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Proof Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 18 and 25 June 2002

FRIDAY, 12 JULY 2002

CANBERRA

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JOINT COMMITTEE ON TREATIES

Friday, 12 July 2002

Members: Ms Julie Bishop (*Chair*), Mr Wilkie (*Deputy Chair*), Senators Barnett, Bartlett, Kirk, Mason, Marshall, Stephens and Tchen, and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr Hunt, Mr King and Mr Bruce Scott

Senators and members in attendance: Senators Kirk and Marshall, Mr Adams, Ms Julie Bishop, Mr Martyn Evans and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 18 and 25 June 2002.

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[10.10 a.m.]

BARTLEY, Mr Scott William, Manager, Core Rules Unit, Business Income and Industry Policy Division, Department of the Treasury

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

WALKER, Mr Ian James, Manager, Timor Sea Team, Resources Division, Department of Industry, Tourism and Resources

CHAIR—I welcome witnesses from the Attorney-General's Department, the Treasury, the Department of Foreign Affairs and Trade and the Department of Industry, Tourism and Resources to give evidence relating to the exchange of notes constituting an agreement between the government of Australia and the government of the Democratic Republic of East Timor concerning arrangements for exploration and exploitation of petroleum in an area of the Timor Sea between Australia and East Timor, and the proposed Timor Sea Treaty between the government of Australia and the government of East Timor.

I am obliged to advise you that although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate and the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would one of you like to make some introductory remarks before we proceed to questions?

Dr Raby—I have an opening statement to make, which we hope will be helpful to the committee and which will give a background to the Timor Sea petroleum developments—in a historical context, there have been a number of agreements between Australia and East Timor that have led to the Timor Sea Treaty—as well as an outline of the Timor Sea Treaty and the relevant other documents involved. If it is acceptable, I will read that.

CHAIR—That would be very helpful.

Dr Raby—Thank you, Madam Chair. The Timor Sea Treaty, signed by Prime Minister Howard and Prime Minister Alkatiri on 20 May 2002 in Dili, and the Timor Sea exchange of notes done at Dili on the same day, provide a legal basis for the orderly development of petroleum resources of the Timor Sea between Australia and East Timor. Australia has significant interests in such orderly development for the benefit of both countries. Firstly, Australia will benefit through direct revenue from the Timor Sea petroleum fields and through infrastructure development and employment creation in Australia. Secondly, Australia has an interest in promoting East Timor's future economic viability, which will be underpinned by Timor Sea revenue. Although the numbers are yet to be firmed up, we are looking at something in the order of \$A6 billion over 20 years from the Bayu-Undan project alone.

The resources in the sea are quite massive; the Timor Sea contains substantial reserves. In particular, the Bayu-Undan and Greater Sunrise developments are estimated collectively to contain recoverable reserves of around 11 trillion cubic feet of gas and 700 million barrels of petroleum liquids. At this point I will correct a typographical error in the national interest analysis for the Timor Sea Treaty and exchange of notes. The figure shown there for Bayu-Undan gas reserves was 2.4 tcf. The reserve is, however, 3.4 tcf.

CHAIR—That is in paragraph 11 of the exchange of notes?

Dr Raby—Yes. The error has been corrected. The NIA on the DFAT web site has been amended accordingly.

CHAIR—It is just a typo?

Dr Raby—Yes. Bayu-Undan, containing around \$15 billion worth of petroleum, lies wholly within the Joint Petroleum Development Area—the JPDA—between Australia and East Timor. Greater Sunrise, with petroleum resources valued at around \$30 billion, has 20.1 per cent of its reserves located within the JPDA and 79.9 per cent located within Australian jurisdiction. We will be distributing the paper so that you will have these figures.

CHAIR—Thank you.

Dr Raby—As for the historical development of the Timor Sea Treaty, the Timor Gap Treaty entered into force in 1991, creating the Timor Gap Zone of Cooperation. Production within the zone of cooperation started in 1998 from the Elang/Kakatua field. In 2000, there was an exchange of notes. This exchange of notes followed the separation of East Timor from Indonesia. Australia and the United Nations Transitional Authority in East Timor, UNTAET, exchanged notes on behalf of the people of East Timor in February 2000. The 2000 exchange of notes effectively continued, *mutatis mutandis*, the terms of the Timor Gap Treaty. The 2000 exchange of notes ceased to have legal force upon East Timor's independence on 20 May 2002.

In July last year, we reached agreement on the Timor Sea Arrangement. That was in order to ensure a continuing legal basis for petroleum development after East Timor's independence. Negotiations between Australia and UNTAET East Timor resulted in the Timor Sea Arrangement of 5 July 2001, which was the basis for a new Timor Sea Treaty upon East Timor's independence. The Timor Sea Treaty reflects the evolution of those arrangements between Australia and Indonesia initially and then Australia and UNTAET East Timor. The

treaty itself reflects very much the structure of the Timor Sea Arrangement which was, as I said, reached on 5 July 2001.

Turning to the treaty itself, the Timor Sea Treaty will be the fundamental document underpinning the development of the major oil and gas deposits in the Timor Sea between Australia and the newly independent East Timor. Australia and East Timor have competing claims to the resources of the seabed of the Timor Sea. The Timor Sea Treaty enables the commercial development of the resources of a major part of the seabed of the Timor Sea that is referred to in the treaty as the Joint Petroleum Development Area, notwithstanding the competing claims.

When the treaty enters into force, the revenue to governments from oil and gas production in the JPDA will be shared in the proportion of 90 per cent for East Timor and 10 per cent for Australia. In agreeing to that formula, Australia was conscious of the need for East Timor to have a sound economic base. The revenues it will receive as a result of this arrangement will provide a major contribution to that outcome. The JPDA will be jointly managed by Australia and East Timor for the benefit of both countries.

The treaty covers both oil and gas developments. It provides a comprehensive regulatory framework covering matters such as development and production, the marine environment, employment, health and safety of workers, surveillance, security, search and rescue, air traffic services, as well as the application of taxation and criminal law. Upon entry into force, the treaty will be applied retrospectively to 20 May 2002. The treaty provides also for other, more detailed instruments covering mining and taxation matters. The taxation code has been concluded recently and forms an annex to the treaty itself.

On the exchange of notes, it was important to avoid a legal vacuum in the period between signature of the treaty and ratification of the Timor Sea Treaty and to provide a sound legal basis for the continued development of Timor Sea resources. Therefore, an exchange of notes of treaty status has been concluded between Australia and East Timor that will continue the arrangements for the Timor Sea that were in place on 19 May 2002—that is, the terms of the 2000 exchange of notes—until entry into force of the Timor Sea Treaty. It is, essentially, a provisional arrangement until ratification and the entry into force of the treaty. However, it was agreed that East Timor would receive additional revenue on and from the date of independence. Therefore, the exchange of notes brings forward to 20 May 2002 East Timor's ability to collect revenue from its value added tax and some income taxes on a 90-10 basis. Additional petroleum related revenue will be placed into an interest-bearing escrow account and paid to East Timor upon entry into force of the treaty.

Turning now to the unitisation of the Greater Sunrise field, only 20.1 per cent of the Greater Sunrise field falls within the JPDA, with 79.9 per cent of that deposit within exclusive Australian jurisdiction. The treaty provides for the development of that deposit as a single unit, even though it is located in two separate jurisdictions. The conclusion of a separate international unitisation agreement, or IUA, is a matter of high priority for the government, as it is a prerequisite for the development of the Greater Sunrise field. In a separate memorandum of understanding signed on 20 May 2002, Australia and East Timor expressed their commitment to work expeditiously and in good faith to conclude that IUA by the end of this year. We expect that the negotiations on an IUA will proceed in parallel with the process to ratify the TST. The

IUA will be neutral with respect to the type of development that the Greater Sunrise partners—namely Shell, Woodside Petroleum, Phillips and Osaka Gas—eventually decide on.

In conclusion, the Timor Sea Treaty represents a significant step forward in cooperation between Australia and the newly independent state of East Timor. It will be an important element of our bilateral relations and a cornerstone of East Timorese economic stability and viability. A basis in international law is crucial for a fair and mutually beneficial system of development of Timor Sea resources.

CHAIR—As no-one else wishes to make a statement, we will proceed to questions. I am sure there will be quite a number of questions, so perhaps I could start with some of the fundamentals. You mentioned the 90-10 split of revenue under the Timor Sea Treaty and said that we took into account the needs of East Timor as a developing nation. What is the actual rationale of 90-10? Where did that figure come from?

Dr Raby—It came out of the negotiations with East Timor, UNTAET. We started at different positions, and that was the final position we reached through a process of negotiation, bearing in mind East Timor's needs and our claims to the area.

CHAIR—Do we reconsider that to be a fair split?

Dr Raby—Very much so.

CHAIR—Does East Timor?

Dr Raby—Very much so.

CHAIR—There have been some criticisms from some high profile East Timorese about that split. Do you have any comment?

Dr Raby—I think the criticism is not about the 90-10 split as such, although, obviously, there were some who would have wished for 100 per cent. The criticism as such of the arrangement from some NGOs tends to be about the structure of the Joint Petroleum Development Area, where the boundaries exist there, and, specifically, about the fact that the Greater Sunrise field, under those boundaries, is 79.9 per cent exclusively in Australian jurisdiction.

