

## Australia-East Timor Certain Maritime Arrangements Treaty

### Introduction

- 6.1 The *Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, referred to hereafter as the CMATS Treaty, was signed in Sydney on 12 January 2006.
- 6.2 The principal aim of the CMATS Treaty, together with the Sunrise International Unitisation Agreement (Sunrise IUA), is to establish a framework for the exploitation of the Greater Sunrise gas and oil resources, to the benefit of both Australia and East Timor. The CMATS Treaty will allow exploitation of gas and condensate reservoirs to commence while suspending maritime boundary claims for a significant period and maintaining the current treaty arrangements in place.

### Background

- 6.3 Proven petroleum resources are contained in the seabed and subsoil of the Timor Sea between northern Australia and East Timor. This

resource potential was initially the subject of the 1989 Timor Gap Treaty between Australia and Indonesia.<sup>1</sup>

6.4 When East Timor separated from Indonesia on 25 October 1999, Australia and the United Nations Transitional Administration in East Timor (UNTAET) entered into an Agreement to allow Australia and East Timor to benefit from the continued exploration and exploitation of the Timor Sea. Australia recognised that this Agreement would end upon East Timor's independence, and began negotiations with UNTAET/East Timor to develop a framework for the joint development of Timor Sea resources.

6.5 The CMATS Treaty is the fourth in a series of treaty actions between Australia and East Timor relating to the exploration and exploitation of Timor Sea resources, the previous actions being:

- 2002 Exchange of Notes<sup>2</sup>
- Timor Sea Treaty<sup>3</sup>
- Sunrise IUA.<sup>4</sup>

6.6 The CMATS Treaty will sit alongside the Timor Sea Treaty and the Sunrise IUA:

Together they underpin stable legal and fiscal regimes for the exploration and exploitation of petroleum resources in the Timor Sea between Australia and East Timor.<sup>5</sup>

## Timor Sea Treaty

6.7 The Timor Sea Treaty provided for the continued exploration and exploitation of the resources of the Joint Petroleum Development Area (JPDA). The Committee received approximately 80 submissions

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1 For a more comprehensive coverage of the history of negotiations between Australia and Indonesia regarding maritime boundaries in the Timor Sea, see JSCOT Report 49: The Timor Sea Treaty, paras 1.4-1.21.

2 Full title: *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning arrangements for Exploration of Petroleum in an Area of the Timor Sea between Australia and East Timor*. Signed 25 June 2002.

3 Full title: *Timor Sea Treaty between the Government of Australia and the Government of East Timor*. Signed 25 June 2002. See JSCOT Report 49.

4 Full title: *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 6 March 2003. See JSCOT Report 53.

5 CMATS Treaty National Interest Analysis, para. 7.

in relation to this treaty and travelled extensively between July and October 2002 to conduct public hearings at Canberra, Perth, Darwin and Melbourne.<sup>6</sup>

- 6.8 The Timor Sea Treaty continues the terms of the Timor Sea Arrangement concluded between Australia and the UNTAET in July 2001.<sup>7</sup> The Arrangement provided the basis for the Timor Sea Treaty in determining the administrative mechanisms for the JPDA. It also provided that of the petroleum produced in the JPDA, 90% will belong to East Timor and 10% will belong to Australia (Article 4(a)).
- 6.9 The Timor Sea Treaty also provides for an international unitisation agreement to be negotiated for the Greater Sunrise field. The Greater Sunrise field extends across the Eastern boundary of the JPDA, and consists of the Sunrise and Troubadour petroleum deposits. Annex E under Article 9(b) provides that Australia and East Timor will unitise the Greater Sunrise field on the basis that 20.1% of the resources of the field lies within the JPDA, and that production from Greater Sunrise will be distributed on the basis that 20.1% is attributed to the JPDA and 79.9% is attributed to Australia.<sup>8</sup>

## Sunrise International Unitisation Agreement

- 6.10 The Sunrise IUA provides for the joint development of the Greater Sunrise field. The Sunrise IUA formalises the apportionment of the field as set out in Annex E under Article 9(b) of the Timor Sea Treaty. This means that, according to East Timor's 90% share of petroleum within the JPDA under the Timor Sea Treaty, East Timor is entitled to receive 18.1% of revenue from the Greater Sunrise resource, and Australia is entitled to 81.9%.<sup>9</sup>
- 6.11 The Sunrise IUA also covers administration of the area, taxation, process of approval of a development plan, abandonment provisions, point of sale and valuation of petroleum, customs, security and dispute settlement mechanisms.

