The Parliament of the Commonwealth of Australia

Report 85

Treaties tabled on 6, 7 and 27 February 2007

Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, done at Sydney on 12 January 2006

Agreement between Australia and the Swiss Confederation on Social Security (Canberra, 9 October 2006)

Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol done at Melbourne on 20 November 2006

Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds and Exchange of Notes Canberra, 6 December 2006

Measure 4 (2006) Specially Protected Species: Fur Seals Edinburgh, 23 June 2006

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Resolution of appointment

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

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

   (i) either House of the Parliament, or

   (ii) a Minister; and

c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of abbreviations

ATCM	Antarctic Treaty Consultative Meeting
ATO	Australian Taxation Office
CAMBA	China – Australia Migratory Bird Agreement
CMATS	Certain Maritime Arrangements in the Timor Sea
CMS	Convention on Migratory Species
Cth	Commonwealth
DEWR	Department of Environment and Water Resources
DFAT	Department of Foreign Affairs and Trade
EPBC	Environmental Protection and Biodiversity Act
ETAN	East Timor and Indonesia Action Network
IUA	International Unitisation Agreement
JAMBA	Japan – Australia Migratory Bird Agreement
JPDA	Joint Petroleum Development Area
JSCOT	Joint Standing Committee on Treaties
MFN	Most Favoured Nation
NIA	National Interest Analysis

NIE	National Interest Exemption
OECD	Organisation for Economic Co-operation and Development
ROKAMBA	Republic of Korea – Australia Migratory Bird Agreement
SCAR	Scientific Committee on Antarctic Research
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTAET	United Nations Transitional Administration in East Timor
US	United States
WHT	Withholding Taxation

List of recommendations

2 Social Security Agreement with the Swiss Confederation

Recommendation 1

The Committee supports the *Agreement on Social Security between the Government of Australia and the Swiss Confederation* (Canberra, 9 October 2006) and recommends that binding treaty action be taken.

3 Agreement between Australia and Finland on the Avoidance of Double Taxation

Recommendation 2

The Committee supports the *Agreement between Australia and Finland on the Avoidance of Double Taxation* done at Melbourne on 20 November 2006 and recommends that binding treaty action be taken.

4 Agreement between Australia and the Republic of Korea on the Protection of Migratory Birds

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds* (Canberra, 6 December 2006) and recommends that binding treaty action be taken.

5 Measure 4 (2006) Specially Protected Species: Fur Seals

Recommendation 4

The Committee supports *Measure 4 (2006) Specially Protected Species: Fur Seals* and recommends that binding treaty action be taken.

1

Introduction

Purpose of the report

1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of treaty actions tabled in Parliament on 6, 7 and 27 February 2007. These treaty actions are:

6[1] and 7[2] February 2007

- *Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, done at Sydney on 12 January 2006*
- *Agreement between Australia and the Swiss Confederation on Social Security (Canberra, 9 October 2006)*
- *Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol done at Melbourne on 20 November 2006*

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1 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 147, p. 1658; Senate 2004-07, *Journal*, No. 127, p. 3333.

2 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 148, p. 1678; Australia, Senate 2004-07, *Journal*, No. 128, p. 3373.

27 February 2007[3]

- *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds and Exchange of Notes Canberra, 6 December 2006*
- *Measure 4 (2006) Specially Protected Species: Fur Seals Edinburgh, 23 June 2006*

Briefing documents

1.2 The advice in this Report refers to the National Interest Analysis (NIA) prepared for the proposed treaty actions. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of the NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/6_7_february2007/tor.htm

www.aph.gov.au/house/committee/jsct/27february2007/tor.htm

1.3 Copies of treaty actions and NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's review

1.4 The review contained in this report was advertised in the national press and on the Committee's website.[4] Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Members of Parliament and to individuals who have expressed an interest in being kept informed of proposed treaty

3 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 155, p. 1745; Senate 2004-07, *Journal*, No. 131, p. 3469.

4 The Committee's review of the proposed treaty action was advertised in *The Australian* on 14 February and 14 March 2007. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee, both in the advertisement and via the Committee's website.

actions. Submissions received and their authors are listed at Appendix A.

1.5 The Committee also received evidence at public hearings held on 26 February and 26 March 2007 in Canberra. A list of witnesses who appeared before the Committee at the public hearings is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/6_7_february2007/hearings.htm

www.aph.gov.au/house/committee/jsct/27february2007/hearings.htm

2

Social Security Agreement with the Swiss Confederation

Introduction

2.1 On 9 October 2006, Australia signed a Social Security Agreement (the Agreement) with the Swiss Confederation (Switzerland). The Agreement is expected to begin operation in 2008, after the relevant legislation is passed and other necessary changes have been made in both countries.[1]

2.2 Australia's social security agreements are bilateral treaties which close gaps in social security coverage for people who migrate between countries. They do this by overcoming barriers to pension payment in the domestic legislation of each country, such as requirements on citizenship, minimum contributions record, past residence record and current country of residence. [2]

2.3 The Agreement provides for enhanced access to certain Australian and Swiss social security benefits and greater portability of most of these benefits between countries. Portability of benefits allows for the payment of a benefit from one country into another country. Enhanced access to benefits is an underlying principle of bilateral social security agreements where the responsibility for providing

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1 Information Sheet from the FACSIA website, accessed 15 May 2007: <www.facs.gov.au/internet/facsinternet.nsf/VIA/international_ssa/$File/InfoSheetSwitzerland.rtf>

2 National Interest Analysis (NIA), para. 3.

benefits is shared. Under the Agreement, residents of Australia and Switzerland will be able to move between Australia and Switzerland with the knowledge that their right to benefits is recognised in both countries.[3]

The Agreement

2.4 To qualify for an Australian pension people normally have to be Australian residents and in Australia on the day a claim for pension is lodged, and certain periods of residence (10 years for an age pension) are required before an Australian pension can be granted. Also, most payments are not payable outside Australia except for temporary absences.[4]

2.5 The Social Security Agreement with the Swiss Confederation modifies these rules so that:

- Australia will treat someone who is resident in Switzerland as being a resident of Australia and present in Australia, so that the person can lodge a claim for an Australian pension (Article 17);
- Australia will add the person's period of insurance in Switzerland to his or her Australian residence so that the person can meet the minimum residence qualifications to get an Australian pension (Article 18); and
- Australia will pay benefits covered by the Agreement indefinitely in Switzerland, as long as the person otherwise remains qualified.[5]

2.6 Under the Agreement, Australian nationals will receive the same treatment as Swiss nationals and will be able to have their Swiss social insurance system benefits paid abroad (Article 4).[6]

2.7 Australian nationals will continue to be able to receive refunds of their contributions instead of a Swiss pension, when they leave Switzerland, after the Agreement commences. However people who receive a refund will not be able to receive a Swiss pension and will

3 NIA, para. 4.
4 Information Sheet from the FACSIA website, see note 1 above.
5 Information Sheet from the FACSIA website, see note 1 above.
6 Information Sheet from the FACSIA website, see note 1 above.

not be able to use their periods of insurance in Switzerland to help them qualify for an Australian pension (Article 16).[7]

Australian Pensions

2.8 People who live in Australia but do not have ten years residence in Australia can count their Swiss periods of insurance to qualify for an Australian pension, subject to the means test.[8] During this time (until they have ten years residence in Australia) they will be paid the normal income-tested pension rate less the amount of any Swiss pension. That is, the Swiss pension would be topped up to the rate of Australian pension they would receive if they had no Swiss pension.[9]

2.9 Australian pensions in Switzerland will be based on the person's period of 'Australian working life residence' – this is the period between age 16 and age pension age. A full pension, subject to the means test, is payable to a person with 25 years Australian working life residence.[10] For example, under the Agreement, a man who has lived in Australia from age 30 to age 50 may, at age 65 be paid 20/25ths of a means tested Australian age pension in Switzerland. No pension is paid overseas if a person has less than 12 months Australian working life residence.[11]

