

The Senate

Foreign Affairs, Defence and
Trade References Committee

Australia's declarations made under
certain international laws

February 2020

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Chapter 1

Introduction and Background

Referral and conduct of the inquiry

1.1 This inquiry was referred to the committee on 16 September 2019, through a motion presented by Senator Patrick in the following terms:

- (1) That the Senate notes that—
 - (a) Australia ratified the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and the Statute of the International Court of Justice 1945 (ICJ), accepting the compulsory jurisdiction of the ICJ and the International Tribunal for the Law of the Sea (ITLOS);
 - (b) subsequently, on 22 March 2002, Australia made declarations under articles 287(1) and 298(1) of UNCLOS, and article 36 of the Statute of the ICJ, actions which:
 - (c) limited Australia's acceptance of the compulsory jurisdiction of the ICJ and the ITLOS in maritime boundaries disputes, and;
 - (d) prevented Timor-Leste from exercising its rights under international law;
 - (e) the Joint Standing Committee on Treaties (JSCOT), responsible for scrutinising all treaty actions by Australia, was not given the opportunity to scrutinise the declarations before their making;
 - (f) JSCOT reported, on 26 August 2002, that non-government committee members 'believe the ICJ declaration ... damages Australia's international reputation and may not be in Australia's long-term national interests' as it 'may be interpreted as an effort to intimidate and limit the options of neighbouring countries in relation to any future maritime border disputes'; and
 - (g) Australia has since signed a maritime boundaries treaty with the Democratic Republic of Timor-Leste.
- (2) That the following matter be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 28 November 2019:
 - (a) Australia's declarations made under articles 287(1) and 298(1) of UNCLOS and article 36 of the Statute of the ICJ, including the question of whether those declarations should be revoked and new declarations made which submit maritime delimitation disputes to the jurisdiction of the ICJ or ITLOS; and
 - (b) any related matter.¹

¹ *Journals of the Senate*, No. 16—16 September 2019, pp. 492–493.

- 1.2 On 11 November 2019, the reporting date for the inquiry was extended to 27 February 2020.²

Conduct of the inquiry

- 1.3 Details of the inquiry were placed on the committee's website at: http://www.aph.gov.au/senate_fadt. The committee also contacted a number of relevant individuals and organisations to notify them of the inquiry and invite submissions by 11 October 2019. The committee continued to receive submissions after the closing date. Submissions received and additional information are listed at Appendix 1.
- 1.4 The committee held one public hearing, on 2 December 2019 in Canberra. A list of witnesses who gave evidence is available at Appendix 2. Submissions and the Hansard transcripts of evidence may be accessed through the committee website.
- 1.5 The committee thanks the organisations and individuals who lodged submissions and participated in the committee's public hearing.

Structure of the report

- 1.6 This report consists of two chapters. The remainder of Chapter 1 provides background information on Australia's declarations that are the subject of this inquiry and Australia's maritime boundary negotiations with Timor-Leste. Chapter 2 summarises the key issues raised by submitters and witnesses, and presents the committee's views.

Background to Australia's 2002 declarations

- 1.7 The declarations relevant to this inquiry were made by Australia under international instruments on 22 March 2002:
- Declarations under Articles 287(1) and 298(1) of the United Nations Convention on the Law of the Sea (UNCLOS); and
 - Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice (ICJ).
- 1.8 These declarations exclude Australia from the compulsory jurisdiction of UNCLOS and the ICJ in relation to matters of delimitation of maritime boundaries. However, Australia still remains subject to compulsory conciliation processes under Article 298 of the UNCLOS convention in relation to the resolution of maritime boundary disputes.

United Nations Convention on the Law of the Sea

- 1.9 UNCLOS is an international treaty that provides a legal framework for marine and maritime activities. It lays down a comprehensive regime of law and order

² *Journals of the Senate*, No. 24—11 November 2019, p. 751.

in the world's oceans and seas, and establishes rules governing all uses of the oceans and their resources.³ UNCLOS was signed by Australia on 10 December 1982 and ratified on 5 October 1994.⁴

Dispute settlement procedures

- 1.10 Part XV of the convention provides a compulsory and binding framework for the peaceful settlement of all ocean-related disputes between parties. Under Article 287(1), states may make a written declaration nominating one or more of the following means for the settlement of disputes concerning the interpretation or application of the convention:
- (a) the International Tribunal for the Law of the Sea (a body established under Annex VI of the treaty);
 - (b) the International Court of Justice;
 - (c) an arbitral tribunal constituted in accordance with Annex VII;
 - (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more specified categories of disputes (including disputes relating to fisheries, protection and preservation of the marine environment, and marine scientific research).
- 1.11 Under paragraph 287(3), if a state becomes party to a dispute and has not made a specific declaration in relation to dispute settlement methods, it is deemed to have accepted arbitration in accordance with Annex VII, making arbitration the default option for dispute settlement.⁵
- 1.12 Under Article 298, there are three optional exceptions to the applicability of compulsory procedures in the forum(s) chosen by states under Article 287.
- 1.13 Paragraph 1 of Article 298 provides that a state may declare in writing that it does not accept one or more of the dispute settlement forums in Article 287, with respect to three categories of disputes, including 'disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles'.⁶ However, if such a

³ United Nations Division for Ocean Affairs and the Law of the Sea, 'United Nations Convention on the Law of the Sea of 10 December 1982: Overview and full text', https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (accessed 18 September 2019).

⁴ United Nations Division for Ocean Affairs and the Law of the Sea, 'Table recapitulating the status of the Convention and of the related Agreements', available at https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (accessed 18 September 2019).

⁵ Professor A.L. Serdy, *Submission 6*, p. 3.

⁶ Article 15 deals with delimitation of the territorial sea between States with opposite or adjacent coasts; Article 74 deals with delimitation of the exclusive economic zone between States with opposite or adjacent coasts; and Article 83 deals with delimitation of the continental shelf between States with opposite or adjacent coasts.

dispute arises and no agreement within a reasonable period of time is reached in negotiations between the parties, the state must accept submission of the matter to a Conciliation process laid out in Annex V of the convention.

Australia's UNCLOS dispute settlement declaration

- 1.14 On 22 March 2002, Australia made declarations relating to dispute settlement under Articles 287 and 298 of UNCLOS.
- 1.15 Under paragraph 1 of Article 287, Australia chose the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) as its two means for the settlement of disputes arising under the convention (without specifying that one has precedence over the other).
- 1.16 By the same instrument, Australia also lodged a declaration under Article 298(1)(a) that it does not accept any of the procedures provided for in Article 287 (including ITLOS and the ICJ), with respect to disputes concerning the interpretation or application of articles relating to sea boundary delimitations as well as those involving historic bay or titles.
- 1.17 The declarations were signed on 21 March 2002 and entered into force on 22 March 2002.⁷
- 1.18 The National Interest Analysis (NIA) for this declaration,⁸ tabled on 18 June 2002, summarised Australia's obligations under this declaration:

The declaration lodged by Australia under Article 287(1) means that Australia as a matter of international obligation has accepted the ICJ and ITLOS as forums for dispute settlement in relation to the interpretation or application of UNCLOS.

The declaration under Article 298(1)(a) means that Australia is not obliged to submit to compulsory dispute settlement under UNCLOS disputes relating to sea boundary delimitations or historic bays or titles.⁹
- 1.19 However, it was noted in the NIA that disputes concerning maritime boundaries could still be heard by a conciliation commission under UNCLOS; but that results of conciliation would not be binding.¹⁰

⁷ Australian declarations under Articles 287(1) and 298(1) of the United National Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis.

⁸ Treaty actions are tabled in Parliament with a National Interest Analysis which explains the impact of the proposed treaty action on the national interest. See <https://dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/tabling-of-treaty-actions-in-parliament.aspx> (accessed 23 September 2019).

⁹ Australian declarations under Articles 287(1) and 298(1) of the United National Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraphs 16 and 17.

