

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Report 180

Peru FTA; EU Framework Agreement; Timor Treaty-Maritime Boundaries; WIPO Australian Patent Office; Scientific Technical Cooperation: Italy and Brazil

Joint Standing Committee on Treaties

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August 2018
CANBERRA

Executive Summary

This Report contains the Committee's review of seven treaty actions:

- *Free Trade Agreement between Australia and the Republic of Peru* (Canberra, 12 February 2018);
- *The Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments* (Lima 7 December 1995);
- *Framework Agreement Between Australia, of the one part and the European Union and its Member States, of the other part* (Manila, 7 August 2017)
- *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* (New York, 6 March 2018);
- *Agreement between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty;*
- *Agreement on Scientific, Technological and Innovation Cooperation between the Government of Australia and the Government of the Italian Republic* (Canberra, 22 May 2017); and
- *Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation* (Canberra, 7 September 2017).

The *Free Trade Agreement between Australia and the Republic of Peru* (PAFTA) is intended to open new trade and investment opportunities for Australia.

Negotiations for PAFTA were entered into in the wake of the collapse of the Trans-Pacific Partnership Agreement and in tandem with the negotiations for the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11). PAFTA is expected to provide better market access than that obtained under the

TPP-11. The Committee is currently reviewing the TPP-11. It found that many of the issues raised in this inquiry were also addressed in the TPP-11 inquiry and has chosen to review those common issues in more detail in its report on the TPP-11.

The Committee acknowledges the ongoing concerns caused by the continuing proliferation of trade agreements with the same partners, and that the complexity of entering these markets may be hindering businesses from taking full advantage of the opportunities presented. It encourages the Department of Foreign Affairs and Trade (DFAT), other relevant departments and umbrella organisations to continue developing and providing practical assistance that will assist Australian businesses, particularly small businesses, to navigate the available agreements and engage in these markets.

The European Union (EU) Framework Agreement formalises a range of existing bilateral cooperation and dialogue processes between the Australia and the EU. The Committee recognises the need for this aspirational Agreement to reaffirm commitment to high-level political dialogue, shared values and the common principles that underpin the bilateral relationship between Australia and the EU.

The Committee welcomes the finalisation of the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea*. The Agreement settles a permanent maritime boundary between Australia and Timor-Leste, bringing certainty after some fifty years of controversy.

The Agreement with the International Bureau of the World Intellectual Property Organization (WIPO) ensures that the Australian Patent Office remains an International Authority, able to provide an important service for both Australian and international clients.

The two Agreements on scientific technical cooperation, one with Italy the other with Brazil, reinforce Australia's commitment to international cooperation in scientific and technological fields with two important partners.

The Committee has recommended that all of the six treaty actions be ratified and binding treaty action be taken in each case. The termination agreement for the Peru-Australia investment treaty will happen automatically when PAFTA comes into effect.

The Report also contains the Committee's review of the following four minor treaty actions:

- Protocol to Amend Annex 2 and Annex 5 of the *Thailand-Australia Free Trade Agreement* (Protocol);
- *Fifth Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the*

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
AFTINET	Australian Fair Trade and Investment Network
DFAT	Department of Foreign Affairs and Trade
DIIS	Department of Industry, Innovation and Science
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IP	Intellectual Property
IPEA	International Preliminary Examining Authority
ISA	International Searching Authority
ISDS	investor-state dispute settlement
JSCOT	Joint Standing Committee on Treaties
LNG	liquefied natural gas
MCA	Minerals Council of Australia
METS	mining equipment, technology and services
NFF	National Farmers' Federation
NIA	National Interest Analysis
OBPR	Office of Best Practice Regulation
RIS	Regulation Impact Statement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TPP	Trans-Pacific Partnership
UNCLOS	United Nations Convention on the Law of the Sea
UNTAET	United Nations Transitional Administration in East Timor
US	United States
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Members

Chair

Hon Stuart Robert MP

Deputy Chair

Hon Michael Danby MP

Members

Mr John Alexander OAM, MP

Senator Slade Brockman

Mr Chris Crewther MP

Senator David Fawcett

Senator Sarah Hanson-Young

Mr Ross Hart MP (from 21May 2018)

Senator the Hon Kristina Keneally

Senator Kimberley Kitching

Senator the Hon Ian Macdonald

Mrs Nola Marino MP

Senator Jenny McAllister

Ms Susan Templeman MP

Mr Ross Vasta MP

Mr Andrew Wallace MP

Mr Josh Wilson MP (to 10 May 2018)

Committee Secretariat

Ms Julia Morris, Committee Secretary

Dr Narelle McGlusky, Inquiry Secretary

Mr Anthony Overs, Inquiry Secretary

Mr Kevin Bodel, Senior Research Officer

Ms Cathy Rouland, Office Manager

Terms of Reference

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

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

List of Recommendations

Recommendation 3

4.81 The Committee supports the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* and recommends that binding treaty action be taken.

1. Introduction

1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions:

- *Free Trade Agreement between Australia and the Republic of Peru* (Canberra, 12 February 2018) (PAFTA);
- *The Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, Lima 7 December 1995* (IPPA);
- *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* (New York, 6 March 2018) (Timor Treaty Maritime Boundaries);
- *Framework Agreement Between Australia, of the one part and the European Union and its Member States, of the other part* (Manila, 7 August 2017) (EU Framework Agreement);
- *Agreement between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty* (WIPO Australian Patent Office);
- *Agreement on Scientific, Technological and Innovation Cooperation between the Government of Australia and the Government of the Italian Republic* (Canberra, 22 May 2017) (Scientific Technical Cooperation: Italy); and
- *Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation* (Canberra, 7 September 2017) (Scientific Technical Cooperation: Brazil).

- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.
- 1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.
- 1.4 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.5 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The Peru Free Trade Agreement was the only treaty examined in this report that required a RIS.
- 1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 Copies of the treaties considered in this report and the associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/PeruFTA/Treaty_being_considered;
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TimorTreaty/Treaty_being_considered;
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/EUFrameworkAgreement/Treaty_being_considered;
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/WIPOPatentOffice/Treaty_being_considered;
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ScienceTechnicalItaly/Treaty_being_considered;
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ScienceTechnicalBrazil/Treaty_being_considered.
- 1.8 This report also contains the Committee's views on four minor treaty actions:

- Protocol to Amend Annex 2 and Annex 5 of the *Thailand-Australia Free Trade Agreement* (Protocol);
- *Fifth Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17* (Fifth Protocol);
- Amendments to the *Agreement on the Conservation of Albatrosses and Petrels* (ACAP); and
- Amendments to the *Annex of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocols of 1978 and 1997 relating thereto* Amendments to Annex VI (Designation of the Baltic Sea and the North Sea Emission Control Areas for NOx Tier III control) Resolution MEPC.286(71).

Conduct of the Committee's review

1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaty actions were requested by the dates set out in Table 1.1. The number of submissions received for each inquiry is also listed.

Table 1.1 Submission dates for treaty actions

Treaty action	Submission date	No of submissions received
Peru FTA	20.03.18	10
Timor Treaty Maritime Boundaries	20.03.18	12
EU Framework Agreement	20.03.18	6
WIPO Australian Patent Office	25.05.18	0
Scientific Technical Cooperation: Italy	25.05.18	1
Scientific Technical Cooperation: Brazil	25.05.18	1

- 1.10 The Committee held public hearings into the treaty actions as set out in Table 1.2. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee’s website as listed above.

Table 1.2 Public hearings for treaty actions

Treaty action	Public hearing dates
Peru FTA	07.05.18
Timor Treaty Maritime Boundaries	07.05.18
EU Framework Agreement	07.05.18
WIPO Australian Patent Office	18.06.18
Scientific Technical Cooperation: Italy	18.06.18
Scientific Technical Cooperation: Brazil	18.06.18

- 1.11 A list of submissions received for the inquiries is at Appendix A. A list of exhibits received for the inquiries is at Appendix B. A list of witnesses who appeared at the public hearings is at Appendix C.

4. Timor Treaty-Maritime Boundaries

Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea

Introduction

- 4.1 This Chapter reviews the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* (the Agreement) which was signed in New York on 6 March 2018 and tabled in the Parliament on 26 March 2018.

Background

- 4.2 The Timor Sea maritime boundary has been in dispute since the 1970s. Australia has negotiated with Portugal (1971–1975), Indonesia (1975–1999), the United Nations Transitional Administration in East Timor (UNTAET) (1999–2001) and Timor-Leste successively in attempts to establish a permanent boundary.¹ A gap was left in the Indonesia and Australia maritime boundary established in 1972 which became known as the Timor Gap. In 1989 Australia came to an agreement with Indonesia regarding this

¹ Professor Donald R. Rothwell, *Submission 8*, para 2.

area in order to establish a 'stable environment for petroleum exploration and exploitation' without prejudicing either country's maritime boundary claims.² The Timor Gap Treaty³ was an interim measure to allow development of the oil and gas reserves in the area:

The outcome was the 1989 Timor Gap Treaty which provided for an innovative joint development that shared the oil and gas revenue on a 50/50 basis in a central area, and a 90/10 revenue split in favour of Indonesia to the north and Australia to the south of the central area.⁴

- 4.3 When Timor-Leste gained its independence in 2002, the Timor Sea Treaty⁵ was signed, implementing a similar joint development scheme between Australia and the new nation as that in the Timor Gap Treaty.⁶ In this case the split was 90/10 in favour of Timor-Leste. Annex E of the Timor Sea Treaty provided for the unitisation of two of the oil and gas deposits, Sunrise and Troubadour, which became known as the 'Greater Sunrise' field.
- 4.4 While these two agreements dealt with ongoing development of the petroleum reserves in the area, attempts to come to agreement over the permanent maritime boundary failed. Instead the two parties agreed on a division of the proceeds from the new Greater Sunrise field and a 50-year moratorium on the maritime boundaries.⁷ As a result three treaties governed maritime arrangements in the Timor Sea without establishing any permanent maritime boundary between Australia and Timor-Leste:
- *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (Timor Sea Treaty) signed in 2002;
 - *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* (International Unitisation Agreement) signed in 2003; and

² Robert J. King, *Submission 6*, p. 29.

³ *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*.

⁴ Professor Donald R. Rothwell, *Submission 8*, para 5.

⁵ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*.

⁶ Professor Donald R. Rothwell, *Submission 8*, para 6.

⁷ Robert J. King, *Submission 6*, p. 65.

- *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS)* signed in 2006.

Conciliation process

- 4.5 Timor-Leste was not satisfied with the outcome of these arrangements and after repeated attempts to renegotiate the Timor Sea Treaty failed, it commenced proceedings against Australia under the *United Nations Convention on the Law of the Sea (UNCLOS)* in April 2016.⁸ This was the first time that the compulsory conciliation process had been invoked. A Conciliation Commission was established consisting of five members who met from July 2016 to September 2017, bringing down its report on 9 May 2018.⁹
- 4.6 Australia and Timor-Leste took opposing views on the delimitation of any proposed maritime boundary. Timor-Leste supported the principle of 'equidistance' under which a median line should be drawn between the two countries.¹⁰ Australia favoured principals of 'natural prolongation'¹¹ which take into consideration geographic and geomorphic conditions, as defined by UNCLOS:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹²

- 4.7 Initially Australia questioned the competence of the Commission on three grounds. However, after consideration the Commission dismissed Australia's objections and the conciliation process proceeded.¹³

⁸ Professor Donald R. Rothwell, *Submission 8*, para 8.