Swiss Pensions

2.10 The Swiss pension will be based on the period of insurance the person has completed in Switzerland.[12]

2.11 Where a partial pension is equivalent to less than 10% of the corresponding full pension, an Australian national or their survivor who does not reside in Switzerland or who is permanently leaving Switzerland will receive a lump sum payment.[13]

2.12 Where a partial pension is equivalent to more than 10% but not more than 20% of the corresponding full pension, an Australian national or their survivor who does not reside in Switzerland or who is

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7 Information Sheet from the FACSIA website, see note 1 above.
8 Information Sheet from the FACSIA website, see note 1 above.
9 Information Sheet from the FACSIA website, see note 1 above.
10 Information Sheet from the FACSIA website, see note 1 above.
11 Information Sheet from the FACSIA website, see note 1 above.
12 Information Sheet from the FACSIA website, see note 1 above.
13 Information Sheet from the FACSIA website, see note 1 above.

permanently leaving Switzerland may opt between having the pension paid or a lump sum (Article 14).[14]

2.13 Double coverage provisions are included to ensure that Australian and Swiss employers do not have to make compulsory superannuation contributions into both countries' systems when an employee is seconded to work in the other country temporarily.[15] The Agreement provides that, generally the employer, and employee, where compulsory employee contributions are required, need to contribute only to the relevant superannuation scheme in their home country (Articles 6-11).[16]

2.14 Income tested Swiss benefits will be disregarded under the Australian income test for persons residing in Switzerland or third countries and vice versa.[17] This is consistent with concessions given in other social security agreements and with the principle of shared responsibility (Article 20).[18]

2.15 Any information transmitted under the Agreement in relation to an individual is to be treated as confidential and used only for the purposes of implementing the Agreement or the social security laws of Australia and Switzerland.[19] Article 23 specifies that the Agreement shall in no case oblige a Competent Authority or Competent Institution to carry out administrative measures or supply details in a manner contrary to that Party's laws, regulations and administrative practices.[20]

Purpose of the Agreement

2.16 The Social Security Agreement with the Swiss Confederation will improve income support for people who have lived in Australia and Switzerland. Most of the people benefiting from this agreement are age pensioners.[21]

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14 Information Sheet from the FACSIA website, see note 1 above.
15 Information Sheet from the FACSIA website, see note 1 above.
16 Information Sheet from the FACSIA website, see note 1 above.
17 NIA, para. 26.
18 NIA, para. 26.
19 NIA, para. 28.
20 NIA, para. 28.
21 NIA, para. 7.

2.17 In 2006, the Australian government was paying pensions to approximately 1,500 Swiss born pensioners, most of whom reside in Australia and $0.32 million annually to 38 people (not necessarily Swiss born) residing in Switzerland. Switzerland was paying 1,339 pensions into Australia, with an annual value of $6.4 million.[22]

2.18 It is estimated that approximately 1000 people residing in Australia and Switzerland will benefit when the Agreement comes into force by being able to claim payments from Australia or Switzerland to which they currently do not have access.[23]

2.19 The Agreement also deals with 'double coverage' of superannuation, exempting employers in one country, who send employees to work temporarily in the other country, from paying superannuation contributions in the other country, provided they continue to make contributions in their home country. These provisions also apply where employees are required to make superannuation contributions.[24]

2.20 The Agreement will bring economic and political benefits to Australia. It will assist in maximising the foreign income of Australian residents and there will be flow-on effects of these funds into the Australian economy. [25] The Agreement will also further strengthen bilateral relations between Australia and Switzerland and provide choices in retirement for individuals who have migrated (or will migrate) to Australia or Switzerland during or after their working lives. The provisions on double coverage of superannuation will reduce costs of doing business in both Switzerland and Australia.[26]

Other social security agreements

2.21 Australia has bilateral social security agreements in place with Austria, Belgium, Canada, Chile, Croatia, Cyprus, Denmark, Ireland, Italy, Malta, the Netherlands, New Zealand, Portugal, Slovenia, Spain

22 NIA, para. 9.

23 NIA, para. 11.

24 Information Sheet from the FACSIA website, see note 1 above..

25 NIA, para. 6.

26 NIA, para. 6.

and the United States of America.[27] Treaties have been signed with Germany and Korea, but have yet to enter into force.

2.22 Currently Australia is negotiating or starting to negotiate similar treaties with the Czech Republic, Poland, Finland, Latvia, the Slovak Republic, France, Hungary, Sweden and Greece.[28]

2.23 The Committee was interested in the progress of the proposed Social Security Agreement with Greece which has been in negotiation for several years.

2.24 The Department stated that it was near completion on a Social Security Agreement with Greece and that this agreement would impact on a large number of Australians.[29]

2.25 Since these public hearings a Social Security Agreement with Greece has been signed during the recent visit by the Greek Prime Minister in May 2007.

Consultation

2.26 The Department of Families, Community Services and Indigenous Affairs (FACSIA) wrote to a number of Swiss community groups, welfare organisations and State and Territory governments as part of the consultation for this Agreement. No formal responses were received.[30]

Costs

2.27 Both countries will share the financial responsibility for providing benefits covered by the Agreement. The NIA states that the Agreement is expected to result in a reduction in administered outlays of around $1.4 million over the period ending 2009-2010.[31] FACSIA informed the Committee:

> Broadly speaking, we expect to pay about $1.1 million worth of pensions per annum into Switzerland to people entitled to

27 NIA, Social Security Agreements with other Countries Attachment.

28 Correspondence from FACSIA, 26 April 2007.

29 Mr Peter Hutchinson, *Transcript of Evidence*, 26 March 2007, pp.4 and 5.

30 NIA, Consultation Annex.

31 NIA, para. 41.

> Australian pensions in Switzerland, so there is a cost up-front for us of approximately $1 million a year. We expect people living in Australia who have worked and contributed to the Swiss system to be entitled to Swiss pensions. It is very difficult to estimated these things, but we are estimating that something like $3 million to $3 ½ million a year in Swiss pensions will come into Australia. Because we means test our pensions, a proportion of the Swiss pension money that comes in will cause reductions in Australian pension outlays, and we think that it is slightly more than our initial outlays into Switzerland, which will produce some minor savings over the first few years of the agreement. But it is a very marginal thing.[32]

2.28 FACSIA and Centrelink departmental costs of $2.466 million over the same period represent the cost of implementing this Agreement and the Agreement with Norway.[33]

Entry into force and withdrawal

2.29 This Agreement will enter into force on the first day of the month following the month in which notes are exchanged by the Contracting States notifying each other that all domestic requirements have been finalised.

2.30 The Agreement is concluded for an indefinite period.[34] However, termination of the Agreement is possible under Article 60 of the *Vienna Convention on the Law of Treaties*, or after 12 months from the date on which either Party receives from the other written intention to terminate the Agreement.[35]

Legislation

2.31 The *Social Security (International Agreements) Act 1999 (Cth)* (the SSIA Act) gives effect in domestic law to relevant provisions of social security agreements that are scheduled to the Act. A new schedule

32 Mr Peter Hutchinson, *Transcript of Evidence*, 26 March 2007, pp. 3-4.

33 NIA, para. 41.

34 Text of the Agreement, Article 34.

35 NIA, para. 45; Article 34 of the Agreement.

containing the full text of the Agreement will be added to the SSIA Act pursuant to sections 8 and 25 of that Act.[36]

2.32 Relevant provisions of social security agreements relating to double superannuation coverage are automatically given effect, in domestic law, once the agreement is scheduled to the SSIA Act.[37] This is pursuant to the *Superannuation Guarantee (Administration) Act 1993 (Cth)* (paragraph 27(1)(e)) and the *Superannuation Guarantee (Administration) Regulations 1993* (regulation 7AC), which have the effect that payment of salary or wages to an employee who has been sent temporarily to work in Australia will not give rise to a superannuation guarantee obligation for the overseas employer, provided that a scheduled social security agreement is in place. [38]

Conclusion and recommendation

2.33 It is the considered view of the Committee that the new agreement with Switzerland will be of benefit to individuals and to Australia therefore the Committee supports the agreement.

