affairs Minister Alexander Downer, who directed the clandestine bugging mission, claimed that foreign relations with Indonesia were a factor in the CMATS negotiations. Mr Downer was referring to treaties negotiated in 1971 for the Arafura Sea and in 1972 for the Timor Sea. The 1971 treaty was uncontroversial and was resolved on settled principles. In 1972, Indonesia accepted a maritime boundary line on the continental shelf between West Timor and other Indonesian islands, and, Australia, significantly further north of where the median line is between the two countries.[[47]](#footnote-47)
2. Mr Downer said:

*And if we had made special provisions for East Timor, then naturally enough the Indonesians would've come back to us and said, well, in that case why should we adhere to these earlier treaties? And then in that context all of our maritime boundaries and seabed agreements would unravel, and that would be diplomatic folly for Australia.*[[48]](#footnote-48)

1. This claim was not new. Mr Downer made a similar claim in 2002 while defending the 2002 TST asserting that a radical change to delimitation of the boundaries was unacceptable:

*As I explained to the East Timorese some time ago, we are happy to hear what they have to say but we don't want to start renegotiating all of our boundaries, not just with East Timor, but with Indonesia. It has enormous implications. As I have explained to them, our maritime boundaries with Indonesia cover several thousand kilometres. That is a very, very big issue for us and we are not in the game of renegotiating them.[[49]](#footnote-49)*

1. Mr Downer’s reference to the boundary agreements with Indonesia being potentially unstable is misleading. The 1971 Treaty that established a boundary line in the Arafura Sea between Australia and Indonesia was drawn on the principles of the then Geneva Convention on the Continental Shelf endorsed by the International Court in the *North Sea Cases[[50]](#footnote-50)* and since reaffirmed in the 1982 UNCLOS. Namely, that as the Arafura Sea is mostly at a depth of 200m or less, a median line was appropriate. A declassified 1965 Australian Cabinet Submission bears that out.[[51]](#footnote-51) Contrary to Mr Downer’s claim nothing in the Arafura Sea can ‘*unravel’ as* the boundary is set in accordance with established principles.
2. The 1972 Treaty between Australia and Indonesia concerned a seabed boundary issue in which Australia rejected equidistance principles and pursued a "two-shelves" approach. This boundary is less than 1000 km in length, not the "*thousands of kilometres*" asserted by Mr Downer in his *Four Corners* interview. Moreover, the area between the 1972 Treaty seabed boundary and the median line which might conceivably ‘unravel’, is approximately 48,500 square km, miniscule when compared to Australia's 12.75 million square km of continental shelf entitlement.
3. The 48,500 square km area in question has been explored for hydrocarbon potential. Apart from Greater Sunrise, to which Indonesia has made no claim no significant commercially viable petroleum deposits between the notional median line with Australia and the 1972 agreed line have been identified. Indonesia is well endowed with energy resources elsewhere and has yet to develop significant identified reserves. What incentive could Indonesia have to now seek a median line?
4. Indonesia would have to unilaterally abrogate the 1972 Treaty for the line to ‘unravel’ as a result of any Australian agreement with Timor-Leste. Indonesia has made no demarches whatsoever during the lengthy public debate between Australia and Timor-Leste over the median line claimed by Timor-Leste.
5. It is true that in 1977, during a period of strained relations with Australia, the then Indonesian Foreign Minister, Dr Mochtar Kusamaatmadja, who was a law of the sea expert and had been an Indonesian negotiating official during the 1971 and 1972 negotiations with Australia, claimed that Australia had ‘*taken Indonesia to the cleaners’* in the negotiations over the seabed boundary. Dr Mochtar said, ‘*The Australians were able to talk us into accepting that the Timor Trench constituted a natural boundary between the two shelves, which is not true*.’[[52]](#footnote-52)
6. A more sanguine view emerged in 2004 when a senior Indonesian diplomat, Hashim Djalal, then participating with Indonesia in the revised economic zone seabed negotiations, said that the Indonesian Government was unaware of the Timor Sea’s oil and gas potential at the time.[[53]](#footnote-53) Mr Djalal acknowledged that Indonesia, in negotiating its 1972 boundary, wanted to be a good neighbour to Australia after the armed confrontation in the 1960s between Indonesia and Malaysia that was supported by Britain, Australia and New Zealand.
7. In lodging a comprehensive Continental Shelf submission in 2009 at the UN, Indonesia did not signal in any way its intent to seek to renegotiate or abrogate the 1972 Treaty.[[54]](#footnote-54) Indeed, Indonesia cited in its submission both the 1971 and 1972 treaties as settled, and, domestic law accepting the 1971 and 1972 agreements as exceptions to Indonesia’s adherence to UNCLOS principles. This was unsurprising, for at no time during the ten years of negotiations between Australia and Indonesia in relation to the eventual 1989 Timor Gap Treaty did Indonesia seek any concession with respect to the 1972 boundary line. A review of 1987 Cabinet papers reveal that during the post-1979 negotiations, Indonesia indicated that it wanted an economic share of the petroleum revenue to be acquired from the areas of the eventual zone of cooperation in the Timor Gap up to the 200 nautical mile limit not already covered by petroleum titles granted by Australia.
8. Indonesia expressed the sensible view that when existing petroleum titles issued by Australia for that area expired, the vacated title area should become part of Indonesia’s co-economic interest. In other words, in negotiating with the additional leverage available to it after invading Timor-Leste, Indonesia sought no concessions in relation to the 1972 boundary line but only concessions in relation to the Timor Gap. The concession was made and Zone A became an area of joint Australian-Indonesian ‘co-prosperity’.
9. If, in the context of the 1989 Timor Gap Treaty, Indonesia did not seek a concession in relation to the 1972 boundary lines, it is hard to comprehend the basis upon which it could be asserted that if a median line was agreed with Timor-Leste, Indonesia would seek a renegotiated boundary. Mr Downer would have known that the prospect of Indonesia re-opening the 1972 boundary agreement was ruled out by the then Australian Cabinet in 1987 and by Indonesia itself in its 2009 Continental Shelf Submission.
10. Moreover, the 1987 Cabinet Submission that canvassed the bases upon which Australia might reach the eventual 1989 Timor Gap Treaty with Indonesia noted that:

…*under International Law Australia’s and Indonesia’s seabed rights in the Timor Gap extend from their respective coastlines to the bathymetric axis (the deepest point) of the Timor Trough, which is the end of their respective continental shelves in this area*.[[55]](#footnote-55)

**. . .**

…*Indonesia’s position has been that there is one shared continental shelf between Australia and Indonesia and that accordingly, a boundary equidistant between the two coasts (the median line) would be appropriate. In addition, Indonesia argues that recent developments in the law of the sea, incorporated in 1982 United Nations Convention on the Law of the Sea, conferring jurisdiction over the seabed and water column out to 200 nautical miles, (the Exclusive Economic Zone –“EEZ”) regardless of geomorphology, support the median as the appropriate delimitation. No agreement on the principles for a permanent delimitation seems possible*.[[56]](#footnote-56)

***. . .***

*Indonesia has not accepted and is unlikely to accept the compulsory jurisdiction of the Court because it shares the traditional antipathy of less developed countries to compulsory third party settlement of disputes*.[[57]](#footnote-57)

1. In March 2002, Australia withdrew from all Law of the Sea adjudication concerning maritime boundaries. In consequence, any concern that Indonesia might litigate any boundary issue with Australia was well gone before the 2004 ASIS bugging mission in Dili. Indonesia’s Foreign Minister, Hassan Wirajuda, had observed on 26 February 2002 that ‘in due course’ Indonesia might wish to be part of a three-way process in redefining the boundaries of the Timor Gap. In this context, the Indonesian Foreign Minister was referring only to the adjustment of the tri-junction points out in the Timor Sea.
2. On other bilateral fronts, Indonesia has accepted the joint maritime arrangements at sea whereby Australia has assumed responsibility out to the 1972 negotiated line. Indonesia is still resolving maritime boundaries with its northern neighbours and it would seem highly unlikely for Indonesia as a democratic state to seek to abrogate a long-standing international treaty. The 1997 EEZ Treaty between Indonesia and Australia reaffirmed the original 1972 line but neither Australia nor Indonesia has ratified the 1997 EEZ Treaty.
3. In this submission, Mr Downer’s claim that Indonesia might renege on a treaty is more than just an unconvincing justification for spying on Timor-Leste’s internal Cabinet discussions. Mr Downer’s explanation is so far-fetched that it is suggestive of an attempt to cover-up a blatant breach of ASIS’s enabling legislation. The evidence suggests that there is no such *‘ foreign relations’* issue with Indonesia. A mere claim that there are foreign relations interests is not sufficient to oust a court’s jurisdiction. What is necessary in law is for the Minister and his Director-General of ASIS to establish that the Alkatiri Cabinet was affecting a foreign relations issue that would or could be reasonably expected to cause actual or significant compromise to Australia’s national interests. It seems unlikely that Australia could evade, on national security grounds, judicial and/or tribunal scrutiny of Mr Downer’s improbable claims.[[58]](#footnote-58)
4. Evidence as to Mr Downer’s real motive in directing the bugging of the Timor-Leste Cabinet rooms stems from comments on 17 March 2014 in the aftermath of the bugging scandal:

*We were close to all stakeholders and we would've been derelict in our duty had we not been. Galbraith was working for the United Nations, that's a different thing; the United Nations doesn't have an oil company. But of course when we're involved in negotiations we maintain contact with Australian companies. The Australian government isn't against Australian companies, or if it is it's derelict in its duty. The Australian government supports Australian business and Australian industry. The Australian government unashamedly should be trying to advance the interests of Australian companies.[[59]](#footnote-59)*

1. How then does advancing the interests of Australian companies fit within the legislative scheme of the *Intelligence Services Act 2001* *(Cth)*? The legislative terminology should be viewed in the first instance in light of successive statements of Australian foreign and trade policy:

*The values which Australia brings to its foreign policy are the values of a liberal democracy. These have been shaped by national experience... but reflect a predominantly European intellectual and cultural heritage. They include the rule of law, freedom of the press, the accountability of the government to an elected parliament, and a commitment to a “fair go.[[60]](#footnote-60)*

1. Article 5 of CMATS requires that Australia and Timor-Leste "*share equally*” revenues derived from the upstream exploitation of petroleum resources within the Sunrise IUA area.[[61]](#footnote-61) According to Australia, the Greater Sunrise field contains an “*estimated 8.4 trillion cubic feet of gas and 295 million barrels of condensate.*”[[62]](#footnote-62) The consortium holding the rights to develop the field is led by Australian oil major Woodside Energy Ltd, and the projected costs of development are approximately AUD$6.6 billion.[[63]](#footnote-63)
2. Following negotiation of CMATS, then Foreign Minister Alexander Downer noted that equal sharing of the upstream revenues deriving from Greater Sunrise “*could result in Australia and Timor-Leste each receiving up to US$10 billion over the life of the project.”[[64]](#footnote-64)*
3. Thus, the purely fiscal impact of CMATS on Australia and Timor-Leste over the estimated 30year life of the project can be assessed as between the estimated revenue from the non risk-adjusted 8.4tcf claimed by Australia, and, in standard petroleum trade terms, a risk-adjusted estimate that might reduce field potential by 15- 20%.
4. Timor-Leste had already secured what amounted to an 18.1% share of the reserve through the TST and IUA. The National Interest Analysis tabled in the Australian Parliament with the CMATS Treaty estimated that it would involve transfers to Timor-Leste of around $AUD4 billion over the expected 30 year life of the project.[[65]](#footnote-65) The *difference* between what Timor-Leste would have received under the IUA and what was negotiated under CMATS is up to $AUD6 billion.
5. Although Timor-Leste gained from the CMATS Treaty negotiation more than double the revenue than it would otherwise have derived under the IUA, it failed to secure the main prize. During the run up to the negotiation of CMATS, Timor-Leste argued for the processing facility to be located in Timor-Leste in order to provide much needed stimulus to the local economy. Prime Minister Alkatiri noted that some estimates of the economic benefits of locating the facilities in Darwin were as much as $AUD22 billion. He also asserted that given Australia was receiving the downstream benefits processing from the Baya-Undan field, it would be fair if Timor-Leste were to benefit from the Sunrise field.[[66]](#footnote-66)
6. In fact, Dr Alkatiri had a treaty basis for this negotiation position. Article 8 in both the 2002 TST and its precursor agreement, the Exchange of Notes between UNTAET and Australia of 10 February 2000, provided:

*(c) In the event a pipeline is constructed from the JPDA to the territory of either Australia or East Timor, the country where the pipeline lands may not object to or impede decisions of the Joint Commission regarding a pipeline to the other country...*

1. The silence of CMATS on the location of processing facilities was, on Timor-Leste’s analysis, a $AUD22 billion wildcard. On one view, the major beneficiary from CMATS in economic terms was the Woodside consortium, as the untying of Article 8 of the TST in its application to Greater Sunrise lost Timor-Leste the right to land a pipeline in Timor-Leste. To avoid this debacle, Timor-Leste would have required a term in the CMATS Treaty that preserved Article 8 and applied it explicitly to any Greater Sunrise Development Plan and to Production Sharing Contracts executed in anticipation of a Greater Sunrise Development Plan being approved.[[67]](#footnote-67) It was not only Timor-Leste that missed out. Australia could have required Woodside to link a pipeline from Greater Sunrise to the existing Bayu-Undan pipeline to Darwin by treaty terms.
2. By CMATS Timor-Leste and Australia accepted a 50% share each of the total anticipated upstream tax revenues from Greater Sunrise without knowing what the tax deductible cost of the most important variable in the equation would be, namely, the outstanding costs of exploration, gas recovery, delivery and processing. In not securing the right to either stipulate or maintain a veto right to influence the LNG processing method Australia and Timor-Leste left the anticipated tax revenue return from Greater Sunrise to commercial dictates.
3. In a provision remarkable for its hands-off approach, the CMATS Treaty simply required the State parties to agree with the Contractors within six years on a Greater Sunrise Development Plan, which included the gas processing decision.[[68]](#footnote-68) By April 2010, the long anticipated decision that the consortium favoured an FLNG as the processing and delivery method was confirmed.[[69]](#footnote-69) Thus, both Timor-Leste and Australia are, as matters stand, going to miss out on the multi billion-dollar infrastructure and employment boost from a landed facility.
4. In Australia’s case, and adopting an Australian argument, the loss is all the more galling because a pipeline under Australian supervision already was available from the Bayu-Undan Field to Darwin and a seabed connecting line from Greater Sunrise to the Bayu-Undan flange could present no unusual engineering challenges. Once at the Bayu-Undan flange, ullage in the line to Darwin could be taken up to transport a gas stream from Greater Sunrise, and, LNG and condensate sales could be made direct from the Bayu-Undan plant. As the countdown for the life of the Bayu-Undan field approaches, estimated in 2020-24, a multi-billion investment in an FLNG may become less feasible economically.[[70]](#footnote-70) But Parliament was not told this.
5. On 6 February 2007, the Australian Government tabled the CMATS Treaty in the Federal Parliament with a National Interest Analysis that did not address the pipeline infrastructure issues. The following day the Government declared the legislation implementing the IUA operative. On 22 February 2007, on the eve of the Exchange of Notes the following day in Dili between Timor-Leste and Australia to bring the IUA and the CMATS Treaty simultaneously into force, Mr Downer informed the Chair of the Joint Standing Committee on Treaties (JSCOT) that he was invoking the national interest exemption and would proceed to ratify the CMATS Treaty before the stipulated twenty day sitting period following tabling elapses. This unscrutinized process represented a major strategic win for the consortium.
6. Nevertheless, the manipulation of the parliamentary process did not pass unnoticed. When the JSCOT met on 26 February 2007, the following exchange took place between the Acting Chair, Mr Wilkie MP, and a DFAT official, Ms Richards:

*Acting Chair: Thank you very much. Before we proceed to questions on the treaty itself, I have a few questions about the process of invoking the national interest exemption. Given this treaty was signed in January 2006 and that the minister made the statement to parliament in February last year that the treaty would be brought forward virtually as quickly as possible to the Australian parliament for consideration, why has it taken until February this year for the treaty to be tabled so that this committee can investigate it?*

*Ms Richards: The feeling was that both governments wished to move as closely in-step as possible through their domestic processes. As you know, the processes are somewhat different, so it is difficult to dovetail them exactly, but East Timor had requested us to arrange for synchronous entry into force of the treaty. The East Timorese processes were disrupted by domestic developments in 2006 but, towards the end of last year and the beginning of this year, the East Timor government was in a position to move quickly and had requested hat Australia proceed with synchronous exchange of letters and entry into force. So the Australian government sought to meet that East Timorese request to be in a position to exchange notes on the same day.*

*Acting Chair: So the Timorese parliament have followed their due process in considering the treaty, but Australia has not; is that right?*