⁹ *The Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea* is available from the Permanent Court of Arbitration website: <https://www.pcacases.com/web/view/132>.

¹⁰ *Report and Recommendations of the Compulsory Conciliation Commission*, p. 67.

¹¹ *Report and Recommendations of the Compulsory Conciliation Commission*, p. 68.

¹² United Nations Convention on the Law of the Sea (UNCLOS), Article 76(1).

¹³ Robert J. King, *Submission 6*, pp. 86–87; Professor Donald R. Rothwell, *Submission 8*, para 8; *Report and Recommendations of the Compulsory Conciliation Commission*, pp. 28–29.

- 4.8 To facilitate the negotiation of the new Agreement, Timor-Leste terminated CMATS in 2017. The Joint Standing Committee on Treaties (JSCOT) examined the consequences of termination of CMATS and reported on it in March 2017.¹⁴
- 4.9 The treaty under review in this Chapter, the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea*, was subsequently agreed to and signed in March 2018. It replaces the Timor Sea Treaty and the International Unitisation Agreement.¹⁵
- 4.10 The outcome is seen as a ‘vindication of the [UNCLOS] process’ and setting a precedent for conciliation to ‘be utilised to settle other law of the sea disputes’.¹⁶ At the time of presentation of the treaty in the Parliament, the Hon. Julie Bishop, MP, Minister for Foreign Affairs, called it a ‘landmark for international law and the rules based order’.¹⁷
- 4.11 The Agreement establishes permanent maritime boundaries between Australia and Timor-Leste in the Timor Sea. It also establishes the Greater Sunrise Special Regime for the joint development, exploitation and management of the Sunrise and Troubadour (Greater Sunrise) petroleum deposits.
- 4.12 Figure 4.1, adapted from the Conciliation Commission Report, depicts the maritime boundaries established by the Agreement. The western and eastern lateral boundaries, running from point TA-1 to TA-5 and TA-10 to TA-13 respectively, are continental shelf (seabed) boundaries only. The water column boundaries in these areas are subject to delimitation between Timor-Leste and Indonesia.¹⁸
- 4.13 The southern boundary, running from TA-5 to TA-10, is both a continental shelf and exclusive economic zone (water column) boundary. The western segment of the southern boundary runs above the median line between

¹⁴ National Interest Analysis [2018] ATNIA 3 with attachment on consultation Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (New York, 6 March 2018) [2018] ATNIF 4, hereafter referred to as NIA, para 3; Joint Standing Committee on Treaties (JSCOT), *Report 168: Certain Maritime Arrangements-Timor-Leste*, March 2017, Canberra.

¹⁵ NIA, para 3.

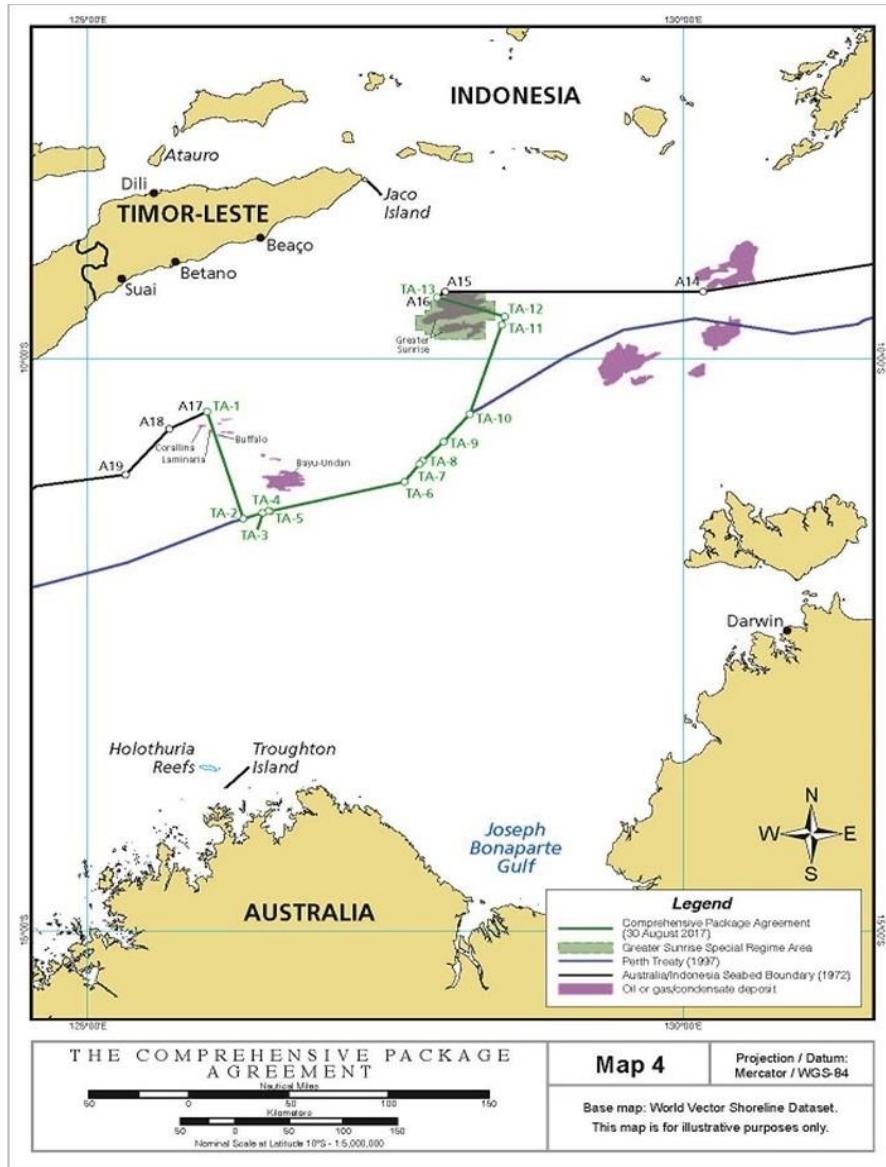
¹⁶ Professor Donald R. Rothwell, *Submission 8*, para 8.