2.34 In addition, however, it would be of benefit to the Committee if further information could be provided by the relevant government agencies on the criteria that they employ when prioritising the negotiation of such agreements.

Recommendation 1

The Committee supports the *Agreement on Social Security between the Government of Australia and the Swiss Confederation* (Canberra, 9 October 2006) and recommends that binding treaty action be taken.

36 NIA, para. 39.

37 NIA, para. 40.

38 NIA, para. 40.

3

Agreement between Australia and Finland on the Avoidance of Double Taxation

Introduction

3.1 A new Taxation Agreement between Australia and Finland was signed on 20 November 2006. The proposed treaty action will replace both the 1984 Australia-Finland Agreement and First Protocol, and the 1997 Second Protocol.[1]

3.2 It is intended that the proposed treaty will update and enhance Australia's existing tax arrangements with Finland.[2]

Background

3.3 The entry into force of the 2001 Protocol amending the United States (US) Double Taxation Agreement[3] and the 2003 United Kingdom (UK) Double Taxation Convention[4] triggered the Most Favoured

1 NIA, para 2; Press Release, The Hon Peter Costello MP, Treasurer, p. 1.

2 Mr Michael Rawstron, *Transcript of Evidence*, 26 March 2007, p. 7.

3 *Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income;* see JSCOT Report 46.

4 *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, and associated exchange of notes*; see JSCOT Report 55.

Nation (MFN) obligation under the existing Australia-Finland Agreement, requiring Australia to enter into negotiations with Finland with a view to providing lower Withholding Taxation (WHT) rates for interest and royalty payments and to include rules that protect nationals and businesses from tax discrimination in the other countries.[5]

3.4 Australia's MFN obligations will be met when the new Treaty enters into force. The Treaty will enter into force when both countries advise that they have completed their domestic requirements. [6]

Purpose of the Agreement

3.5 It is proposed that the agreement will reduce rates of withholding taxes on dividends, interest and royalties and bring into line the treatment of capital gains tax with OECD practice and its improved integrity measures. [7] In particular, the Agreement includes rules to allow for the cross-border collection of tax debts and rules for the exchange of information on tax matters.[8]

3.6 The Agreement is expected to: meet Australia's most favoured nation obligations with Finland;[9] reduce barriers to trade and investment caused by overlapping taxing jurisdictions between Parties thus promoting closer economic cooperation with Finland; and help prevent tax evasion.[10]

Obligations

3.7 Key obligations under the Agreement with Finland are:

- The relief of double taxation on cross-border income (Article 22);[11]
- A general principle of non-discrimination, which requires each State to treat nationals of the other no less favourably than it treats its own nationals (Article 23);

5 NIA, para. 6.
6 NIA, para. 3.
7 NIA, para. 4; Organisation for Economic Cooperation and Development.
8 NIA, para. 4.
9 NIA, para. 3.
10 NIA, para. 5.
11 NIA, para. 16.

- Mutual agreement procedures for dispute resolution of issues that arise from the Treaty, including a mechanism for individuals to complain about the operation of the Treaty (Article 24);
- A specific obligation to gather and provide information upon request has been created between the two States (Article 25);
- Each State receiving information should treat it in the same manner as information obtained under its domestic laws (Article 25(2));
- Either State is allowed to decline to provide information requested in some circumstances, such as where to do so would be contrary to law or public policy (Article 25(3));
- Each State is obliged to take certain action to assist in the collection of taxes owed to the other State, (although the requirement to provide assistance is not absolute) subject to certain conditions and limitations (Article 26);[12] and

3.8 The Agreement does not impose any greater obligations on Australian residents than Australian domestic tax laws, and may actually reduce the obligations of Australians operating or investing in Finland (Articles 10 (*Dividends*), 11 (*Interest*), and 12 (*Royalties*)).

Entry into force and withdrawal

3.9 The Agreement will enter into force 30 days after the date of the last notification that Parties' domestic requirements have been met (Article 28). The provisions of the Treaty will generally have effect from 1 January or from the beginning of the year of income in the year following entry into force.[13]

3.10 Article 25 (exchange of information) will have effect from the date of entry into force, and the Parties must identify in an exchange of notes when Article 26 (assistance in collection of tax debts) will come into effect.[14]

12 NIA, paras 16-18.

13 NIA, para. 1.

14 NIA, para. 1.

Legislation

3.11 Prior to the Agreement coming into force in Australia, the *International Tax Agreements Act 1953* will be amended to include the treaty text as a schedule.[15]

Consultation

3.12 The Board of Taxation conducted a Review of International Taxation Arrangements on the direction of Australia's tax treaty policy. The Board's recommendations supported a move towards a more residence-based treaty policy (reflected in most of Australia's treaties, including the existing Australia-Finland Convention) in substitution for treaty policies based on the source taxation of income.[16]

3.13 Consultation with the business community occurred through the Tax Treaties Advisory Panel[17] and, more broadly, submissions from stakeholders and the wider community were invited in November 2003. Business and industry groups generally supported similar outcomes to those in the 2003 United Kingdom Tax Convention and the 2001 United States Protocol. The Convention provides similar outcomes to those treaties.[18]

3.14 State and Territory Governments were consulted via the Commonwealth-State/Territory Standing Committee on Treaties in October 2003.[19]

Costs

3.15 Costs associated with the Agreement are expected to be negligible.[20] Compliance costs are expected to be reduced through closer alignment with international treaty practice.[21] Administrative costs

15 NIA, para. 20.

16 NIA, Attachment A, para 1.

17 Members include: Business Council of Australia, CPA Australia, Corporate Tax Association, Institute of Chartered Accountants, International Fiscal Association, Investment and Financial Services Association, Law Council of Australia, Minerals Council of Australia, Taxation Institute of Australia. NIA, Attachment A, para 2.

18 NIA, Attachment A, para 3.

19 NIA, Attachment A, para 4.

20 NIA, para. 21.

21 NIA, para. 22.

associated with implementing the Agreement will be managed within the Australian Taxation Office (ATO) and Treasury Budgets.[22]

3.16 Treasury expects that the proposed interest withholding tax rate changes will reduce the effective cost of borrowing as Australian borrowers bear the burden of tax through "gross up" clause arrangements.[23]

3.17 As a result of the reduction in the cost of borrowing from Finland, Treasury expects that the Agreement could lead to an increase in economic activity and foreign investment in Australia. The increase in economic activity is likely to lead to increases in other forms of tax collection.[24]

Future double taxation treaties

3.18 The Department of Treasury informed the Committee that as part of Australia's obligation under the *most favoured nation* clauses in other existing treaties there are a number of treaties which will come before the Committee at a future date.[25]

Conclusion and recommendation

3.19 The Committee accepts that the Agreement between Australia and Finland on the Avoidance of Double Taxation is a revised version of an existing treaty and is satisfied that the key changes to the treaty will further aid in the elimination of obstacles to investment as a result of international double taxation and will be beneficial in building better economic relationships between Australia and Finland.

22 NIA, paras 23 and 24. There will be some second round impacts on taxation revenue, i.e. impacts that arise as the changes introduced by the treaty flow through to prices, wages and other economic activity. Treasury does not quantify the second round impact of minor policy proposals as the benefits are too small to measure with any degree of certainty.

23 NIA, para. 25.

24 NIA, para. 26.

25 Ms Lynette Redman, Transcript of evidence, 26 March 2007, p. 8.

Recommendation 2

The Committee supports the *Agreement between Australia and Finland on the Avoidance of Double Taxation* done at Melbourne on 20 November 2006 and recommends that binding treaty action be taken.