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6 JSCOT Report 49.

7 JSCOT Report 49, para. 1.19.

8 Unitisation refers to the treatment of a field straddling a jurisdictional boundary as a single entity for management and development purposes. Sunrise IUA National Interest Analysis, para. 5.

9 CMATS Treaty NIA, para. 8; Sunrise IUA NIA, para. 13.

- 6.12 The Sunrise IUA, although signed and tabled in 2003, entered into force on 23 February 2007, the same day as the CMATS Treaty.<sup>10</sup>

## The CMATS Treaty

- 6.13 The CMATS Treaty is intended to operate in conjunction with the Timor Sea Treaty and the Sunrise IUA.<sup>11</sup> Together the three treaties will govern the rights and obligations of Australia and East Timor for the exploration and exploitation of the Timor Sea (Article 7).
- 6.14 The CMATS Treaty allows for the exploitation of Greater Sunrise while ensuring that Australia and East Timor refrain from asserting or pursuing their claims to rights, jurisdiction and maritime boundaries, in relation to each other, for 50 years. Under the treaty, although the formal apportionment of Greater Sunrise under the Sunrise IUA remains the same, Australia has agreed to share equally (50:50) the upstream revenues from the resource.
- 6.15 Outlined below are the key provisions of the CMATS Treaty:
- Article 22 of the Timor Sea Treaty is amended so that the Timor Sea Treaty remains in force for the duration of the CMATS Treaty (Article 3).
  - There is a moratorium on each Party from asserting sovereign rights, jurisdiction and maritime boundaries in relation to each other for the period of the Treaty (Article 4). This does not prevent a Party from continuing activities, including the regulation and authorisation of existing and new activities, in areas in which its domestic legislation at a specific date authorised petroleum activities (Article 4.2). Australia had legislation on that date that authorised petroleum activities in relation to the seabed and subsoil, for areas outside the JPDA and south of the 1972 Australia-Indonesia seabed boundary.<sup>12</sup>

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10 CMATS Treaty NIA, para. 3.

11 For the Timor Sea Treaty see JSCOT Report 49, for the Sunrise IUA (*Agreement between Australia and Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields*) see JSCOT Report 53.

12 See Exchange of Side Letters concerning Article 4.2, Letter to José Ramos-Horta: Mr Downer to Mr Ramos-Horta, Senior Minister and Minister for Foreign Affairs and Cooperation, 12 January 2006.

- The Parties will share equally (50:50) revenue derived from production of the Greater Sunrise resource (Article 5). Article 5 sets out the details of what constitutes the revenue component for each Party and how it will be determined. It also sets out a procedure of notification of revenue amounts received each quarter and when and how those amounts are to be paid from Australia to East Timor. Article 5.12 provides that the CMATS Treaty, the Timor Sea Treaty, the Sunrise IUA and any other documents relating to those treaties existing at the time of entry into force of the CMATS Treaty constitute the final financial settlement concerning the exploration and exploitation of the Timor Sea.
- An independent assessment process will be put in place to review the revenue calculations made under Article 5 (Article 6). Where an assessment process was used, the Parties would be obliged to implement the assessor's conclusion (Article 6.4). More general disputes over the CMATS Treaty are to be settled by negotiations or consultations (Article 11).
- The Treaty formalises the arrangements over water column (including fisheries) jurisdiction in the JPDA that are, in practice, already in place. Until a permanent delimitation of the exclusive economic zone is made, East Timor continues to exercise water column jurisdiction within the JPDA (Article 8).
- A Maritime Commission is established, constituted by Australia and East Timor. The Commission will facilitate bilateral consultations on maritime matters of interest to the parties, including on maritime security, the protection of the marine environment and management of natural resources (Article 9).
- The apportionment ratio of the Greater Sunrise field will not be re-determined during the period of the Treaty (Article 10).
- The period of the CMATS Treaty is 50 years from its entry into force, or five years after Greater Sunrise exploitation ceases, whichever is earlier (Article 12).