¹⁷ Hon. Julie Bishop, MP, Minister for Foreign Affairs, *House of Representatives Hansard*, 26 March 2018, p. 70.

¹⁸ NIA, para 27.

Australia and Timor-Leste. The eastern segment of the southern boundary runs along the median line between Australia and Timor-Leste.¹⁹

Figure 4.1 Permanent maritime boundary between Australia and Timor-Leste



Source: Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, p. 79.

¹⁹ NIA, para 28.

Reasons for Australia to take the treaty action

Permanent maritime boundaries

- 4.14 The permanent maritime boundaries established by the Agreement are designed to allay the longstanding concerns of both Australia and Timor-Leste. The NIA states that, while the Treaty was negotiated consistent with Articles 74(1) and 83(1) of UNCLOS, the settlement is based on a ‘mutual accommodation between the Parties without prejudice to their respective legal positions’. It represents a negotiated compromise which, the NIA claims, both countries, and the Conciliation Commission, consider is fair and balanced.²⁰
- 4.15 Questioned on the reception of the result by Australia and Timor-Leste, the Department of Foreign Affairs and Trade (DFAT) acknowledged that there were some reservations but overall, both sides were satisfied with the outcome:

We felt that the result evidenced in the treaty is a fair result for both sides ... the Timorese side were very satisfied with the outcome of the negotiations. In particular, they were very satisfied to have resolved the maritime boundary. I believe they found elements of the package favourable, in the sense that they were pleased with the outcome ... there were other elements in the outcome, including in relation to the development concept, which they were less satisfied with. Overall, the treaty represents a satisfactory package for both sides ... on the Timorese side ... they were very pleased to finally settle on an agreed boundary.²¹

Providing economic benefits to Australia and Timor-Leste and certainty to business

- 4.16 The NIA expects permanent boundaries to provide economic benefit to both Parties and allow for continued development of natural resources in the Timor-Sea by providing certainty and stability for companies with investments in the Timor Sea.²²
- 4.17 The Agreement recognises that both Australia and Timor-Leste may exercise sovereign rights in respect of the Special Regime Area encompassing the

²⁰ NIA, para 10.

²¹ Mr James Larsen, Chief Legal Officer, Legal Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 7 May 2018, p. 33.

²² NIA, para 15.

Greater Sunrise gas fields. The Agreement establishes the Greater Sunrise Special Regime for the joint development, exploitation and management of the Greater Sunrise fields for the benefit of both Parties.²³

- 4.18 The Committee sought clarification on the involvement of commercial interests in the treaty making process. DFAT stressed that the commercial interests were not involved in the treaty negotiations but were consulted regarding the development options:

Certainly, there are very important and ongoing commercial interests in relation to the area subject to the treaty and, particularly in the latter part of the conciliation proceedings where the discussion was about the development options for the Greater Sunrise resource, the companies were closely involved in the discussions about the development concept. But, in an important way, those companies were not involved in the negotiations of the treaty itself, although, of course, the companies are affected by the terms of the treaty.²⁴

- 4.19 The NIA states that the Agreement provides for Australia to receive either 20 or 30 per cent of the upstream revenue from the Greater Sunrise fields depending on the development option chosen: whether by means of a pipeline to a liquefied natural gas (LNG) processing plant in Australia or Timor-Leste.²⁵

- 4.20 Previous evidence to the Committee during its inquiry into the termination of CMATS suggests that the Timorese would like to see the processing plant developed in Timor-Leste.²⁶ DFAT explained that cost considerations could inhibit such an option:

... taking the pipeline down to Australia or taking the pipeline up to Timor-Leste - the crunch is in Timor-Leste you have to build a greenfield LNG plant. The cost of a greenfield LNG plant varies somewhere between \$4 billion and \$8 billion. If you take the pipeline down to Darwin, which is one of the commercial proposals, you don't have to build a new greenfield plant. That's the guts of it. That's where the saving of money is.²⁷

- 4.21 The NIA maintains that the Agreement, and the progress made during the conciliation, provide a platform for reaching agreement on the development

²³ NIA, para 16.

²⁴ Mr Larsen, DFAT, *Committee Hansard*, Canberra, 7 May 2018, pp. 33–34.

²⁵ NIA, para 17.

²⁶ JSCOT, *Report 168*, p. 15.

²⁷ Mr Larsen, DFAT, *Committee Hansard*, Canberra, 7 May 2018, p. 34.

of the Greater Sunrise fields. The Parties are expected to build on the work done by the Conciliation Commission, including its engagement with the Sunrise Joint Venture, to find an outcome that is commercially viable and delivers substantial benefits to Timor-Leste.²⁸

- 4.22 The Agreement includes transitional arrangements that are expected to provide certainty for affected companies. This is consistent with Australia's obligations under the Timor Sea Treaty and International Unitisation Agreement to provide equivalent conditions and terms and reflects both Parties' interest in ensuring that existing operations continue with minimal impact.²⁹
- 4.23 DFAT stressed the importance of the transitional arrangements particularly to existing commercial interests operating in the area:

... there are a number of companies currently operating inside the [Joint Petroleum Development Area], the joint area, and there are obviously some projects and companies that are operating in the adjoining areas. The transitional arrangements obviously are to make sure that essentially those companies can keep doing business and so that the government-to-government negotiations and changes have no practical effect on the way that the companies are operating so that their projects are able to keep going. Australia is heavily involved in those discussions of course.³⁰

Supporting Timor-Leste's economic development

- 4.24 The NIA argues that a stable and prosperous Timor-Leste is in Australia's national interest. Australia is Timor-Leste's largest partner in development and security. The Australian Government will provide an estimated \$96.1 million in total development aid to Timor-Leste in 2017-18.³¹
- 4.25 The NIA notes that despite the progress since independence, the country's economic challenges are considerable. Timor-Leste's economy is oil-dependent with petroleum revenues accounting for 70 per cent of GDP and almost 90 per cent of total government revenue between 2010 and 2015. The

²⁸ NIA, para 18.