¹⁰ Australian declarations under Articles 287(1) and 298(1) of the United National Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraph 14.

Australia's declaration under the ICJ Statute

- 1.20 Also on 22 March 2002, Australia made a declaration adding reservations to Australia's acceptance of the compulsory jurisdiction of the ICJ.
- 1.21 This declaration, made under Article 36(2) of the ICJ Statute, replaced a prior declaration relating to ICJ jurisdiction Australia had made in 1975. Under the 1975 declaration, Australia's only reservation to the compulsory jurisdiction of the ICJ was for disputes 'in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement.'¹¹
- 1.22 The 2002 declaration contained two additional reservations to the compulsory jurisdiction of the ICJ, namely:
- (b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation; and
 - (c) any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where their acceptance of the Court's compulsory jurisdiction was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.¹²

Government rationale for the UNCLOS and ICJ Statute declarations

- 1.23 The Australian Government's stated reasons for the UNCLOS declaration were set out in the NIA for that declaration, published in 2002:

Australia chose the ICJ and ITLOS as its preferred means of dispute resolution because there are advantages in taking disputes to existing, internationally recognised forums. Arbitral tribunals are not pre-existing bodies and have to be constituted before dispute resolution can be commenced. This can be a time consuming and difficult process. Also, the parties to the dispute have to pay the full cost of both the tribunal and the arbitration. Australia already contributes to the cost of the ICJ and ITLOS and no additional costs are incurred by taking a dispute to the Court or the Tribunal.

...

The Government's view is that maritime boundary disputes are best resolved through negotiation, not litigation. Negotiations allow the parties

¹¹ Declaration recognising as compulsory the jurisdiction of International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, Done at Canberra on 13 March 1975.

¹² International Court of Justice, 'Declarations recognising the jurisdiction of the Court as compulsory: Australia', 22 March 2002, <https://www.icj-cij.org/en/declarations/au> (accessed 10 December 2019).

to work together to reach an outcome acceptable to both sides. The Government is, and remains, committed to the peaceful settlement of disputes. Compared to other countries, Australia, as an island continent, has some of the longest maritime boundaries in the world. It has maritime boundaries with many countries and the Government is concerned that every endeavour should be made to reach an agreed resolution of any maritime boundary disputes through peaceful negotiation.¹³

1.24 In relation to the ICJ Statute declaration, the government's NIA reiterated the view that disputes involving maritime boundaries are best resolved through negotiation and not litigation, and noted that this declaration parallels the reservations made under the UNCLOS declaration.¹⁴

1.25 The ministerial press release announcing the declarations noted Australia's unresolved maritime boundaries at that time:

Australia's maritime zones abut the maritime zones of Indonesia, New Zealand, Papua New Guinea, the Solomon Islands, France (New Caledonia, Kerguelen Island and Antarctica), East Timor and Norway. Australia is yet to resolve boundaries with France, New Zealand and Norway in the maritime area adjacent to Antarctica. Australia has negotiated treaties on permanent maritime boundaries with Indonesia, Papua New Guinea, the Solomon Islands and France (New Caledonia and Kerguelen Island). Negotiations are ongoing with New Zealand.¹⁵

Consultation processes and timing of the UNCLOS and ICJ declarations

1.26 The Australian Government undertook no public consultation on the 2002 declarations prior to them being made, and the declarations were not subject to the standard process of review by the Joint Standing Committee on Treaties (JSCOT) prior to them coming into effect.¹⁶ The NIAs for the 2002 UNCLOS and ICJ stated that each declaration fell within a 'sensitive treaty action' exception to the normal processes for tabling treaties prior to their entry into

¹³ Australian declarations under Articles 287(1) and 298(1) of the United Nations Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraphs 12 and 15.

¹⁴ Australian Declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945, lodged at New York on 22 March 2002, Documents tabled on 18 June 2002, National Interest Analysis, Text of proposed treaty action, paragraphs 10, 14 and 15.

¹⁵ The Hon Daryl Williams AM QC MP, Attorney-General, and The Hon Alexander Downer MP, Minister for Foreign Affairs, *News Release*, 'Changes to International Dispute Resolution', 25 March 2002.

¹⁶ The treaty standard making process requires the Government to table in the Parliament all proposed treaty actions for a period of at least 15 (or in some cases, 20) sitting days before action is taken that will bind Australia at international law to the terms of the treaty. An exception to the requirement is applied 'where the Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests'. See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee (accessed 24 September 2019).

force, and the declarations were not made public prior to taking to ensure the effectiveness of the declaration was maintained.¹⁷

1.27 The NIA for to the UNCLOS declaration stated:

Public knowledge of the proposed action could have led other countries to pre-empt the declaration by commencing an action against Australia in relation to sea boundary delimitation that could not be made once the declaration under article 298(1)(a) of UNCLOS was made.¹⁸

History of negotiations over the delimitation of the Timor Sea maritime boundary

1.28 Submissions raised the maritime boundary between Australia and Timor-Leste which has been the subject of longstanding dispute, with the lucrative oil and gas deposits in the Timor Sea central to negotiations.

1.29 Since the 1970s Australia has negotiated with successive governments over the delimitation of the seabed boundary of the Timor Sea and the development of the gas and petroleum deposits; including Portugal, Indonesia, the United Nations Transitional Administration in East Timor (UNTAET), and finally the government of Timor-Leste after gaining its independence on 20 May 2002.¹⁹ Below is a brief summary of those negotiations.

1973 Agreements relating to certain seabed boundaries

1.30 On 18 May 1971 and 9 October 1972, Australia and Indonesia signed an *Agreement establishing Certain Seabed Boundaries* and a supplementary *Agreement establishing Certain Seabed Boundaries in the area of the Timor and Arafura Seas*, respectively. Both agreements came into force on 8 November 1973.²⁰ Under these initial agreements, a gap was left in the maritime boundary agreed by Australia and Indonesia which became known as the 'Timor Gap'.²¹

¹⁷ See: Australian declarations under Articles 287(1) and 298(1) of the United National Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraph 20; and Australian Declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945, lodged at New York on 22 March 2002, Documents tabled on 18 June 2002, National Interest Analysis, Text of proposed treaty action, paragraph 21.

¹⁸ Australian declarations under Articles 287(1) and 298(1) of the United National Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraph 20. Similar wording is found in the NIA for the ICJ Statute declaration.

¹⁹ Joint Standing Committee on Treaties, *Report 180—Peru FTA; EU Framework Agreement; Timor Treaty-Maritime Boundaries; WIPO Australian Patent Office; Scientific Technical Cooperation: Italy and Brazil*, August 2018, p. 29.

²⁰ Joint Standing Committee on Treaties, *Report 49—The Timor Sea Treaty*, November 2002, p. 2.

²¹ Joint Standing Committee on Treaties, *Report 49—The Timor Sea Treaty*, November 2002, p. 3.

Timor Gap (Zone of Cooperation) Treaty

1.31 In talks between Australia and Indonesia in November 1984, Australia proposed an interim measure for a joint development zone in the disputed area, with commercial resources to be shared equally.²² On 11 December 1989 Australia and Indonesia announced the signing of the Timor Gap (Zone of Cooperation) Treaty, which came into effect in February 1991. The conclusion of the Treaty stated that:

...while establishing a long-term stable environment for petroleum exploration and exploitation, [the treaty] would not prejudice the claims of either country to sovereign rights over the continental shelf, nor would it preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation.²³

Memorandum of Understanding of Timor Sea Arrangement

1.32 In a UN supervised referendum on 30 August 1999 the East Timorese people voted for independence. The UNTAET was established on 25 October 1999 to provide interim administration and a peacekeeping mission in East Timor until its independence, which was gained on 20 May 2002.