*Ms Richards: Mr Downer, as you know, on 22 February invoked the national interest exemption, which is a provision allowing for unusual measures in the event of safeguarding Australia’s national interest. It was felt in this case, because the treaties bring significant national benefits to both countries and because there was possibly a very narrow window of opportunity to bring them into force in the short term, that it was important to take advantage of that window of opportunity.*

*Acting Chair: Then why didn’t the government ask the treaties committee at the last sitting fortnight to look at urgently considering this treaty within that week and reporting as quickly as possible, rather than invoke a national interest exemption that bypasses the committee completely?*

*Ms Richards: The treaty was tabled on 6 February, the first available tabling day this year, and it is the government’s intention to answer the committee’s questions. As I mentioned, the treaty has been available to the general public for a full 12 months but, as I said, there was a rapidly closing window of opportunity, developments were moving quickly in East Timor, and in the national interest it was thought best to grab that window before it closed.*

*Acting Chair: This a rather blunt question, but whose incompetence led to this situation, given that this treaty could have been examined by this committee at any point in the last 13 months and it has taken until now for it to be tabled? Is that a decision of the minister or the department?*

*Ms Richards: East Timor had requested the government to try and move in step with it, to ratify synchronously if that were possible, and in good faith the government sought to respond to that and move step by step with East Timor as closely as the procedures allowed.*

*Acting Chair: I think it is outrageous that this committee was not given the opportunity to examine the treaty in due time, and it is a failing on behalf of both the minister and the department which I find totally unacceptable. Does anyone have any questions?*[[71]](#footnote-71)

1. The suggestion that the timing was to meet a request by Timor-Leste was disingenuous to say the least. In 2002, Mr Wilkie’s questioning had elicited from another DFAT official an intended *modus vivendi* whereby a revenue flow for Timor-Leste anticipated by the 2003 IUA, would not commence until a deal for Greater Sunrise was agreed to by Timor-Leste.[[72]](#footnote-72) In other words, the IUA would not be ratified until there were treaty rights to Greater Sunrise for commercial contractors. By 2007, the Alkatiri Government had collapsed in civil strife and an interim government, still largely reliant upon donor funds, was preparing for elections.
2. Mr Downer attributed uncertainty arising from the national elections in Timor-Leste as the reason why he invoked a national interest exemption to exclude an inquiry into the CMATS Treaty by the JSCOT.[[73]](#footnote-73) Mr Wilkie’s retort to this claim was:

*…but could someone please explain to me why on the DFAT webpage there is a media release from the minister dated 8 February, which says the process is not the timing of the elections. It says it was agreed to move through in parallel, which has already been stated, but that it was not the timing of the elections that dictated the government’s approach. That is totally the opposite of what you just said.[[74]](#footnote-74)*

1. Ultimately, in terms of the ASIS Dili mission, the question is whether the silence of CMATS on the location of processing facilities was a benefit to Australia's national economic well-being or primarily of commercial gain to the Woodside led consortia. On any current analysis of information in the public domain, abdication of government control over sovereign resource processing was to both Australia and Timor-Leste’s detriment as the upstream economic development gains of a landed processing facility would dwarf total anticipated tax revenue stated in the National Interest Analysis to be worth up to $AUD10 billion each to Australia and Timor-Leste, a figure worth perhaps a tenth of the anticipated cash earnings by the commercial entities.
2. If the Greater Sunrise Field gas is processed by an internationally moored FLNG using flown in foreign labour, the infrastructure and employment gains to Timor-Leste and Australia of a landed facility may largely be lost.
3. Just what ‘wealth’ would accrue to Australia is not spelt out in Mr Downer’s recollection in his 17 March 2014 television interview:

*Alexander Downer: Woodside is a huge Australian company and they were proposing to invest billions of dollars in Greater Sunrise to create wealth, which would inter alia have been wealth for Australians, but obviously substantially for the East Timorese as well. So I was all in favour of that. I was all in favour of it…*[[75]](#footnote-75)

*…*

*Marian Wilkinson: Woodside executives led by Voelte lobbied the government strongly during the 2004 negotiations.*

*Alexander Downer: Me, for my part, I reckon, I don't know, I mean I haven't checked, but I would've had certainly more than one, I should think three or four meetings with the CEO of Woodside and no doubt he had a couple of other people there and I would talk to them about how the negotiations were progressing. Well, of course I did. But I mean like there's some…[[76]](#footnote-76)*

*…*

*Alexander Downer: You don't need to ask me about the intelligence operation allegations because you know no Australian government, past or present, will ever get into any discussion about intelligence operations. But suffice it to say the um Australian government was on Australia's side in the negotiations and we did our best to make sure that we were ah able to achieve our objective, which was particularly an objective in relation to the delineation of the maritime boundaries.[[77]](#footnote-77)*

1. The emphasis on LNG trade expansion also unfolds in the contemporaneous evidence of DFAT Senior Legal Adviser, Ms Penny Richards:

*The CMATS Treaty and the IUA are good deals for Australia and very much in our national interest. The treaty will promote further investment in Australia’s offshore petroleum industry. Australia is currently the fifth largest exporter of LNG, with seven per cent of global volume. The development of Greater Sunrise has the potential to build significantly on Australia’s standing in the global energy market.* [[78]](#footnote-78)