²⁹ NIA, para 19.

³⁰ Ms Lisa Scholfield, Acting Head of Resources Division, Department of Industry, Innovation and Science (DIIS), *Committee Hansard*, 7 May 2018, p. 39.

³¹ NIA, para 20.

sole producing petroleum field that Timor-Leste currently derives its revenue from, Bayu-Undan, is nearing the end of its producing life.³²

4.26 According to the NIA, the Agreement is expected to support Timor-Leste's economic development by providing new opportunities for commercial and industrial development. Permanent maritime boundaries will expand Timor-Leste's areas of exclusive maritime jurisdiction, potentially leading to additional income for Timor-Leste as further resources are developed. Timor-Leste will receive all future income revenue from the Bayu-Undan gas and condensate field, which will transfer to Timor-Leste's jurisdiction.³³

4.27 However, La'o Hamutuk (Walking Together), the Timor-Leste Institute for Development Monitoring and Analysis, reminded the Committee that the known oil and gas fields in the contested area are reaching the end of their productive life:

Kitan, Buffalo and Elang-Kakatua have been decommissioned as no longer commercially viable, more than 98% of government revenues from Bayu-Undan have been received, and Laminaria-Corallina is almost empty. Furthermore, the boundaries relevant to Laminaria-Corallina and Greater Sunrise will not be finalized until those fields are exhausted.³⁴

4.28 DFAT told the Committee that Australia will provide approximately \$AU96 million to Timor-Leste in Official Development Assistance (ODA) over the current financial year and this would be used to assist in diversifying the country's revenue base. The Department was asked to elaborate on the specifics of that assistance:

We assist with the economic integration into the region through a trilateral economic process, which we're involved in with the governments of Timor-Leste and Indonesia. There's an economic triangle arrangement between the eastern part of Indonesia, the northern part of Australia and Timor-Leste. We work on things like skills acquisition on education to build up the capacity of the workforce and the people of Timor-Leste to contribute more substantially to the economy. We work with Timor-Leste to support capacity development in areas of infrastructure development and those kinds of things, so there are a variety of activities that we're involved in.³⁵

³² NIA, para 22.

³³ NIA, para 23.

³⁴ La'o Hamutuk, *Submission 3*, p. 3.

³⁵ Mr Jeremy Bruer, Assistant Secretary, South-East Asia Maritime Branch, South-east Asia Division, DFAT, *Committee Hansard*, 7 May 2018, p. 36.

- 4.29 The NIA expects the development of the Greater Sunrise fields to result in substantial additional revenue to Timor-Leste. According to Professor Rothwell, the Greater Sunrise field has been ‘valued at between \$AU40-50 billion’ and it could ‘yield revenue in the vicinity of \$US8-10 billion’.³⁶ The NIA notes that the exact benefit to Timor-Leste and Australia will depend on a range of factors including the economics of the project and prevailing market prices for oil and gas.³⁷
- 4.30 Submitters to the inquiry raised the question of Australia paying compensation to Timor-Leste for the revenue Australia previously gained from the Timor Sea oil and gas fields now within Timor-Leste maritime boundaries.³⁸ Article 10 of the Agreement specifically states that ‘neither Party shall have a claim for compensation with respect to Petroleum Activities conducted in the Timor Sea’.³⁹
- 4.31 However, submitters suggest that this provision does not prevent Australia from voluntarily compensating Timor-Leste.⁴⁰ Submitters claim that Australia’s conduct in this regard has damaged its international reputation and that that damage will remain if Australia does not take steps to redress this issue.⁴¹
- 4.32 DFAT reiterated that the treaty does not provide for compensation and refuted any suggestion that ‘there was anything wrongful with the previous arrangements’.⁴²
- 4.33 The Committee asked DFAT for any information on the economic value of the extractions under the prior treaty arrangements and DFAT provided the following figures:

Since 2000, the combined petroleum revenues (excluding taxation revenue) under the prior treaties and prior arrangements to Timor-Leste and Australia

³⁶ Professor Donald R. Rothwell, *Submission 8*, paragraphs 1 and 26.

³⁷ NIA, para 24.

³⁸ Mr Ian Melrose, *Submission 2*; La’o Hamutuk, *Submission 3*; Uniting Church of Australia, *Submission 11*.

³⁹ *Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea*, Article 10.

⁴⁰ La’o Hamutuk, *Submission 3*, pp. 3–4; Timor Sea Justice Campaign, *Submission 5*, p. 2; Uniting Church of Australia, *Submission 11*, p. 3.

⁴¹ Canberra Friends of Dili, *Submission 4*; Timor Sea Justice Forum NSW, *Submission 7*, p. 3.