4

Agreement between Australia and the Republic of Korea on the Protection of Migratory Birds

Introduction

4.1 On 6 December 2006 Australia signed a bilateral agreement with the Government of the Republic of Korea on the protection of migratory birds, the *Agreement between the Government of the Republic of Korea on the Protection of Migratory Birds* (ROKAMBA).[1]

4.2 Australia has a strong interest in maintaining biodiversity generally and in protecting migratory bird species which visit our shores. The ROKAMBA represents a significant development in Australia's efforts to conserve migratory bird populations.[2]

Background

4.3 Migratory waterbirds journey twice a year from the northern to the southern hemisphere and back. Migratory birds use four major global

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1 *Agreement between the Government of the Republic of Korea on the Protection of Migratory Birds, and exchange of notes;* NIA, para. 1.

2 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 10.

routes called global flyways.[3] These birds are in need of protection and habitat management in all the regions they visit and conservation of these birds consequentially requires an international approach.[4]

4.4 In Australia, there are important bird habitat sites such as:

> Roebuck Bay and Eighty Mile Beach in the north-west of Australia, which are sand and mud flat coastal habitats—and inland wetlands that are used by migratory birds to coral quays and more oceanic sites that are used by things like the terns and the migratory seabirds.[5]

4.5 Australia has led the conservation of migratory birds throughout the East Asian – Australasian Flyway through the Asia Pacific Migratory Waterbird Conservation Strategy 1996-2005 and continues to do so as one of the initiating partners of the World Summit on Sustainable Development, Type II Partnership for Migratory Waterbirds in the East Asian – Australasian Flyway.[6]

4.6 Australia has existing bilateral agreements similar to the ROKAMBA with China[7] and with Japan[8]. The ROKAMBA signifies Australia's ongoing commitment to the conservation of migratory birds.

Purpose of the Agreement

4.7 The purpose of the agreement is to help protect bird species, which regularly migrate between Australia and the Republic of Korea, and their environment.[9]

4.8 Migratory species are a matter of National Environmental Significance under the *Environmental Protection and Biodiversity Act 1999* (EPBC Act). The Republic of Korea provides critical stopover sites for migratory shorebirds during their migration to Australia.[10]

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3 Department of Environment and Water Resources (DEWR) website, accessed 8 May 2007: <www.environment.gov.au/water/wetlands/bulletin/shorebird.html>

4 DEWR website, accessed 8 May 2007: <www.environment.gov.au/water/wetlands/bulletin/shorebirds.html>

5 Mr Jason Ferris, *Transcript of evidence*, 26 March 2007, p. 11.

6 NIA, para. 4.

7 *Agreement with the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment* (CAMBA).

8 *Agreement with the Government of Japan for the Protection of Migratory Bird and Birds in Danger of Extinction and their Environment* (JAMBA).

9 NIA, para. 5.

10 NIA, para. 6.

The ROKAMBA complements Australia's existing bilateral agreements with China and Japan, providing a formal mechanism through which Australia can work to ensure the protection of important habitat for shorebirds during their migration beyond Australian jurisdiction.[11]

Obligations

4.9 The agreement will bring no new obligations for Australia.

4.10 Article 1(2) provides that the Annex to the ROKAMBA contains the list of species or subspecies of birds for which there is reliable evidence of migration between the two countries (see Appendix A).[12] All the species included in the annex are already protected under the EPBC Act and also under relevant state and territory wildlife and environment legislation.[13]

4.11 ROKAMBA obliges contracting Parties to protect and conserve bird species, which regularly migrate between Australia and the Republic of Korea, and their habitats.[14]

4.12 Australia and the Republic of Korea are prohibited to take, sell, purchase or exchange migratory birds or their eggs, except in the following cases:[15]

- for scientific, educational, propagative or other specific purposes not inconsistent with the objectives of the Agreement;
- for the purpose of protecting persons and property;
- for hunting during hunting seasons or on hunting grounds established in accordance with Article 2(1)(c); and,
- to allow the hunting and gathering of specified migratory birds or their eggs by the inhabitants of specified regions who have traditionally carried on such activities for their own food, clothing or cultural purposes, provided that the population of each species

11 NIA, para. 6.
12 NIA, para. 5.
13 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 11.
14 NIA, para. 7.
15 ATNIF 28, Article 2.

is maintained in optimum numbers and that adequate preservation of the species is not prejudiced (Article 2).[16]

4.13 Australia and the Republic of Korea are encouraged to undertake joint research programs and to exchange data and publications relating to migratory birds (Article 3).

4.14 Australia and Korea shall endeavour to manage and conserve the habitats of birds listed under the ROKAMBA and to take measures to conserve and improve their environments (Articles 4 and 5).

Other issues

Avian influenza

4.15 The Committee questioned officials from the Department of Environment and Water Resources (DEWR) regarding any possible threat to Australia though the spread of avian influenza by migratory bird populations.[17]

4.16 The Committee was assured that the majority of the birds that are protected under this agreement are migratory shore birds that carry avian influenza viruses at a much lower rate than ducks and geese and therefore pose a much lower risk.[18] Migratory birds also have a much lower chance of interacting with domestic poultry which is a key element of disease spread scenarios.[19]

4.17 In addition, it is considered unlikely that birds weakened by avian influenza would be able to transverse the considerable distance from Korea to Australia.[20]

Korean Government obligations

4.18 The Committee noted that one of the single greatest threats to shorebirds is the loss of feeding grounds and that in some areas hunting may also be a serious threat. It questioned the DEWR officials

16 ATNIF 28, Article 2.

17 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 12.

18 There are two duck species included under the agreement but the frequency of their migration is considered to be very low. Mr Jason Ferris, *Transcript of evidence*, 26 March 2007, p. 12.

19 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 12.

20 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 12.

on how the agreement encouraged or enforced the Republic of Korea to conserve migratory bird habitats. The Committee was told:

> It is quite specifically addressed in the agreement, but unfortunately it is at the level of endeavour. Article 4 says:
>
> - Each Party shall endeavour to manage and conserve the habitat of migratory birds through activities such as the designation of conservation areas in its territory.[21]

4.19 DEWR further stated:

> Certainly we are aware of plans by the Korean government to undertake further reclamation of coastal mud flats. The agreement will certainly give us an opportunity to try to encourage them to do that in a way that manages habitat for migratory species.[22]

Levels of Korean research on migratory birds

4.20 The Committee questioned DEWR concerning the types of research undertaken by Korea and how this might impact on migratory bird populations. They were informed that:

> There are a very small number of birds taken for research purposes. Most of the research is non-invasive or it involves at worst capture and banding of the birds and applying colour markings to allow migration studies. There have been a few studies working on the physiology of birds and trying to understand the migration where birds have been taken and killed, but we are talking about a handful of birds over the last decade. The work was actually undertaken by some Dutch researchers.[23]

Consultation

4.21 The NIA states that the following Commonwealth, State and Territory agencies were consulted regarding the ROKAMBA:

- Australian Government Attorney-General's Department;

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21 Mr Jason Ferris, *Transcript of Evidence,* 26 March 2007, p. 13.

22 Mr Jason Ferris, *Transcript of Evidence*, 26 March 2007, p. 13.

23 Mr Jason Ferris, *Transcript of Evidenc*e, 26 March 2007, pp. 11 to 12.

- Australian Government Department of Immigration and Multicultural Affairs;
- Australian Government Department of Foreign Affairs and Trade;
- Australian Government Department of Communications, Information Technology and the Arts;
- Australian Government Department of Industry, Tourism and Resources;
- Australian Government Department of Defence;
- Australian Government Department of the Prime Minister and Cabinet;
- Australian Government Department of Transport and Regional Services;
- Australian Government Department of the Treasury;
- Australian Government Department of Agriculture, Fisheries and Forestry;
- Department of Primary Industries Water and Environment (Tasmania);
- Department of Primary Industries (Victoria);
- Department for Environment and Heritage (South Australia);
- Department of Conservation and Land Management (Western Australia);
- Department of Environment and Conservation (New South Wales);
- Department of Infrastructure, Planning and Natural Resources (New South Wales);
- Environmental Protection Agency (Queensland);
- Department of Natural Resources, Environment and the Arts (Northern Territory); and
- Environment ACT.[24]

4.22 The Department of the Environment and Heritage consulted with the Natural Resource Management Wetlands and Waterbirds Taskforce[25]

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24 ATNIF 28, Consultation, para. 1.