## Issues

- 6.16 As with the reviews of the Timor Sea Treaty and the Sunrise IUA, the Committee received many submissions expressing strong

reservations about certain aspects of the Treaty, as well as an overall belief that CMATS is not in the national interest of East Timor:

CMATS is a 'stop gap, band aid' solution that precludes discussion of broader issues of sovereignty. It's simply an attempt to allow the commercial development of the Greater Sunrise field while the Australian Government continues to violate East Timor's rights to this and other fields on East Timor's side of the median line.<sup>13</sup>

- 6.17 The Australian Government views the CMATS Treaty and the Sunrise IUA as being in the national interest of both countries. The agreements "must be in force to provide certainty for the major private sector infrastructure investment that is required to develop the Greater Sunrise fields for the benefit of both Australia and East Timor".<sup>14</sup> Exploitation of this resource, and the revenue provided under the treaty will support East Timor's development and promote East Timor's economic stability.<sup>15</sup> The CMATS Treaty also clearly delivers benefits for Australia.

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.<sup>16</sup>

- 6.18 The Committee also notes that some of the issues raised in submissions relate to obligations imposed by either the Timor Sea Treaty or the Sunrise IUA, rather than the changes made under the CMATS Treaty. The Committee has already considered these issues in its reviews of these two treaties.<sup>17</sup>

## Moratorium on asserting claims to maritime boundaries

- 6.19 Under the CMATS Treaty, neither Australia nor East Timor will be able to assert or pursue its claims to rights, jurisdictions or maritime

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13 Timor Sea Justice Campaign, *Submission 5*, p. 1.

14 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007, p. 2.

15 CMATS Treaty NIA, para. 2.

16 Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, p. 31.

17 See JSCOT Report 49 and JSCOT Report 53.

boundaries in relation to the other for 50 years. Many submissions expressed concern about this moratorium on asserting claims to maritime boundaries,<sup>18</sup> with the Timor Sea Justice Campaign stating:

The Australian Government must 'finish the job' and commit to negotiate permanent maritime boundaries with East Timor in accordance with International Law.<sup>19</sup>

- 6.20 Several submissions accused Australia of contravening international laws in this respect,<sup>20</sup> with Mr Rob Wesley-Smith believing that maritime boundaries should be agreed to under United Nations Convention on the Law of the Sea<sup>21</sup> (UNCLOS) guidelines.<sup>22</sup>
- 6.21 Under Articles 74 and 83 of UNCLOS, in the absence of agreed exclusive economic zone and continental shelf delimitation, Australia is obliged to make every effort to enter into provisional arrangements of a practical nature which are without prejudice to the final delimitation. The Committee considers that has been achieved through the CMATS Treaty.
- 6.22 According to the Minister for Foreign Affairs and his Department, the suspension of maritime boundary claims for a significant period "will assist in promoting strong bilateral relations between Australia and East Timor and build further confidence in the development of our offshore petroleum industries."<sup>23</sup>
- The CMATS treaty will also promote strength in bilateral relations by putting to one side diverging maritime claims and enabling enhanced cooperation and coordination in the Timor Sea.<sup>24</sup>
- 6.23 Accordingly, the Committee believes the moratorium will add to the stability of the legal regime governing the exploitation of Greater

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18 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; East Timor and Indonesia Action Network (ETAN), *Submission 3*; Mr Andrew Serdy, *Submission 4*; Timor Sea Justice Campaign, *Submission 5*; Mr Rob Wesley-Smith, *Submission 7*; La'o Hamutuk, *Submission 8*.