⁴² Mr Larsen, DFAT, *Committee Hansard*, 7 May 2018, p. 34.

is approximately US\$13.8 billion. Of this approximately US\$12.4 billion of that has gone to Timor-Leste, with US\$1.4 billion going to Australia. The petroleum revenues are from the Elang Kakatua and Kakatua North oil fields; the Litan oil field and the Bayu-Undan gas-condensate field.⁴³

- 4.34 However, submitters to the inquiry claim that counting taxation, royalties and levies from the Corallina, Laminaria, Buffalo and other oil fields, the Australian Government has received in the order of A\$3 to A\$4 billion.⁴⁴

Supporting Australia's existing maritime boundaries

- 4.35 The NIA maintains that the Agreement respects third states' interests and does not prejudice future negotiations between Indonesia and Timor-Leste. The Agreement links Australia's seabed boundary with Timor-Leste to its seabed boundary with Indonesia at defined points on the boundary (points A16 and A17), as described in the *Agreement between the Commonwealth of Australia and the Republic of Indonesia on Seabed Boundaries in the Area of the Timor and Arafura Seas* (Jakarta, 10 September 1972, [1973] ATS 32).⁴⁵

- 4.36 However, submitters to the inquiry suggested that Indonesia has indicated that it may seek to reopen negotiations over the earlier *Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries* (Perth Treaty).⁴⁶ To date, that treaty has not been ratified by Indonesia and could therefore be subject to renegotiation. Professor Rothwell cautioned that Indonesia may see an opportunity to take advantage of the situation to obtain a more satisfactory outcome:

... given the significant concessions Australia made to Timor as a result of the conciliation Indonesia may be keen to press Australia for an equivalent set of boundary arrangements that reflect a more equitable outcome consistent with UNCLOS.⁴⁷

- 4.37 Asked if Indonesia had formally advised Australia of any such intention, DFAT stressed that Indonesia had been kept fully informed throughout the process of negotiating the Agreement with Timor-Leste. The Department

⁴³ Department of Foreign Affairs and Trade (DFAT), *Submission 12*.

⁴⁴ Mr Ian Melrose, *Submission 2*, para 2.2.

⁴⁵ NIA, para 25.

⁴⁶ Professor Donald R. Rothwell, *Submission 8*, para 27; Professor A.L. Serdy, *Submission 1*, para 6.

⁴⁷ Professor Donald R. Rothwell, *Submission 8*, para 27.

informed the Committee that Indonesia had suggested that ‘we have technical discussions at some point in relation to the Perth treaty’.⁴⁸

- 4.38 DFAT reiterated that it has no concerns that the Agreement with Timor-Leste will have a detrimental effect on Australia’s relationship with Indonesia:

The various maritime boundary arrangements with Indonesia—the 1972 one, the seabed boundary, of course—is fully ratified and in force. The Perth treaty has not been ratified, but both sides have fully implemented its provisions. We believe that this treaty we have negotiated with Timor-Leste under the auspices of the Conciliation Commission very much takes into account, and is without prejudice to, Indonesia’s interests. So, we are confident that that can be managed appropriately in our future engagement with Indonesia. We don’t see this as being a reason to reopen existing treaty arrangements.⁴⁹

Obligations

- 4.39 The following summary of the obligations under the Agreement is taken from the NIA.

Permanent maritime boundaries

- 4.40 **Articles 2 to 5** establish maritime boundaries between Australia and Timor-Leste in the Timor Sea, which are depicted for illustrative purposes at Annex A of the Treaty (see Figure 4.4).⁵⁰
- 4.41 Under **article 3**, the eastern and western boundaries can be adjusted in certain circumstances. Whether any adjustment occurs depends on the outcome of the delimitation between Indonesia and Timor-Leste, and in particular whether those States delimit their continental shelf boundary to the east and west of points A16 and A17 respectively. Should this occur, the adjustment could only take place after resources in the relevant areas (Greater Sunrise fields in the east, and Laminaria and Corallina oil fields in the west) are commercially depleted, as defined by the Agreement. This ensures boundary adjustments do not impact on existing company rights and operations.⁵¹

⁴⁸ Mr Justin Whyatt, Assistant Secretary, Transnational and Sea Law Branch, Legal Division, DFAT, *Committee Hansard*, 7 May 2018, p. 37.

⁴⁹ Mr Larsen, DFAT, *Committee Hansard*, 7 May 2018, p. 37.

⁵⁰ NIA, para 26.

⁵¹ NIA, para 29.

- 4.42 **Article 6** provides that the Treaty does not prejudice negotiations between Timor-Leste and Indonesia on their maritime boundaries in the Timor Sea. It explicitly protects the rights and freedoms of other states under UNCLOS.⁵²
- 4.43 **Article 8** requires Australia and Timor-Leste to work to reach agreement on how if any resources that straddle the new continental shelf boundary will be exploited and shared.⁵³
- 4.44 **Article 11** affirms the permanence of the Treaty and the maritime boundaries it creates. It also makes clear the interlinked nature of all elements of the Treaty. This reflects the fact that the boundaries and other elements of the treaty were part of a holistic and comprehensive package, facilitated by the Conciliation Commission.⁵⁴

Greater Sunrise Special Regime

- 4.45 **Article 7** establishes the Greater Sunrise Special Regime (Special Regime). Within this area, Australia and Timor-Leste jointly exercise their rights as coastal states pursuant to article 77 of UNCLOS, until the Special Regime ceases to be in force. After the Special Regime ceases to be in force, the Parties shall individually exercise their rights as coastal states on the basis of the continental shelf boundary established in **article 3** of the Treaty. In other words, the continental shelf boundary in the Special Regime Area only becomes relevant after the Special Regime ceases to be in force.⁵⁵
- 4.46 The Parties decided that the Greater Sunrise Special Regime should continue for the life of the Greater Sunrise fields regardless of the outcome of the delimitation between Timor-Leste and Indonesia, and that this was part of the overall fair and balanced outcome. This is reflected in **article 7(6)** and in the interlinked nature of the Agreement as described in **article 11**.⁵⁶
- 4.47 **Annex B** of the Treaty establishes a governance and regulatory structure and details the exercise of jurisdiction in the Special Regime Area over matters including customs, immigration, quarantine, security and crime.⁵⁷

⁵² NIA, para 30.