1. The conclusion must be that no direct Australian national economic well-being interest was being served by the then Foreign Minister Alexander Downer directing ASIS to eavesdrop on the internal deliberations of the Timor-Leste Cabinet. The 2002 TST had already committed Timor-Leste to including Greater Sunrise in the Joint Venture with Australia, so the eavesdropping was not to get Greater Sunrise for Australia. The maritime boundary dispute was to be deferred. The absence of a pipeline tie to the terms of the CMATS Treaty deprived Australia and Timor-Leste of a chance to directly boost their economies
2. The principal beneficiary from this debacle was the Woodside-led consortium, which had been closely involved with Alexander Downer in the negotiations.[[79]](#footnote-79) Announcements by the Australian Government during negotiations between Australia and Timor-Leste were often preceded by or followed by similar announcements, including threats, by Woodside Petroleum. During negotiations between Timor-Leste and Woodside Petroleum, an official from DFAT was ‘seconded’ to Woodside Petroleum’s offices in Dili. In September 2005, Ashton Calvert, the then recently retired head of DFAT, was appointed to the Woodside Board. It was under Calvert’s tenure as head of DFAT and under the same roof that instructions for the eavesdropping ASIS operation were given.
3. In 1999, the then National Secretary of the Australian Labour Party, Gary Gray, resigned. In early 2001, he was employed by Woodside Petroleum as an adviser, later joining the company’s executive board. In 2007, he was elected to the Federal Parliament and during the last phase of the Gillard Labor Government was Australian Minister for Natural Resources Energy and Tourism.
4. The conclusion must be that Timor-Leste delegation was cheated and the Australian Parliament left uninformed as to the economic significance of the pipeline issue for Australia.[[80]](#footnote-80) In terms of Defence Policy the Parliament was not informed that the pipeline issue had significant implications for the economic growth of Timor-Leste that would assist the creation of a stable prosperous neighbour.

***‘Capabilities, intentions or activities of people or organisations’ (s 11 of the Intelligence Services Act 2001* (Cth)*)***

1. Capturing, unlawfully, the internal Cabinet deliberations of the Ministers of State and advisers of a friendly, law-abiding sovereign State concerning a treaty that would divide the economic benefits of a mutually shared resource between that State and Australia, could not on any stretch of the statutory language of s11, even without extrinsic aid to interpretation, justify such a function of ASIS in the national interest. Taking the ordinary meaning of words in context, law abiding Cabinet Ministers with no harmful intent to Australia are not the ‘*people’* the legislature intended to embrace, and nor is such a Cabinet of Ministers an ‘*organisation*’ within the contemplation of parliament.

**Conclusion**

1. Every element of the conspiracy to defraud Timor-Leste, including securing Australia’s ill-gotten territorial position and levering the Woodside consortium into a favourable position, offended basic notions of criminal and civil law, and, international law. Apart from the local Australian Capital Territory Criminal Code dealing with conspiracy to defraud, the likely breaches of Australian law include the prospect of certain persons being charged with conspiring for a purpose unlawful under a law of the Commonwealth to contravene the *Intelligence Services Act 2001* (Cth) and if any lawyer was involved the Attorney-General’s Directions issued pursuant to the *Judiciary Act 1903* (Cth). This may depend upon whether the Australian Federal Police Commissioner and the ACT Director of Public Prosecutions can find the same resolve as did the Victoria Police Commissioner and prosecutors after the Sheraton Affair.
2. The *modus vivendi* included wilful and persistent breaches by Australia of international treaty law including the Vienna Convention on Diplomatic Relations (‘VCDR’).[[81]](#footnote-81) The sustained breaches of the VCDR included breaches of immigration law and the use of the facilities of the Australian Embassy to assist the clandestine mission.
3. An analysis of the elements upon which the legitimacy of the ASIS bugging mission to Dili in 2004 depends, reveals no lawful basis for the mission. Such an analysis was well within the capacity of the IGIS in the 12 months that elapsed after Timor-Leste gave explicit details of the Dili mission (being no old rumours of espionage as Attorney Dreyfus and Senator Carr were told) to Australia and before Australia moved to threaten the witness and my firm. This raises the further question as to who put their heads together with what purpose to search my and the witness’ premises.
4. After all, the witness, my client was put in charge of the Dili mission personally by the then Director-General David Irvine. How hard would it have been for a lawyer with honest intent to ask me how I saw the case and the precautions needed to protect any legitimate security issues? I had after all discussed *ad referendar* in Cambridge the need for confidentiality with Australia’s Counsel Professor James Crawford. I informed Professor Crawford that I had appeared in a Special Forces Inquiry in the UK and other security related matters and could suggest means to protect witnesses and security related matters.
5. In the absence of an effective oversight of ASIS it remains for proper inquiry by police and or Parliament to find the motivation for the use of ASIO powers by Senator Brandis instead of going with affidavit evidence to a judicial officer who would no doubt have seen the significance of compromising the Brief of Evidence for proceedings underway and asked some questions…. Questions that I suggest this Government did not want to answer. Given the publicised nature of the case any judicial officer is likely to have asked the obvious questions. Were Collaery Lawyers acting with authorisation and was the ASIS conduct complained of lawful or unlawful?

