

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Report 168

Certain Maritime Arrangements - Timor-Leste

Joint Standing Committee on Treaties

March 2017
CANBERRA

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Abbreviations

CMATS Treaty	<i>Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea</i>
DFAT	Department of Foreign Affairs and Trade
JPDA	Joint Petroleum Development Area
NIA	National Interest Analysis
RIS	Regulation Impact Statement
Timor Sea Treaty	<i>Timor Sea Treaty between the Government of East Timor and the Government of Australia</i>
UNCLOS	United Nations Convention on the Law of the Sea

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Terms of Reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - either House of the Parliament, or
 - a Minister; and
 - such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of Recommendations

Recommendation 1

- 2.74 The Committee supports the amendments to the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* as agreed between Australia and Timor-Leste and recommends that binding treaty action be taken.

1. Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the consequences of termination of the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, done at Sydney on 12 January 2006 ('the CMATS Treaty') which was tabled in Parliament on 13 February 2017.
- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.
- 1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.
- 1.4 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.5 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment

for Australian business. The Treaty examined in this report did not require a RIS.

- 1.6 The Committee takes account of these documents in its examination of the Treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 Copies of the Treaty considered in this report and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/CMATS

Conduct of the Committee's review

- 1.8 The Treaty action reviewed in this report was advertised on the Committee's website from the date of tabling. Submissions for the Treaty were requested by 10 March 2017. The Committee received 32 submissions.
- 1.9 The Committee held a public hearing into the treaty in Canberra on 14 March 2017. The transcript of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website listed above.
- 1.10 A list of submissions received is at Appendix A. A list of witnesses who appeared at the public hearing is at Appendix B.

Foreign Minister's request for expedited consideration

- 1.11 On 13 February 2017, the Foreign Minister, the Hon Julie Bishop MP wrote to the Chair of the Committee requesting the Committee's expedited consideration of the proposed treaty action and for the Committee to table its report on the matter by 30 March 2017. The Foreign Minister stated that expedited consideration of the treaty action would allow an exchange of notes with Timor-Leste before termination of the CMATS Treaty on 10 April 2017.
- 1.12 On 13 February 2017, the Committee agreed to the Foreign Minister's request.

2. Certain Maritime Arrangements - Timor-Leste

Consequences of termination of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea

2.1 This chapter reviews the proposed amendment of the CMATS Treaty tabled in the Parliament on 13 February 2017.

Background

2.2 The CMATS Treaty was terminated unilaterally by Timor-Leste on 10 January 2017, following an agreement between Australia and Timor-Leste to negotiate permanent maritime boundaries in the Timor Sea. In accordance with the terms of the CMATS Treaty, it will cease to be in force on 10 April 2017.

2.3 Termination of a treaty would usually cease all operation and effect of its clauses. However Article 12(4) of the CMATS Treaty gives continuing effect to a number of provisions that would re-enliven the whole Treaty if the Greater Sunrise resource in the Timor Sea is developed in the future. The

national interest analysis (NIA) explains that ‘these provisions, in the absence of further action, ordinarily survive termination of the Treaty’.¹

- 2.4 Australia and Timor-Leste have agreed to terminate Article 12(4) and prevent the Treaty being re-enlivened in the future. The proposed treaty action under inquiry will amend Article 12(4) so that it will not survive the termination of the CMATS Treaty.

Maritime arrangements in Timor Sea

- 2.5 Australia and Timor-Leste have not delimited a permanent maritime boundary. Three treaties govern maritime arrangements in the Timor Sea:
- the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (the ‘Timor Sea Treaty’) signed in 2002;
 - the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields* signed in 2003 (the ‘International Unitisation Agreement’); and
 - CMATS Treaty signed in 2006.²
- 2.6 The suite of treaties has enabled the joint development of petroleum resources pending the delimitation of a maritime boundary.³
- 2.7 The Timor Sea Treaty establishes the Joint Petroleum Development Area (JPDA) to allow petroleum development in an area of the Timor Sea claimed by both Australia and Timor-Leste. Ninety percent of the petroleum resources in the JPDA are apportioned to Timor-Leste, and 10 percent to Australia.
- 2.8 The International Unitisation Agreement creates a framework to develop the Greater Sunrise gas fields as a single unit. The Department of Foreign Affairs

¹ National Interest Analysis [2017] ATNIA 8 with attachment on consultation, *Consequences of termination of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, done at Dili on 10 January 2017, [2017 ATNIF 8, (hereafter referred to as ‘NIA’), para 10.

² NIA, para 4.

³ NIA, para 4.

and Trade (DFAT) explains that 'this was necessary because 20.1 per cent of Greater Sunrise lies within the shared JPDA and 79.9 per cent in the exclusive Australian seabed jurisdiction'.⁴ Under the International Unitisation Agreement, private companies may propose development plans for Greater Sunrise. The Australian and Timor-Leste Governments are to approve a plan that, amongst other things, develops the Greater Sunrise resources 'to the best commercial advantage consistent with good oilfield practice'. To date, no plan has been approved.⁵

2.9 The CMATS Treaty also provides for the development of Greater Sunrise without prejudicing the maritime boundary claims of either Australia or Timor-Leste.⁶ The CMATS Treaty establishes a moratorium on a permanent maritime boundary and on proceedings relating to maritime boundaries for 50 years, or five years after exploitation of the Greater Sunrise gas field ceases, whichever occurs earlier. The CMATS Treaty shares future revenue from upstream exploitation of the Greater Sunrise equally between Australia and Timor-Leste.