⁵³ NIA, para 31.

⁵⁴ NIA, para 32.

⁵⁵ NIA, para 33.

⁵⁶ NIA, para 34.

⁵⁷ NIA, para 35.

- 4.48 **Article 2 of Annex B** specifies that Australia and Timor-Leste both have title to petroleum produced in the area, with upstream government revenue shared either 30:70 or 20:80 in Timor-Leste's favour, depending on whether the Greater Sunrise fields are developed by means of a pipeline to an LNG processing plant in Timor-Leste or Australia. This differential was designed to reflect the different distribution of downstream economic benefits which may flow from either option.⁵⁸
- 4.49 **Articles 3 and 4 of Annex B** confirm that the fiscal regime and new Production Sharing Contract for the Greater Sunrise fields will reflect both Parties' obligations to provide conditions and terms equivalent to those set out in the International Unitisation Agreement and Timor Sea Treaty.⁵⁹
- 4.50 The Designated Authority, a statutory authority of Timor-Leste, will be the day-to-day regulator in the Special Regime Area. Its powers are set out in **article 6 of Annex B**.⁶⁰
- 4.51 Under **article 7 of Annex B**, a Governance Board, comprising representatives from Australia and Timor-Leste, will exercise oversight over 'strategic matters', with decisions to be made by consensus. The Regime includes a Dispute Resolution Committee, an independent body, to break deadlocks that arise on the Governance Board, as set out in **article 8 of Annex B**.⁶¹
- 4.52 **Article 9 of Annex B** sets out the process and criteria for approving a Development Plan for the Greater Sunrise fields. **Article 14 of Annex B** sets out the requirements for a local content plan, which is to be included in the Development Plan, reflecting both Parties' commitment to ensure substantial benefits flow to Timor-Leste from the development of the Greater Sunrise fields.⁶²
- 4.53 **Article 10 of Annex B** confirms that exclusive jurisdiction over a pipeline from the Special Regime Area will accrue to the Party in whose territory the pipeline lands. This jurisdiction applies both in the Special Regime Area and outside it. There is an obligation on the Party exercising exclusive

⁵⁸ NIA, para 36.

⁵⁹ NIA, para 37.

⁶⁰ NIA, para 38.

⁶¹ NIA, para 39.

⁶² NIA, para 40.

jurisdiction to cooperate with the Designated Authority to ensure effective management.⁶³

- 4.54 **Articles 15 to 20 of Annex B** detail the jurisdictional arrangements which apply in the Special Regime Area.⁶⁴
- 4.55 **Article 23 of Annex B** deals with the duration of the Greater Sunrise Special Regime and confirms that the Special Regime will continue until the Commercial Depletion of the Greater Sunrise fields, as defined in **Article 1** of the Agreement.⁶⁵
- 4.56 **Annex C** of the Agreement sets the boundaries of the Special Regime Area. These boundaries are based on the definition of the Unit Area in the International Unitisation Agreement.⁶⁶

Relationship of the Agreement to previous agreements and transitional arrangements

- 4.57 **Articles 9 and 10** of the Agreement reflect the relationship between the Agreement and previous agreements between Australia and Timor-Leste. These provisions recognise the Agreement builds on the agreements the Parties have had in place for many years and is forward-looking in nature.⁶⁷
- 4.58 **Article 9** of the Agreement confirms that the Timor Sea Treaty and the International Unitisation Agreement will terminate when this Treaty comes into force. **Article 10** clarifies that neither Party has a claim for compensation.⁶⁸
- 4.59 **Annex D** provides for transitional arrangements for petroleum activities undertaken in the Timor Sea.⁶⁹
- 4.60 **Article 1 of Annex D** provides that Petroleum Activities conducted under the Timor Sea Treaty and International Unitisation Agreement will continue

⁶³ NIA, para 41.

⁶⁴ NIA, para 42.

⁶⁵ NIA, para 43.

⁶⁶ NIA, para 44.

⁶⁷ NIA, para 45.

⁶⁸ NIA, para 46.

⁶⁹ NIA, para 47.

under conditions or terms equivalent to those in place under those agreements.⁷⁰

- 4.61 **Article 1 of Annex D** provides that Timor-Leste will receive all future upstream revenue derived from Petroleum Activities from the Bayu-Undan Gas Field and Kitan Oil Field. In addition to the general obligation to maintain conditions equivalent, the Parties agreed to grandfather existing arrangements for these fields, recognising they are near to the end of their production life. This includes maintaining the existing fiscal regime for upstream and downstream components for the exploitation of the Bayu-Undan Gas Field (**Article 2**), and other elements as set out in the Exchange of Correspondence on Bayu-Undan and Kitan Transitional Arrangements.⁷¹
- 4.62 **Article 3 of Annex D** confirms that Australia exercises exclusive jurisdiction over the Bayu-Undan pipeline, including for the purposes of taxation.⁷²
- 4.63 The Agreement also provides for protection of the rights of the existing titleholder to the Buffalo oil field (under exploration permit WA-523-P), which will transfer to Timorese jurisdiction, as set out in **Article 4 of Annex D**.⁷³

Dispute resolution

- 4.64 **Article 12** specifies that Australia or Timor-Leste can submit disputes on the interpretation or application of the Agreement to an arbitral tribunal, where the dispute cannot be resolved by negotiation within six months. **Article 12(4)** specifies a number of articles for which disputes cannot be submitted to an arbitral tribunal. These include disputes over the articles establishing permanent maritime boundaries, and disputes which fall within the remit of the Dispute Resolution Committee established under **article 8 of Annex B**.⁷⁴
- 4.65 For five years after entry into force of the Agreement, Australia and Timor-Leste can also jointly submit disputes to members of the Conciliation Commission, if the issue cannot be resolved by negotiation within six months, under **article 12(1)**. This provision acknowledges the unique role played by the Conciliation Commission in facilitating the Agreement. **Annex**

⁷⁰ NIA, para 48.