19 Timor Sea Justice Campaign, *Submission 5*, p. 1.

20 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; ETAN, *Submission 3*; Timor Sea Justice Campaign, *Submission 5*; Mr Rob Wesley-Smith, *Submission 7*; La'o Hamutuk, *Submission 8*.

21 [1994] ATS 31.

22 Mr Rob Wesley-Smith, *Submission 7*, p. 4.

23 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007, p. 1.

24 Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, p. 31.

Sunrise, providing an opportunity to underpin further the income, development and economic stability of East Timor.

## Equal share of upstream revenues from the Greater Sunrise field

- 6.24 Under the Sunrise IUA and Timor Sea Treaty, the formal apportionment of the Greater Sunrise field is that 20.1% lies in the JPDA and 79.9% is apportioned to Australia. As a result of East Timor's 90% share of petroleum within the JPDA, East Timor would receive 18.1% for revenues from the Greater Sunrise resource. Under the CMATS Treaty, Australia has agreed to increase East Timor's share so that the upstream government revenues from Greater Sunrise are shared equally between the two countries (50:50).
- 6.25 The majority of submissions received by the Committee claim that Australia is not being generous by agreeing to allow East Timor a 50% share of Greater Sunrise's upstream gas and oil revenues.<sup>25</sup> They argue that, given Greater Sunrise is twice as close to East Timor as it is to Australia, all the resources contained therein should belong to East Timor, and East Timor should therefore be given a higher percentage of royalties from gas revenues:

While the 50% share of Greater Sunrise upstream revenues is an improvement on the miserly 18% previously acceded to by the Australian Government, it still falls dramatically short of East Timor's legal entitlement under current International Law<sup>26</sup> ... if permanent maritime boundaries were established in accordance with international law – along the median line halfway between Australia and East Timor's coastlines, the Greater Sunrise field would lie entirely within East Timor's exclusive economic zone.<sup>27</sup>

- 6.26 The Government has defended its position by pointing to the substantial increase in revenue this apportionment of Greater Sunrise will afford East Timor.<sup>28</sup> According to the NIA:

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25 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; ETAN, *Submission 3*; Timor Sea Justice Campaign, *Submission 5*; Mr Rob Wesley-Smith, *Submission 7*; La'o Hamutuk, *Submission 8*.

26 Timor Sea Justice Campaign, *Submission 5*, p. 1.

27 Timor Sea Justice Campaign, *Submission 5*, p. 2.

28 Per Prime Minister John Howard: Nigel Wilson, 'Treaty to pump \$25bn to E Timor', *The Australian*, 13 January 2006; Ms Penny Richards (DFAT), *Transcript of Evidence*, 26 February 2007, p. 31.



Exploitation of the Greater Sunrise resource, and the additional revenue provided under this Treaty, will assist in securing East Timor's development and economic stability. The stable economic development of East Timor is in Australia's interests. According to domestic legislation in East Timor, the revenue from Greater Sunrise would be paid to East Timor's Petroleum Fund. The Fund establishes a means for East Timor to derive a sustainable source of income over the long-term.<sup>29</sup>

- 6.27 DFAT estimates the total revenue from the Greater Sunrise field over the life of the field (approximately 25-30 years) to be around US\$20 billion, equating to \$10 billion each to East Timor and Australia.<sup>30</sup> This revenue would be a large boost for East Timor's budget:

According to East Timor's budget for 2006-07, East Timor is expected to receive approximately \$870 million from revenue related to petroleum activities in the Joint Petroleum Development Area (JPDA). This makes up 92 per cent of total revenue for the year. The 2006-07 budget expenditure is approximately \$400 million. The expected revenue from petroleum activities is around 215 per cent of planned expenditure, generating a large surplus.<sup>31</sup>

- 6.28 The apportionment of Greater Sunrise under this Treaty is a positive step for East Timor and the Committee supports the sharing arrangement established by the CMATS Treaty.