CHAIR—Could you explain for the committee how the JPDA boundaries were drawn? How did that come about historically?

Dr Raby—I will ask Bill Campbell from Attorney-General's Department to answer that.

Mr Campbell—I do not have a copy of the diagram. Maybe I could borrow a copy of the diagram.

Dr Raby—It is in front of the committee.

Mr Campbell—Basically, the area in red represents the old zone of cooperation area A under the Timor Gap Treaty with Indonesia. The major part of the two side boundaries represents the points of equidistance between East Timor and Indonesia.

CHAIR—On the eastern side, the line that goes through the Greater Sunrise and Troubador fields is the equidistant line between East Timor and Indonesia?

Mr Campbell—Yes. The northern part of the boundary is the so-called 1,500-metre isobar. It is the 1,500-metre depth limit, which used to form the top of the old zone of cooperation under the Timor Gap Treaty. The bottom line with an arrow is the median point between East Timor and Australia.

Mr MARTYN EVANS—Which would be the median point under the law of the sea equation, if theoretical—

Mr Campbell—That raises a whole list of issues. But if one were to delimit the boundary, which is not on the basis of the median point, that would be the median line.

Mr WILKIE—That would be the line that would be part of the boundary if, in fact, we follow current international practice?

Mr Campbell—I can answer those questions now.

Mr ADAMS—Maybe I could add one, too, if you do not mind, Mr Campbell. Wasn't there something to do with the water column being in a different position in the seabed, which came in relation to fishing?

Mr Campbell—Perhaps if I can just go into a bit of detail on that. I hesitate to go into some detail on the law relating to maritime boundary delimitation, quite frankly, because we still have negotiation of a maritime boundary to come up.

CHAIR—We are looking for a historical perspective as to why we are dealing with this particular area.

Mr Campbell—The reason we are dealing with this particular area is that Australia has had a long-term claim to a continental shelf based on what is called the natural prolongation of its land area out to the edge of the continental shelf. That claim goes to the middle of a deep ocean trench called the Timor Trough, which is quite close to East Timor. In fact, it is the old top of area A under the Timor Gap Treaty with Indonesia and it is above that top line under this treaty here.

CHAIR—How far above?

Mr Campbell—I am not quite sure of the exact—

Dr French—It would be about 15 to 20 nautical miles.

Mr Campbell—On this diagram, it would be about 10 mm above, if I can put it that way.

CHAIR—That is the continental shelf?

Mr Campbell—That is the extent of Australia's continental shelf claim. The law of the sea convention as it is now recognises that you can have a continental shelf on two bases: one being based on 200 nautical miles—that is, a distance criteria—and the other being based on the natural prolongation of the land area out to the edge of the continental shelf, which is what Australia relies upon in this case.

CHAIR—So, essentially, where it drops away.

Mr Campbell—We go to the middle of the trough where it drops away. Indonesia originally made a 200 nautical mile claim, which extends down beyond that median line on this diagram to a point which is actually 200 nautical miles from East Timor now. It might be useful to the committee if we give you a diagram—I do not think we have it here—of the old Timor Gap Treaty, which shows where that bottom claim was.

CHAIR—What would be useful perhaps is an overlay, for historical purposes, of what has happened over the years between Australia and Indonesia, and Indonesia, East Timor and Australia. It would be a map with a lot of lines on it.

Mr Campbell—Having got to that point, Australia has a claim to the edge of the natural prolongation of its land area, that is, the centre of the Timor Trough. I believe that East Timor has claim to the 200 nautical miles from the East Timorese coastline. So that would be the area subject to a permanent delimitation between the two countries. As to what would happen under international law, that is an open question. There are those who would say that international law, in circumstances where there are fewer than 400 nautical miles between the two countries, would tend to adopt a median line. On the other hand, the courts have never had the opportunity to examine a delimitation where there is such a pronounced feature as the Timor Trough. Unless there are more specific questions, that is where I would leave that issue.

CHAIR—Can you just confirm for us the area covered by the JPDA that was first defined in—what year?

Mr Campbell—In 1989 in the Timor Gap Treaty.

Mr WILKIE—On the boundary issue, I note that the IUA says that we will negotiate in good faith on boundaries and the split-up of the Sunrise field. But the foreign minister stated that we do not intend to change the boundaries at all, and I think this has caused a bit of angst amongst the East Timorese. Is there any clarification there on what we are proposing to do?

Dr Raby—What we have agreed in the treaty are the boundaries of the JPDA, and they are fixed in the treaty. I think that is the point the foreign minister is making. He has said on a number of occasions, publicly and privately, that we will negotiate the seabed boundary delimitation in good faith, and we are prepared to do that. But we have our position and we will have to work through both sides' arguments over time in a proper negotiation. He is absolutely

committed to sitting down with East Timor once the treaty is ratified and negotiating in good faith the eventual seabed boundary, wherever that may end up.

CHAIR—So the sequence of events would be that the exchange of notes is in place already without having gone through this treaty process and the treaty would then be ratified—this is theoretically. What about the international unitisation agreement? Where does that fit into the scheme of things? Then where does the permanent seabed delimitation process—

Dr Raby—The exchange of notes, as you said, has happened, and for the treaty itself we would expect it to move forward through this process here roughly on a parallel track with the international unitisation agreement. I think it is fair to say that how we come out on the unitisation agreement would influence the government's view on the process of eventual legislation for the treaty. But if, as we hope and it looks, all this will be done over the next six months, by the end of this year at the latest, then we would be looking at responding to any requests by East Timor to begin a program of work that would lead to the negotiations over the eventual delimitation of the seabed boundary.

CHAIR—What would be required for the international unitisation agreement to be concluded? What is the character of the agreement and who is involved and what happens?

Dr Raby—I will give you a bit of a thumbnail sketch, with other colleagues dealing with the detail of it. Essentially, it arises because you have a resource that straddles two jurisdictions. Usually the most difficult issue in a unitisation agreement is how you share the resource. That has already been achieved in a treaty, and we have the 79.9 to 20.1 split. So we now come down to issues of, basically, providing the framework that will allow commercial development of the Greater Sunrise field to proceed. That deals with a lot of things, including the pricing arrangements for the gas and where the price would be set. A number of these issues will have an influence over the eventual value of the resource to either side. I am not sure whether any of my colleagues wish to add more detail to that.

Mr Walker—To add a little bit to that, because there are two different tax jurisdictions involved, one involving the JPDA side and the other one the Australian side, the international unitisation agreement has to deal with the actual ring fences as to exactly where these points of taxation are, what are the various allowable costs and so on, and the apportionment of these. In addition, the unitisation agreement has to cover a lot of details relating to the administration of the area—for example, what is the applicable law across the field for environment and health and safety and so on—so that industry can operate.

CHAIR—Who are the parties to the agreement?

Mr Walker—Australia and East Timor, is the intention.

CHAIR—So when you talk about working out the laws to apply, it is a question of Australian law or East Timorese law.

Mr Walker—Or, in this case, Australian law or the law applicable in the Joint Petroleum Development Area. This complicates it a little further.

CHAIR—So it is either Australian law plus 10 per cent of 20 per cent or 90 per cent of 20 per cent.

Mr Walker—It does get complex, because obviously in the taxation area you are talking about apportioning the field under different laws. However, when you are talking about some of the other administrative things, it is obviously far more efficient and effective to have a single law covering the whole field. For example, you do not want one set of safety regulations in one part, then a work boat crosses a border and it suddenly has another set of safety regulations. So you look for some things that are totally uniform across the field, but things like the taxation and the fiscal issues relate back to the resource apportionment, hence the law applicable to those differs depending on where the resource is attributed to.

CHAIR—Are you saying that the treaty and the unitisation agreement are inextricably linked in that what applies to one will influence the other?

Mr Walker—Yes. There are very close links between them, because the treaty sets out the laws that apply on the Joint Petroleum Development Area side of it.

Dr Raby—The treaty is the framework in which the unitisation agreement will be developed. The unitisation agreement, if you like, is the detail that provides the answers to the commercial parties in terms of how much tax they pay, where it arises and accrues, in whose jurisdiction various activities take place, plus all the other administrative arrangements—health and safety and so on.

CHAIR—But only to the extent that the JPDA takes in 20 per cent of Sunrise. The treaty makes determinations for that 20 per cent of Sunrise, not the 80 per cent.

Dr Raby—But it also establishes that the 80 is outside the JPDA. It is a very important part of this.

Ms Irwin—The Timor Sea Treaty has a range of applicable law provisions to regulate various issues on activities that happen within the JPDA—for example, on health and safety of workers, on environmental issues, on governments being responsible for security, on the application of customs and quarantine law, those sorts of things—because you have two jurisdictions there. So the Timor Sea Treaty, in terms of applicable law and regulation across a range of issues, already sets up a number of provisions. The issue with the international unitisation agreement is that there needs to be agreement as to how those issues apply across that field. It may be that some of the sorts of issues that are raised in the Timor Sea Treaty where there is joint jurisdiction between Australia and East Timor—for example, in relation to the application of criminal law—would also apply for an international unitisation agreement.

CHAIR—It will not necessarily be Australian law applying to the 80 per cent of Sunrise outside the treaty.

Ms Irwin—That is a matter for negotiation between Australia and East Timor.