1.33 UNTAET had a wide treaty making power and Australia subsequently entered into negotiations with UNTAET and East Timorese representatives on rights for future exploration and exploitation for petroleum in the Timor Gap to replace the Timor Gap Treaty when independence was gained. On 5 July 2001 Australia and UNTAET signed the *Memorandum of Understanding of Timor Sea Arrangement* (MoU) in anticipation of a new treaty to be entered into once Timor-Leste gained independence.²⁴

1.34 The MoU formed the basis of the subsequent *Timor Sea Treaty* between Australia and Timor-Leste. It established the Joint Petroleum Development Area (JPDA) which had the same boundaries as Area A of the Zone of Cooperation under the Timor Gap Treaty; and sets out the terms for joint control, management and facilitation of exploration, development and exploitation of the petroleum resources. The MoU did not resolve the question of the seabed boundary between Australia and East Timor.²⁵

²² Senate Foreign Affairs, Defence and Trade References Committee, *East Timor*, December 2000, p. 161.

²³ See: Senate Foreign Affairs, Defence and Trade References Committee, *East Timor*, December 2000, pp. 164–165.

²⁴ Joint Standing Committee on Treaties, *Report 49—The Timor Sea Treaty*, November 2002, pp. 4–5.

²⁵ See: Agreements, treaties and negotiated settlements project, 'Memorandum of Understanding of Timor Sea Arrangement', <https://www.atns.net.au/agreement.asp?EntityID=2438> (accessed 11 October 2019).

Timor Sea Treaty

1.35 On 20 May 2002 Timor-Leste gained independence, and Australian and Timorese representatives signed the *Timor Sea Treaty*. This treaty confirmed the 2001 interim arrangements of the Joint Petroleum Development Area under the MoU. Article 2(b) of the Treaty stated:

Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements.²⁶

1.36 The Timor Sea Treaty was presented to the Australian Parliament for ratification on 5 March 2003 and the legislation to enact Australia's obligations under that treaty received Royal Assent on 2 April 2003.²⁷

International Unitisation Agreement

1.37 Article 9 of the *Timor Sea Treaty* deals with the unitisation arrangements under the treaty. Unitisation refers to the treatment of a field straddling a jurisdictional boundary as a single entity for management and development purposes.²⁸ Article 9(a) states that any reservoir of petroleum that extends across the boundary of the JPDA shall be treated as a single entity for management and development purposes.

1.38 The Greater Sunrise Field in the Timor Sea (comprised of the Sunrise and Troubadour fields) is one such reservoir straddling the eastern boundary of the JPDA.²⁹ Australia and Timor-Leste signed the *Agreement relating to the Unitisation of the Sunrise and Troubadour Fields* (Sunrise IUA) on 6 March 2003 providing a comprehensive framework for the joint development of the Sunrise and Troubadour Fields.

Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)

1.39 Further negotiations between the two countries led to the signing of the *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS) on 12 January 2006 and it subsequently entered into force on 23 February 2007. The CMATS Treaty was intended to operate alongside the Timor Sea Treaty and the Sunrise IUA to provide stable legal and fiscal regimes for the exploration and exploitation of petroleum resources in the Timor Sea to the benefit of both

²⁶ Article 2(b), *Timor Sea Treaty*, available at <http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html> (accessed 11 December 2019).

²⁷ Commonwealth of Australia, *Petroleum (Timor Sea Treaty) Act 2003*.

²⁸ 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, National Interest Analysis, paragraph 5.

²⁹ Joint Standing Committee on Treaties, *Report 53—Treaties Tabled in May and June 2003*, August 2003, p. 36.

countries.³⁰ In its examination of the CMATS Treaty, the JSCOT committee summarised its purpose as allowing:

...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.³¹

- 1.40 At this time the following three treaties governed maritime arrangements between Timor-Leste and Australia in the Timor Sea without a resolution on a maritime boundary: the Timor Sea Treaty, the Sunrise IUA, and the CMATS Treaty.³²

2018 treaty establishing maritime boundaries in the Timor Sea

- 1.41 Events in the following years led Timor-Leste to consider the arrangements under the CMATS Treaty as unsatisfactory. On 3 May 2013 the Australian Government announced that Timor-Leste had initiated arbitration at the Permanent Court of Arbitration (PCA) in The Hague of a dispute related to the 2006 CMATS Treaty. Timor-Leste had advised that the arbitration related to the validity of the CMATS Treaty, which it argued was invalid because it alleged Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage. The Australian Government responded to the spying allegations as follows:

These allegations are not new and it has been the position of successive Australian Governments not to confirm or deny such allegations.

However, Australia has always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith.

Australia considers that the CMATS treaty is valid and remains in force.³³

- 1.42 On the eve of the first directions hearing at The Hague the Australian Secret Intelligence Service (ASIS) and the Australian Federal Police raided the home of a former ASIS operative, known as Witness K, and office of his lawyer, Bernard Collaery, who had also acted on behalf of Timor-Leste. When Australia refused to return the documents seized, Timor-Leste took action

³⁰ Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, done at Sydney on 12 January 2006, National Interest Analysis, paragraph 7.

³¹ Joint Standing Committee on Treaties, *Report 85—Treaties tabled on 6, 7 and 27 February 2007*, June 2007, p. 40.

³² Joint Standing Committee on Treaties, *Report 180*, August 2018, pp. 30-31

³³ Senator the Hon Bob Carr, Minister for Foreign Affairs, and the Hon Mark Dreyfus QC MP, Attorney-General, *Joint Media Release*, 'Arbitration under the Timor Sea Treaty', 3 May 2013.

against Australia in the general division of the ICJ, and following an interim hearing in March 2014 Australia was ordered to seal the documents pending a full hearing at a later date.³⁴

- 1.43 On 11 April 2016 Timor-Leste commenced compulsory conciliation proceedings under Article 298 and Annex V of UNCLOS to resolve differences between the countries on a maritime boundary. A five member Conciliation Commission was constituted on 25 June 2016. With the agreement of the parties, the PCA acted as Registry in the proceedings.³⁵
- 1.44 Australia objected to the competence of the Conciliation Commission on a number of grounds and lost.³⁶ This was the first time that the compulsory conciliation process under UNCLOS had been invoked.³⁷
- 1.45 As part of the conciliation process, on 9 January 2017, the then Foreign Ministers of Australia and Timor-Leste, together with the Conciliation Commission issued a joint statement announcing the termination of the CMATS Treaty.
- 1.46 Timor-Leste wrote to the PCA Arbitral Tribunal (in relation to the arbitration under the 2002 Timor Sea Treaty) on 20 January 2017, noting the Trilateral Joint Statement issued on 9 January 2017 by the Foreign Ministers of Timor-Leste and Australia and the Conciliation Commission, which advised Timor-Leste's decision to initiate the termination of the CMATS treaty pursuant to Article 12 (2) of the treaty. Accordingly, Timor-Leste further advised that the termination of the CMATS treaty would 'render the continuation of the arbitral proceedings unnecessary' and therefore Timor-Leste was withdrawing its claims and requesting the termination of proceedings of the Arbitral Tribunal pursuant to Article 30(2) of the PCA rules of procedure. On 23 January 2017 Australia agreed to the termination of the arbitration proceedings.³⁸
- 1.47 Over a period of 15 months the Conciliation Commission met regularly and held its last negotiating session in February 2018. The new *Treaty between*

³⁴ See: *Submission 5*, The Hon Steve Bracks AC, p. 5.

³⁵ Permanent Court of Arbitration, The Hague, *Press Release*, 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia', 9 May 2018.

³⁶ Permanent Court of Arbitration, The Hague, *Press Release*, 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia', 9 May 2018.

³⁷ Department of Foreign Affairs and Trade, *Fact sheet: Australia and Timor-Leste maritime boundaries*, March 2018, p. 1, available at <https://dfat.gov.au/geo/timor-leste/Pages/australias-maritime-arrangements-with-timor-leste.aspx> (accessed 11 December 2019).