### Revenues from the Laminaria-Corallina fields

- 6.29 A number of submissions claim that Australia has received up to \$2.5 billion in revenue from the Laminaria-Corallina fields.<sup>32</sup> These submissions contend that, as these fields are closer in proximity to East Timor,<sup>33</sup> all of Laminaria-Corallina should rightfully belong to

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29 CMATS Treaty NIA, para. 10.

30 Mr John Hartwell, *Transcript of Evidence*, 26 February 2007, p. 35.

31 DFAT, Submission 9, p. 1.

32 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; ETAN, *Submission 3*; Timor Sea Justice Campaign, *Submission 5*; La'o Hamutuk, *Submission 8*.

33 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; p. 1.

East Timor,<sup>34</sup> and East Timor should be compensated for the revenue Australia has received since 1999.<sup>35</sup>

The Treaty allows Australia to exploit other fields in the Timor Sea outside the JPDA and the Sunrise IUA, including Laminaria-Corrallina, Buffalo and other fields which may be discovered in the future (Article 4). This allows Australia to receive revenues from current and potential fields in disputed areas, while Timor-Leste cannot. Since Laminaria-Corrallina began production while the smoke was still rising from the ashes of our nation 1999, the Commonwealth government has taken in about A\$2,400 million in tax revenues from that project, money which rightfully belongs to Timor-Leste.<sup>36</sup>

- 6.30 The Committee notes that, as a consequence of Article 4, Australia will be able to continue regulating and authorising 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.<sup>37</sup>

## Dispute resolution procedures

- 6.31 Article 4 of the CMATS Treaty obliges each Party not to raise in any international organisation any matter relating to the delimitation of maritime boundaries in the Timor Sea, nor commence any international dispute settlement proceedings against the other that could result in issues or findings relevant to maritime delimitation in the Timor Sea. Instead, disputes about the interpretation or application of the Treaty are to be determined by consultation or negotiation (Article 11).
- 6.32 Several of the submissions were troubled by the dispute resolution provisions, claiming they “prevent fair adjudication”<sup>38</sup> by preventing

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34 ETAN, *Submission 3*, p. 1.

35 Timor Sea Justice Campaign, *Submission 5*, p. 1.

36 La’o Hamutuk, *Submission 8*, p. 5.

37 See Exchange of Side Letters concerning Article 4.2, Letter to José Ramos-Horta: Mr Downer to Mr Ramos-Horta, Senior Minister and Minister for Foreign Affairs and Cooperation, 12 January 2006; Letter to Alexander Downer: Mr Ramos-Horta to Mr Downer Minister for Foreign Affairs, 12 January 2006.

38 La’o Hamutuk, *Submission 8*, p. 1.

the use of courts or other impartial mechanisms for resolving disputes.<sup>39</sup>

If any disputes arise over interpretation or implementation of the CMATS Treaty, the Treaty forbids Timor-Leste from exercising its legal rights to involve other parties or arbitration mechanisms, forcing us to resort exclusively to inherently unbalanced negotiations. This is more favourable to Australia, because the negotiations will be affected by disparities in economic, political and military power between our nations.<sup>40</sup>

- 6.33 The Committee is aware of the views on the perceived vulnerability of East Timor in relation to dispute resolution under the CMATS Treaty. However, allowing the Parties to resolve disputes between themselves will foster a more stable relationship between the two countries.

## Entry into force

- 6.34 Both the CMATS Treaty and the Sunrise IUA were brought into force on Friday 23 February 2007 by an exchange of notes in Dili. The National Interest Exemption (NIE) was invoked to fast-track ratification of the CMATS treaty before Australian domestic treaty scrutiny processes could be concluded.

## Use of the National Interest Exemption

- 6.35 The CMATS Treaty was tabled in Parliament on the first sitting day of the year – Tuesday 6 February 2007. On Thursday 22 February 2007, immediately before the exchange of notes with East Timor on Friday 23 February 2007, the Minister for Foreign Affairs wrote to inform the Committee of his decision to invoke the NIE and proceed with binding treaty action for the CMATS Treaty.<sup>41</sup>

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39 ETAN, *Submission 3*, p. 2. See also Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*; Timor Sea Justice Campaign, *Submission 5*, p. 1.