Mr WILKIE—Just to follow on from that, you quote an example from article 12 of the treaty referring to the health and safety of workers:

The Designated Authority may adopt, consistent with this Article, standards and procedures taking into account an existing system established under the law of either Australia or East Timor.

Are East Timor's laws concerning occ. health and safety weaker than ours? Are they established? What would be applicable then in the field?

Ms Irwin—As I understand it, at this stage, East Timor is still developing; it does not have current laws on that issue. I think it has some transitional arrangements in place so that some of its laws at the moment would reflect the Indonesian legal system. But as I understand it, there are not specific health and safety laws there at the moment. Your question raises a significant issue about the administrative structure that is set up under this treaty. One of the key organisational issues set up to administer the treaty will be a designated authority. It will have day-to-day management of a range of significant issues, and one may well be occupational health and safety issues. That would be an issue that the designated authority would have a significant role in developing regulation for.

Mr WILKIE—The words 'may well be' really worry me. If we are dealing with the safety of Australian workers, and even East Timorese workers, that are going to be employed in that area, I would expect that they should be covered by Australian standards. That was just one example.

Mr ADAMS—Is there any guarantee of who is going to work these fields?

Dr Raby—It is a commercial decision for the commercial parties.

Mr ADAMS—So nothing has been written about Australian workers in this treaty?

Dr Raby—As I said, that is not for negotiation between the governments; it is a commercial decision.

Mr WILKIE—It is part of the treaty, actually. I think article 11 refers to Australian and East Timorese workers being given precedence in employment opportunities. It is something I wanted to touch on a little later. We could return to that.

Mr ADAMS—I just wanted to touch on where we as a committee got done over by these letters of exchange. I just wanted more detail on why it was seen that there was a need to go around the normal processes of a treaty. There was plenty of time in coming up to East Timor's independence to have a treaty and then come to this committee. Why don't you think that occurred?

CHAIR—Why didn't the exchange of notes come to the committee?

Mr WILKIE—In July last year the agreement was reached, and on 20 May the exchange of letters took place. I would have thought there was sufficient time for the treaty and even the exchange of letters to have been referred to this committee for comment and investigation prior to any signature.

Mr Campbell—The Timor Sea arrangement that was initialled in July 2001 is basically the same as the Timor Sea Treaty, which is before the committee now. That arrangement has not entered into force beforehand. Some changes were made between the Timor Sea arrangement and the Timor Sea Treaty—that is, between July last year and this year. In particular, a taxation code was added onto it and the percentages in relation to unitisation were changed from 80-20 to 79.9-20.1. The point I am trying to make is that the Timor Sea arrangement and the Timor Sea Treaty that followed on from it have not entered into force, so this committee does have the opportunity to look at it before it enters into force.

CHAIR—What about the points about the exchange of notes?

Mr Campbell—In relation to the exchange of notes, I think it would be fair to say that the hope of both East Timor and Australia was that the Timor Sea Treaty would be in a position to come into force at the time of East Timorese independence. That did not come about for a number of reasons, but there needed to be negotiations on a number of very important arrangements to go with the Timor Sea Treaty. They include the taxation code, the mining code, the production sharing contracts. They were not complete, and therefore it was not possible for the Timor Sea arrangement to enter into force on independence. It was necessary, when that realisation came about, to negotiate some sort of interim arrangement which would ensure that there was a legal basis for continuity of exploration and exploitation of, and investment in, the Timor Sea pending the ultimate entry into force of the Timor Sea Treaty.

That arrangement was finalised just before independence. It was very important to have a legal basis between independence and the entry into force of the Timor Sea Treaty in the future. If there had been no exchange of notes, there would have been no continuing legal arrangement, because the arrangement with UNTAET ended on independence. So it was a question of timing. It was very important to have this interim legal basis put in place and there simply was not time to bring it before the committee. The time between completing the negotiations for that exchange of notes and independence was very short.

Mr WILKIE—I think even the exchange of notes should have come here for discussion, and that did not occur either. So that has not really explained why we did not get to look at the exchange of notes. The exchange of notes is here now, but it is already signed and in force.

Mr Campbell—The point I am trying to make, if I can just repeat something, is that the legal arrangements that were in place when UNTAET came into play—and we had an exchange of notes with UNTAET to continue arrangements in the Timor Sea—came to an end on independence.

CHAIR—So they had to be extended?

Mr Campbell—They had to be, essentially, extended. That is what the exchange of notes does. If I can just make one other point, I do realise that that original exchange of notes with UNTAET was also treated as an urgent treaty, but it was considered by this committee after it came into force. Essentially, the arrangements that are in force now are the same as the arrangements that were in force under the exchange of notes with UNTAET.

CHAIR—What is the revenue split under the exchange of notes?

Mr Raby—It is 90-10.

Mr Campbell—That is the fundamental difference between the two. In the exchange of notes with UNTAET, the revenue split was 50-50. The revenue split in the exchange of notes now is, in a practical sense, 90-10.

Mr Raby—But some of it is held in escrow, as a—

CHAIR—That is what I am getting at: it is still 50-50, isn't it?

Mr Campbell—Yes.

CHAIR—But we are going to hold 40 per cent in escrow.

Mr Campbell—Essentially, that is the case.

Mr Raby—For some items. There are other—

CHAIR—So it is not a 90-10 split. It is not what the treaty envisages; it is a different scenario.

Mr Bartley—There are actually three elements to the arrangement in the interim period until the treaty comes into force. For East Timor's value added taxes and some income taxes that it withholds on a monthly basis, the exchange of notes allows East Timor to collect on a 90-10 basis effectively from 20 May. The income that is derived from resource taxation on the petroleum is basically divided up on a 90-10 basis but held in escrow. East Timor does not get access to that until—

CHAIR—None of it? It does not get access to any of the 90 per cent?

Mr Bartley—It does not get access to the extra 40 per cent.

CHAIR—So it gets access to 50 per cent of it?

Mr Bartley—Yes. The extra 40 per cent is held in escrow until the treaty is ratified. Similarly, where they levy income taxes on the income that comes from the production of the petroleum, they also will be held under an escrow arrangement.

CHAIR—That is the same deal; currently it is 50-50 and their extra 40 per cent is being held in escrow?

Mr Bartley—Yes, that is right.

Mr ADAMS—Does that deal with taxation? Is there a royalty on the product or is there a taxation arrangement?

Mr Bartley—The royalty is what I referred to as the resource taxation, and that is held in escrow. The extra 40 per cent is held in escrow.

Mr MARTYN EVANS—I want to ask about the future of this. This treaty will expire at some point in the future, if and when, and I assume when, we reach agreement with East Timor on permanent delineation of the boundaries of the seabed, whether that is on the median line or on some compromise position somewhere in between. Is there some possibility that this would include again some zone of cooperation where we would have joint control over some of the petroleum assets and an agreed split of management and revenue again, or is it envisaged that we would simply have a clean division of the seabed and whatever assets fall on either side of the line would be managed in that way? I know this is the subject of future negotiation, but it does seem to me that Australia has almost as much interest in the management of the petroleum assets as it does in the revenue from the petroleum assets. There are two questions: there is the revenue we get from these things and there is also the management of the petroleum assets as well. Wherever you draw the seabed line out there, it is almost inevitable that you are going to draw it over some substantial piece of gas or petroleum or liquids or whatever. So is some kind of zone of cooperation an option in these kinds of negotiations, or is it a clean seabed line wherever it is drawn? I know we cannot really speculate about that because that is very much down to negotiation, but is that what is likely to happen over some period of time?

Mr Campbell—One point you have raised is probably the answer, and that is that the negotiations have not even started on a delimitation between the two countries. Obviously there are many options open in relation to that negotiation, so it would certainly be speculative on my part to say where it was likely to end up or even at this stage what the government's view would be about various options. The second point I would make is in relation to things like pipelines and even environmental matters, where you have one petroleum installation very close to the jurisdiction of another country. There are some very important general principles under the Law of the Sea Convention that actually deal with those cross-border issues, such as that one country will take measures on its side of the boundary to ensure there is not marine pollution and things like that on the other side of the boundary. But at this stage I think it would be a little speculative to say where it might come out.

Dr Raby—One point to bear in mind in all of this, though, is that both governments are very conscious of the need to provide commercial certainty and predictability. Both governments have a very pragmatic approach in order to allow commercial development to go ahead and to ensure that the companies have the certainty and predictability that they need to make very big investments over long periods of time.

Mr WILKIE—Having said that, in terms of the border theory and the negotiations on the boundaries East Timor is in quite a weak position really, isn't it, because Australia has said, 'You have got no recourse apart from negotiation with us on borders. We are not going to negotiate on borders and in fact we're not going to recognise the International Court of Justice's ability to actually determine boundaries.' I think our international reputation is pretty bad at the moment and I am concerned that we may seem to be a bit of a bully in these negotiations with East Timor internationally, and it goes on to the next treaty we are going to be looking at. Given that we are saying that we want to negotiate but we are not going to accept the International Court of Justice's ruling on maritime boundary issues, I suppose I am concerned that our reputation is not going to be seen as being very good in those terms.