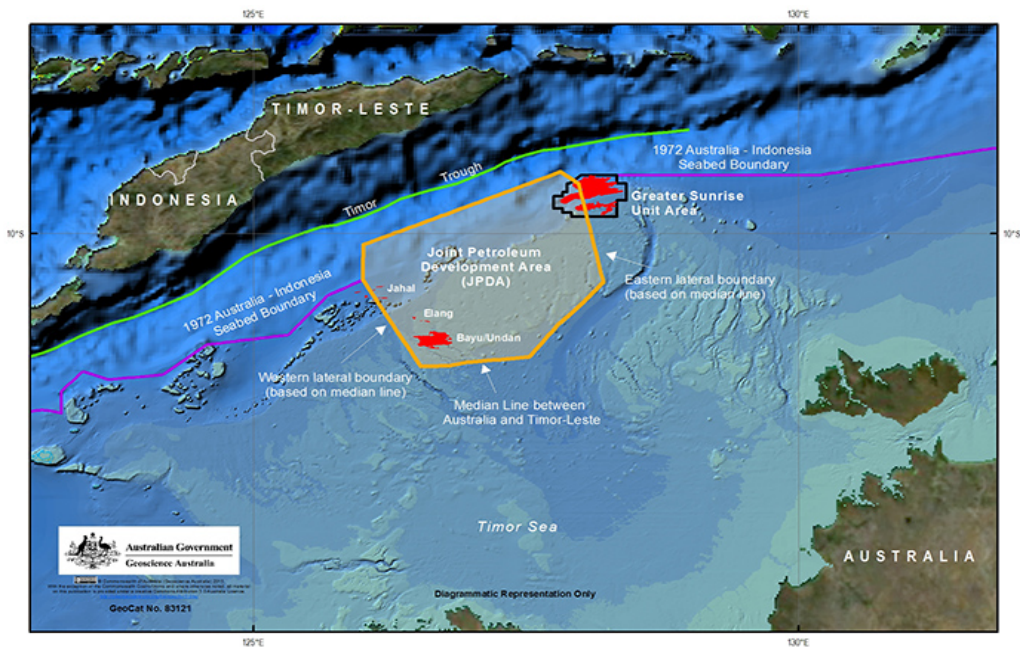
2.10 Figure 2.1 is an illustration of these maritime arrangements in the Timor Sea.

⁴ Department of Foreign Affairs and Trade, 'Australia's maritime arrangements with Timor-Leste', <http://dfat.gov.au/geo/timor-leste/Pages/australias-maritime-arrangements-with-timor-leste.aspx>, accessed on 6 March 2017.

⁵ Department of Foreign Affairs and Trade, 'Australia's maritime arrangements with Timor-Leste', <http://dfat.gov.au/geo/timor-leste/Pages/australias-maritime-arrangements-with-timor-leste.aspx>, accessed on 6 March 2017.

⁶ NIA, para 6.

Figure 2.1 Maritime arrangements in the Timor Sea



Geoscience Australia

Greater Sunrise Unit Area

- 2.11 The gas reserves within the Greater Sunrise Unit Area were discovered by Woodside Energy in 1974, and hold contingent resources of 5.13 trillion cubic feet of gas and 225.9 million barrels of condensate.⁷ It is estimated that the Greater Sunrise resource is worth A\$40 billion.⁸
- 2.12 The commercial joint venture for Greater Sunrise is led by Woodside Petroleum Limited (operator and 33.44 per cent shareholder), and includes Royal Dutch Shell (26.56 per cent), ConocoPhillips (3 per cent) and Osaka Gas (10 per cent). The Sunrise Joint Venture holds both retention leases and

⁷ Sunrise Joint Venture, *Submission 26*, p. 1.

⁸ Dr Rebecca Strating, *Submission 29*, p. 1, referencing the following: Damien Kingsbury, 'Indonesian lessons for choppy East Timor waters', *Deakin Speaking*, 6 December 2013; Kim McGrath, 'Oil, gas and spy games in the Timor Sea', *The Monthly*, April 2014; Andrea Katalin Molnar, *Timor-Leste: Politics, History, and Culture*, Oxon: Routledge, 2010.

production sharing contracts, giving the Sunrise Joint Venture exclusive rights to develop the Greater Sunrise fields.⁹

- 2.13 The Sunrise Joint Venture noted in a submission that it is 'encouraged by steps being taken by both governments to work in good faith towards a permanent agreement on maritime boundaries'.¹⁰ The submission continued:

... the Sunrise Joint Venture welcomes the commitment of... Timor-Leste and Australia... that they will provide ongoing stability and certainty for petroleum companies with current rights in the Timor Sea. We also welcome the decision taken by the governments that the 2002 Timor Sea Treaty would remain in force until a final delimitation of maritime boundaries had come into effect and the commitment by the governments that the current rights of companies with interests in the Timor Sea would be respected.

A permanent agreement on maritime boundaries between Australia and Timor-Leste has the potential to unlock Greater Sunrise, provided the Sunrise Joint Venture is given the fiscal and regulatory certainty necessary for a commercial development to proceed and our rights of ownership and operation are unequivocally preserved on equivalent terms.¹¹

- 2.14 At the public hearing, Professor Clive Schofield and Dr Rebecca Strating advised the Committee that Greater Sunrise has not been developed to date due to three factors:

- perceived instability of the agreements in the Timor Sea;¹²

⁹ Department of Industry, Innovation and Science, 'Joint Petroleum Development Area and Greater Sunrise', <https://industry.gov.au/resource/UpstreamPetroleum/Pages/JointPetroleumDevelopmentAreaandGreaterSunrise.aspx>, accessed 16 March 2017.

¹⁰ Sunrise Joint Venture, *Submission 26*, p. 1.

¹¹ Sunrise Joint Venture, *Submission 26*, p. 2.