40 La'o Hamutuk, *Submission 8*, p. 6.

41 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007.

## History of the National Interest Exemption

- 6.36 The NIE has been used at least 6 times in recent history. In each instance the Government made a clear case in favour of prompt binding treaty action.
- 6.37 When establishing the Committee the Minister for Foreign Affairs recognised that there would be occasions when the Government would need to take treaty action urgently:

These exceptions will be used sparingly and only where necessary to safeguard Australia's national interests, be they commercial, strategic or foreign policy interests.<sup>42</sup>

- 6.38 In its report on the *UNESCO International Convention Against Doping in Sport*, the Committee recognised the importance of ratifying that Convention in an expedient manner so that it would be in force for Australia before it hosted the 2006 Commonwealth Games. On that occasion the Committee asserted that the use of the NIE may not have been required had the Committee been asked to progress its review of the Convention in light of the time constraints.<sup>43</sup> The Committee further stated:

The Committee appreciates the importance of this matter but encourages the use of National Interest Exemptions only where the Committee would be unable to report on the particular treaty in time.<sup>44</sup>

- 6.39 The Department of Foreign Affairs and Trade has issued a document called *Signed, Sealed and Delivered: Treaties and Treaty Making: An Officials' Handbook*, which provides an overview of the use of the NIE:

Where it is in Australia's national interest to proceed with an urgent treaty action or where there is particular sensitivity attached to a treaty, the 15 or 20 day tabling requirement may be varied or waived. Guidance on treaties qualifying for exemption should be obtained from the Executive Director of the TSC [DFAT Treaties Secretariat]. **Exemptions are rare and the failure by departments or agencies to progress treaties for which they are responsible in a timely fashion will not be sufficient reason to avoid prior tabling.** Any exempt treaty is tabled as soon as possible before or after binding

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42 Ministerial Statement, House of Representatives, *Hansard*, 2 May 1996, p. 232.

43 JSCOT Report 70, para. 2.32.

44 JSCOT Report 70, para. 2.33.

treaty action has been taken, with an explanation in the NIA as to why the normal treaty processes were not complied with.<sup>45</sup>

## Reasons for invoking the National Interest Exemption for the CMATS Treaty

6.40 The Minister for Foreign Affairs explained that the NIE was invoked to take advantage of an immediate and short term opportunity in East Timor to bring the CMATS Treaty into force while complying with the understanding with East Timor that the countries would, as far as possible, synchronise their domestic treaty processes.

The East Timorese Government has recently indicated to the Australian Government that East Timor now wishes to move ahead expeditiously to bring the CMATS Treaty and Sunrise IUA into force. It has an opportunity to do this prior to presidential and parliamentary elections which will occur over the next few months. The Australian Government is working to place itself in a position to match East Timor's preparedness to have the treaties enter into force soon. Given the importance of the treaties to our interests in the Timor Sea as well as those of our close neighbour, East Timor, the Government would not wish to allow an opportunity to pass to finalise our agreed arrangements for the Timor Sea. It is uncertain when an opportunity would arise after the East Timorese elections period. I therefore consider that the CMATS Treaty action needs to be taken before the usual twenty sitting day period following tabling elapses, under the national interest exemption recognised by the Government and JSCOT.<sup>46</sup>

6.41 DFAT gave further details at the public hearing.

Mr Downer had agreed last year with the Prime Minister of East Timor, Dr José Ramos-Horta, that we would move through our domestic processes as closely in harmony with East Timor as possible. This was to ensure the greatest likelihood that the treaty would proceed to enter into force. Both governments wished to avoid the situation where only one of them had embarked on or substantially completed

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45 Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered: Treaties and Treaty Making: An Officials' Handbook*, Sixth Edition, August 2005, p. 19. (emphasis added)

46 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007, p. 2.