25 The taskforce comprises the agencies listed. The Department of Environment and Water Resources was formerly known as the Department of the Environment and Heritage.

(the Taskforce) and provided papers, and spoke, to the Taskforce meetings in November 2004, July 2005 and May 2006 summarising the state of affairs for Australia's bilateral migratory bird agreements. Each paper included information about the ROKAMBA and progress in its development.[26]

4.23 No agencies raised any concerns regarding the proposed treaty action.[27]

Costs

4.24 The entry into force of the ROKAMBA is not expected to impose any additional costs on Australia as the species in the annex to ROKAMBA are already protected as matters of National Environmental Significance under the EPBC Act, by virtue of their inclusion in the Annexes to the JAMBA, CAMBA and the Convention on Migratory Species (CMS). [28]

Entry into force and withdrawal

4.25 The ROKAMBA would not require implementing legislation. The EPBC Act enables Australia to give domestic effect to the obligations imposed by the ROKAMBA.[29]

4.26 The EPBC Act provides for protection of migratory species as a matter of National Environmental Significance. Division 2 of Part 13 of the EPBC Act provides for the preservation, conservation and protection of migratory species in or on a Commonwealth area, including to the outer limits of the exclusive economic zone, but excluding State and Northern Territory waters.[30]

4.27 Section 209(3)(c) of the EPBC Act specifies that the list of migratory species must include all native species from time to time identified in a list established under an international agreement approved by the

26 ATNF 28, Consultation, para. 3.
27 ATNIF 28, Consultation, para. 4.
28 NIA, para. 17.
29 NIA, para. 13.
30 NIA, para. 14.

Minister under subsection 4.[31] Before the ROKAMBA enters into force, the Minister for the Environment and Water Resources will need to sign an instrument under Section 209(4) of the EPBC Act, approving the ROKAMBA as an international agreement relevant to the conservation of migratory species. [32]

4.28 Division 1 of Part 3 of the EPBC Act prohibits the taking of actions that are likely to have a significant impact on matters of National Environmental Significance without approval from the Minister for the Environment and Water Resources.[33] Under sections 20(1) and 20A(1), a person must not take an action that has, will have, or is likely to have a significant impact on a listed migratory species unless that Minister has given approval.[34] There are exceptions to this prohibition, including those set out in Part 4 of the EPBC Act and an exception for certain actions requiring separate authorisation by an Australian government agency.[35]

4.29 Article 8(2) of the ROKAMBA provides that either Party may, by giving one year's notice in writing, terminate the ROKAMBA at the end of the initial fifteen year period or at any time thereafter.[36] Withdrawal by Australia would also be subject to our domestic treaty making process including the tabling of a National Interest Analysis and consideration by JSCOT and Federal Executive Council.[37]

Conclusion and recommendations

4.30 The Committee agrees that the ROKAMBA is an important development in Australia's efforts to conserve the migratory birds which visit this country and that it complements the two similar agreements Australia has in place with China and Japan.

31 NIA, para. 15.
32 NIA, para. 15.
33 NIA, para. 16.
34 NIA, para. 16.
35 NIA, para. 16.
36 NIA, para. 20.
37 NIA, para. 20.

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds* (Canberra, 6 December 2006) and recommends that binding treaty action be taken.

5

Measure 4 (2006) Specially Protected Species: Fur Seals

Introduction

5.1 *Measure 4 (2006) Specially Protected Species: Fur Seals* was adopted by consensus at the 29th session of the Antarctic Treaty Consultative Meeting in Edinburgh in Scotland in 2006.[1]

5.2 The proposed treaty action amends Appendix A to Annex II to the *Protocol on Environmental Protection to the Antarctic Treaty* (the Protocol).[2] Amendments to annexes[3] are adopted by Consultative Parties at the annual Antarctic Treaty Consultative Meeting (ATCM), via a Measure. Measure 4 will remove the fur seal species of the genus *Arctocephalus*, from the list of Specially Protected Species.[4]

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1 Mr Jonathon Barrington, *Transcript of Evidence*, 26 March 2007, p. 15.

2 NIA, para. 1.

3 Pursuant to Article 9 of the Protocol and Article IX of the Antarctic Treaty [1961] ATS 12, amendments to annexes are adopted by Consultative Parties. See NIA, para. 2.

4 Mr Jonathon Barrington, *Transcript of Evidence*, 26 March 2007, p. 15.

Background

The Antarctic Treaty

5.3 The *Antarctic Treaty* is a multilateral agreement under which Parties ensure that Antarctica is used exclusively for peaceful purposes. The Treaty guarantees freedom of scientific research, promotes international scientific cooperation, allows for inspection of all operations, sets aside potential for disputes over territorial sovereignty in Antarctica, and provides for regular meetings between the Parties.[5]

5.4 The Protocol is a multilateral agreement under the Antarctic Treaty. It commits Parties to the protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science.[6]

5.5 Australia has been a Consultative Party[7] to the Antarctic Treaty since it came into force in 1961.[8] Australia took a leading role in the formation of both the Treaty and the Protocol, and maintenance of the Antarctic Treaty is a high priority for the Australian government.[9] Australia has a large territorial claim and an extensive research program in Antarctica.[10]

Specially Protected Species

5.6 There are seven types of genus of seals that inhabit the Antarctic region. Of the seven, three of these have been on the Specially Protected Species list. They are the Antarctic fur seal, the sub-Antarctic fur seal and the Ross seal.[11] Fur Seals were put on the Specially Protected Species list in the 1960s to protect them from

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5 NIA, para. 7.

6 NIA, para. 7.

7 Consultative Parties include all original signatories to the Antarctic Treaty and all Parties that acceded to the Treaty and are demonstrating their interest in Antarctica by conducting substantial scientific research activity there. Consultative Parties have voting status at the annual Antarctic Treaty Consultative Meetings. Contracting Parties whose representatives were entitled to participate in the meetings in this context can also be read as Consultative Parties.

8 NIA, para. 6.

9 NIA, para. 7.

10 NIA, para. 7.

11 Mr Jonathon Barrington, *Transcript of Evidence,* 26 March 2007, p. 18.

commercial harvesting.[12] Measure 4 will remove the Antarctic fur seal and the sub-Antarctic fur seal but not the Ross seal, from the Specially Protected Species list.[13]

5.7 The term of Specially Protected Species has been developed to provide an internationally recognised special category by which species at risk of extinction can be designated. When it is established that a species is no longer at risk of extinction it is removed from the category.[14]

Purpose of the Measure

5.8 Since 1999 the Consultative Parties have sought to review the status of species listed as Specially Protected Species and to establish objective criteria for selecting species for listing, adopting guidelines for the listing and delisting of Specially Protected Species in 2005.[15] The Consultative Parties have agreed that fur seals no longer require Specially Protected Species status to ensure their conservation.[16]

5.9 The Scientific Committee on Antarctic Research (SCAR) has determined that both the Antarctic (*A. gazelle*) and the sub-Antarctic (*A. tropicalis*) fur seals are no longer at significant risk of extinction. SCAR described the recovery of the populations of fur seals in the Antarctic Treaty area as 'a major conservation success, attributable to the concerted actions taken national and internationally to rescue heavily exploited populations from probable extinction'.[17]

5.10 The removal of fur seals from the Specially Protected Species list will not result in any potential threat of future commercial exploitation.[18] Fur seals will continue to receive the comprehensive general protections afforded to all Antarctic seal species under the Protocol. These protections include the restriction that taking or harmful interference must be in accordance with a permit, and only for purposes of scientific study, educational or cultural uses, or