¹² Professor Clive Schofield, Director of Research, Australian National Centre for Ocean Research and Security and Challenge Lead, Sustaining Coastal and Maritime Zones, Global Challenges Program, University of Wollongong, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 62; Dr Rebecca Strating, Lecturer, La Trobe University, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 62.

- falls in international oil and gas prices have not provided the right economic environment for the commercialisation;¹³ and
- Timor-Leste's advocacy for a pipeline to its coast to process the oil and gas reserves.¹⁴

2.15 Dr Strating explained that Timor-Leste's domestic oil industrialisation program is central to the economic ambitions of Timor-Leste. Under that program, Timor-Leste has advocated for a pipeline from Greater Sunrise to its coastline over the Timor Trough. Dr Strating commented that:

... the independent analysis provided, suggests [the pipeline to Timor-Leste] it is a very risky prospect, that there has not been a proper cost-benefit analysis conducted or provided by the Timorese government and that this has partly contributed to Woodside shelving the project in 2015 because there is a reluctance on behalf of Timorese representatives to let go of the pipeline idea.¹⁵

2.16 Friends of Bacau similarly discussed Timor-Leste's plan for economic diversification and the desired pipeline from Greater Sunrise to its coastline, noting that the area is 'geologically unstable, meaning an underwater pipeline and supports could be vulnerable to seismic activity'.¹⁶

Maritime boundary dispute

2.17 The maritime boundary dispute between Australia and Timor-Leste is not a central issue in the Committee's review of amendments to the CMATS Treaty prior to its termination. Nonetheless, it provides context as to why Timor-Leste unilaterally terminated the CMATS Treaty and why, despite previous statements,¹⁷ the Australian government agreed to amend its position on the CMATS Treaty.

¹³ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 62.

¹⁴ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, pp. 62-63; Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 63.

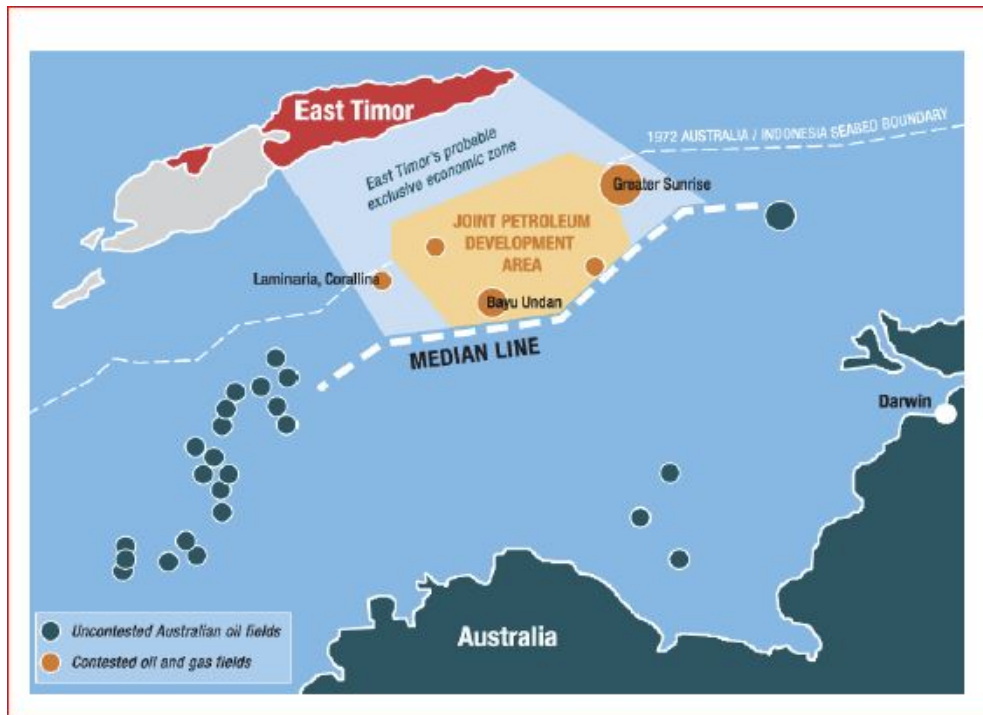
¹⁵ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 63.

¹⁶ Friends of Bacau, *Submission 15*, pp. 10-11.

¹⁷ The Hon Julie Bishop MP, Foreign Minister, 'Op-ed published in The Australian: Conciliation between Australia and Timor-Leste', 30 August 2016, http://foreignminister.gov.au/articles/Pages/2016/jb_ar_160830.aspx, accessed on 6 March 2017.

2.18 The maritime boundary between Australia and Timor-Leste has not been established since the latter became an independent state in 2002. Timor-Leste claims that the boundary should be drawn in the middle of the sea between the two states. These claims rest on the principle of ‘equidistance’ under which a median line should be drawn between Australia and Timor-Leste. Delimitation drawn according to this principle would see the sea border drawn significantly closer to Australia than Timor-Leste, and the majority of gas and oil reserves in the disputed territory would fall within Timor-Leste maritime boundary (see Figure 2.2)

Figure 2.2 Maritime boundary according to equidistance principle



Timor Sea Justice Campaign, Submission 21, p. 7.

