

## Minority Report by Senator Andrew Bartlett

The Australian Democrats have a number of concerns relating to Australia's ratification of the *Timor Sea Treaty between the Government of Australia and the Government of East Timor* (the Treaty) in its present form and in present circumstances.

For the purposes of this report, we concur with the Committee's summary of the relevant history and substance of the Treaty, as set out in Chapter 1 of its Report.

### National Interest

The Australian Democrats acknowledge that the Committee's function is to consider and report on treaty actions with respect to their effect on Australia's national interest.

In this instance, we are persuaded by the weight of submissions which argued that Australia's national interest is inherently related to that of East Timor.

East Timor is a near neighbour of Australia and the world's newest sovereign state. It is clearly in Australia's best interests for East Timor to evolve into a strong, prosperous, democratic nation with proper regard for the rule of law.

As Oxfam Community Aid Abroad argued:

For Australia, an economically unviable East Timor could threaten national security and that of the region. An unstable East Timor could lead to a flow of refugees to Australia with associated costs. The Australian and international community would expect the Australian government to bear much of the responsibility for increased humanitarian aid and assistance, and the provision of continued peacekeeping and security assistance to East Timor.<sup>1</sup>

For these reasons, the Democrats have given careful consideration to the many submissions which highlighted the serious consequences that ratification of the Treaty will have for the people of East Timor.

The East Timor Institute for Reconstruction Monitoring and Analysis stated that "this may be the most important issue for the future of our newly-independent country".<sup>2</sup>

---

1 Oxfam Community Aid Abroad, *Submissions No. 46*, p. 4.

2 East Timor Institute for Reconstruction Monitoring and Analysis, *Submissions No. 14*, p. 1.

It further argued that “without economic security and without the ability to rely on the rule of law both within our country and internationally”, East Timor faces the serious risk of becoming a “failed state”.<sup>3</sup>

## **Negotiation of the Treaty**

A number of submissions alleged that the negotiation of the Treaty was unjustifiably hasty. Furthermore, it was claimed that East Timor’s agreement to the terms of the Treaty was extracted through undue pressure from Australia and reflects the unequal bargaining power of the two countries.

The Australian Democrats accept that Australia occupied a stronger position than that of East Timor in the negotiations leading to the signing of the Treaty. In particular, we note the vast difference in the relative wealth of each country and the fact that East Timor relies heavily on aid provided by the Australian Government.

It has also been argued that, because 40% of East Timor’s income from petroleum resources within the Joint Petroleum Development Area (JPDA) is being held in trust until the Treaty comes into force, East Timor had a compelling incentive to sign (and now to ratify) the Treaty.

This inequality of bargaining power may have influenced East Timor’s decision to sign the Treaty, however the Democrats do not believe that the Australian Government acted in bad faith or exerted undue pressure on East Timor during the negotiations.

We acknowledge that it is in the best interests of both countries to expedite an agreement for the sharing of revenue from petroleum resources in the JPDA. A number of companies with commercial interests within the JPDA argued persuasively that fiscal and regulatory certainty is vital to ensure ongoing investment in, and development of, those petroleum resources.

Clearly, then, there is a strong incentive for Australia and East Timor to reach an expeditious agreement so as to ensure that development opportunities are not lost. However, the economic benefits associated with expediency must not outweigh the fundamental importance of ensuring that the Treaty is fair and just.

For reasons outlined below, the Democrats do not believe that the Treaty represents a fair agreement between Australia and East Timor.

---

3 East Timor Institute for Reconstruction Monitoring and Analysis, *Submissions No. 14*, p. 6.

Furthermore, the Treaty neglects a number of key issues which we believe should be included in its provisions. For example, the Treaty is silent on environmental protection standards to be applied within the JPDA. This is an issue of considerable concern to the Democrats, given the potential impact on marine bio-systems and the implications regarding greenhouse gas emissions.

The Australian Maritime Officers Union (AMOU) raised concerns relating to the occupational health and safety (OH&S) standards applicable within the JPDA. In particular, the potential for OH&S standards within the JPDA to be less stringent than those which apply within Australia.

The Democrats are concerned by the Committee's willingness to rely on assurances from companies operating in the JPDA that they observe strict OH&S standards. This may well be the case, but the Democrats believe that it is inappropriate and undesirable for OH&S standards to be the subject of self-regulation within the private sector. For reasons of consistency and enforceability, Governments should take responsibility for determining and monitoring appropriate OH&S standards.

Australia and East Timor should negotiate appropriate OH&S standards to apply within the JPDA and these standards should be set out clearly in the terms of the Treaty, or annexed thereto.

The Treaty contains an employment preference clause for nationals and permanent residents of East Timor, however the Committee has acknowledged the practical difficulties associated with implementing such a clause. In particular, concerns have been raised regarding the lack of appropriate skills and training within the East Timorese workforce.

As noted in the Committee's report, Australia is well-placed to train East Timorese workers who seek to gain employment in the resource industry.

The Democrats believe that the issue of training should be specifically addressed in the terms of the Treaty.

In its submission to the Committee, the East Timor Independent Information Centre for the Timor Sea argued that:

Providing a stable environment for oil companies must not be prioritised over protecting the future of East Timor's sea, land, natural and human resources.<sup>4</sup>

This argument applies equally to the protection of Australia's natural and human resources.

---

4 East Timor Independent Information Centre for the Timor Sea, *Submissions No. 9*, p. 3.

## Seabed boundary delimitation

The Australian Democrats believe that the revenue split of 90-10 in favour of East Timor represents a fair allocation of the resources within the JPDA, as it is defined within the Treaty.