³⁸ Australian Government, *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*, 24 January 2017, available at <https://dfat.gov.au/news/media/Pages/joint-statement-by-the-governments-of-timor-leste-and-australia-and-the-conciliation-commission.aspx> (accessed 11 December 2019).

Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea (Maritime Boundaries Treaty) was signed in New York on 6 March 2018. The Department of Foreign Affairs and Trade advise that the treaty 'consists of a number of inextricably linked elements which are part of the overall agreement'. Among other things, the treaty:

- established permanent maritime boundaries between Australia and Timor-Leste in the Timor Sea;
- recognises both states' rights and creates the Greater Sunrise Special Regime for the joint development, exploitation and management of the Greater Sunrise gas field; and
- includes transitional arrangements to provide regulatory certainty and continuity for affected investors in the oil and gas sector in the Timor Sea.³⁹

1.48 On the signing of the Maritime Boundaries Treaty, Australia's then Minister for Foreign Affairs, the Hon Julie Bishop MP, stated:

The outcome is a milestone for the parties and for UNCLOS and international law. It reinforces our respect for, and the importance of, the international rules-based order in resolving disputes.⁴⁰

1.49 Timor-Leste's Chief Negotiator, Kay Rala Xanana Gusmao, stated:

History is made today as Timor-Leste signs a treaty on permanent maritime boundaries that establishes, for the first time, a fair border between our two countries, based on international law. We thank the Commission for their patience, wisdom and trust, and the Australian representatives for their constructive engagement and spirit of cooperation.⁴¹

1.50 After being ratified by both parliaments⁴² the new treaty entered into force on 30 August 2019 at the time of a visit by the Australian Prime Minister to Dili to commemorate the 20th anniversary of the referendum on the independence of Timor-Leste. Upon entry into force, the Maritime Boundaries Treaty terminated both the 2002 Timor Sea Treaty and the 2003 Sunrise IUA.

³⁹ Department of Foreign Affairs and Trade, *Fact sheet: Australia and Timor-Leste maritime boundaries*, March 2018, p. 2.

⁴⁰ The Hon Julie Bishop MP, Minister for Foreign Affairs, *Media release*, 'Australia and Timor-Leste sign historic maritime boundary treaty', 6 March 2018.

⁴¹ The Hon Julie Bishop MP, Minister for Foreign Affairs, *Media release*, 'Australia and Timor-Leste sign historic maritime boundary treaty', 6 March 2018.

⁴² See The Hon Scott Morrison MP, Prime Minister, *Media Release*, 'Establishing Maritime Boundaries in the Timor Sea', 29 July 2019; and Oki Raimundos, 'Timor-Leste Parliament Approves Sea Border Treaty with Australia', *The Diplomat*, 24 July 2019, <https://thediplomat.com/2019/07/timor-leste-parliament-approves-sea-border-treaty-with-australia/> (accessed 15 October 2019).

Chapter 2

Key issues

- 2.1 The inquiry's terms of reference ask the committee to consider the question of whether Australia's 2002 declarations under the United Nations Convention on the Law of the Sea (UNCLOS) and the Statute of the International Court of Justice 1945 (ICJ Statute) should be revoked, and new declarations made which submit maritime delimitation disputes to the jurisdiction of the ICJ or the International Tribunal for the Law of the Sea (ITLOS).
- 2.2 In addressing this question, submitters and witnesses raised several key issues, namely:
- whether Australia's 2002 UNCLOS and ICJ Statute declarations were consistent with broadly accepted practice in the international community;
 - the policy reasoning and motivations behind the declarations and their timing;
 - the effects of the declarations on Australia's subsequent maritime boundary negotiations and general relations with Timor-Leste; and
 - the potential practical and/or symbolic effects of withdrawing and replacing the declarations.

Use of declarations by signatories to the UNCLOS and the ICJ Statute

- 2.3 Submitters and witnesses presented differing views on whether Australia's 2002 declarations represented a normal course of action for a state to pursue under international law, or whether they represented exceptional and potentially unfair actions taken by a state in order to protect its interests.
- 2.4 Professor Donald Rothwell and Ms Katherine Arditto of the ANU College of Law submitted that Australia's 2002 declarations 'are consistent with international law and Australia's entitlements as a sovereign state to be subject to various forms of compulsory dispute settlement'.¹
- 2.5 The Department of Foreign Affairs and Trade (DFAT) submitted that it is 'common practice for States to make a declaration to clarify the meaning and scope of a multilateral treaty or specific provisions'.² Mr James Larsen, Chief Legal Officer at DFAT, told the committee:

Australia has a strong and deserved reputation for supporting the international rule of law. Australia's declarations are fully consistent with international law, including the [UNCLOS] and the Statute of the [ICJ].

¹ Professor Donald R. Rothwell and Ms Katherine Arditto, ANU College of Law, *Submission 3*, p. 12.

² DFAT, *Submission 10*, p. 1.

Australia continues to accept the compulsory jurisdiction of the [ICJ] and is in fact amongst a minority of states to do so. Only 74 out of a total of 193 states have accepted the compulsory jurisdiction of the International Court of Justice.³

- 2.6 It was noted that 50 out of the 74 states that have accepted the compulsory jurisdiction of the ICJ have made declarations limiting that jurisdiction.⁴ DFAT submitted:

Like most countries accepting the compulsory jurisdiction to the ICJ—including the United Kingdom, Canada and New Zealand—Australia does so with limitations. Eight countries have made a reservation to the ICJ statute specifically regarding maritime boundaries including Germany, India and Malta.⁵

- 2.7 In relation to Australia's UNCLOS declarations, DFAT stated that 'many other countries have made similar declarations...including, Canada, China, France, Mexico, Portugal, Republic of Korea, Singapore and Thailand'.⁶

- 2.8 Professor Clinton Fernandes, Professor of International and Political Studies at the University of New South Wales, disagreed that Australia's position was similar to many other nations who have made declarations under the UNCLOS and the ICJ Statute:

The reality is that of the 21 States that made declarations under Article 298(1)(a) of [the UNCLOS], only nine also made declarations under Article 36(2) of the ICJ Statute. And out of these nine, **only Australia explicitly excluded sea boundary delimitation disputes from the jurisdiction of the ICJ.**

...No other country had made both declarations and furthermore explicitly excluded sea boundary delimitation disputes.⁷

- 2.9 When questioned on how the declarations made by States limiting their acceptance of compulsory ICJ jurisdiction are structured, Mr Larsen from DFAT commented:

I'd say that that there would obviously be similarities, but each state's declaration will reflect its particular circumstances. Of course, both UNCLOS and the Statute of the [ICJ] expressly contemplate such arrangements, so we would strongly put the position that what Australia is doing is utterly unremarkable and a perfectly conventional way to protect

³ Mr James Larsen, Chief Legal Officer, DFAT, *Committee Hansard*, 2 December 2019, p. 16.

⁴ Ms Anne Sheehan, Assistant Secretary, Office of International Law, Attorney-General's Department, *Committee Hansard*, 2 December 2019, p. 16.

⁵ DFAT, *Submission 10*, p. 3.

⁶ DFAT, *Submission 10*, p. 2.

⁷ Professor Clinton Fernandes, *Supplementary Submission 2.1*, p. 1 (emphasis in original).

our interests and make sure that we manage dispute resolution processes in ways which reflect our particular circumstances.⁸

Rationale for the 2002 declarations and their timing

2.10 Submitters and witnesses commented in some detail on the motivations behind, and the timing of, Australia's 2002 declarations.