2.19 In contrast, Australia favours principles of ‘natural prolongation’, which gives seabed territory that extends to the edge of a geomorphic continental shelf, to the Timor Trough (see Figure 2.1). The Timor Trough is a 3,500-metre trench 40 nautical miles from the coastline of Timor-Leste, dividing the two continental shelves. Delimitation according to this principle would result in Greater Sunrise falling within Australia’s maritime boundary. At

the public hearing, DFAT confirmed that Australia maintains its position on the principle of natural prolongation.¹⁸

- 2.20 A large number of submissions support the position of Timor-Leste in the maritime boundary dispute – a delineation of boundaries based on median line principles – and argue that the CMATS Treaty denied Timor-Leste of oil and gas reserves that should fall within its sovereign maritime boundaries.¹⁹
- 2.21 Many of these submissions also reference changes in international law since Australia set its northern maritime boundary with Indonesia in 1972 based on the principle of natural prolongation. These changes, most notably the development of the 1982 *United National Convention on the Law of the Sea* (UNCLOS), according to the submissions, would favour the median line boundary as advocated by Timor-Leste.²⁰

Dispute resolution mechanisms

- 2.22 The UNCLOS provides a universal legal framework defining the rights and responsibilities of nations with respect to their use of the world's oceans, the environment, and the management of marine natural resources.

¹⁸ Ms Katrina Cooper, Senior Legal Adviser, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 57.

¹⁹ Lindy Yates, *Submission 1*, p. 1; Dr Ingvar Anda, *Submission 2*, p. 2; Marian Lester, *Submission 3*, p. 1; Michel and Anne Beuchat, *Submission 4*, pp. 2-3; Colin Forrest, *Submission 5*, p. 1; East Timor Action Network, *Submission 6*, p. 3; ACT Timor Sea Justice Action Group, *Submission 7*, p. 2; Peter McMullin, *Submission 8*, p. 1; Canberra Friends of Dili, *Submission 11*, p. 2; Sustainable East Timor Loan, *Submission 12*, p. 2; Queensland Timor Sea Justice Committee, *Submission 13*, p. 4; Nichola Ann Hungerford, *Submission 14*, p. 1; Friends of Bacau, *Submission 15*, p. 2; La'o Hamutuk, *Submission 16*, p. 4; Timor Sea Justice Forum NSW, *Submission 17*, p. 4; Simon Wood, *Submission 18*, p. 1; Timor Sea Justice Campaign, *Submission 21*, p. 2; Timorese United Association Incorporated, *Submission 22*, p. 2; Uniting Church in Australia, *Submission 23*, p. 4; Australia East Timor Friendship Association of South Australia, *Submission 24*, p. 9; Veterans Of Timor-Leste, *Submission 25*, p. 4; Robert King, *Submission 27*, p. 92; Friends of Maliana, *Submission 28*, p. 2.

²⁰ East Timor Action Network, *Submission 6*, p. 3; La'o Hamutuk, *Submission 16*, p. 5; Timor Sea Justice Forum, *Submission 17*, p. 4; Timor Sea Justice Campaign, *Submission 21*, p. 3; Timorese United Association Incorporated, *Submission 22*, p. 8; Uniting Church in Australia, *Submission 23*, p. 4, and Veterans of Timor-Leste, *Submission 25*, p. 4.

- 2.23 UNCLOS provides for the compulsory settlement of disputes over the interpretation and application of the Convention through the International Tribunal for the Law of the Sea, the International Court of Justice or another tribunal set out in the terms of the Convention. Australia ratified UNCLOS on 5 October 1994. In 2002, Australia lodged a declaration rejecting the compulsory jurisdiction of international courts and tribunals in relation to maritime disputes.
- 2.24 The declaration was referred to this Committee in 2002. The national interest analysis tabled with the declaration explained that maritime boundary disputes are best resolved through negotiation, not litigation. The majority of the then Committee supported the declaration.²¹
- 2.25 The effect of Australia's declaration is that any permanent maritime boundary will have to be negotiated and agreed bilaterally. The matter cannot be referred to an international court or tribunal where the decision would bind both parties.

Conciliation Commission proceedings

- 2.26 Timor-Leste initiated a conciliation procedure under UNCLOS in April 2016 related to maritime boundaries. The Conciliation Commission consists of five members appointed by Australia and Timor-Leste, and is empowered to make recommendations but not legally binding orders.²² The function of the conciliation is to assist the parties reach a settlement.²³ The Conciliation Commission commenced in late 2016 and will run until September 2017.²⁴
- 2.27 Proceedings are confidential to the Governments of Australia and Timor-Leste in accordance with the rules adopted by the Conciliation Commission.²⁵ DFAT confirmed that the Commission has held a 'few rounds

²¹ Joint Standing Committee on Treaties, *Report 18*, tabled 25 June 2002, pp. 17-25.

²² Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 55.

²³ Department of Foreign Affairs and Trade, 'Fact Sheet: Conciliation Between Australia and Timor-Leste' October 2016, <http://dfat.gov.au/geo/timor-leste/Documents/fact-sheet-conciliation-between-australia-and-timor-leste.pdf>, accessed on 6 March 2017.

²⁴ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 55.

²⁵ NIA, para 8.

of discussions to date', however the content of those negotiations remains confidential so that 'we can create the atmosphere necessary to try and reach agreement'.²⁶

2.28 As a result of the conciliation proceedings to date, Australia and Timor-Leste agreed to a 'package of measures' including:

- Timor-Leste would terminate the CMATS Treaty as it is entitled to do under Article 12(2);
- both parties would confirm that the Timor Sea Treaty would continue in its original form;
- the termination of the CMATS Treaty would include termination of all its terms; and
- Timor-Leste would withdraw the two arbitrations²⁷ it had commenced against Australia.²⁸

2.29 Australia's agreement to the conciliated measures listed above is a shift in position for Australia, which has previously maintained the CMATS Treaty was valid and should remain in force.²⁹

2.30 Australia has committed to negotiating with Timor-Leste in good faith under the auspices of the Conciliation Commission.³⁰ This commitment, and

²⁶ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 55.