processing of the treaty domestically. Focus on entry into force of the treaty was diverted by several disruptions in mid-2006 in East Timor. That was the reason why the CMATS treaty was not tabled earlier.<sup>47</sup>

[T]owards 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 that 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.<sup>48</sup>

[E]lections have been announced in East Timor and I think parliamentary attention is rapidly going to be diverted to those elections. It was not clear, if we did not do it now, that the Timorese would be able to focus on the treaty again until after their political processes – the elections and so on – had been completed.<sup>49</sup>

- 6.42 The Minister for Foreign Affairs also pointed to the fact that the Committee had already reviewed and indicated its support for the Sunrise IUA, the principal treaty dealing with Greater Sunrise:

The CMATS Treaty does not alter the principal legal and regulatory arrangements established under the Sunrise IUA, but establishes procedures for the equal sharing of revenue from Greater Sunrise between the Governments and puts in place measures for enhancing cooperation in the Timor Sea.<sup>50</sup>

- 6.43 The submissions the Committee received were highly critical of the Government's use of the national interest exemption, believing it was invoked without good cause.<sup>51</sup> According to the East Timor and Indonesia Action Network (ETAN):

The ratification of the treaty clearly shows a democratic deficit in both countries. Signed more than a year ago, there is no justifiable reason why its consideration was so rushed in the parliament of Timor-Leste and short-circuited in Australia. The after-the-fact, truncated inquiry to which we

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47 Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, p. 31.

48 Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, p. 32.

49 Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, p. 33.

50 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007, p. 1.

51 Dr Clinton Fernandes and Dr Scott Burchill, *Submission 2*, p. 1; ETAN, *Submission 3*, p. 1; Timor Sea Justice Campaign, *Submission 5*, p. 5; La'o Hamutuk, *Submission 8*, p. 1.

offer this input only highlights both nations' failure to allow for any genuine public consultation.<sup>52</sup>

### The Committee's view

- 6.44 Both the Minister and the Department informed the Committee that the CMATS Treaty has been publicly available since its signature in January 2006.<sup>53</sup> The Committee understands the desire of the Government to move synchronously with the East Timor government in ratifying this treaty. However, given the early public availability of the Treaty, it has not been adequately explained why it was not referred several months earlier for review. The Committee's previous endorsement of the Sunrise IUA should not have been used to infer support for CMATS. The CMATS Treaty contains new and important obligations and raises different issues which should have been subject to the usual process of scrutiny and review. In this instance the national interest exemption should not have been invoked before the Committee was given a reasonable opportunity to consider and report on the Treaty within the Government's timeframe.
- 6.45 The Committee has previously demonstrated the capacity to report within a very short timeframe where the circumstances warranted expeditious treatment. For example, in relation to the Cambodia Prisoner Transfer Agreement, the Committee heard evidence on the evening of Tuesday, 5 December 2006 and made an interim report on the morning of Thursday, 7 December 2006 to enable work to progress immediately to bring that agreement into force.<sup>54</sup> The Government was aware that the opportunity to ratify the CMATS Treaty with East Timor was a possibility in the days leading up to its eventuality. It should have taken this opportunity to approach the Committee with a request for an early hearing and a prompt interim report on the agreement. Such a request would have been without prejudice to the Government's prerogative to invoke the NIE if this were necessary.

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52 ETAN, *Submission 3*, p. 1.

53 Letter to Dr Andrew Southcott: Minister for Foreign Affairs to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007, p. 1; Ms Penny Richards, *Transcript of Evidence*, 26 February 2007, pp. 31 and 32.

54 JSCOT Report 82, *Agreement between the Government of Australia and the Government of the Kingdom of Cambodia concerning Transfer of Sentences Persons* (Canberra, 11 October 2006).

## Withdrawal or Denunciation

6.46 The CMATS Treaty may only be terminated by a Party in either of the following circumstances:

- If a development plan for Greater Sunrise has not been approved in accordance with the Sunrise IUA within six years of the entry into force of the Treaty; or
- If production from Greater Sunrise has not commenced within ten years of the entry into force of the Treaty.