2.11 As noted in Chapter 1, the rationale articulated by the Australian Government in the National Interest Analysis (NIA) published at the time of the UNCLOS declaration in 2002 is as follows:

The Government's view is that maritime boundary disputes are best resolved through negotiation, not litigation. Negotiations allow the parties to work together to reach an outcome acceptable to both sides. The Government is, and remains, committed to the peaceful settlement of disputes. Compared to other countries, Australia, as an island continent, has some of the longest maritime boundaries in the world. It has maritime boundaries with many countries and the Government is concerned that every endeavour should be made to reach an agreed resolution of any maritime boundary disputes through peaceful negotiation.⁹

2.12 DFAT reiterated this view in its submission to the committee's inquiry:

DFAT's view is that negotiations are more likely to produce better resolutions to maritime boundary disputes. Boundaries are fundamental elements of sovereignty and statehood; as a result many States have excluded these matters from dispute resolution procedures. A negotiated boundary settlement with a neighbour is more likely to result in an enduring and respected boundary that provides certainty for the parties and all stakeholders.¹⁰

2.13 At the committee's public hearing in Canberra, Mr Larsen from DFAT told the committee that the department had nothing further to add to the public record to explain the specific motivations of the Australian Government in making the declarations when it did, beyond what was stated in the National Interest Analysis tabled at the time in 2002 and contemporaneous statements by Ministers.¹¹

2.14 Professor Rothwell and Ms Arditto commented on the rationale behind the 2002 declarations as follows:

The 2002 declaration reflected Australia's desire to resolve maritime boundary disputes through negotiation. At that time, Australia was in

⁸ *Committee Hansard*, 2 December 2019, p. 17.

⁹ Australian declarations under Articles 287(1) and 298(1) of the United Nations Convention on the Law of the Sea 1982, Lodged at New York on 22 March 2002, National Interest Analysis, paragraph 15. Similar wording is found in the National Interest Analysis for Australia's declaration under the ICJ Statute.

¹⁰ DFAT, *Submission 10*, p. 3.

¹¹ Mr James Larsen, Chief Legal Officer, DFAT, *Committee Hansard*, 2 December 2019, pp. 19-20.

active negotiations over maritime boundary delimitation with New Zealand and Timor-Leste and was concerned about possible disputes over Antarctic maritime boundaries with Norway, France and New Zealand. Within this context, Australia drafted the reservation in broad language so as to cover all the potentially associated disputes that could arise in a delimitation situation as between the parties to the delimitation.¹²

- 2.15 Some submitters questioned the government's stated rationale that maritime boundary disputes are best resolved by bilateral negotiations rather than through litigation. Professor A.L. Serdy, Professor of the Public International Law of the Sea at the University of Southampton, described the justification provided in the NIA as 'threadbare', and commented:

This [argument] is unconvincing, not because it is wrong, but because exactly the same could be said of all international legal disputes, not just those concerning maritime boundaries; litigation should in principle always be a last resort. Yet no explanation was put forward in [the NIA] or any other document as to why maritime boundaries were uniquely unsuitable to litigation, even as a last resort.¹³

- 2.16 Professor Fernandes argued similarly in evidence to the committee:

Negotiations are always the preferred way of solving a dispute. It's not as though maritime boundary disputes are so complex that they are uniquely unsuitable for litigation. No, what happened here is we tried to exempt ourselves only from maritime boundary delimitation. We were still able to take Japan to the International Court of Justice on whaling. We didn't believe in limiting ourselves to only negotiations on whaling... It's only in the case of seabed boundary delimitation that we said, 'No, we aren't going to go to court.' That, to me, indicates that we are trying to block Timor from asserting its rights under international law.¹⁴

- 2.17 Several submitters asserted that the timing of the declarations, coming eight years after Australia had ratified the UNCLOS treaty, as well as Australia's decision not to announce their intentions to make such declarations before doing so, indicated that the declarations were clearly made with the intention of preventing Timor-Leste from achieving a swift and equitable resolution to the Timor Sea maritime boundary upon it gaining independence from Indonesia.¹⁵ For example, the Timor Sea Justice Campaign submitted:

The Australian Government's withdrawal of recognition happened just two months before Timor-Leste became an independent nation, knowing that the Timorese would want to negotiate—as is their right—permanent

¹² Professor Donald R. Rothwell and Katherine Arditto, ANU College of Law, *Submission 3*, p. 4.

¹³ Professor A.L. Serdy, *Submission 6*, p. 5 (emphasis in original). See also: Professor A.L. Serdy, *Supplementary Submission 6.1*, p. 3; Professor Clinton Fernandes, *Supplementary Submission 2.1*, p. 1.

¹⁴ Professor Clinton Fernandes, *Committee Hansard*, 2 December 2019, p. 4.

¹⁵ La'o Hamutuk, *Submission 1*, p. 5; Timor Sea Justice Campaign, *Submission 4*, p. 1; The Hon Steve Bracks AC, *Submission 5*.

maritime boundaries with their neighbours in accordance with international law.

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

Turning your back on the independent umpire is a pretty clear sign that you do not intend to play by the rules. The Australian Government shunned international law and bullied its way into a series of temporary resource sharing arrangements that significantly short-changed Timor-Leste.¹⁶

- 2.18 La'o Hamutuk, the Timor-Leste Institute for Development Monitoring and Analysis, submitted:

In March 2002, Australia unilaterally withdrew from international mechanisms for resolving maritime boundary disputes under UNCLOS and the [ICJ]. At that time, Australia was worried that a binding, impartial, third-party ruling might not allow it to continue to take resources from territory which Australia now acknowledges belongs to Timor-Leste. Australia demonstrated how a large nation could violate the sovereign rights of a small neighbour, rejecting international mechanisms in favour of inherently unequal bilateral negotiations.¹⁷

Effect of the declarations on maritime boundary negotiations and general relations with Timor-Leste

- 2.19 Submitters discussed whether Australia's 2002 declarations had materially affected subsequent maritime boundary negotiations with Timor-Leste, as well as the impact on broader bilateral relations between the two countries.
- 2.20 Professor Rothwell and Ms Arditto argued that Australia's 2002 declarations have not had the effect of removing other states' ability to pursue international legal proceedings against Australia:

There is no evidence that other States have been completely barred from commencing international legal proceedings against Australia in the ICJ as is evidenced by Timor-Leste commencing proceedings against Australia in the 2014 *Documents and Data* case. Likewise, notwithstanding Australia's Article 36(2) ICJ declaration and Article 298 UNCLOS declaration, Timor-Leste was able to commence compulsory conciliation proceedings against Australia in reliance upon Article 298(1)(a) which facilitated the negotiation of the 2018 Timor Sea Treaty.¹⁸

- 2.21 Professor Fernandes contested these points, arguing that: the 2014 *Documents and Data* case was not a case about maritime boundary delimitation, and

¹⁶ Timor Sea Justice Campaign, *Submission 4*, p. 1.

¹⁷ La'o Hamutuk, *Submission 1*, p. 5.

¹⁸ Professor Donald R. Rothwell and Katherine Arditto, *Submission 3*, p. 12.