Dr Raby—That is a subjective judgment. What I can say is what I said before: the minister has made it absolutely clear that Australia will negotiate on the seabed boundary in good faith, and we will certainly do that. We find ourselves in good company on the question of ICJ. It is a measure that is taken with respect to all of the ongoing maritime boundary issues that we have outstanding. We could brief you separately on that if you wish, but certainly as far as the seabed boundary negotiations with East Timor go, all I can say is that we will negotiate in good faith.

Mr MARTYN EVANS—Is the blue line which refers to the 1972 seabed boundary—insofar as it refers to our current boundary with Indonesia on both sides of East Timor, left and right—based on the prolongation of our continental shelf?

Mr Campbell—It is a negotiated boundary which is slightly less than the claim that we made in those negotiations with Indonesia, but it is based upon natural prolongation.

Mr MARTYN EVANS—The rough basis of it is the continental shelf type?

Mr Campbell—That was the basis that we put forward in the negotiations, but it was a negotiated boundary.

Mr ADAMS—Has Indonesia had any comments in relation to these boundaries?

Mr Campbell—In relation to which boundaries?

Mr ADAMS—In relation to the Timor Sea and East Timor.

Mr Campbell—I believe Indonesia sees the area of the old zone of cooperation and the area of JPDA as a matter between Australia and East Timor.

Mr ADAMS—Have they said anything about the 1972 seabed boundary?

Mr Campbell—I am not certain of that, but it is an agreed boundary and we would expect it to stay where it is.

CHAIR—Is area A on this second map that we received—attachment 2, Timor Gap Treaty Boundaries—the JPDA?

Mr Campbell—That is exactly right.

CHAIR—Can you tell me about areas B and C? What do they represent?

Mr Campbell—Under the old Timor Gap Treaty with Indonesia there were three areas. Area A was an area very much like the JPDA, where there was joint development and control of the area. Area B, which I believe is at the bottom, was an area administered pursuant to Australian law, but under the Timor Gap Treaty 10 per cent of the revenue from that area would go to Indonesia. Likewise, area C at the top was totally under the control of Indonesia, but 10 per cent of the revenue from that would go to Australia. I could be corrected by my colleagues there, but I do not think there was ever any transfer of revenue in relation to areas B and C.

CHAIR—And area A was divided 50-50?

Mr Campbell—The production from that area was shared 50-50.

CHAIR—We have been informed this morning, courtesy of *ABC News Online*, that East Timor's parliament has passed legislation outlining a claim that extends 200 nautical miles from its coastline. That would therefore claim 100 per cent of Sunrise, and, as we know, 80 per cent of that is currently in Australian jurisdiction. I assume it is true that the East Timor parliament has done that?

Mr Campbell—The East Timorese parliament has given some initial approval to legislation establishing the maritime claims and boundaries of East Timor.

CHAIR—Essentially, it is their claim?

Mr Campbell—It is a general piece of legislation which one would have to apply to the area we are talking about here. In other words, it is legislation that establishes the so-called territorial sea baseline from which all its maritime zones are measured: its 12 nautical mile territorial sea; 200 nautical mile exclusive economic zone; 24 nautical mile contiguous zone; and, in relation to the continental shelf, 200 nautical miles or to the natural prolongation of its land area. It is a standard piece of maritime legislation, similar to our Seas and Submerged Lands Act, under which they set out their general maritime areas. The report that I think was on *AM* this morning referred to this as being East Timor's claim in relation to the Timor Sea. The point I am making is that one would have to apply that piece of legislation to the Timor Sea to see exactly where their claim is, but certainly, based on that legislation, the claim has the potential to go down to 200 nautical miles, which is the bottom of area B on that diagram. In fact, as I understand it the legislation has not quite finished going through the processes of the East Timorese parliament. I can be corrected, but we are yet to receive any letter or notification from East Timor about how they would apply that legislation to this particular area.

CHAIR—Also, how does that legislation fit with the treaty that we have before us and the negotiations that are currently ongoing between Australia and East Timor in relation to treaty unitisation?

Mr Campbell—If I can put it this way, it fits the same way that our Seas and Submerged Lands Act fits. The Timor Sea Treaty, as I think was set out in the NIA, is a provisional arrangement recognised in article 83 of the United Nations Convention on the Law of the Sea pending the permanent delimitation of the boundary. Both of those pieces of legislation fit in with that structure.

CHAIR—There seems to be a tension here between what has been negotiated and agreed in relation to the boundaries of the JPDA, which specifically exclude 80 per cent of Sunrise, and then the—

Mr Campbell—My recollection of the ABC report is—

CHAIR—I am not suggesting that it was absolutely accurate. It was a short statement.

Mr Campbell—This amounted to a claim by East Timor to these areas and that area. I am saying that it is a general piece of maritime legislation and—

CHAIR—There is nothing remarkable about it per se.

Mr Campbell—Nothing remarkable about it per se, but we are yet to hear from East Timor about how it would apply that legislation to this area, although there were statements made beforehand that East Timor would be looking for a greater maritime area than it currently has.

Dr Raby—This has been anticipated from statements since independence by East Timorese leaders. It is a perfectly normal approach for them to take. The key point with the treaty, though, is that it is about setting up through the Joint Petroleum Development Area a practical way to enable commercial development of the resources to proceed while these bigger questions of eventual seabed delimitation are worked through.

Mr WILKIE—There is potential for East Timor to join with Indonesia and put forward a joint claim on equidistance, isn't there?

Mr Campbell—In relation to areas outside the JPDA where the 1972 seabed boundary is noted on the diagram, we have an agreement with Indonesia which fixes that boundary. We would expect that boundary to stay where it is. That would be the Australian government position.

Mr ADAMS—The information we have received says that there has been consultation with the states and territories. That has occurred with respect to this treaty?

Dr Raby—Yes.

Mr ADAMS—And industry?

Dr Raby—Yes.

Mr ADAMS—Nobody—the states and territories—has any difficulties with this treaty?

Dr Raby—Not that we are aware of. It may be that people would wish for something more perfect.

Mr ADAMS—I know, but there are no burning issues?

Dr Raby—Not that we are aware of.

CHAIR—Did any particular state or territory government come up with suggested changes?

Dr Raby—Not that I am aware of.

Mr Walker—I am not aware of any.

CHAIR—Can you go through the three-tiered administrative structure quickly to give us some understanding of how that is intended to operate with the designated authority, the joint commission and the ministerial council?

Ms Irwin—The three tiers work on the basis that the designated authority has responsibility at the day-to-day level for managing operations in the Joint Petroleum Development Area. When the treaty comes into force, the idea under the current arrangements is that there would be a joint authority that would have equal numbers of Australian and East Timorese representatives that would be responsible for managing the area. For the first three years of the entry into force of the treaty, that organisation would take the role of the designated authority. However, around the three-year period, that organisation would become part of either the East Timorese government or an East Timorese statutory authority.

Sitting above the designated authority is a joint commission. The joint commission would have basically a two to one representation of East Timorese to Australians. They essentially have an oversight role of the designated authority and have to approve various activities of the designated authority, including its budget. Sitting on top of the joint commission is a ministerial council. The ministerial council would have equal numbers of Australian and East Timorese representatives, and it would then have a broader global view of activities in the area. There are specific annexes in the treaty: annex C sets out the specific activities that the designated authority is responsible for, and annex D sets out the specific activities that the joint commission is responsible for.

CHAIR—If there is an equal number of ministers on the ministerial council from each country, how is it intended to resolve any disputes?

Ms Irwin—There is a dispute settlement provision in the treaty itself so, in the first instance, you would seek to resolve dispute through negotiation. However, annex B—I think—provides for arbitration if necessary.

CHAIR—Which body would arbitrate such a dispute?

Mr Campbell—There is an annex to the treaty which sets up a mechanism for establishing a three-person arbitral tribunal.

CHAIR—Is that under article 23?

Mr Campbell—I am not quite sure of the article.

Ms Irwin—Yes, that is right.

Mr Campbell—Article 23 and annex B of the treaty. If there were a disagreement in the joint commission, notwithstanding that there will be more East Timorese representatives on the joint commission, it would still be open to either party in the joint commission to refer that disagreement to the ministerial council. Then it would be up to the ministerial council—with equal membership—to try to resolve that disagreement. If there could not be resolution of that disagreement in the ministerial council, it would go to the arbitration mechanism.

CHAIR—But, as there are more East Timorese commissioners than Australian ones, if there were a dispute at the joint commission level, the majority would rule, would it not?

Mr Campbell—No, because in the treaty, notwithstanding that difference in representation, either side can refer a matter of disagreement to the ministerial council for resolution.

CHAIR—Which is then fifty-fifty representation?

Mr Campbell—Which is then fifty-fifty representation.

CHAIR—If they cannot agree, it would go to international arbitration?

Mr Campbell—It would go to the three-person arbitrary tribunal.

CHAIR—Where are those three from?

Mr Campbell—Australia and East Timor would appoint one arbitrator each. Then there are some fairly standard provisions on the selection of the third arbitrator. If Australia and East Timor cannot agree on the third arbitrator, either country ultimately can request the President of the International Court of Justice to select the third arbitrator.

CHAIR—If the president is a citizen of Australia or East Timor, you get somebody else to do it?

Mr Campbell—You get somebody else to do it.