In either of these circumstances, the Treaty will cease to be in force three months after a Party notifies the other that it wishes to terminate the Treaty.<sup>55</sup>

## Consultation

6.47 Commonwealth agencies, led by DFAT, participated actively in eight rounds of negotiations from April 2004 until November 2005.<sup>56</sup>

6.48 Inter-departmental committee meetings were held regularly between DFAT, the Department of the Prime Minister and Cabinet, the Department of Industry, Tourism and Resources, Department of Finance and Administration, Attorney-General's Department and the Treasury. Separate consultations were held with the Department of Agriculture, Fisheries and Forestry regarding Article 8.<sup>57</sup>

6.49 On 1 December 2005, Mr Downer stated in Parliament that negotiations with East Timor on the Treaty had finished. Immediately after the Treaty was signed in Sydney on 12 January 2006, the Treaty was made available to the media and published on the DFAT website.<sup>58</sup>

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55 CMATS Treaty, Article 12.2.

56 NIA Consultation Annex, para. 3.

57 NIA Consultation Annex, para. 4.

58 NIA Consultation Annex, para. 6.



## Costs

6.50 Existing resources will be able to cover the costs for implementing the administrative arrangements under the CMATS Treaty. Once the exploitation of Greater Sunrise has commenced, revenue must be transferred from Australia to East Timor to increase East Timor's share to half of the total upstream revenues, as obliged under the Treaty. According to the NIA:

It is difficult to predict the amounts this will involve due to the uncertain economics of the project and the variable market prices of oil and gas. On Government predictions, it will involve transfers to East Timor of around \$4 billion over the expected 30-year life of the project.<sup>59</sup>

## Implementation

6.51 The implementation of CMATS obligations will not require any new legislation, as the provisions can be implemented through executive and administrative actions by the Government.<sup>60</sup>

6.52 However, once production of Greater Sunrise commences, appropriate legislation will be required to transfer half of the total upstream revenues from Greater Sunrise to East Timor.<sup>61</sup>

## Concluding remarks

6.53 The purpose of this Committee is to provide for parliamentary and public scrutiny of treaty actions in terms of their promotion or obstruction of Australia's national interest. It is for the Government and Parliament of East Timor to represent the interests entrusted to them. The Committee notes that the democratically elected Government of East Timor has judged that the entering into force of the Treaty in its current terms best serves the national interests of its constituents.

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59 CMATS Treaty NIA, para. 26.

60 CMATS Treaty NIA, para. 24.

61 CMATS Treaty NIA, para. 24.

6.54 The Committee notes that ratification of the CMATS Treaty is a fundamental condition precedent to the exploitation of the resources in Greater Sunrise. It also acknowledges that it is in the best interests of both countries to expedite an agreement for the sharing of revenue from Greater Sunrise to ensure development opportunities are not lost. Without the certainty provided by the framework established by the CMATS Treaty and the Sunrise IUA, which is supported by the deferral of the question of permanent maritime boundaries, it is unlikely that any commercial operator would commit to the investment necessary to develop the resources in the Timor Sea. This would be to the economic detriment of both countries and put at risk the future economic viability of East Timor.

6.55 The Committee also notes the generous development assistance provided by Australia to East Timor:

Since 1999 Australia has provided over \$3 billion in security, policing, development and other assistance.<sup>62</sup>

Australia's development assistance in 2006-07 will be at least \$44 million ... Australia also provides capacity building assistance for the East Timor police force and is a lead donor in the development of the East Timor Defence Force.<sup>63</sup>

6.56 While the Committee understands that Australia has an interest in promoting East Timor's future economic viability, the inquiry's terms of reference require the consideration of the implications of ratification of the CMATS Treaty in terms of Australia's national interest. Significant benefit to the people and economies of both Australia and East Timor will result from the immediate development of the Greater Sunrise field. The Committee therefore supports the CMATS Treaty.

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62 NIA Background Information, Political Brief on East Timor, para. 8.

63 NIA Background Information, Political Brief on East Timor, para. 9.