²⁷ In the first arbitration, Timor-Leste launched a case against Australia at the Permanent Court of Arbitration to withdraw from the CMATS Treaty entirely on the basis it was not negotiated in good faith. In presenting this argument, Timor-Leste accused Australia of placing listening devices within the Timor-Leste Cabinet room in 2004 during negotiations for the CMATS Treaty.

The second arbitration is a derivative of the first action, and involved Timor-Leste commencing an action in the International Court of Justice in an attempt to recover property that it claimed was illegally seized by agents of Australia in December 2013.

²⁸ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 53.

²⁹ The Hon Julie Bishop MP, Foreign Minister, 'Op-ed published in *The Australian: Conciliation between Australia and Timor-Leste*', 30 August 2016, http://foreignminister.gov.au/articles/Pages/2016/jb_ar_160830.aspx, accessed on 6 March 2017.

³⁰ The Hon Julie Bishop MP, Foreign Minister, 'Media release: Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea', 9 January 2017,

the package of measures agreed through conciliation, was strongly supported by a number of submissions to the inquiry.³¹ For example, the Timor Sea Justice Campaign commented that it will 'allow the two nations to start afresh on the fundamental problem at the heart of the dispute - where exactly to establish permanent maritime boundaries'.³² Robert King made similar arguments.³³

- 2.31 The United States-based, East Timor Action Network however expressed scepticism about the likelihood of the confidential proceedings of the Conciliation Commission resulting in 'a fair boundary line'.³⁴ The Network advocated that 'arbitration by an impartial third party is the fairest way to decide where the boundary should be drawn' and urged Australia to withdraw its declaration rejecting compulsory jurisdiction under UNCLOS.³⁵ A number of organisations also called for Australia to accept the compulsory jurisdiction of the International Court of Justice with respect to maritime boundaries.³⁶
- 2.32 Although the Conciliation Commission will not make a determination or a finding establishing a maritime boundary between Australia and Timor-Leste, DFAT advised that the conciliation proceedings could lead to one of two outcomes:

http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170109.aspx, accessed on 16 March 2017; NIA, para 9.

- ³¹ Lindy Yates, *Submission 1*, p. 1; Colin Forrest, *Submission 5*, p. 1; East Timor Action Network, *Submission 6*, p. 2; East Timor Action Network, *Submission 6*, pp. 3-4; ACT Timor Sea Justice Action Group, *Submission 7*, p. 1; Australian Timor-Leste Business Council, *Submission 10*, p. 2; Canberra Friends of Dili, *Submission 11*, p. 1; Nichola Ann Hungerford, *Submission 14*, p. 1; Friends of Bacau, *Submission 15*, p. 2; La'o Hamutuk, *Submission 16*, p. 4; Timor Sea Justice Forum NSW, *Submission 17*, p. 6; Timor Sea Justice Campaign, *Submission 21*, p. 4; Veterans Of Timor-Leste, *Submission 25*, p. 2; Friends of Maliana, *Submission 28*, p. 2.
- ³² Timor Sea Justice Campaign, *Submission 21*, p. 4.
- ³³ Robert King, *Submission 27*, pp. 92-93.
- ³⁴ East Timor Action Network, *Submission 6*, p. 3.
- ³⁵ East Timor Action Network, *Submission 6*, p. 3.
- ³⁶ Timor Sea Justice Campaign, *Submission 21*, p. 2; Queensland Timor Sea Justice Committee, *Submission 13*, p. 5; La'o Hamutuk, *Submission 16*, p. 5; Australia East Timor Friendship Association of South Australia, *Submission 24*, p. 10; Friends of Maliana, *Submission 28*, p. 2.

If [the parties reach] an agreement, then the agreement will be recorded by the Commission. If there is no agreement, then a report will be issued which will include recommendations. So it is not a binding decision, as such, but there will be recommendations that will be issued for the parties to consider.³⁷

- 2.33 Professor Schofield noted that although a report by the Conciliation Commission would not be binding on Australia, ‘the reputational cost, internationally, to Australia rejecting [its recommendations] would be high’.³⁸
- 2.34 Professor Schofield advised the Committee that there has only been one other maritime jurisdictional conciliation process: a conciliation between Norway and Iceland over a dispute regarding maritime boundaries surrounding the Jan Mayen Island in 1981. Professor Schofield foreshadowed the impact of that conciliation on the current conciliation process between Australia and Timor-Leste:

The Conciliation Commission produced a report and that was followed exactly by [Norway and Iceland]... They drew a boundary and included a maritime joint development zone, which was unevenly distributed across the line. So the Conciliation Commission has the potential to come up with a solution rather similar to what we are in the midst of dismissing.³⁹

Termination of the CMATS Treaty

- 2.35 As noted above, Timor-Leste unilaterally terminated the CMATS Treaty following an agreement reached through conciliation proceedings between Australia and Timor-Leste. Article 12(2) allows either Party to terminate the CMATS Treaty if:
- a development plan for the Greater Sunrise resource has not been approved within six years after the entry into force of the Treaty, that is by 23 February 2013; or

³⁷ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 55.

³⁸ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 67.

³⁹ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 65.