'therefore completely irrelevant' to the committee's inquiry; and furthermore that Australia resisted Timor-Leste's attempts to commence compulsory conciliation, and only submitted to those proceedings after it had challenged the jurisdiction of the Compulsory Conciliation Commission and lost.¹⁹

- 2.22 The Timor Sea Justice Forum submitted that Australia's withdrawal from the jurisdiction of ITLOS and the ICJ and the events which flowed from that decision 'have had detrimental effects on the nation of Timor-Leste, on Australia's standing with other nations, on Australia's regional reputation, and on Australians themselves':

The Timorese government and people have had to spend inordinate amounts of time, effort and money opposing the Australian determination to grasp as much revenue from the Timor Sea as possible. Instead of receiving comprehensive and genuine good faith support from Australian governments, the Timorese have had to devote their diplomatic and financial structures to protect their sovereign maritime rights.²⁰

- 2.23 Professor Fernandes argued that the issue of Australia's 2002 declarations and subsequent difficulties in maritime boundary negotiations had severely impacted the bilateral relationship between Australia and Timor-Leste:

[This issue] just dogged the bilateral relationship for 16 years. It dogged the whole bilateral relationship. Timor was basically forced into one temporary revenue sharing agreement after the next. From the Timor Sea treaty to a treaty in 2005 to the International Unitisation Agreement. Then the CMATS, certain maritime arrangements in the Timor Sea 2007. Then there was another epic after that, which was the entire allegations of espionage and International Court of Justice proceedings to recover documents that were seized. The whole thing could have been avoided had we simply said, 'Timor, you have the right to take us to court if you believe that you have a good case. We believe in the rules based international order. Take us to court if you believe you have a good case.' If they win, they win. If they lose, they lose. That way the burden, or the blame for their loss, would have rested on the neutral umpire, the [ICJ], not on the Australian government. Sixty five per cent of Timor's population is under the age of 21. They remember this. This is not a good look for us.²¹

- 2.24 La'o Hamutuk submitted that the outcome achieved through the 2018 Timor Sea Treaty 'could have been accomplished sooner and more fairly if Australia had accepted a process of third-party arbitration or judicial decision under international law'.²²

- 2.25 Professor Serdy commented:

¹⁹ Professor Clinton Fernandes, *Supplementary Submission 2.1*, pp. 2 and 4.

²⁰ Timor Sea Justice Forum, *Submission 7*, p. 2.

²¹ Professor Clinton Fernandes, *Committee Hansard*, 2 December 2019, p. 3.

²² La'o Hamutuk, *Submission 1*, p. 1.

[T]he 2002 declarations were poor legal policy: by giving Australia a false sense of security in relation to Timor-Leste, they allowed political tensions related to the boundary to fester to such a degree that their resolution by the...2018 treaty ultimately required much greater concessions than the most unfavourable outcome conceivable had the boundary instead been adjudicated on Timor-Leste's unilateral application by the ICJ or under UNCLOS dispute settlement.²³

- 2.26 Mr Larsen of DFAT maintained that negotiations, ultimately through the Compulsory Conciliation Committee, had produced a successful outcome in resolving the Timor Sea maritime boundary:

If you look at the history of the conciliation process that produced the treaty that is now in force between Australia and Timor-Leste, that reinforces our very firm view that the most appropriate way to resolve maritime boundary disputes or boundary disputes of any sort is by negotiation and then having a negotiated process. That really was the critical achievement of the conciliation process. In effect, it brought two parties, which were very much at odds with each other in relation to a very wide variety of matters, to a position where they were able, sensibly, to negotiate an arrangement that was mutually acceptable. Insofar as that arrangement deals with previous arrangements, that reflects where the party's landed as a consequence of the negotiation. I think the evidence supports the view that the end result is highly satisfactory for all sides.²⁴

- 2.27 DFAT representatives argued that events around the conclusion of the 2018 treaty and the 20th anniversary of Timor-Leste's vote for independence in 2019 have 'laid the groundwork for a positive transformation of the relationship' between Australia and Timor-Leste.²⁵

Potential effects of revoking Australia's 2002 declarations

- 2.28 A number of submitters argued that Australia should withdraw its declarations made under Article 298 of UNCLOS and Article 36(2) of the ICJ Statute and replace them with new declarations which submit maritime boundary disputes to the jurisdiction of the ICJ or ITLOS without reservation.²⁶
- 2.29 Submitters noted that withdrawing Australia's 2002 declarations is unlikely to have a practical impact on future maritime boundary negotiations; arguments for withdrawing the declarations were primarily centred around the symbolic effect that this could have in acknowledging a perceived historic wrong and enhancing Australia's international standing.

²³ Professor A.L Serdy, *Submission 6*, p. 4.

²⁴ Mr James Larsen, Chief Legal Officer, DFAT, *Committee Hansard*, 2 December 2019, p. 21.

²⁵ Mr James Larsen, Chief Legal Officer, DFAT, and Ms Julie Heckscher, First Assistant Secretary, Southeast Asia Division, DFAT, *Committee Hansard*, 2 December 2019, p. 21.

²⁶ La'o Hamutuk, *Submission 1*, p. 1; Timor Sea Justice Campaign, *Submission 4*, pp. 1–2; The Hon Steve Bracks AC, *Submission 5*, p. 6; Timor Sea Justice Forum, *Submission 7*, p. 5; Josephite Justice Office, *Submission 8*, p. 2.

Practical impact of revoking Australia's declarations

- 2.30 Professor Serdy noted that, with a treaty delimiting Australia's maritime boundary with Timor-Leste having been settled, very few of Australia's other maritime boundaries remain undelimited.²⁷ Professor Serdy argued that for this reason, the declarations under UNCLOS Article 298 and ICJ Statute Article 36 'are now largely of historical interest only'.²⁸ This view was echoed by Professor Fernandes.²⁹
- 2.31 Professor Rothwell noted that there was one outstanding issue relating to Australia's maritime boundaries that could still prove consequential:

There is an interesting outstanding issue in terms of the so-called Perth treaty between Australia and Indonesia. It was negotiated [in 1997]. It is yet to enter into force, because Indonesia has yet to ratify that treaty. If Indonesia were to say to Australia, 'Look, we're not going to ratify that treaty and, rather, we'd like to go back and renegotiate it,' that would throw a significant spanner in the works in terms of Australia's maritime boundary arrangements with Indonesia in that part of the Indian Ocean. So that's a very significant maritime boundary issue that remains outstanding.³⁰

Effect on Australia's international standing

- 2.32 Some submitters argued that resubmitting fully to the jurisdiction of the ICJ and ITLOS in relation to maritime boundary disputes would enhance Australia's standing in the international community. For example, the Hon Steve Bracks AC submitted that revoking Australia's 2002 declarations 'would send a signal to the world that Australia is a cooperative global citizen and a willing participant in the international rules-based order'.³¹
- 2.33 The Timor Sea Justice Campaign submitted similarly:

Because the Australian Government still does not recognise the full jurisdiction of the [ICJ] and the [ITLOS], Australian foreign ministers continue to have a serious credibility gap when they call on countries, like China, to follow international maritime law and heed various court rulings, when we ourselves do not fully recognise those same courts.

Respect for international law and the role of independent arbitration in settling disputes between countries is vital for Australia's security and reputation. We therefore urge the Committee to recommend that the

²⁷ Professor A.L. Serdy, *Submission 6*, p. 4. A portion of Australia's maritime boundary with France (east of New Caledonia) is currently undelimited, as are Australia's maritime boundaries with Norway, France and New Zealand in respect of the Australian Antarctic Territory. None of these are viewed as problematic.

²⁸ Professor A.L. Serdy, *Submission 6*, p. 4.

²⁹ Professor Clinton Fernandes, *Submission 2*, p. 2.

³⁰ Professor Donald Rothwell, *Committee Hansard*, 2 December 2019, p. 11.

³¹ *Submission 5*, p. 6.

Australian Government immediately resubmit its recognition to the complete jurisdiction of the [ICJ] and the [ITLOS].³²

- 2.34 Professor Serdy submitted that 'the case for retention of the declarations is...weak, even though in practice it is too late for anything significant to be achieved by withdrawing them'.³³

[W]ithdrawal or amendment of these declarations would in reality change very little. That said, it would be a welcome acknowledgement nonetheless that the 2002 declarations were poor legal policy[.]³⁴

- 2.35 Professor Serdy commented further at the committee's public hearing:

I certainly wouldn't oppose withdrawing the declaration. In fact, I'd be quite happy to see it happen. I'd just caution, though, that it wouldn't actually achieve anything concrete. It would really be just of symbolic value. It would be to say, we made a mistake in 2002 and we're sorry and we won't do it again.

Senator PATRICK: All right. But do you think it would give us additional standing in the context of the rule based order regime or philosophy that we purportedly aspire to?