Mr WILKIE—I wanted to move on to the employment issue in article 11. I see that it is not actually Australian and East Timorese workers; it is just East Timorese. I suppose I would like to see something there about Australian workers. In terms of employing East Timorese nationals in particular in relation to article 11, you made the comment, Dr Raby, that who they employ is really a commercial decision of the producers. What teeth then does article 11 have in trying to get East Timorese nationals employed in the gas fields? I am particularly concerned because my information is that in the interim arrangements with the exchange of notes that took place last year, even up until this case, there was a provision to enable East Timorese workers and Australian nationals to be employed. According to my information, none have been and the employees being taken on by the companies have been European. Although it is in writing, I am concerned that article 11 will have no validity whatsoever. How can we ensure that article 11 in particular is complied with?

Dr Raby—I might invite my colleague from DITR to respond to that.

Mr Walker—One of the major ways in which we have attempted to address this is through starting with the appropriate training activities, basically to bring some East Timorese people to a point where they have the skills to be able to apply for jobs that might be generated in the area. There is quite a deal of activity going on in this. One of these is a committee on training and education, which is chaired by Prime Minister Alkatiri and has membership from the Northern Territory government, the Commonwealth and industry. There are also commercial

arrangements between Phillips and East Timor to undertake additional such training, with the aim of increasing employment opportunities for East Timorese in the oil and gas industry.

Mr WILKIE—I would not mind seeing the previous agreement and checking whether that did have provision for Australian workers as well as for East Timorese workers. Can anyone tell me whether that was the case?

Mr Walker—By that agreement, you mean the treaty with—

Mr WILKIE—I think it was the one with Indonesia.

Mr Campbell—The previous agreement with Indonesia had provisions for the employment of Australian and Indonesian workers.

Mr WILKIE—Can someone tell me why Australian workers are not included in this treaty?

Mr Campbell—They are not precluded by this treaty. It says, ‘to facilitate, as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents.’ It does not preclude Australians from being employed in the area.

CHAIR—Returning to the timing of all this, the exchange of notes continues until the entry into force of the Timor Sea Treaty and it is really a holding position, but everybody’s rights and obligations are in place. What is the impetus then to ratify the treaty?

Dr Raby—From the East Timorese side, revenues which they would like to have access to are accumulating in escrow.

CHAIR—How are they held in escrow? Who has got them? Where are they?

Mr ADAMS—What is the structure?

CHAIR—How does it work?

Mr Walker—Under the interim arrangements, the resource taxes are collected by the joint authority. The joint authority holds trust accounts for these moneys and makes disbursements to governments as required.

CHAIR—So they do not have to wait for the treaty in order to get—

Mr Walker—I would expect that they would be setting up a special trust account to hold the 40 per cent that is being held in escrow.

Dr Raby—The real pressure for moving forward with this is that tremendous commercial developments, which depend on a legal framework being put in place to give them the certainty they need to commit these large funds for investment, are just sitting there.

Mr WILKIE—Wouldn’t that happen now under the current arrangement?

Dr Raby—No. The current arrangement, being temporary, does not include a unitisation agreement, for example, which would enable Greater Sunrise to go ahead. Certainly, the companies interested in Bayu-Undan want to see a treaty that is ratified and that enters into force.

CHAIR—So the completion of the unitisation agreement is very significant?

Dr Raby—It is absolutely essential if Greater Sunrise is to go ahead.

CHAIR—So you would not want one to occur without the other? You would not want to ratify the treaty without the unitisation agreement being in place?

Dr Raby—We want both these elements to move forward in parallel in the shortest possible time.

CHAIR—But there is nothing in the treaty that requires the unitisation agreement to be completed at the same time?

Dr Raby—No, not at all, but a memorandum of understanding was signed—obviously, that is subtreaty status—in Dili on 20 May, and it has both governments committing themselves to expeditiously concluding a unitisation agreement.

CHAIR—Are you saying that that was with a view to them being completed at the same time?

Dr Raby—That would be an expectation, but the point is that we think that basically both can be accommodated within the same time frame.

Mr WILKIE—Even now, given the legislation that East Timor passed this week?

Dr Raby—Yes. We have had very positive comments from the East Timorese leadership about their commitment to moving this unitisation agreement forward very quickly.

Mr WILKIE—When you say ‘very quickly’, what time frame are you looking at?

Dr Raby—Before the end of the year, which is consistent with the memorandum of understanding that was signed on 20 May in Dili. The date set down in that MOU was 31 December. We hope that it can be done earlier than that, but certainly the indications we have are that there is a commitment on the East Timorese side to have this done by 31 December at the latest, and obviously we are committed to that as well.

CHAIR—What is the imperative on the part of East Timor to sign the unitisation agreement?

Dr Raby—They have the same interest that we have in the commercial development of the region.

Mr WILKIE—I have had information that Phillips are saying that they really want to come online in 2006. If the treaty and the IUA are held up until the end of December, is that going to affect those plans?

Dr Raby—I think it is fair to say that Phillips certainly want this done sooner rather than later. But they will have to make a judgment about how the negotiations are going and where we will end up towards the last quarter of this year.

Mr MARTYN EVANS—Do we know where all this gas is going to be used? We have a lot of gas on the North West Shelf, and other countries such as Malaysia have a fair bit of gas.

Mr Walker—It is probably best if I address this in terms of the two specific projects that are being discussed. Firstly, for the Bayu-Undan project, Phillips plans to start producing natural gas from Bayu-Undan, pipelining it to Darwin, where it will be converted into LNG, and then selling that LNG to the Japanese market. The commercial negotiations to enable that to happen are well advanced. The case of the Greater Sunrise field is, however, more complex. There are two development options being considered. Shell, one of the joint venture partners, has proposed developing the field using floating LNG technology—this is something that has not been done anywhere in the world to date—and then selling the gas to the US west coast market. However, there are counterproposals for Greater Sunrise, for bringing that natural gas onshore and using it to supply the Australian domestic gas market. The joint venture partners are currently undertaking a review of the domestic market to see whether they can achieve the volumes and price levels that they would need to make that feasible.

Mr ADAMS—Who owns the new technology that you just talked about?

Mr Walker—Shell.

Mr ADAMS—Developed where?

Mr Walker—I am not certain of that, but it was certainly not in Australia.

CHAIR—So it is one option or the other, is it? The US market or the Australian domestic market?

Mr Walker—They are the two options that are on the table as of now. Somebody may yet develop a new option.

Mr WILKIE—Mr Walker, would they pipe that gas down?

Mr Walker—Under the floating LNG proposal, there would be no pipeline from the Greater Sunrise field to Australia; the natural gas would be exported direct from the production point to the LNG markets.

Mr WILKIE—I am thinking of the natural gas domestic market.

Mr Walker—In the natural gas domestic market, you have to bring very large quantities of gas ashore to make this commercially feasible, and that would require markets in southern and eastern Australia, as well as potential markets in the Northern Territory, in order to get to the necessary volumes.

Mr ADAMS—Are any Australian public interests run over this, when it is being negotiated, or is it just left up to the private sector's business interests and what serves them best? Is bringing it ashore, employing Australian workers, interchanging technology or any other such thing, brought into consideration when we negotiate these treaties?

Mr Walker—In terms of the treaty itself, that does not really impinge on the development options, except to ensure that the treaties, the international unitisation agreements, are written in ways which do not preclude any development options. As you say, there are obviously benefits if the gas can be brought ashore commercially, but we are talking about very large investments. It is something that the commercial sector has to make decisions about, on commercial grounds.

Mr ADAMS—Somebody has to make the decision on the public interest of the country of Australia: that is my task, and that is why I am asking the question. That is my task on this committee, and I am looking at whether the process has given that consideration, and I am really being told that it has not, and that is what I will accept from your answer.

Mr Walker—There has been a lot of detailed consideration of the relative merits of onshore versus offshore. You will have seen a lot of things, particularly from the Northern Territory government, which is obviously very interested in seeing onshore development take place. At the end of the day, the actual decision to invest will have to be made by industry; what they are currently exploring is whether one option is economically feasible or not, or whether in fact neither is, perhaps.

Mr ADAMS—What about the Australian component of input into building a platform? Or will the platforms be built in Indonesia or somewhere else and floated in? Is there any opportunity for Australia? Have we negotiated anything in this, in the interests of Australia?

Dr Raby—What we are dealing with with this treaty is not an issue of industry policy. This is a legal instrument that is permissive. It is intended to allow all sorts of things to happen. Those things that you are describing may or may not be accommodated within this. That it is permissive—nothing is precluded—is the point I want to make. The treaty is about the legal framework. The industry policy is another issue but it is not an issue that is addressed with this treaty. However, the treaty does not preclude any number of industry policy outcomes.

Mr ADAMS—But it does not put anything into it.

Dr Raby—No, it creates a legal framework for commercial development to proceed. How that is structured is a matter of government policy and, ultimately, a matter for commercial decision of the partners.

Mr ADAMS—But in the process of not excluding anything happening it could also write certain things into it as well. That would have been possible, would it not?

Dr Raby—I am not sure. It is to do with the legal framework between East Timor and Australia.

CHAIR—We would not want it writing in what options they should pursue in development.

Mr ADAMS—I am talking about what is to the benefit of East Timor in getting some skills and what is in the interest of Australia in getting some technological change or technological wins.

Dr Raby—That is a question you will have to direct to the government. We have negotiated the treaty, but the parameters for that are obviously set by the government. You will need to address that to government.

Mr ADAMS—I accept that.