- petroleum production has not commenced within ten years.⁴⁰

2.36 As a development for the Greater Sunrise has not yet been approved,⁴¹ Timor-Leste has availed itself of its right to terminate the CMATS Treaty under Article 12(2).⁴²

Reasons for termination

2.37 In response to questions regarding Timor-Leste's reasons for termination, DFAT provided the following quotes made by Timor-Leste ministers. On 25 June 2015, the Prime Minister of Timor-Leste, Rui de Araújo, suggested that Timor-Leste would seek to use natural gas from Greater Sunrise to help establish an industrial zone in Timor-Leste, and was quoted by DFAT as follows:

We want the pipeline to come onshore... We can develop our oil and gas industry, a big supply base, on the south coast.⁴³

2.38 DFAT also quoted the Timor-Leste Minister of Petroleum and Mineral Resources, Alfredo Pires, who stated on 21 February 2013:

I wish to say that our recent concern focused on the duration of the [CMATS] Treaty, which is very long, and on the search for a viable means that allows us to unilaterally choose to withdraw from the same Treaty without engaging into a confrontation with the Australian Government... Regardless of the diversity of opinions that may exist insofar as the CMATS Treaty is concerned, our stance as regards Greater Sunrise to bring the oil and gas pipeline to Timor-Leste as regards is maintained.⁴⁴

2.39 In a submission, La'o Hamutuk was of the view that Timor-Leste's decision to unilaterally terminate the CMATS Treaty was not affected by economic

⁴⁰ NIA, para 15.

⁴¹ NIA, para 15.

⁴² NIA, para 27.

⁴³ Department of Foreign Affairs and Trade, *Submission 30*, p. 1.

⁴⁴ Department of Foreign Affairs and Trade, *Submission 30*, p. 1.

development goals: 'the struggle for people's sovereignty is distinct from any economic value this project may have'.⁴⁵

Impact of termination on maritime arrangements

- 2.40 As part of the conciliation, Australia and Timor-Leste have agreed that the Timor Sea Treaty will remain in force in its original form prior to its 2006 amendment by the CMATS Treaty.⁴⁶
- 2.41 Article 3 of the CMATS Treaty amended Article 22 of the Timor Sea Treaty such that the Timor Sea Treaty would remain in force for the same duration as the CMATS Treaty; that is 50 years from its date of entry into force, or five years after development of the Greater Sunrise had ceased.⁴⁷
- 2.42 The NIA explains that Article 22 of the Timor Sea Treaty will revert to its original terms prior to its amendments by the CMATS Treaty. This means that:
- ...the Timor Sea Treaty shall be in force until there is a permanent seabed delimitation between Australia and Timor-Leste or for thirty years from the date of its entry into force, whichever is sooner.⁴⁸
- 2.43 The NIA states that, in light of the 'importance of providing certainty for investors', Australia and Timor-Leste have explicitly confirmed that, following termination of the CMATS Treaty, the Timor Sea Treaty 'shall remain in force between them in its original form, prior to its amendment by the CMATS Treaty'.⁴⁹ There is no provision for withdrawal from or denunciation of the Timor Sea Treaty.⁵⁰
- 2.44 According to the Foreign Minister's letter of 13 February 2017, 'this will provide certainty for petroleum companies with interests in the Timor Sea

⁴⁵ La'o Hamutuk, *Submission 16*, p. 4.

⁴⁶ NIA, para 2.

⁴⁷ NIA, para 12.

⁴⁸ NIA, para 19.

⁴⁹ NIA, para 13.

⁵⁰ NIA, para 27.

and a stable framework for the continued development of resources'.⁵¹ The Department of Industry, Innovation and Science confirmed at the public hearing:

The existing arrangements around the Timor Sea Treaty provide that... the resource companies that are doing work now can continue... under the existing arrangements, so there is no impact on their day-to-day business through the termination [of] CMATS.⁵²

2.45 However Professor Schofield commented that though the legal arrangements are clear, it is 'extremely doubtful that the oil companies, particularly Woodside, would go ahead whilst the conciliation process is ongoing'.⁵³

2.46 Reverting to the International Unitisation Agreement and the Timor Sea Treaty amends the allocation of Greater Sunrise between Australia and Timor-Leste. With the termination of CMATS, 80 per cent of the Greater Sunrise unit area falls within Australia's maritime boundary. Of the remaining 20 per cent, Timor-Leste is apportioned 90 per cent, or 18 per cent of the Greater Sunrise complex in total.⁵⁴ This is in contrast to the 50 per cent of the total Greater Sunrise Unit Area Timor-Leste had negotiated under the CMATS Treaty.

Impact on the financial security of Timor-Leste

2.47 Timor-Leste's termination of the CMATS Treaty—and the consequential potential loss of income—raises concerns about Timor-Leste's financial security.

⁵¹ The Hon Julie Bishop MP, Foreign Minister, 'Correspondence to Joint Standing Committee on Treaties', dated 13 February 2017; See also, NIA, para 13 and Ms Katrina Cooper, Senior Legal Adviser, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 54.

⁵² Ms Lisa Schofield, General Manager, Offshore Resources Branch, Resources Department of Industry, Innovation and Science, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 56.

⁵³ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 67.

⁵⁴ Marc Moszkowski and Rodney Lewis, *Submission 9*, p. 2; Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 61.

- 2.48 Up to 95 per cent of Timor-Leste's budget is reliant on the JPDA and its Petroleum Wealth Fund, and 80 per cent of Timor-Leste's gross domestic product is derived from these oil resources.⁵⁵ However, the resources from the JPDA are expected to run out between 2020 and 2022. The Petroleum Wealth Fund is expected to last until 2025 or 2028.⁵⁶
- 2.49 At the public hearing, Dr Strating commented that, paradoxically, Timor-Leste's ambitions to secure its sovereignty through economic development are undermining its capacity to develop. Dr Strating explained:

We see this in a number of fragile resource-wealthy post-conflict states: the resource curse... To go back to that idea of being the architect of their own demise, it is very possible that they could be... But since 2012 it seems to me that this pursuit of independence may actually create a failed state in Timor-Leste.⁵⁷

- 2.50 Timor-Leste's reliance on declining oil resources could result, according to Dr Strating, in a failed state:

If Timor-Leste has no Petroleum Wealth Fund and no oil revenues coming in from the Joint Petroleum Development Area, it has no way of enacting a state budget... Its capacity to provide health, education, and infrastructure and to support the livelihoods of its citizens would be significantly eroded. So, when I talk about a failed state, I do not mean to use hyperbole; I am very serious that, if there is no agreement on Greater Sunrise, it will create an aid dependent state in Timor-Leste.⁵⁸

- 2.51 A number of submissions also expressed concerns about the economic sovereignty of Timor-Leste and the possibility of it becoming a failed state.⁵⁹ For example, Friends of Bacau explained the impact of a failed state on Australia's northern boundary:

⁵⁵ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 65.