Prof. Serdy: I think it would certainly do no harm in that regard, and it might do a little bit of good. I wouldn't expect too much of it, though. Otherwise, I'd be more enthusiastic.³⁵

- 2.36 When questioned whether Australia's 2002 declarations may make it more difficult for Australia to maintain that it fully respects the rules-based international order and encourage other states to do the same, Mr Larsen of DFAT responded:

I wouldn't concede that. I think that the declarations that have been made by Australia are perfectly proper. They reflect our particular circumstances. They have been in place for a considerable period of time. Since they've been in place, we have had a very satisfactory negotiation with Timor-Leste to resolve our maritime boundary with Timor-Leste. So, no, I would not accept the proposition that those declarations in any way undermine Australia's standing in relation to the rules based order. Indeed, I think the capacity effectively to have arrangements which foreshadow how you will engage with other states in relation to disputed matters underscores our integrity as a nation.³⁶

- 2.37 On the specific issue of whether Australia's 2002 declarations should be withdrawn, Mr Larsen commented:

³² Timor Sea Justice Campaign, *Submission 4*, pp. 1–2. See also: La'o Hamutuk, *Submission 1*, pp. 5–6.

³³ Professor A.L. Serdy, *Submission 6*, p. 5.

³⁴ Professor A.L. Serdy, *Submission 6*, p. 4.

³⁵ *Committee Hansard*, 2 December 2019, p. 9.

³⁶ Mr James Larsen, Chief Legal Officer, DFAT, *Committee Hansard*, 2 December 2019, p. 22.

Ultimately, that is a decision for a government at the political level. My recommendation would be not to withdraw those declarations.

Senator PATRICK: And you'd make that recommendation because—

Mr Larsen: For the rationale that has been given consistently in relation to them: that certainly the view of the Department of Foreign Affairs and Trade is that these boundary delimitation matters are better resolved through negotiation rather than litigation.³⁷

Committee view

- 2.38 This inquiry has considered the question of whether Australia's 2002 declarations under the United Nations Convention on the Law of the Sea (UNCLOS) and the Statute of the International Court of Justice 1945 (ICJ Statute) should be revoked, and new declarations made which submit maritime delimitation disputes to the jurisdiction of the ICJ or the International Tribunal for the Law of the Sea (ITLOS).
- 2.39 The committee notes that, with the conclusion of the 2018 Maritime Boundaries Treaty between Australia and Timor-Leste, a historic agreement has been reached which brings to an end over 40 years of uncertainty over our shared maritime border. This agreement, which has been welcomed by all parties, provides an equitable outcome for Timor-Leste and Australia and gives certainty around arrangements into the future, including mechanisms for resolving ongoing issues.
- 2.40 The committee heard that, now this treaty has been formalised, the prospects of Australia having to undertake significant maritime boundary negotiations with other nations in the future are remote. In this context, the committee agrees with submitters and witnesses who gave evidence that Australia's 2002 declarations are now largely of historical interest only.
- 2.41 Given that revoking these declarations would appear to have negligible practical impact, the committee considers that such a revocation should not be advanced at this time.

Senator Kimberley Kitching
Chair

³⁷ Mr James Larsen, Chief Legal Officer, DFAT, *Committee Hansard*, 2 December 2019, p. 23.

Dissenting comments by Senator Rex Patrick

Pushing the Boundaries Too Far

Not Happenstance

- 1.1 I thank the Committee and Secretariat for their work in relation this inquiry. Its report reflects the expert evidence received by the Committee. It fails, however, to properly consider the context in which the actions of the Australian Government occurred and, in doing so, makes the wrong finding.
- 1.2 Australia's declarations, lodged on 22 March 2002 to limit Australia's acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and the International Tribunal on the Law of the Sea (ITLOS), were not mere happenstance. The declarations were part of Australia's most shameful international swindle.

Declarations Context

- 1.3 As early as 1962 Australia had established that there were significant oil and gas reserves beneath the Timor Sea. It set about trying to gain access to these reserves.
- 1.4 Important to the following, it must be appreciated that Timor-Leste is flanked on either side by Indonesia.
- 1.5 Australia and Indonesia had negotiated a maritime boundary in 1972 based on a natural prolongation of the continental shelf, resulting in a boundary much closer to Indonesia than to Australia. Indonesia agreed to the boundary in exchange for Australia's support of the concept of archipelagic waters in the Law of the Sea Convention (LOSC) of 1982, which entered into force in November 1994. Australia had thus gained the majority of oil and gas resources that might be discovered in the seabed. For its part, Indonesia benefited from the archipelagic waters concept because it gained significant rights to the seas between its many islands.
- 1.6 Noting that Indonesia flanked Portuguese Timor, this left a gap in the boundary line colloquially known as the 'Timor Gap'. Australia was thus in the best possible position for negotiating with Portugal in respect of the area south of Portuguese Timor. The location of the boundary points at either end of the gap provided a most favourable situation for Australia in respect of the significant resources that were under the Timor Sea.
- 1.7 Frustratingly for Australia, but consistent with LOSC, Portugal's approach to the boundary line was much different to Indonesia's, with Portugal insistence

on a median line. Portugal's positions became insignificant, however, when in 1974 it granted independence to all of its colonies.

- 1.8 1974 was also the year that Woodside manoeuvred the 'Big John' drill into place and drilled the seabed, quickly confirming the presence of oil and gas. Viqueque, a town on the south coast of Portuguese Timor was used as the base for the drilling operation, on account of the fact that the drilling was taking place much closer to Portuguese Timor than Australia.
- 1.9 Australia, focussing on the oil and gas and the significant financial windfall that would be obtained if the Timor Gap were closed with a straight line, took the stance that Portuguese Timor should not gain independence and then Prime Minister Whitlam encouraged Indonesia to annex Timor. Indonesia set about preparing to invade Timor, and after Prime Minister Fraser re-confirmed Australia's position, following the Whitlam dismissal, Indonesia invaded Portuguese Timor in 1975. In the war that followed, more than 200,000 East Timorese died at the hands of the Indonesian military.
- 1.10 Still chasing the oil and gas, Australia fully recognised Indonesian sovereignty over East Timor even though it acknowledged privately that Indonesia's invasion of East Timor was 'outright aggression' and 'contrary to Article 2(3) and (4) of the Charter'¹. Australia was the only western country to extend de jure recognition of Indonesian sovereignty; in 1989, Australia's Foreign Minister, Gareth Evans, signed the Timor Gap Treaty with Indonesia's Foreign Minister, Ali Alatas, sipping on champagne and posing for photographs.
- 1.11 Australia's plans fell apart when, against all odds, Timor-Leste gained independence in 2002.
- 1.12 Australia was aware of the decision by the International Court of Justice in a case between Libya and Malta in 1985. Libya relied on the principle of natural prolongation of its continental shelf whereas Malta relied on the principle of equidistance—a median line—between the two countries. The ICJ dismissed Libya's argument, and said that irrespective of the undersea geology, both countries had rights based on equidistance². In other words, international law favoured the East Timorese, and Australia knew it.
- 1.13 It was under these circumstances, with Timor-Leste was at last able to exercise its rights under international law, that Australia issued the declarations.

¹National Archives of Australia: A1838, 935117/3, iii. Cited in Clinton Fernandes, *Island off the Coast of Asia* (Clayton: Monash University Publishing, 2018), 46.

² ICJ, Case Concerning the Continental Shelf Libyan Arab Jamahiriya/Malta, Judgment of 3 June 1985. <http://www.icj-cij.org/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>

Declaration Motivated by Greed

- 1.14 The 2002 declaration was made to allow Australia to steal oil and gas from the newest and one of the most impoverished countries in the world. The Committee politely alludes to this in circumstances where brutal frankness should prevail.
- 1.15 At the time of the declarations the Australian Labor Party took a strong and principled view. A joint media released by the Shadow Minister for Foreign Affairs, Kevin Rudd MP, and the Shadow Attorney-General Robert McClelland MP, stated the party's position in the following terms:

RESTRICTIONS ON INTERNATIONAL DISPUTE RESOLUTION CONDEMNED

Changes to Australia's approach to international dispute resolution were condemned today by Shadow Foreign Minister Kevin Rudd and Shadow Attorney-General Robert McClelland. The most significant of the changes announced on Monday by the Foreign Minister and the Attorney-General was the exclusion of maritime boundary delimitation disputes and related matters from compulsory international dispute resolution forums previously accepted by Australia.