12 Mr Jonathon Barrington, *Transcript of Evidence*, 26 March 2007, p. 16.
13 Mr Jonathon Barrington, *Transcript of Evidence*, 26 March 2007, pp. 18 and 19.
14 Mr Jonathon Barrington, *Transcript of Evidence*, 26 March 2007, p. 16.
15 NIA, para. 8.
16 NIA, para. 4.
17 NIA, para. 9.
18 NIA, para. 10.

unavoidable consequences of scientific activity.[19] The grant of permits is also limited by the restrictions that no more fur seals are to be taken than are strictly necessary, no more taken than can be replaced by natural reproduction, and the diversity and ecosystem balance must be maintained.[20]

5.11 There are additional conditions attached to permits for taking species on the Specially Protected Species list, namely, the taking must be for a compelling scientific purpose, not jeopardise the survival of the species, and use non-lethal techniques where possible.[21]

5.12 The NIA states that removal of fur seals from the Specially Protected Species list will be in the national interest because it is expected to improve the efficiency and effectiveness of the Antarctic Treaty and associated agreements.[22] The fur seal's removal reinforces the operation of the Specially Protected Species designation as a mechanism for protecting Antarctic species at significant risk of extinction.[23]

Entry into force and withdrawal

5.13 The measure will automatically become effective one year after the close of the next ATCM (that is, on 23 June 2007), unless, prior to that date, one or more of the Consultative Parties

- requests an extension of the time period, or
- states that it is unable to approve the measure.[24]

5.14 Neither the Measure nor the Protocol contains a specific withdrawal provision.[25] Australia can withdraw as a Party from either the Antarctic Treaty or Protocol at any time so long as it has the consent of all Parties following consultation.[26]

19 NIA, para. 14.
20 NIA, para. 14.
21 NIA, para. 13.
22 NIA, paras 5 and 11.
23 NIA, para. 15.
24 NIA, para. 3.
25 NIA, para. 24.
26 NIA, para. 26.

Consultation

5.15 Prior to the ATCM in June 2006, the Department of Foreign Affairs and Trade (DFAT) held consultative meetings with other government departments, including the Australian Government Antarctic Division of the Department of the Environment and Water Resources, the Attorney-General's Department, and the Department of Industry, Tourism and Resources. The consultative forum hosted by DFAT was attended by the Antarctic and Southern Ocean Coalition, a coalition of environmental non-government organisations. The views of these organisations were taken into account in developing Australia's position in relation to proposals considered at the ATCM.[27]

5.16 The Measure does not affect the States and Territories as the measure only applies to the Antarctic Treaty area.[28]

Costs

5.17 The proposed treaty action is not expected to impose any additional costs to Australia. The Measure will not require any new domestic agencies or management arrangements to be put in place.[29]

Other Matters

5.18 In response to a question on branding seals, the Committee was informed that the Australian Antarctic Ethics Committee imposes strict ethical standards for research on fur seal and elephant seal populations at Macquarie Island. Branding is strictly prohibited. Tagging of seals involves the insertion of a small tag into the flipper of the animal.[30]

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27 A representative from the Antarctic and Southern Ocean Coalition participated as a member of the Australian delegation at ATCM XXIX. The State Government representative on the Australian delegation to ATCM XXIX was from the Department of Economic Development of the Government of Tasmania. NIA, Consultation, paras 1 and 2.

28 NIA, Consultation, para. 1.

29 NIA, para. 18.

30 Department of Environment and Water Resources (DEWR), *Submission 1.*

5.19 In addition, the Committee requested further information on the recovery of seal populations in the Antarctic region from the 1960s and were informed that Antarctic fur seals were considered extinct until a colony was found on Bird Island, South Georgia in 1950. This colony of approximately 1,000-3,000 fur seals then recovered at a spectacular rate. The colony emigrated from its founder colony to many previous sites in its former range. In the past half century the Antarctic fur seal population has grown to over 1.6 million. About 95 per cent of these seals still live in South Georgia, but other colonies around the Southern Oceans are continuing to recover at a rapid rate (almost 10 per cent each year).[31]

5.20 The recovery of the sub-Antarctic fur seals has probably also taken place in the past 50 years. Its population is smaller (>300,000) and is primarily located on Gough Island (South Atlantic Ocean) and Prince Edward Island and Amsterdam Island in the southern Indian Ocean.[32]

Conclusion and recommendations

5.21 The Committee welcomes scientific research indicating that fur seal numbers have reached a level that no longer requires their inclusion under the Specially Protected Species designation.

5.22 The Committee was also reassured:

> That fur seals would continue to receive the comprehensive general protection afforded to all Antarctic seal species under the Protocol, and that they would not be exposed to any potential threat of commercial exploitation in future as a result of their de-listing as Specially Protected Species.[33]

5.23 In view of this research and in recognition of the importance of maintaining a current list of species that do require the level of protection offered under the Specially Protected Species Designation the Committee supports the removal of the words, 'All species of the genus *Arctocephalus,* Fur Seals' from the measure.

31 DEWR, *Submission 1*.

32 DEWR, *Submission 1*.

33 NIA, para. 10.

Recommendation 4

The Committee supports *Measure 4 (2006) Specially Protected Species: Fur Seals* and recommends that binding treaty action be taken.

6

Australia-East Timor Certain Maritime Arrangements Treaty

Introduction

6.1 The *Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, referred to hereafter as the CMATS Treaty, was signed in Sydney on 12 January 2006.

6.2 The principal aim of the CMATS Treaty, together with the Sunrise International Unitisation Agreement (Sunrise IUA), is to establish a framework for the exploitation of the Greater Sunrise gas and oil resources, to the benefit of both Australia and East Timor. The CMATS Treaty will allow exploitation of gas and condensate reservoirs to commence while suspending maritime boundary claims for a significant period and maintaining the current treaty arrangements in place.

Background

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

resource potential was initially the subject of the 1989 Timor Gap Treaty between Australia and Indonesia.[1]

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

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

- 2002 Exchange of Notes[2]
- Timor Sea Treaty[3]
- Sunrise IUA.[4]

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

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

Timor Sea Treaty

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

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

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

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

4 Full title: *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields*. Signed 6 March 2003. See JSCOT Report 53.

5 CMATS Treaty National Interest Analysis, para. 7.

in relation to this treaty and travelled extensively between July and October 2002 to conduct public hearings at Canberra, Perth, Darwin and Melbourne.[6]

6.8 The Timor Sea Treaty continues the terms of the Timor Sea Arrangement concluded between Australia and the UNTAET in July 2001.[7] The Arrangement provided the basis for the Timor Sea Treaty in determining the administrative mechanisms for the JPDA. It also provided that of the petroleum produced in the JPDA, 90% will belong to East Timor and 10% will belong to Australia (Article 4(a)).

6.9 The Timor Sea Treaty also provides for an international unitisation agreement to be negotiated for the Greater Sunrise field. The Greater Sunrise field extends across the Eastern boundary of the JPDA, and consists of the Sunrise and Troubadour petroleum deposits. Annex E under Article 9(b) provides that Australia and East Timor will unitise the Greater Sunrise field on the basis that 20.1% of the resources of the field lies within the JPDA, and that production from Greater Sunrise will be distributed on the basis that 20.1% is attributed to the JPDA and 79.9% is attributed to Australia.[8]

Sunrise International Unitisation Agreement

6.10 The Sunrise IUA provides for the joint development of the Greater Sunrise field. The Sunrise IUA formalises the apportionment of the field as set out in Annex E under Article 9(b) of the Timor Sea Treaty. This means that, according to East Timor's 90% share of petroleum within the JPDA under the Timor Sea Treaty, East Timor is entitled to receive 18.1% of revenue from the Greater Sunrise resource, and Australia is entitled to 81.9%.[9]

6.11 The Sunrise IUA also covers administration of the area, taxation, process of approval of a development plan, abandonment provisions, point of sale and valuation of petroleum, customs, security and dispute settlement mechanisms.

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6 JSCOT Report 49.