Senator MARSHALL—Do other countries, when negotiating these sorts of treaties, seek to put in those industry policy type issues, as you describe them?

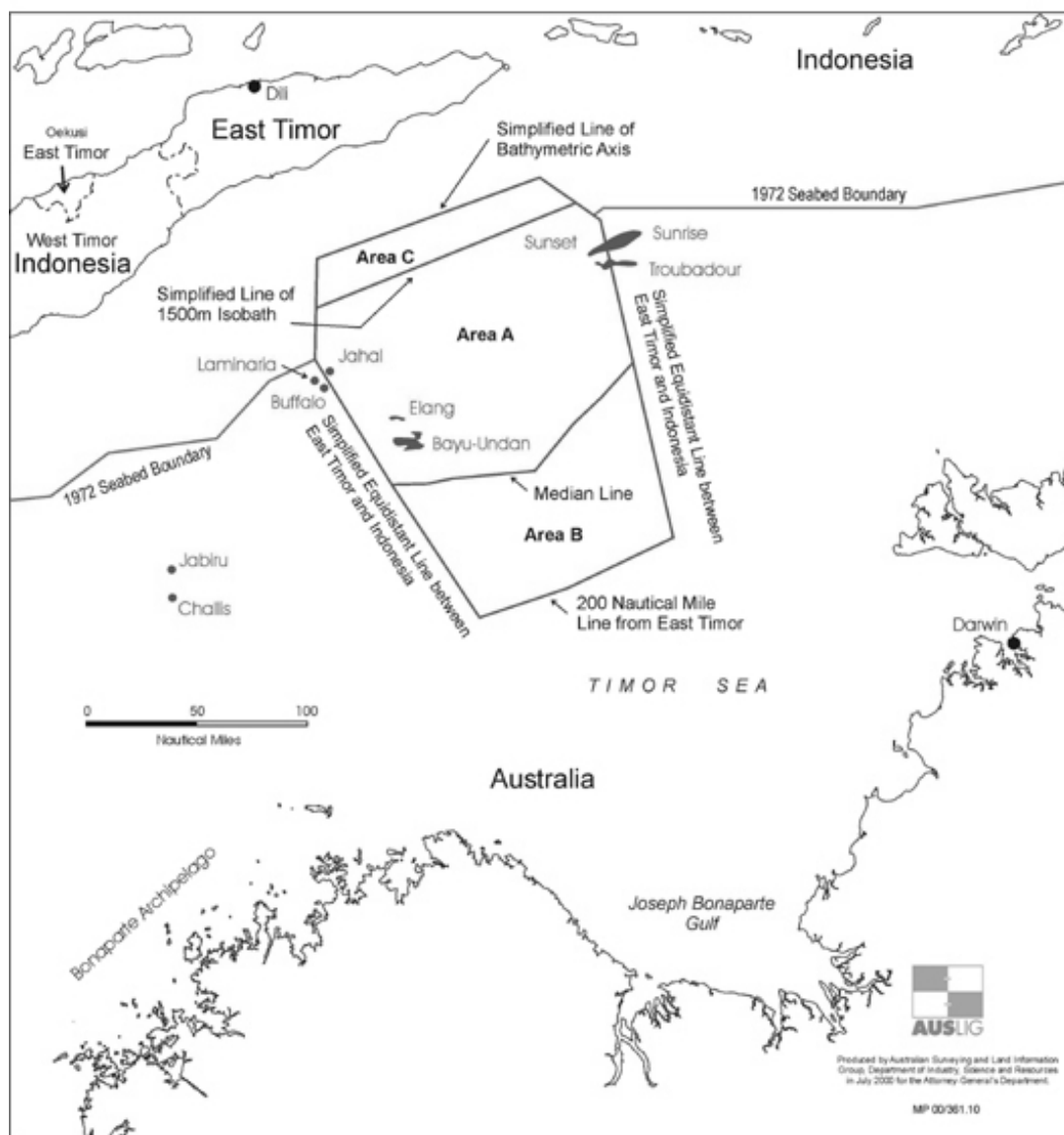
Mr Walker—Not in any of the international unitisation agreements and things that I have seen, no.

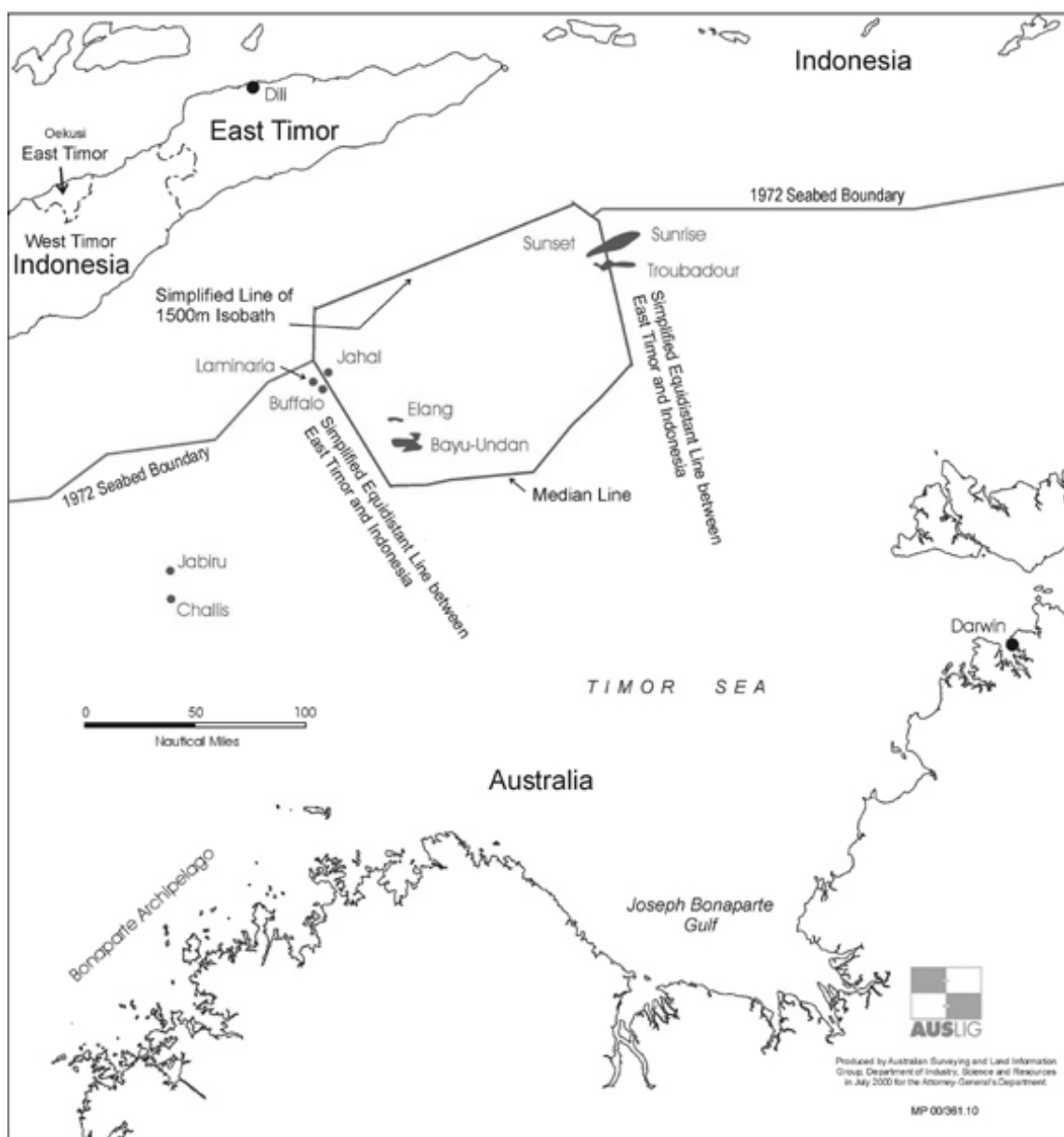
CHAIR—Thank you for your time this morning. This may not be the last time that we ask you to appear before the committee. It depends on how the public submissions proceed.

Is it the wish of the committee that the Auslig maps—I think that is the best way to describe it—of the Timor Sea provided by the Department of Foreign Affairs and Trade and the Timor Gap Treaty boundaries map provided by the Department of Industry, Tourism and Resources be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The maps read as follows—

TIMOR GAP TREATY BOUNDARIES





Mr WILKIE—Mr Campbell, could I ask for a copy of the wording for the previous treaty that we had—

Mr Campbell—In relation to employment.

Mr WILKIE—In relation to employment, for Australia and East Timor.

Mr Campbell—I have got it here.

CHAIR—Thank you.

[11.28 a.m.]

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—I welcome witnesses from the Attorney-General's Department and the Department of Foreign Affairs and Trade to give evidence in relation to the Australian declarations under articles 2871 and 2981 of the United Nations Convention on the Law of the Sea 1982 and the Australian declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice 1945. As you were all witnesses in the last hearing I will not go over the warning about not giving false and misleading evidence. I am sure that you are all aware that these are regarded as proceedings of the parliament and should be treated accordingly. Would somebody like to make some opening remarks about this particular international instrument?