However, uncertainty regarding the legality of the boundaries of the JPDA is crucial when assessing the overall fairness of this allocation between Australia and East Timor.

A series of legal opinions have given rise to conflicting interpretations of international law as it applies to the delimitation of seabed boundaries between Australia and East Timor. These divergent – and often equally persuasive – opinions illustrate the complexity of the legal principles governing the delimitation of seabed boundaries and the unique factual circumstances of this particular case.

An additional factor relevant to the delimitation of East Timor's maritime boundaries is the unitisation of the Greater Sunrise gas and oil fields, as provided for in the Treaty. Again there are conflicting legal opinions regarding this issue and it is unclear whether the International Unitisation Agreement would survive a subsequent change to East Timor's maritime boundaries, or whether it would be possible for the Agreement to be amended to reflect the new boundaries.

The Democrats believe that these issues must be resolved in accordance with the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) and any applicable customary law. If the parties are unable to reach a fair and just agreement, they should submit to the jurisdiction of the International Court of Justice (ICJ).

A number of submissions argued that the distribution of resources under the Treaty is likely to be a relevant consideration in the ultimate determination of East Timor's seabed boundaries, despite the 'without prejudice' clause contained in the Treaty (Article 2(b)).

The Democrats are sympathetic to those submissions which argue that the maritime boundaries between Australia and East Timor must be delimited as a matter of urgency, and prior to any further agreements on revenue sharing.

We are concerned that ratification of the Treaty may undermine the imperative to expedite the delimitation of seabed boundaries between Australia and East Timor. As Oxfam Community Aid Abroad notes:

The treaty does not ... provide any framework or mechanism for the advancement of maritime boundary negotiations.<sup>5</sup>

## Jurisdiction of the International Court of Justice

The Australian Democrats take this opportunity to record our opposition to the declarations made by the Australian Government in March of this year, excluding Australia from the compulsory jurisdiction of the ICJ and UNCLOS with respect to maritime boundary disputes.

The Democrats believe that it is in Australia's best interests to support the structures and principles of the international legal system, which have been established to promote collective security, the just resolution of disputes and international peace. In practical terms, this means submitting to the rule of law even where this is contrary to our more immediate, financial interests.

Australia's withdrawal from the compulsory jurisdiction of the ICJ with respect to maritime boundary disputes is not only contrary to Australia's national interest, but sets a poor example in our dealings with East Timor.

In this respect, the East Timor Institute for Reconstruction Monitoring and Analysis made the point that:

Australia and others in the international community consistently encourage East Timor's new government to implement democracy, the rule of law, transparency and safeguards against corruption as we develop our governmental structures and practices.... At the same time, Australia is not practicing what you are preaching. When your country withdrew from legal processes for resolving maritime boundary disputes, you taught us the opposite message – that when the booty is large enough, the legal principles go out of the window.<sup>6</sup>

East Timor was not notified of Australia's decision prior to the making of the declarations. The National Interest Analysis with respect to these declarations, states:

This action was not made public prior to it being taken to ensure the effectiveness of the declaration was maintained. Public knowledge of the proposed action could have led other countries to pre-empt the declaration by commencing an action against Australia in relation to sea boundary delimitation that could not be made once the declaration under article 298(12)(a) of UNCLOS was made.

---

5 Oxfam Community Aid Abroad, *Submissions No. 46*, p. 3.

6 East Timor Institute for Reconstruction Monitoring and Analysis, *Submissions No. 14*, p. 5.

This decision clearly has adverse consequences for East Timor and may prevent it from “receiving the guidance and rulings”<sup>7</sup> of the ICJ, in the event of a failure to resolve its competing claims with Australia.

It is arguable that Australia was at least morally, if not legally, obliged to give East Timor prior notice of this decision. In this respect, the Democrats note evidence to the effect that Australia’s withdrawal from the dispute resolution mechanisms under the ICJ and UNCLOS has been interpreted by the East Timorese as an act of bad faith on the part of the Australian Government.

## Recommendations

For the reasons outlined above, the Australian Democrats recommend that the Treaty not be ratified in its present form.

We note that during renegotiations, it will be possible for commercial activity to continue within the JPDA in accordance with the terms of the Exchange of Notes, which currently governs the sharing of revenue and remains in effect until the Treaty comes into force.

In addition, the Democrats make the following recommendations:

1. That Australia and East Timor negotiate a definitive time frame, not exceeding five years, in which the seabed boundaries between the two countries will be delimited, and agree to refer their competing claims to the ICJ in the event that a fair agreement cannot be reached.
  2. That Australia immediately reinstates its adherence to the dispute resolution mechanisms under the UNCLOS and to the jurisdiction of the ICJ pertaining to maritime boundary disputes.
  3. That, in negotiating the new Treaty, consideration be given to a requirement that all of Australia’s revenue, together with 40% of East Timor’s revenue, from petroleum resources within the JPDA be placed in a denominated interest bearing escrow account, pending the determination of the seabed boundaries.
  4. That the new Treaty include express provisions regarding:
    - (a) environmental standards to apply within the designated area;
    - (b) OH&S standards to apply within the designated area; and
- 

7 East Timor Institute for Reconstruction Monitoring and Analysis, *Submissions No. 14*, p. 6.

- (c) A commitment by Australia to assist in the provision of training for East Timorese nationals and permanent residents seeking to enter the resource industry.