7 JSCOT Report 49, para. 1.19.

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

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

6.12 The Sunrise IUA, although signed and tabled in 2003, entered into force on 23 February 2007, the same day as the CMATS Treaty.[10]

The CMATS Treaty

6.13 The CMATS Treaty is intended to operate in conjunction with the Timor Sea Treaty and the Sunrise IUA.[11] Together the three treaties will govern the rights and obligations of Australia and East Timor for the exploration and exploitation of the Timor Sea (Article 7).

6.14 The CMATS Treaty allows for the exploitation of Greater Sunrise while ensuring that Australia and East Timor refrain from asserting or pursuing their claims to rights, jurisdiction and maritime boundaries, in relation to each other, for 50 years. Under the treaty, although the formal apportionment of Greater Sunrise under the Sunrise IUA remains the same, Australia has agreed to share equally (50:50) the upstream revenues from the resource.

6.15 Outlined below are the key provisions of the CMATS Treaty:

- Article 22 of the Timor Sea Treaty is amended so that the Timor Sea Treaty remains in force for the duration of the CMATS Treaty (Article 3).
- There is a moratorium on each Party from asserting sovereign rights, jurisdiction and maritime boundaries in relation to each other for the period of the Treaty (Article 4). This does not prevent a Party from continuing activities, including the regulation and authorisation of existing and new activities, in areas in which its domestic legislation at a specific date authorised petroleum activities (Article 4.2). Australia had legislation on that date that authorised petroleum activities in relation to the seabed and subsoil, for areas outside the JPDA and south of the 1972 Australia-Indonesia seabed boundary.[12]

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10 CMATS Treaty NIA, para. 3.

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

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

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

Issues

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

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

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

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

> The CMATS treaty and the IUA are good deals for Australia and very much in our national interest. The treaty will promote further investment in Australia's offshore petroleum industry. Australia is currently the fifth largest exporter of LNG, with seven per sent of global volume. The development of Greater Sunrise has the potential to build significantly on Australia's standing in the global energy market.[16]

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

Moratorium on asserting claims to maritime boundaries

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

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

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

15 CMATS Treaty NIA, para. 2.

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

17 See JSCOT Report 49 and JSCOT Report 53.

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

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

6.20 Several submissions accused Australia of contravening international laws in this respect,[20] with Mr Rob Wesley-Smith believing that maritime boundaries should be agreed to under United Nations Convention on the Law of the Sea[21] (UNCLOS) guidelines.[22]

6.21 Under Articles 74 and 83 of UNCLOS, in the absence of agreed exclusive economic zone and continental shelf delimitation, Australia is obliged to make every effort to enter into provisional arrangements of a practical nature which are without prejudice to the final delimitation. The Committee considers that has been achieved through the CMATS Treaty.

6.22 According to the Minister for Foreign Affairs and his Department, the suspension of maritime boundary claims for a significant period "will assist in promoting strong bilateral relations between Australia and East Timor and build further confidence in the development of our offshore petroleum industries."[23]

> The CMATS treaty will also promote strength in bilateral relations by putting to one side diverging maritime claims and enabling enhanced cooperation and coordination in the Timor Sea.[24]

6.23 Accordingly, the Committee believes the moratorium will add to the stability of the legal regime governing the exploitation of Greater

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

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

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

21 [1994] ATS 31.

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

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

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

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

Equal share of upstream revenues from the Greater Sunrise field

6.24 Under the Sunrise IUA and Timor Sea Treaty, the formal apportionment of the Greater Sunrise field is that 20.1% lies in the JPDA and 79.9% is apportioned to Australia. As a result of East Timor's 90% share of petroleum within the JPDA, East Timor would receive 18.1% for revenues from the Greater Sunrise resource. Under the CMATS Treaty, Australia has agreed to increase East Timor's share so that the upstream government revenues from Greater Sunrise are shared equally between the two countries (50:50).

6.25 The majority of submissions received by the Committee claim that Australia is not being generous by agreeing to allow East Timor a 50% share of Greater Sunrise's upstream gas and oil revenues. [25] They argue that, given Greater Sunrise is twice as close to East Timor as it is to Australia, all the resources contained therein should belong to East Timor, and East Timor should therefore be given a higher percentage of royalties from gas revenues:

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

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

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

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

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

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

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

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

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

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

Revenues from the Laminaria-Corallina fields

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

29 CMATS Treaty NIA, para. 10.

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

31 DFAT, Submission 9, p. 1.

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

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

East Timor,[34] and East Timor should be compensated for the revenue Australia has received since 1999.[35]

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

6.30 The Committee notes that, as a consequence of Article 4, Australia will be able to continue regulating and authorising petroleum activities outside of the JPDA and south of the 1972 Australia-Indonesia seabed treaty. This area encompasses the Laminaria-Corrallina gas fields, preventing further revenue claims between the two countries in this area.[37]

Dispute resolution procedures

6.31 Article 4 of the CMATS Treaty obliges each Party not to raise in any international organisation any matter relating to the delimitation of maritime boundaries in the Timor Sea, nor commence any international dispute settlement proceedings against the other that could result in issues or findings relevant to maritime delimitation in the Timor Sea. Instead, disputes about the interpretation or application of the Treaty are to be determined by consultation or negotiation (Article 11).

6.32 Several of the submissions were troubled by the dispute resolution provisions, claiming they "prevent fair adjudication"[38] by preventing

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

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

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

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

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

the use of courts or other impartial mechanisms for resolving disputes.[39]

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

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

Entry into force

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

Use of the National Interest Exemption

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

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

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

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

History of the National Interest Exemption

6.36 The NIE has been used at least 6 times in recent history. In each instance the Government made a clear case in favour of prompt binding treaty action.

6.37 When establishing the Committee the Minister for Foreign Affairs recognised that there would be occasions when the Government would need to take treaty action urgently:

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

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

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

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

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

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

43 JSCOT Report 70, para. 2.32.

44 JSCOT Report 70, para. 2.33.

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

Reasons for invoking the National Interest Exemption for the CMATS Treaty

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

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

6.41 DFAT gave further details at the public hearing.

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

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

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

> processing of the treaty domestically. Focus on entry into force of the treaty was diverted by several disruptions in mid-2006 in East Timor. That was the reason why the CMATS treaty was not tabled earlier.[47]
>
> [T]owards the end of last year and the beginning of this year, the East Timor government was in a position to move quickly and had requested that Australia proceed with synchronous exchange of letters and entry into force. So the Australian government sought to meet that East Timorese request to be in a position to exchange notes on the same day. [48]
>
> [E]lections have been announced in East Timor and I think parliamentary attention is rapidly going to be diverted to those elections. It was not clear, if we did not do it now, that the Timorese would be able to focus on the treaty again until after their political processes—the elections and so on—had been completed.[49]

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

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

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

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

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

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

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

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

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

> offer this input only highlights both nations' failure to allow for any genuine public consultation.[52]

The Committee's view

6.44 Both the Minister and the Department informed the Committee that the CMATS Treaty has been publicly available since its signature in January 2006.[53] The Committee understands the desire of the Government to move synchronously with the East Timor government in ratifying this treaty. However, given the early public availability of the Treaty, it has not been adequately explained why it was not referred several months earlier for review. The Committee's previous endorsement of the Sunrise IUA should not have been used to infer support for CMATS. The CMATS Treaty contains new and important obligations and raises different issues which should have been subject to the usual process of scrutiny and review. In this instance the national interest exemption should not have been invoked before the Committee was given a reasonable opportunity to consider and report on the Treaty within the Government's timeframe.

6.45 The Committee has previously demonstrated the capacity to report within a very short timeframe where the circumstances warranted expeditious treatment. For example, in relation to the Cambodia Prisoner Transfer Agreement, the Committee heard evidence on the evening of Tuesday, 5 December 2006 and made an interim report on the morning of Thursday, 7 December 2006 to enable work to progress immediately to bring that agreement into force.[54] The Government was aware that the opportunity to ratify the CMATS Treaty with East Timor was a possibility in the days leading up to its eventuality. It should have taken this opportunity to approach the Committee with a request for an early hearing and a prompt interim report on the agreement. Such a request would have been without prejudice to the Government's prerogative to invoke the NIE if this were necessary.