Mr Campbell—Before making some opening remarks, I note that the tabling of these treaties was anticipated in a letter sent to you on 24 March of this year, stating that the declarations had been lodged but that they would be tabled before the committee as soon as possible thereafter. They were lodged early, on the basis of the sensitive nature of the action, which is probably something that we will get into afterwards. Having stated that, we welcome the opportunity to explain to the committee these two instruments: the declarations relating to dispute settlement under the United Nations Convention on the Law of the Sea, which I will refer to as the Law of the Sea convention, or UNCLOS; and Australia's new declaration of acceptance of the jurisdiction of the International Court of Justice, which I will refer to as the ICJ.

Before moving on to the two declarations, I would like to make a preliminary point about international adjudication and arbitration in general, and that is that most if not all dispute settlement by international courts and tribunals is based upon the consent of the states appearing before them. That consent can be given in a variety of ways, as I will mention in relation to the ICJ. However, in the absence of its consent, a state cannot be taken before an international court or tribunal. In the absence of such consent by a state, no other state has the right to bring a dispute between the two of them before an international court or tribunal. The point I make is that consent is fundamental to international adjudication and arbitration.

CHAIR—So you cannot have a unilateral referral of a matter to the court?

Mr Campbell—That is exactly right. Moving on to the UNCLOS declaration, which was made on 22 March, Australia gave its consent to dispute settlement in relation to the interpretation and application of the Law of the Sea convention when it ratified that convention in 1994. Indeed Australia, together with New Zealand, utilised the dispute settlement proceedings under UNCLOS when both countries took Japan to an arbitration over southern bluefin tuna in 1999. While all parties to UNCLOS accept dispute settlement under the convention, the convention allows states parties certain choices, and those choices are both as to the means of dispute settlement and also as to the exclusion of certain forms of dispute from dispute settlement. The declaration made by Australia recently under the convention relates to those two choices.

The purpose of the first part of the declaration was to nominate the International Tribunal for the Law of the Sea and the ICJ as preferred means of dispute settlement under UNCLOS. The NIA sets out the other means that were the subject of that choice, and I will not go into them now. UNCLOS also enables countries to exclude specified forms of dispute from dispute settlement, and one of those express exclusions referred to in UNCLOS relates to the determination of maritime boundaries. Under its declaration, pursuant to that provision, Australia has excluded maritime boundary disputes from compulsory dispute settlement under the Law of the Sea convention. That action was taken in line with the government's view that maritime boundaries are best resolved through negotiation rather than by resort to an international court or tribunal. As a matter of statistics, of the 29 states parties to UNCLOS that have actually nominated preferred dispute resolution mechanisms, 11 have made similar exceptions in relation to maritime boundary disputes.

Moving on to the International Court of Justice, or ICJ, declaration, as is explained in the NIA, a state can accept the jurisdiction of the International Court of Justice in three ways. The first way a state can do this is by entering into an agreement with another country to refer a particular dispute to the International Court of Justice; that is referred to technically as a *compromis*. The second mechanism is that, in a treaty on a particular subject, a state might agree that the ICJ will have jurisdiction over disputes arising under that treaty—and the example I just gave of the declaration under the UN Convention on the Law of the Sea is an example of that. In other words, we have agreed under the UN Convention on the Law of the Sea that the ICJ can be used for the resolution of disputes under that treaty. The third form of consent is that under article 36.2 of the statute of the ICJ—commonly known as the optional clause—a state may lodge a declaration with the Secretary General of the United Nations, accepting the jurisdiction of the court in relation to any other country making a similar declaration: that is, there is an element of reciprocity. In making such a declaration, a state is entitled to place conditions or exceptions on its acceptance. If there is a dispute between two states, both of whom have lodged declarations under the optional clause that covered the dispute, then the ICJ has jurisdiction over it.

Australia's previous declaration in 1975 under the optional clause was an open declaration; it only included one qualification. The declaration made by Australia in March this year inserted a number of further qualifications. Those qualifications bring about a consistency with the declaration I just referred to under UNCLOS, which excluded maritime boundary disputes. They also bring about some commonality with qualifications that have been adopted by a number of other countries in relation to their ICJ declarations.

The four qualifications are set out in the NIA. In short, the first qualification is where we have agreed with another state to utilise another dispute resolution mechanism in relation to a particular dispute; in that case, that other means will be used and not the ICJ. That exception was contained in the previous declaration. The second qualification concerns maritime boundary disputes between Australia and another state, or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute. The effect of that exception, combined with the UNCLOS declaration, is to preclude compulsory dispute settlement of Australia's maritime boundaries.

I will give a bit of background about our boundaries. We have some of the largest maritime areas in the world, and we also have some of the longest maritime boundaries. It is the view of the government that the maritime boundaries, as I mentioned earlier, are best resolved by negotiation and not through resort to third party dispute settlement. All the current maritime boundaries that we have settled with other countries have been agreed by negotiation. Negotiation allows the parties to work together to reach outcomes acceptable to both sides for the long term.

The third qualification is where another state accepts the jurisdiction of the ICJ only for the purpose of a particular dispute. That reservation ensures that only countries that have the same broad acceptance of the jurisdiction of the ICJ can take Australia to the international court under the optional clause. The final qualification is in relation to cases where less than 12 months has elapsed since another state accepted the jurisdiction under the optional protocol. This is designed to protect Australia from litigation by countries that have accepted the jurisdiction of the ICJ for the sole purpose of bringing proceedings against Australia. Again, it relates to that issue of long-term acceptance of the jurisdiction.

Notwithstanding those qualifications, Australia still accepts the jurisdiction of the International Court of Justice in relation to most disputes. There has been quite a lot of reporting that Australia has withdrawn from the ICJ jurisdiction; that is simply not the case. Australia has put on some further qualifications, but it has not withdrawn from the jurisdiction. Indeed, as pointed out in the national interest analysis, Australia is in the minority of only one-third of United Nations members who accept ICJ jurisdiction under the optional clause. Of the 190-odd United Nations members, only 63 have made a declaration under the optional clause to accept the jurisdiction of the court. Of those 63 states, a majority—that is, 46—have placed some qualifications on their acceptance. If I could make a slight explanation, I think the NIA refers to 61 states as having accepted the jurisdiction of the ICJ.

CHAIR—Yes, it does.

Mr Campbell—It is very much a matter of reading some declarations and documentation. Some of those relate to declarations that were previously made in relation to the Permanent Court of International Justice prior to 1945. We have had a careful look at it and are fairly sure that the figure is 63. The other point I would make is that the web site containing those declarations is updated only every so often; it is not updated from day to day. We cannot be sure that the figure is exactly right at the moment, but it would be fairly accurate. I will conclude by saying that, consistent with its obligations under the UN charter, Australia is committed to the peaceful settlement of disputes. In this respect, the ICJ and the dispute resolution mechanisms under UNCLOS will continue to play an important role.

CHAIR—One of the exceptions applies where the parties agree to other peaceful means of dispute resolution. Take me through that scenario. What happens when Australia and another party agree to some other means of dispute resolution which does not resolve the dispute?

Mr Campbell—There would be no resort to the International Court of Justice in those circumstances.

CHAIR—There could not be, or there would not be?

Mr Campbell—There would have to be a separate agreement to take it to the International Court of Justice in those circumstances.

CHAIR—So Australia could go back on its exceptions at any time?

Mr Campbell—It is always open to Australia to agree with another country to take a particular dispute to the International Court of Justice. That was the first type of referral that I mentioned: under a so-called compromis, we reach a specific agreement to take a matter to the International Court of Justice.

CHAIR—In broad terms, we have accepted the jurisdiction of the ICJ since 1975?

Mr Campbell—We have accepted the jurisdiction of the ICJ virtually since its inception, which was around 1947. We accepted the jurisdiction of the permanent court before that.

CHAIR—So what was the point of the date of 1975?

Mr Campbell—That was the date our previous declaration was made, but before that there was another declaration in 1954. Prior to that, Australia made a declaration in relation to the permanent court in 1940.

CHAIR—But this is the first time we have made an exception or declaration with respect to maritime boundaries?

Mr Campbell—No. In fact, the 1954 declaration made reservations in relation to certain maritime matters.

CHAIR—What was the difference between that reservation and this current declaration?

Mr Campbell—The current declaration is certainly more comprehensive in its dealing with maritime boundaries, but bear in mind that the maritime boundaries in 1954 fundamentally related to the territorial sea only. The continental shelf was just developing at that stage; there was no concept of an exclusive economic zone. Of necessity, our current declaration is much broader.

Mr WILKIE—Have we ever been taken to court about boundaries?

Mr Campbell—Yes, we have.

Mr WILKIE—What was the outcome? Can you tell us about the case or cases?

Mr Campbell—The case in fact concerned the Timor Gap Zone of Cooperation that was agreed under the Timor Gap Treaty with Indonesia. Portugal took Australia to the International Court of Justice alleging, amongst other things, that the Timor Gap Treaty was illegal because the occupation of East Timor by Indonesia was illegal. However, Portugal could not take Indonesia to the court, because Indonesia had not accepted jurisdiction under the optional clause. The argument put by Australia in that case, relying upon some earlier authority called the Monetary Gold Case, was that Indonesia was what is known as ‘an indispensable third party’ to that action and the action could not sensibly be decided in the absence of Indonesia’s presence before the court. Ultimately, that was the basis on which the court said it would not exercise jurisdiction over the matter, and that was where the matter was left.