1. I am sustained in that view by the opinion of Nicholas Cowdery QC and other eminent Counsel. [↑](#footnote-ref-1)
2. We have Australian War Memorial Director Brendan Nelson’s research to thank for the plane’s co-ordinates. [↑](#footnote-ref-2)
3. Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour Fields (with annexes), Australia-Timor-Leste, signed 6 March 2003, [2007] ATS 11 (entered into force 23 February 2007) (‘International Unitisation Agreement’). Enacted into Australian law as the *Greater Sunrise Unitization Agreement Implementation Act 2004 (Cth).* [↑](#footnote-ref-3)
4. Memorandum of Understanding between the Government of the Democratic Republic of East Timor and the Government of Australia concerning an International Unitization Agreement for the Greater Sunrise field, East Timor-Australia, signed 20 May 2002. [↑](#footnote-ref-4)
5. Mr John Akehurst, Managing Director, Woodside Petroleum Ltd, quoted in ‘*Australia’s Woodside Sees No Threat from Timor Gas Rivalry,’* *Asia Pulse*, 6 December 1999. [↑](#footnote-ref-5)
6. Commonwealth of Australia, Joint Standing Committee, *Timor Sea Treaties*, Monday, 14 October 2002, Canberra, p.275. [↑](#footnote-ref-6)
7. Commonwealth of Australia, Joint Standing Committee, *Timor Sea Treaties*, Monday, 14 October 2002, Canberra, p.273. [↑](#footnote-ref-7)
8. National Parliament Law No.7/2002. [↑](#footnote-ref-8)
9. Senator Bob Brown, House of Representatives, *Petroleum (*Timor Sea Treaty*) Bill 2003*, State Debates, 6 March 2003, p.9371 – “*I believe we are being ambushed with this legislation*.” at p.9371. [↑](#footnote-ref-9)
10. Ultimately the revised formula became Article 5 of the CMATS Treaty of 12 January 2006 whereby upstream revenue was to be shared equally between the countries. [↑](#footnote-ref-10)
11. CMATS, Article 7 (1) (c) and (2). [↑](#footnote-ref-11)
12. Serdy, A., Baird, R. and Rothwell, D., Australian Coastal and Marine Law (2011) 114 – *‘… the agreement provides a comprehensive framework for the joint development of the Greater Sunrise field*, *lying in a Unit Area defined in Annex 1 in three dimensions (so that a separate deposit lying above or more likely below, not necessarily extending across the JPDA boundary, would not be subject to the unitization*.’ [↑](#footnote-ref-12)
13. Australia and East Timor’s Maritime Boundary, March 2005; La’o Hamutuk, February 2008, *Sunrise LNG in Timor-Leste: Dreams, Realities and Challenges, Appendix 2: History of Sunrise developments; East Timor* ETAN/US latest news, March 2005; [↑](#footnote-ref-13)
14. Manuel de Lemos & Nigel Wilson, ‘Treaty to pump $2.5bn to E Timor’, *The Australian* (13 January 2006). [↑](#footnote-ref-14)
15. CMATS, Article 5 (12). See also JSCOT Report 85, p.46 at para 6.30: “*The Committee notes that, as a consequence of Article 4, Australia will be able to continue regulating authorizing petroleum activities outside of the JPDA and south of the 1972 Australia-Indonesia seabed treaty. This area encompasses the Laminaria-Corrallina gas fields, preventing further revenue claims between the two countries in this area.”*  [↑](#footnote-ref-15)
16. AustGeo News 2008 http://www.ga.gov.au/ausgeonews/ausgeonews200806/offshore.jsp [↑](#footnote-ref-16)
17. ‘Downer: pompous colonial git’, Crikey (online), 6 March 2003, http://www.crikey.com.au/2003/03/06/exclusive-alexander-downer-pompous-colonial-git/: Mr Downer said: ‘*You have to face reality. If you are going to demand that all resources are Timor-Leste’s, your claim almost goes to Alice Springs – you* *can demand that for ever for all I care, you can continue to demand, but if you want to make money you should conclude an agreement quickly.’* [↑](#footnote-ref-17)
18. Australian Broadcasting Corporation, Four Corners, Jonathan Holmes, 10 May 2004, “*Rich Man, Poor Man*”, Transcript, p.10. [↑](#footnote-ref-18)
19. Paul Cleary, *Shakedown: Australia’s grab for Timor oil* (2007, Allen & Unwin) 93-97. Jane Perlez, ‘*U.S. Chief pushes oil giant’s moves beyond Australia’*, *New York Times*, 11 August 2004; Nigel Wilson, ‘*Australia warns Timor on gas claim’*, *The Australian*, 30 July 2004. [↑](#footnote-ref-19)
20. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room Dili, Timor-Leste, Crikey.com.au/politics in Robert J King, Submission 25, May-June 2003, ‘The Timor Gap, 1972-2003, at p.54 (also see: www.aphref.aph.gov.au\_house\_committee\_jsct\_mayjune2003\_subs\_subs25-4.pdf) [↑](#footnote-ref-20)
21. Alexander Downer, Ministerial Meeting, 27 November 2002. [↑](#footnote-ref-21)
22. Cited in Mark Dodd, ‘*East Timor hopes for break in oil talks’*, *The Australian*, 27 April 2005. [↑](#footnote-ref-22)
23. *Crimes (Overseas) Act 1964 (Cth),* s3A (10), requires, inter alia, that the actions abroad by ASIS staff be done ‘in the proper performance of a function of ASIS’. ASIS’s function is stated in s 6 of the *Intelligence Services Act 2001 (Cth)* as:

    ...to obtain, in accordance with the Government’s requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and

    to communicate, in accordance with the Government’s requirements, such intelligence; and

    to conduct counter-intelligence activities; and

    to liaise with intelligence or security services, or other authorities, of other countries; and

    (da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and

    to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia. [↑](#footnote-ref-23)
24. Paul Cleary, *Shakedown: Australia’s grab for Timor oil* (2007, Allen & Unwin) p. 188 recounts the opening of the negotiations on 25 October 2004:

    ‘Chester, the hard man sent in Downer, said there appeared to be a ‘slight disconnect’ between the two sides and revealed why Downer agreed [to the talks] was to give Greater Sunrise a way forward,’ he said. The negotiations were not about recognising the rights of Australia’s newly independent neighbor, they were about Woodside’s interests. ‘Our main aim is to give Greater Sunrise a chance to be exploited,’ he added. In making this point Chester subscribed to Woodside’s arguments about a so-called 2010 marketing window and its Christmas deadline. ‘The window is very, very short-time is running out if we are to reach a solution by the end of the year.’ [↑](#footnote-ref-24)
25. See Andrew Wilkie MP, Official Committee Hansard, JSCOT, 14 October 2002, Questioning of Mr Geoffrey Raby, pp.270-284 and The Parliament of Commonwealth of Australia, Report 49, The Timor Sea Treaty, Joint Standing Committee on Treaties, November 2002, Canberra, pp.1-66. [↑](#footnote-ref-25)
26. Andrew Wilkie MP, Official Committee Hansard, JSCOT, Monday, 26 February 2007, Questioning of Ms Richards, Transcript of Evidence, p. 31. [↑](#footnote-ref-26)
27. Intelligence Services Act 2001 (Cth), s 12(a). [↑](#footnote-ref-27)
28. Ibid, s11 (2A). [↑](#footnote-ref-28)
29. Ibid, s 12A (b). [↑](#footnote-ref-29)
30. In 2011, in his inaugural address, President of Timor-Leste Taur Matan Ruak referred to Australia as a longstanding ally. Australia’s defence establishment has worked effectively over many years to enhance defence cooperation with Timor-Leste. The 2013 Australian Defence White Paper listed the four priority tasks required of the Australian Defence Force as:

    Principal Task One: deter and defeat armed attacks on Australia;

    Principal Task Two: contribute to stability and security in the South-Pacific and Timor-Leste;

    Principal Task Three: contribute to military contingencies in the Indo-Pacific region, with priority given to Southeast Asia; and

    Principal Task Four: contribute to military contingencies in support of global security. [↑](#footnote-ref-30)
31. See the Transcripts at Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-­Leste *v.* Australia), available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=156. [↑](#footnote-ref-31)
32. See *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532. [↑](#footnote-ref-32)
33. Conceded by Senator Brandis. Wilkinson M. and Cronau P., ABC *Four Corners*, 17 March 2014, ‘*Drawing the Line*’, Transcript, p.7, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-33)
34. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Gibbs C), [2]. [↑](#footnote-ref-34)
35. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Gibbs C), [2]. [↑](#footnote-ref-35)
36. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Mason J), [2]. [↑](#footnote-ref-36)
37. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Mason J), [2]. [↑](#footnote-ref-37)
38. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Brennan J). [↑](#footnote-ref-38)
39. *A. v. Hayden [1984]* HCA 67; (1984) 156 CLR 532 (Brennan J). [↑](#footnote-ref-39)
40. Xenophon MP, Official Committee Hansard, Finance and Public Administration Legislation Committee, Estimates, Monday 26 May 2014, Questioning of Dr Vivian Thom, Transcript of Evidence, p.120-130. [↑](#footnote-ref-40)
41. Commonwealth of Australia, Joint Standing Committee, Timor Sea Treaties, Monday, 14 October 2002, Canberra, p. 271. [↑](#footnote-ref-41)
42. Commonwealth of Australia, Joint Standing Committee, Timor Sea Treaties, Monday, 14 October 2002, Canberra, pp. 272-3. [↑](#footnote-ref-42)
43. Andrew Wilkie MP, Official Committee Hansard, JSCOT, Monday 26 February 2007, Questioning of Mr John Hartwell, Transcript of Evidence, p.35 ‘…*we work together with Treasury on this one (revenue)*…’. [↑](#footnote-ref-43)
44. Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, Australia-UNTAET, signed 10 February 2000 [2000] ATS 9 (entered into force 10 February 2000, with effect from 25 October 1999). [↑](#footnote-ref-44)
45. See Minister Alfredo Pires comments in Fowler A. and Cronau P. *ABC, Four Corners*, 1 October 2012, “Taxing Times in Timor”, Transcript, available at http://www.abc.net.au/4corners/stories/2012/09/27/3599022.htm. [↑](#footnote-ref-45)
46. Commonwealth of Australia, Defence White Paper 2013, available at <http://www.defence.gov.au/WhitePaper2013/docs/WP_2013_web.pdf>. [↑](#footnote-ref-46)
47. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, Australia-Indonesia, signed 18 May 1971, ATS 1973 No. 31 (entered into force 8 November 1973); Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971, Australia-Indonesia, signed 9 October 1972, ATS 1973 No. 32 (entered into force 8 November 1973) [↑](#footnote-ref-47)
48. Wilkinson M. and Cronau P., ABC *Four Corners*, 17 March 2014, ‘*Drawing the Line*’, Transcript, p.7, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-48)
49. Don Greenlees, ‘*Downer: no change to Timor borders’,* *The Australian,* 25 May 2002 in Robert J. King, July 2002, “*The Timor Gap, 1972-2002*” at p. 45. [↑](#footnote-ref-49)
50. North Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) (Judgement) [1969] ICJ Rep 3. [↑](#footnote-ref-50)
51. David Fairbairn, CE Barnes & BM Snedden, Submission 1165 to Cabinet, *Off-Shore Petroleum, Legislation To Give Effect To Joint Commonwealth-State Legislative Arrangements*, 25 November 1965. [↑](#footnote-ref-51)
52. Michael Richardson, ‘Jakarta’s Tough Sea Boundary Claim’, *The Australian Financial Review*, 20 December 1978. [↑](#footnote-ref-52)
53. Robert J. King, July 2002, “*The Timor Gap, 1972-2002*”. [↑](#footnote-ref-53)
54. Division for Oceans Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Submission in Compliance with the Deposit Obligations Pursuant to the United* *Nations Convention on the Law of the Sea (UNCLOS)* (7 March 2012), available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm>. [↑](#footnote-ref-54)
55. Cabinet Submission No. 5261 – “*Australia – Indonesia Maritime Delimitation Negotiations*”, Canberra, 6 October 1987, p2. [↑](#footnote-ref-55)
56. Cabinet Submission No. 5261 – “*Australia – Indonesia Maritime Delimitation Negotiations*”, Canberra, 6 October 1987, p2. [↑](#footnote-ref-56)
57. Cabinet Submission No. 5261 – “*Australia – Indonesia Maritime Delimitation Negotiations*”, Canberra, 6 October 1987, p2. [↑](#footnote-ref-57)
58. *Thomas v Mowbray* (2007) HCA 233 CLR 307 (2 August 2007) [↑](#footnote-ref-58)
59. Wilkinson M. and Cronau P. *ABC, Four Corners*, 17 March 2014, “Drawing the Line”, Transcript, p.8, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-59)