⁵⁶ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 65. See also, Friends of Bacau, *Submission 15*, p. 9.

⁵⁷ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 64.

⁵⁸ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 65.

⁵⁹ Lindy Yates, *Submission 1*, p. 1; Michel and Anne Beuchat, *Submission 4*, pp. 2-3; Colin Forrest, *Submission 5*, p. 1; Marc Moszkowski and Rodney Lewis, *Submission 9*, p. 1; Friends of Bacau, *Submission 15*, p. 15.

Australia would again face the probability of having to return a stabilization force to Timor-Leste, which would probably be less well received given that Australia would be more clearly viewed as the root cause of the problems that produced the prevailing circumstances. Given Australia's aid orientation, this would also imply a high, possibly increased (in current dollar terms), aid budget to Timor-Leste into the indefinite future.⁶⁰

2.52 Submissions advocated Australia and Timor-Leste to urgently resolve the maritime boundary dispute so that Timor-Leste may establish its financial security.⁶¹

2.53 Professor Schofield was of the view that Timor-Leste is 'taking a huge risk' by terminating the CMATS Treaty which would have provided it with 50 per cent of the resources at Greater Sunrise, and speculated that the conciliation is unlikely to deliver Timor-Leste with a greater share of Greater Sunrise:

We now, potentially, have a long negotiation ahead of us until we can reach an agreement. To achieve anything better than that fifty-fifty split, to put the whole of Greater Sunrise on the Timorese side of the line, is drawing a long bow. It is very difficult to think of the factors in maritime delimitation that would lead to that level of shift in that lateral boundary.⁶²

2.54 The East Timor Action Network also noted the financial risk of Timor-Leste's unilateral termination of the CMATS Treaty, commenting that 'a future boundary settlement could cause Dili to receive less money than the 50 per cent upstream share of Greater Sunrise'.⁶³

⁶⁰ Friends of Bacau, *Submission 15*, p. 15.

⁶¹ Michel and Anne Beuchat, *Submission 3*, p. 3; ACT Timor Sea Justice Action Group, *Submission 7*, p. 2; Canberra Friends of Dili, *Submission 11*, p. 2; Friends of Bacau, *Submission 15*, p. 16; Timor Sea Justice Forum NSW, *Submission 17*, p. 5.

⁶² Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 66.

⁶³ East Timor Action Network, *Submission 6*, p. 3.

- 2.55 Both Professor Schofield and Dr Strating were of the view that the CMATS Treaty was a balanced and equitable sharing of resources negotiated, and agreed to by Timor-Leste.⁶⁴ Dr Strating stated:

The agreement was a good agreement. At the time it was sold by the Timorese government as being a fair deal. It was promoted as being mutually beneficial, but because of this pipeline, because of the oil industrialisation ambitions and because of some various rent-seeking activities—there are those sorts of interests at work in Timor-Leste—this deal, which was seen as being fair and reasonable and cut fifty-fifty, is longer perceived as being fair and reasonable.⁶⁵

- 2.56 These sentiments were echoed by Marc Moszkowski and Rodney Lewis who, in a joint submission, advocated that the CMATS Treaty should not be repudiated and ‘Australia should resile from accepting the Timorese invalidation in the interests of both countries’ until a ‘superior agreement’ was agreed.⁶⁶

Reasons for Australia to take the proposed treaty action

- 2.57 The amendments to Article 12(4) of the CMATS Treaty is necessary to fulfil the Government’s commitment to implement a package of measures designed to facilitate the conciliation with Timor-Leste on maritime boundaries in the Timor Sea.⁶⁷ The NIA states:

Australia’s interests are served by fulfilling its commitment to implement the package of measures agreed with Timor-Leste, including the shared understanding between the Parties on the consequences of termination of the CMATS Treaty. Australia has committed to engage in the conciliation in good faith, reflecting our commitment to settle disputes peacefully and consistently with international law, including UNCLOS.⁶⁸

⁶⁴ Professor Schofield, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 59; Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 66.

⁶⁵ Dr Strating, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 66.

⁶⁶ Marc Moszkowski and Rodney Lewis, *Submission 9*, p. 3.

⁶⁷ NIA, para 9.

⁶⁸ NIA, para 9.

- 2.58 It further provides that both 'Australia and Timor-Leste are committed to negotiating a maritime boundary'.⁶⁹
- 2.59 At the public hearing, DFAT confirmed that the 'package of measures' was proposed by the Conciliation Commission. The measures, according to DFAT, are in Australia's national interest as 'it will assist us to move forward in a positive and constructive way in the conciliation'.⁷⁰

Future treaty action

- 2.60 The NIA explains that 'no future treaty action concerning the... CMATS Treaty is envisaged'.⁷¹ The NIA reiterates the commitments of both Timor-Leste and Australia to 'negotiate maritime boundaries under the auspices of the Conciliation Commission'.⁷²
- 2.61 The NIA forecasts that any agreement on maritime boundaries would result in the Timor Sea Treaty no longer being in force.⁷³
- 2.62 DFAT stated the proposed amendments to the CMAT Treaty will, in turn allow for Australia and Timor-Leste to 'move forward in a positive way' and reach a new agreement on a permanent maritime boundary in the future.⁷⁴

Implementation

- 2.63 The NIA states that the proposed treaty action will be taken as soon as practicable following consideration by this Committee, and subject to the approval by the Executive Council.