Mr WILKIE—Is that the only case?

Mr Campbell—That is not the only case where Australia has been before the International Court of Justice.

Mr WILKIE—I mean over the maritime borders.

Mr Campbell—That is the only case that I can recall over maritime boundaries. There was another semi-maritime matter, and that was when Australia took France to the International Court of Justice in the mid-1970s over atmospheric nuclear testing in the Pacific, which had a maritime aspect to it.

Senator MARSHALL—You mentioned earlier that some other countries may be waiting for this process, to take us to court on some of the boundary issues. I thought you indicated that some other countries had ratified that agreement on the basis that they may be able to use that in some disputed boundary issues with us, unless I misunderstood.

Mr Campbell—I do not think I suggested that.

Senator MARSHALL—I am sorry. Do we have any unresolved boundary issues?

Mr Campbell—We have a number of unresolved boundaries—when I say ‘unresolved’, I mean boundaries yet to be agreed with other countries. As I think is set out in the NIA, we have maritime boundaries with seven countries. We have agreed our maritime boundaries with Indonesia, although the 1997 treaty, which is the final treaty we negotiated with Indonesia, is yet to enter into force. We have some unresolved continental shelf boundaries beyond 200 nautical miles with France that we are yet to resolve, both in relation to New Caledonia and its possession of Kerguelen, which is near Heard and McDonald Islands in the Southern Ocean. We also, of course, have an unresolved boundary with East Timor, but we have provisional arrangements in place. At the present time we are involved in maritime boundary negotiations with New Zealand, where we have maritime boundaries on four fronts, including between our Antarctic possessions. We also have unresolved boundaries with France and Norway in relation to where they abut the Australian Antarctic Territory. They are the unresolved ones.

CHAIR—This declaration was clearly pre-emptive, so who are we assuming is going to begin an action against Australia with regard to a sea boundary delimitation?

Mr Campbell—I cannot really get into the motives of why the declaration was made. There was no actual threat that I have seen in any newspapers, or things like that, about Australia being taken to court over its maritime boundaries. There were certainly a deal of writings and papers being given by academics saying that it was a possibility East Timor would take Australia to the court over its maritime boundaries.

CHAIR—We had not thought of a declaration prior to this? We had not thought it necessary to make this exception prior to 2002?

Mr Campbell—We have been considering for some time the question of the declarations under UNCLOS, which have really been outstanding since we became a party to it in 1994, both in relation to the forum for dispute settlement and in relation to the question of which exceptions under UNCLOS we would adopt. The government has now made that decision.

Mr MARTYN EVANS—In relation to the International Court of Justice, what is the status of the jurisdiction acceptance by countries like the United States and the major European Community powers? Have they more or less unreserved acceptance of the jurisdiction?

Mr Campbell—It might be useful if we provide to the committee the list of declarations made by the countries. We can do that very easily.

Mr MARTYN EVANS—Certainly the major ones would be helpful.

Mr Campbell—We will provide that list to you. The United States, France, China and the USSR do not accept the jurisdiction of the international court. France and the United States used to accept the jurisdiction under the optional clause. Most of the European countries, I think, have made a declaration under the optional clause. Not all of them, but many, have qualifications to it. For example, in our region New Zealand accepts the jurisdiction of the international court with qualifications, some of which relate to resources in its maritime zones. Indonesia does not accept the jurisdiction of the court under the optional clause although—as I mentioned earlier—it made a specific agreement with Malaysia to take a dispute over sovereignty of certain islands to the international court. That was heard by the court in June.

Mr MARTYN EVANS—That would be quite useful. Thank you.

Mr WILKIE—This is not a question; it is more a statement, but you may wish to comment on it. I would think you could understand that the international community might say to Australia, ‘You’ve had this in place since 1940. You’ve never had a judgment made against you and two months before East Timor—the only country likely to take action against you—you’ve suddenly decided to exclude this from the court’s jurisdiction.’ A cynic might say that it has been done to prevent East Timor taking us to court and, therefore, it is in Australia’s international interests.

Mr Campbell—There are a number of points I can make or repeat. Firstly, East Timor has said that it is keen on negotiation as a means of resolving these disputes. Secondly, this applies

to all our maritime boundaries; we are not just talking about our maritime boundaries with East Timor; we do have unresolved boundaries. Thirdly, it is the view of the government that maritime boundaries are best resolved by negotiation and not by resort to international arbitration or courts. To repeat another point: all our current boundaries with other countries have been negotiated.

Finally, the question of the acceptability of the boundary to both countries is very important, given that maritime boundaries remain in place for a very long period. You are much more likely to get acceptance of that boundary, and less tension over time, if it is done by agreement as opposed to an international court or tribunal. There have been cases—I can think of one instance—where countries have had a boundary resolved by arbitration and ended up with a very odd result which may not have been in the interest of either country. The case I am thinking of is a boundary that was set by arbitration between Canada and France in relation to some French possessions very close to the coastline of Canada. These islands ended up with an exclusive economic zone which was 200 nautical miles long and 10½ nautical miles wide. That made it very difficult in relation to regulated fisheries in the area. The fundamental point is that the government believes that maritime boundaries are best resolved by negotiation.

CHAIR—Do you know whether East Timor as a nation has accepted the jurisdiction of the International Court of Justice?

Mr Campbell—East Timor is not yet a member of the UN. Although it has applied for UN membership, it has to be approved in about September.

CHAIR—It has not entered into any international instruments of that nature because it is not yet a member of the UN.

Mr Campbell—It is not yet a member. If you are a member of the UN, it follows that you are also a party to the Statute of the International Court of Justice. Once East Timor became a party to the Statute of the International Court of Justice, if it wanted to, it could make a declaration under the optional clause of that statute.

CHAIR—Currently it has no status to refer a matter to the ICJ, anyway.

Mr Campbell—No, it does not. Let me put it this way: it is our view that they do not.

Mr WILKIE—But they may have in the future.

Dr Raby—The expectation is that they will join the UN in September.

CHAIR—Currently, as it stands today, they do not have standing to refer a matter to the ICJ?

Mr Campbell—No.

Senator KIRK—With respect to these maritime boundary disputes that we will now be negotiating directly with the other country, what will occur if agreement simply cannot be

reached? Is there an international arbitration process that we can agree to enter into if the ICJ is unavailable?

Mr Campbell—It is still the government's view that they are best resolved by negotiation, but it is always open to the two countries to agree specifically to refer a particular matter, including a maritime boundary delimitation, to either a special arbitral tribunal, like I mentioned in relation to the St Pierre and Miquelon matter, or they could agree to refer it to the International Court of Justice, if they wanted to. Also, there is still a measure under the United Nations Convention on the Law of the Sea, which I think is mentioned in the NIA, to the effect that if both countries are a party to the Law of the Sea Convention, either of those parties could refer the matter to a conciliation commission under the convention. That conciliation commission could look at it but the views or decisions of that conciliation commission would not be binding on either country.

CHAIR—Under the UNCLOS declaration, if Australia is involved in a dispute with a country that has not accepted either of our two preferred dispute resolution mechanisms, then there is this default mechanism of an arbitration panel?

Mr Campbell—That is right.

CHAIR—What are the advantages or disadvantages of a panel such as that?

Mr Campbell—I think they are referred to in part in the NIA. One of the reasons that Australia adopted the International Court of Justice and the International Tribunal for the Law of the Sea is that, firstly, Australia has knowledge of both of them, has been before them and has seen how they operate and, secondly, they are both standing tribunals and Australia has already contributed to their costs. If we take a matter or somebody else takes us to the ICJ or the International Tribunal for the Law of the Sea, we do not have to bear the costs of the tribunal and the judges. The other issue is that they are there, ready and available—

CHAIR—With established rules of procedure.

Mr Campbell—They can take matters quite quickly. That situation is as opposed to, for example, an annex 7 arbitration tribunal under the Law of the Sea Convention, of which we have had experience in the southern bluefin tuna case. It takes some time to establish the tribunal. There is quite a lengthy process of negotiation with the country with which you are in dispute over some other substantive issue as to who is going to be appointed to the tribunal and things like that. The other issue is that the countries involved in the dispute have to bear the costs of the running of that tribunal and the payment of the judges. They have to agree on how it is going to be organised.

CHAIR—It is very expensive.

Mr Campbell—There are substantial practical advantages in going to the ICJ and the International Tribunal for the Law of the Sea.

CHAIR—Why did we have to go to an arbitral tribunal under annex 7?

Mr Campbell—Because neither Japan, New Zealand nor Australia for that matter made a choice of tribunals under UNCLOS. We did have to go to the default mechanism, which was an annex 7 tribunal. Although we sought interim measures against Japan, the convention allows that those interim measures be heard by the International Tribunal for the Law of the Sea.

CHAIR—Is that in part why this declaration is being made?

Mr Campbell—In part, the declaration was held off because we wanted to see how the International Tribunal for the Law of the Sea operated, not just in relation to our own case but generally. It came into being only about two years after the convention entered into force. We just wanted to see how that operated before Australia decided whether or not to accept its jurisdiction. We did have experience before it. That is partly the basis on which the choice was made.

CHAIR—Thank you very much for your assistance this morning. It is very much appreciated.

Proceedings suspended from 12.02 p.m. to 1.04 p.m.