"The timing of the Government's announcement is unfortunate," Mr Rudd and Mr McClelland said. "It coincides with reports that an oil company is encouraging East Timor not to sign the recently-agreed treaty with Australia on Timor Sea oil resources, and that the same company has offered to finance international litigation by East Timor contesting the maritime boundaries between Australia and East Timor."

"There is no evidence that East Timor intends to embark on such litigation, or that it would have any prospects of success. However, the Government's action to preclude compulsory dispute settlement in this kind of matter may give rise to a misconception that Australia is not certain of the merits of its claims."

"This announcement marks a historic departure from Australia's proud record of accepting the compulsory jurisdiction of the International Court of Justice without reservation. That position has enjoyed bipartisan support since 1975. It said to the world that Australia honours its international obligations and has nothing to hide."

"Excluding disputes related to the delimitation of maritime boundaries from our acceptance of the ICJ's jurisdiction sends a very different message."

"It says that we are not prepared to argue the legitimacy of any of our international boundaries in international tribunals. It casts doubt on our commitment to the ICJ as an important element of the international legal order. And it invites other countries to follow suit by lodging new exceptions to their acceptance of ICJ jurisdiction. All of this counts against Australia's interests in having the ICJ recognised as a forum for

the peaceful settlement of a wide range of international disputes when negotiation and arbitration have failed."

"Excluding maritime boundary delimitation disputes from our acceptance of the International Tribunal for the Law of the Sea as a forum for compulsory dispute settlement sends equally negative messages."

Further Sordid Behaviour

1.16 Of course, the sordid story does not stop there. As touched on lightly by the Committee, during further negotiations between Australia and Timor-Leste, Australia's external intelligence agency, ASIS, spied on the East Timorese negotiating team, unconscionably establishing what East Timor's negotiation bottom line was. The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) was signed in 2007 with Australia obtaining a most advantageous outcome.

1.17 There can be no question that the spying operation occurred. The Committee is wrong to perpetuate the spying operation as an 'alleged' operation. There is nothing 'alleged' or hypothetical about it. Australia spied. Timor-Leste in its memorial before the ICJ in response to Australia raiding the offices of its legal counsel in 2013, stated³:

1.3. This case is brought by Timor-Leste against Australia seeking a declaration that the Timor Sea Treaty 2002 ('the 2002 Treaty') remains in force in the form and with the text as it stood when the Treaty was signed by the Parties on 20 May 2002.

Specifically, Timor-Leste seeks from the Tribunal a declaration that Article 22 of the 2002 Treaty remains valid and operative in its original terms notwithstanding the provisions of Article 3 of the Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea 2006 ('the 2006 Treaty'). Timor-Leste submits that the amendments to the 2002 Treaty that the 2006 Treaty purported to make are void and inapplicable due to the ineffectiveness of the 2006 Treaty.

1.4 The circumstances... are that during the negotiation of the 2006 Treaty between Timor-Leste and Australia in 2004, Australia covertly spied on the Timor-Leste negotiating team by means of listening devices surreptitiously and unlawfully placed by Australian personnel in the Timor-Leste government offices. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and of its position in relation to various issues arising in connection with the 2002 Treaty and the attempt to amend it by the drafting of the 2006 Treaty. The extent to which the Australian team made use of this illicitly obtained information cannot be determined, but in any case that is not an issue. It is enough that Australia put itself in a position to anticipate the negotiating stance of

³<https://www.icj-cij.org/en/case/156/written-proceedings>

Timor-Leste, and the reasoning underlying that stance, and to benefit from that knowledge.

1.5 This conduct on the part of Australia violated customary international law in that it was manifestly done in bad faith, contrary to the requirement of good faith which is a fundamental legal principle governing relations between States. Such behaviour is analogous to fraud or corruption, grounds which are specifically recognised in the Vienna Convention on the Law of Treaties 1969 ('the VCLT') as bases for vitiating the apparent consent of a State to be bound by a treaty. These rules and principles of international law apply to the provisions in the 2006 Treaty that purported to amend the 2002 Treaty, with the result that those provisions are void and without legal effect and are thus incapable of amending the 2002 Treaty.

- 1.18 Two men, Witness K and Bernard Collaery, are facing charges in the ACT over revealing the ASIS operation.
- 1.19 On 4 April 2019 the Secretary of the Attorney General's Department, Greg Moraitis, appeared before the Senate's Legal and Constitutional estimates hearings. Mr Moraitis was, as it turns out, on the Australian negotiating team for CMATS. The following exchange occurred:

***Senator PATRICK:** Are you aware of the allegations, in respect of Australia spying on the negotiating team of the East Timorese*

***Mr Moraitis:** I'm aware of that. There's a criminal case in the ACT. I'm well aware of it.*

***Senator PATRICK:** Sure. And I presume most criminal cases are not launched on the basis of a fictitious operation.*

***Mr Moraitis:** I would hope not.*

- 1.20 The Committee should not allow its credibility to be undermined by expressing doubt about what we all know to be true – Australia spied on Timor-Leste.

Declarations Should Be Revoked

- 1.21 The declarations made by Australia on 22 March 2002 were part of an Australian Government swindle on the nascent state of Timor-Leste. They should be recognised as such. As Professor Fernandes said in his supplementary submission, 'of the 21 States that made declarations under Article 298(1)(a) of LOSC, only nine also made declarations under Article 36(2) of the ICJ Statute. And out of these nine, only Australia explicitly excluded sea boundary delimitation disputes from the jurisdiction of the ICJ'.
- 1.22 Australia should revoke the declarations for two important reasons:

- It would serve as an important reconciliation step with the people of East Timor.
- It would enhance our standing in the internationally community as a returning participant in the international rules-based order.

1.23 That Labor has retreated from its principled position following the declarations being made is hugely disappointing.

1.24 In recommending things should stay the same the Liberal and Labor members of the committee join in the effort of rowing Australia's Timor-Leste boat of shame.

Recommendation:

Australia should revoke the declarations made on the 22 March 2002.

Rex Patrick

Senator for South Australia

Appendix 1

Submissions and Answers to questions on notice

- 1 La'o Hamutuk
- 2 Professor Clinton Fernandes
 - 2.1 Supplementary to submission 2
- 3 Professor Donald R. Rothwell and Ms Katherine Arditto
- 4 Timor Sea Justice Campaign
- 5 The Hon Steve Bracks AC
- 6 Professor A.L. Serdy
 - 6.1 Supplementary to submission 6
- 7 Timor Sea Justice Forum
- 8 Sisters of Saint Joseph
- 9 Mr Geoff Taylor
- 10 Department of Foreign Affairs and Trade
- 11 Mr Dominic WY Kanak

Answer to Question on Notice

- 1 Department of Foreign Affairs and Trade - Answers to questions on notice taken at a public hearing held 2 December 2019, Canberra (Received 24 January 2020).

Appendix 2

Public hearing and witnesses

Monday, 2 December 2019

Committee Room 2S1

Parliament House

Canberra

Professor Clinton Fernandes, Private capacity

Professor Donald R. Rothwell, Private capacity

Professor A.L. Serdy, Private capacity

Department of Foreign Affairs and Trade

- Mr James Larsen, Chief Legal Officer
- Ms Julie Heckscher, First Assistant Secretary, Southeast Asia Division
- Mr Justin Whyatt, Assistant Secretary (Legal Adviser)

Attorney-General's Department

- Ms Anne Sheehan, Assistant Secretary, Office of International Law