60. Australian Government (1997), Australia's Foreign and Trade Policy White Paper, [www.dfat.gov.au/ani/index.html](http://www.dfat.gov.au/ani/index.html). Also see <http://www.foreignminister.gov.au/releases/1997/fa106_97.html>. [↑](#footnote-ref-60)
61. CMATS, Article 5(1). The remainder of Article 5 provides details on the calculation of each party’s taxation revenues, while Article 6 provides the terms for appointing an assessor to review adjustments to the calculation of the revenues referred to in Article 5, if deemed necessary by either party. The “petroleum resources” are defined in Article 7 as constituting those contained in CMATS itself, the TST, the Sunrise IUA and “any future agreement between Australia and Timor-Leste as referred to in Article 9 of the Timor Sea Treaty” (Article 7 (1, d)). With regard to “ Unit Area”, Article 1 of CMATS, which is devoted to definitions, provides that the term Unit Area refers to the area outlined in Attachment I to the “Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitization of the Sunrise and Troubadour Fields, done at Dili on 6 March 2003” (“IUA”). [↑](#footnote-ref-61)
62. Australian Government’s National Interest Analysis – CMATS Treaty. [9], available at [www.aph.gov.au/house/committee/jsct/6\_7\_february2007/treaties/timor\_nia.pdf](http://www.aph.gov.au/house/committee/jsct/6_7_february2007/treaties/timor_nia.pdf%20) . [↑](#footnote-ref-62)
63. Woodside owns 33.4% of Sunrise in partnership with ConocoPhillips (30%), Royal Dutch/Shell Group (26.6%) and Japan’s Osaka Gas Co. (10%). Estimates as to the projected cost of the project vary, although US$5 billion is often quoted. [↑](#footnote-ref-63)
64. Department of Foreign Affairs and Trade, ‘*Entry into Force of Greater Sunrise Treaties with East Timor’,* Alexander Downer, Minister of Foreign Affairs, Australia, media release, 23 February 2007, available at www.foreignminister.gov.au/releases/2007. [↑](#footnote-ref-64)
65. National Interest Analysis [2007] ATNIA 4, Documents tabled by the Australian Government in the Australian Parliament on 6 February 2007, [10]. [↑](#footnote-ref-65)
66. Mari Alkatiri, “All Timor-Leste Seeks is a Fair Go,” *The Age*, 3 November 2004. [↑](#footnote-ref-66)
67. Production Sharing Contracts: PSC JPDA 03-12 and Appendix X, PSC 03-19, and PSC 03-20. [↑](#footnote-ref-67)
68. Article 12(2)(a). [↑](#footnote-ref-68)
69. Shell Global, *Shell floating LNG technology chosen by joint venture for Greater Sunrise project* (29 April 2010) [http://www.shell.com/global/aboutshell/media/news-and-media- releases/2010/flng-technology-greater-sunrise-29042010.html](http://www.shell.com/global/aboutshell/media/news-and-media-%20releases/2010/flng-technology-greater-sunrise-29042010.html). [↑](#footnote-ref-69)
70. In this scenario it would not make good sense for Timor-Leste to dismantle the Bayu-Undan plant. [↑](#footnote-ref-70)
71. Commonwealth of Australia, Official Committee Hansard, Joint Standing Committee on Treaties, Reference: Treaties tabled on 6 December 2006 and 6 February 2007, Monday, 26 February 2007, Canberra, pp.32-33. [↑](#footnote-ref-71)
72. Andrew Wilkie MP, Official Committee Hansard, JSCOT, 14 October 2002, Questioning of Mr Geoffrey Raby, pp.270-284. [↑](#footnote-ref-72)
73. Alexander Downer, letter dated 22 February 2007 to Dr Andrew Southcott MP, Chair, Joint Standing Committee on Treaties: ‘*It is uncertain when an opportunity would arise after the East Timorese election period*.’ [↑](#footnote-ref-73)
74. Andrew Wilkie MP, Official Committee Hansard, JSCOT, Monday, 26 February 2007, Questioning of Ms Richards, p.34. [↑](#footnote-ref-74)
75. Wilkinson M. and Cronau P. *ABC* *Four Corners*, 17 March 2014, “Drawing the Line” Transcript, p.10, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-75)
76. Wilkinson M. and Cronau P. *ABC* *Four Corners*, 17 March 2014, “Drawing the Line” Transcript, p.10, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-76)
77. Wilkinson M. and Cronau P. *ABC* *Four Corners*, 17 March 2014, “Drawing the Line” Transcript, p11, available at http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm. [↑](#footnote-ref-77)
78. Commonwealth of Australia, Official Committee Hansard, Joint Standing Committee on Treaties, Reference: Treaties tabled on 6 December 2006 and 6 February 2007, Monday, 26 February 2007, Canberra, pp.31. [↑](#footnote-ref-78)
79. The Terms of Reference for a Judicial Inquiry should include investigation into whether information secured, not only from eavesdropping out of session deliberations by the Timor-Leste Cabinet, but from expert advisers and oil executives conferring with the Timor-Leste Prime Minster. Woodside Executives had as many meetings with Timor-Leste Ministers and officials as did Australia. For example, on 13 September 2004, Woodside CEO Don Voelte and officials including Gary Gray flew into Dili for preliminary meetings prior to discussions in Canberra later that month. [↑](#footnote-ref-79)
80. National Interest Analysis [2007] ATNIA 4, Documents tabled by the Australian Government in the Australian Parliament on 6 February 2007. [↑](#footnote-ref-80)
81. Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) (‘VCDR’). [↑](#footnote-ref-81)