⁶⁹ NIA, para 11.

⁷⁰ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 53.

⁷¹ NIA, para 25.

⁷² NIA, para 26.

⁷³ NIA para 26.

⁷⁴ Ms Cooper, DFAT, *Proof Committee Hansard*, Canberra, 14 March 2017, p. 53.

2.64 No change to Australian legislation is required to give effect to the proposed treaty action.⁷⁵

Costs

2.65 The NIA does not foresee any financial costs to Australia associated with the proposed treaty action.

2.66 Importantly, the NIA states that any future revenue flows from the Greater Sunrise will be governed by the International Unification Agreement until such time as a permanent maritime boundary is negotiated with Timor-Leste.⁷⁶

Committee comment

2.67 The Committee's inquiry attracted a number of submissions from community organisations and private individuals. Most of the issues addressed in the submissions were not directly relevant to the current treaty action before the Committee.

2.68 The treaty action being examined by the Committee is to amend Article 12(4) of the CMATS Treaty prior to its termination on 10 April 2017 by Timor-Leste.

2.69 The Committee is not examining a treaty action that establishes a maritime boundary between Australia and Timor-Leste. If such an agreement is reached in the future, the Committee will conduct a thorough inquiry of its terms.

2.70 The Committee is of the strong view that maritime boundary disputes should be negotiated bilaterally and in good faith, and commends both Governments for agreeing to operate by these principles.

2.71 The Committee is of the view that the CMATS Treaty was negotiated in good faith.

⁷⁵ NIA, para 21.

⁷⁶ NIA, para 23.

- 2.72 The Committee notes that the CMATS Treaty gave Timor-Leste a larger share of the Greater Sunrise resources than it would have under pre-existing arrangements. Nonetheless, Timor-Leste unilaterally terminated the CMATS Treaty as it is entitled to do under the terms of the Treaty, and the Committee accepts that the proposed treaty action was agreed to by Australia as part of a broader package of measures. The Committee consequently supports the ratification of the proposed amendments.
- 2.73 Noting the importance of the settlement of a permanent maritime boundary to both the Australian community and the economic security of Timor-Leste, the Committee requests that the Department of Foreign Affairs and Trade provide a briefing to the Committee every six months from the date the proposed treaty action takes effect, until such time as a bilateral agreement is reached between Australia and Timor-Leste.

Recommendation 1

- 2.74 The Committee supports the amendments to the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* as agreed between Australia and Timor-Leste and recommends that binding treaty action be taken.**

The Hon Stuart Robert MP

Chair

27 March 2017

A. Submissions

- 1 Mrs Lindy Yeates
- 2 Dr Ingvar Anda
- 3 Ms Marian Lester
- 4 Mr Michel Beuchat and Mrs Anne Beuchat
- 5 Mr Colin Forrest
- 6 East Timor Action Network
- 7 ACT Timor Sea Justice Action Group
- 8 Mr Peter McMullin
- 9 Mr Marc Mosekowski and Mr Rodney Lewis
- 10 Australia Timor-Leste Business Council
- 11 Canberra Friends of Dili Incorporated
- 12 Sustainable East Timor Loan
- 13 Queensland Timor Sea Justice Group
- 14 Ms Nichola Hungerford
- 15 Friends of Baucau Incorporated

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- 16 La'o Hamutuk
- 17 Timor Sea Justice Forum NSW
- 18 Mr Simon Wood
- 19 Ms Christine Perkins and Mr Chris Dureau
- 20 *Name Withheld*
- 21 Timor Sea Justice Campaign
- 22 Timorese United Association Incorporated
- 23 Uniting Church in Australia, Synod of Victoria and Tasmania
- 24 Australia East Timor Association SA Incorporated
- 25 Veterans of Timor-Leste
- 26 Sunrise Joint Venture
- 27 Mr Robert King
- 28 Friends of Maliana
- 29 Dr Rebecca Strating
- 30 Department of Foreign Affairs and Trade
- 31 Department of Industry, Innovation and Science
- Attachment 1
- 32 Professor Clive Schofield

B. Witnesses

Tuesday, 14 March 2017

Canberra

Department of Foreign Affairs and Trade

- Ms Katrina Cooper, Senior Legal Adviser
- Ms Elly Lawson, Assistant Secretary, Indonesia Program Delivery and Timor-Leste Branch
- Ms Diana Nelson, Director, Timor-Leste Section
- Mr Justin Whyatt, Director, Legal Division

Attorney-General's Department

- Mr John Reid, First Assistant Secretary, Office of International Law

Department of Industry, Innovation and Science

- Ms Lisa Schofield, General Manager, Offshore Resources Branch

Academic expert panel

- Professor Clive Schofield
- Dr Rebecca Strating

Additional Comments - The Australian Greens

The Australian Greens agree with the Committee's findings that binding treaty action be taken to terminate all operations and effects of the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* (CMATS Treaty). However, the Greens are surprised by the Committee's stated disagreement with the contention in many submissions that Australia behaved oppressively or unfairly towards Timor-Leste in the negotiation of the CMATS Treaty. It is manifestly clear that Australia behaved in a reprehensible fashion towards its fledging neighbour. The Greens would like to place on the record that Australia did not negotiate the CMATS Treaty in good faith, having spied on East Timorese Cabinet discussions regarding the Treaty in 2004. To assert otherwise would be to ignore a wealth of evidence against Australia.

Senator Sarah Hanson-Young

The Australian Greens