⁷¹ NIA, para 49.

⁷² NIA, para 50.

⁷³ NIA, para 51.

⁷⁴ NIA, para 52.

E specifies how a dispute can be submitted to an arbitral panel under **article 12**, as well as the arbitral panel's constitution, registry, and rules of procedure.⁷⁵

Implementation

4.66 To implement the Agreement, the new boundaries will be proclaimed under the *Seas and Submerged Lands Act 1973*. The *Petroleum (Timor Sea Treaty) Act 2003* will be repealed and replaced with a new Act. Consequential amendments will also be required to a number of acts, including but not limited to the:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006*;
- *Migration Act 1958*;
- *Customs Act 1901*;
- *Crimes at Sea Act 2000*;
- *International Organisations Act 1963*;
- *Passenger Movement Charge and Collection Act 1978*; and
- *Income Tax Assessment Act 1936*.⁷⁶

4.67 The NIA acknowledges that cooperation between Australia and Timor-Leste's officials will be required to ensure a smooth transition to the new regime, and complementarity of laws.⁷⁷

4.68 According to the NIA, the Department of Industry, Innovation and Science (DIIS) will appoint a representative to the Greater Sunrise Special Regime's Governance Board to perform the duties and responsibilities specified at **Annex B** of the Agreement.⁷⁸

Costs

4.69 The NIA states that the Agreement 'contemplates' that Timor-Leste will receive future upstream revenue from fields that lie within its exclusive jurisdiction, including the Buffalo, Kitan and Bayu-Undan gas fields.⁷⁹

⁷⁵ NIA, para 53.

⁷⁶ NIA, para 54.

⁷⁷ NIA, para 55.

⁷⁸ NIA, para 56.

⁷⁹ NIA, para 57.

- 4.70 According to the NIA, Australia will incur no other additional financial costs through this treaty action. The costs of participating in the governance of the Greater Sunrise Special Regime are expected to be absorbed by DIIS. The NIA states that these costs largely mirror existing arrangements for the Joint Petroleum Development Area.⁸⁰
- 4.71 The Designated Authority responsible for the carrying out the day-to-day regulation and management of petroleum Activities in the Special Regime Area shall be financed from fees collected under the applicable Petroleum Mining Code and the Greater Sunrise Production Sharing Contract.⁸¹

Future treaty action

- 4.72 Under **article 11**, Australia and Timor-Leste can only amend the Agreement by their express agreement to do so.⁸²
- 4.73 Adjustments to the continental shelf boundary under **article 3** would not require further treaty action but might require further changes to Australian legislation. **Article 3** specifies when and how adjustments can be made.⁸³
- 4.74 Adjustments required to the exclusive economic zone boundary under **article 4** would require further treaty action, subject to Australia's treaty-making requirements, as well as changes to Australian legislation. Changes to the exclusive economic zone boundary would depend on the outcome of the delimitation between Timor-Leste and Indonesia.⁸⁴
- 4.75 The Agreement requires Australia and Timor-Leste to agree additional arrangements for the Special Regime and to implement transitional arrangements. These arrangements would not require treaty action but may be made binding on the Parties through domestic legislation, executive action, or through contracts with third parties such as the Sunrise Joint Venture. These arrangements would not alter Australia's obligations under the Agreement, but would provide greater detail on how the obligations would be implemented.

Conclusion

⁸⁰ NIA, para 58.

⁸¹ NIA, para 59.

⁸² NIA, para 61.

⁸³ NIA, para 62.

⁸⁴ NIA, para 63.

- 4.76 As noted in its review of the termination of CMATS, the Committee strongly supports the settlement of disputes over maritime boundaries being negotiated bilaterally and in good faith and congratulates both the Australian Government and the Government of Timor-Leste on concluding this treaty.
- 4.77 The Committee notes that despite the long running controversies surrounding the settlement of a permanent maritime boundary between Australia and Timor-Leste, submitters to this inquiry are overwhelmingly supportive of the outcome of this treaty action.
- 4.78 The Committee has taken an ongoing interest in the issues raised during this inquiry. After reviewing the termination of CMATS, the Committee requested that it be briefed every six months until such time as a bilateral agreement was reached between Australia and Timor-Leste. It consequently received a private briefing on 29 November 2017.
- 4.79 The Committee urges the Australian Government to fully support the ongoing development of the transitional arrangements in order to minimise any impact on the companies currently operating in the affected area and hence any detrimental economic impact on either country.
- 4.80 The Committee supports the Agreement and recommends that binding treaty action be taken.

Recommendation 3

- 4.81 The Committee supports the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* and recommends that binding treaty action be taken.**

A. Submissions

Timor Treaty Maritime Boundaries

- 1 Professor A.L. Serdy
- 2 Mr Ian Melrose
- 3 La'o Hamutuk
- 4 Canberra Friends of Dili
- 5 Timor Sea Justice Campaign
- 6 Mr Robert King
- 7 Timor Sea Justice Forum NSW
- 8 Professor Donald Rothwell
- 9 ConocoPhillips Pty Ltd (COPA)
- 10 Woodside Energy Ltd
- 11 Uniting Church in Australia
- 12 Department of Industry, Innovation and Science

B. Exhibits

Timor Treaty-Maritime Boundaries

- 1 *La'o Hamutuk articles, (Submission 2)*

C. Witnesses

Monday, 7 May 2018

CANBERRA

Timor Treaty Maritime Boundaries

Department of Foreign Affairs and Trade

Attorney-General's Department

Department of Industry, Innovation and Science