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

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

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

Withdrawal or Denunciation

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

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

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

Consultation

6.47 Commonwealth agencies, led by DFAT, participated actively in eight rounds of negotiations from April 2004 until November 2005.[56]

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

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

55 CMATS Treaty, Article 12.2.

56 NIA Consultation Annex, para. 3.

57 NIA Consultation Annex, para. 4.

58 NIA Consultation Annex, para. 6.

Costs

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

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

Implementation

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

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

Concluding remarks

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

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59 CMATS Treaty NIA, para. 26.

60 CMATS Treaty NIA, para. 24.

61 CMATS Treaty NIA, para. 24.

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

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

> Since 1999 Australia has provided over $3 billion in security, policing, development and other assistance.[62]
>
> Australia's development assistance in 2006-07 will be at least $44 million … Australia also provides capacity building assistance for the East Timor police force and is a lead donor in the development of the East Timor Defence Force.[63]

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

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

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

A

Appendix A - Submissions

Treaties tabled on 6 & 7 February 2007

1 Australian Patriot Movement

1.1 Australian Patriot Movement

2 Dr Clinton Fernandes

3 East Timor and Indonesia Action Network (ETAN)

4 Mr Andrew Serdy

5 Timor Sea Justice Campaign, Melbourne

6 Mr Robert King

7 Mr Rob Wesley-Smith

8 La'o Hamutuk

9 Department of Foreign Affairs and Trade

Treaties tabled on 27 February 2007

1 Department of the Environment and Water Resources

B

Appendix B - Witnesses

Monday, 26 February 2007 - Canberra

Attorney-General's Department

Mr William McFadyen Campbell, First Assistant Secretary, Office of International Law

Department of Foreign Affairs and Trade

Mr Paull Grigson, First Assistant Secretary, South East Asia Division

Mr Philip Kimpton, Executive Officer, Sea Law, Environment Law and Antarctic Policy Section, International Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Ms Penny Richards, Senior Legal Adviser

Ms Heidi Venamore, Director, Sea Law, Environment Law and Antarctic Policy Section, International Legal Branch

Department of Industry, Tourism and Resources

Mr John Hartwell, Head of Division, Resources Division

Department of the Treasury

Mr John Anderson, Senior Advisor

Monday, 26 March 2007 - Canberra

Attorney-General's Department

Mr Geoffrey Skillen, Principal Legal Officer

Department of Environment and Heritage

Mr Jason Ferris, Acting Director, Migratory and Marine Biodiversity Section

Department of the Environment and Heritage (TAS)

Mr Jonathon Harold Sutherland Barrington, Senior Policy Adviser, Australian Antarctic Division

Department of Family and Community Services & Indigenous Affairs

Mrs Michalina Stawyskyj, Branch Manager, International

Mr Peter Hutchinson, Section Manager, Agreements Section, International Branch

Department of Foreign Affairs and Trade

Mr Clinton Dengate, Executive Officer

Mr Philip Kimpton, Executive Officer, Sea Law, Environment Law and Antarctic Policy Section, International Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Mr Glenn Miles, Director, Northern Central Eastern Europe Section, Europe Division

Mr Adrian Morrison, Director, Korea Section

Ms Juliana Nam, Executive Officer

Mr Michael Sullivan, Acting Director, Western Europe Section

Department of the Treasury

Mr Derek Bazen, Analyst, Superannuation, Retirement and Savings Division

Dr Anna Lashko, Senior Policy Officer, Migratory and Marine Biodiversity Section

Mr Leon Latimore, Analyst

Mr Michael Rawstron, General Manager, International Tax and Treaties Division

Ms Lynette Redman, Senior Adviser, Tax Treaties Unit

C

Appendix C

Annex

List of the Birds Species in accordance with the Article 1 of the Agreement between Australia and the Republic of Korea on the protection of migratory birds.

No.	*Scientific Name*	*Hangeul Name*	English Name
1	*Anas clypeata*	넓적부리	Shoveler (Northern Shoveler)
2	*Anas querquedula*	발구지	Garganey
3	*Cuculus saturatus*	벙어리뻐꾸기	Oriental Cuckoo
4	*Chaetura caudacuta (Hirundapus caudacutus)*	바늘꼬리칼새	White-throated Needle-tailed Swift (White-throated Needletail)
5	*Apus pacificus*	칼새	White-rumped Swift (Fork-tailed Swift)
6	*Gallinago hardwickii*	큰꺅도요	Latham's Snipe
7	*Gallinago stenura*	바늘꼬리도요	Pintail Snipe (Pin-tailed Snipe)
8	*Gallinago megala*	꺅도요사촌	Swinhoe's Snipe

9	*Limosa limosa*	흑꼬리도요	Black-tailed Godwit
10	*Limosa lapponica*	큰뒷부리도요	Bar-tailed Godwit
11	*Numenius minutus*	쇠부리도요	Little Curlew
12	*Numenius phaeopus*	중부리도요	Whimbrel
13	*Numenius madagascariensis*	알락꼬리마도요	Australian Curlew (Eastern Curlew)
14	*Tringa totanus*	붉은발도요	Redshank (Common Redshank)
15	*Tringa stagnatilis*	쇠청다리도요	Marsh Sandpiper
16	*Tringa nebularia*	청다리도요	Greenshank (Common Greenshank)
17	*Tringa glareola*	알락도요	Wood Sandpiper
18	*Xenus cinereus*	뒷부리도요	Terek Sandpiper
19	*Tringa hypoleucos (Acetitis hypoleucos)*	깝작도요	Common Sandpiper
20	*Tringa brevipes (Heteroscelus brevipes)*	노랑발도요	Grey-tailed Tattler
21	*Arenaria interpres*	꼬까도요	Turnstone (Ruddy Turnstone)
22	*Limnodromus semipalmatus*	큰부리도요	Asian Dowitcher
23	*Calidris tenuirostris*	붉은어깨도요	Great Knot
24	*Calidris canutus*	붉은가슴도요	Red Knot
25	*Crocethia alba (Calidris alba)*	세가락도요	Sanderling
26	*Calidris ruficollis*	좀도요	Red-necked Stint
27	*Calidris minutilla(subminuta) (Calidris subminuta)*	종달도요	Long-toed Stint
28	*Calidris minuta*	작은도요	Little Stint
29	*Calidris melanotos*	아메리카메추라기도요	Pectoral Sandpiper

30	*Calidris aeuminata*	메추라기도요	Sharp-tailed Sandpiper
31	*Calidris alpina*	민물도요	Dunlin
32	*Calidris ferruginea*	붉은갯도요	Curlew Sandpiper
33	*Tryngites subruficollis*	누른도요	Buff-breasted Sandpiper
34	*Limicola falcinellus*	송곳부리도요	Broad-billed Sandpiper
35	*Philomachus pugnax*	목도리도요	Ruff
36	*Phalaropus lobatus*	지느러미발도요	Red-necked (Northern) Phalarope (Red-necked Phalarope)
37	*Pluvialis fulva*	검은가슴물떼새	Pacific Golden Plover
38	*Pluvialis squatarola*	개꿩	Grey (Black-bellied) Plover (Grey Plover)
39	*Charadrius hiaticula*	흰죽지꼬마물떼새	Common Ringed Plover (Ringed Plover)
40	*Charadrius dubius*	꼬마물떼새	Little Ringed Plover
41	*Charadrius mongolus*	왕눈물떼새	Mongolian Plover (Lesser Sand Plover)
42	*Charadrius leschenaultii*	큰왕눈물떼새	Greater Sand Plover
43	*Charadrius veredus*	큰물떼새	Oriental Plover
44	*Glareola maldivarum*	제비물떼새	Oriental Pratincole
45	*Stercorarius parasiticus*	북극도둑갈매기	Parasitic Jaeger (Arctic Jaeger)
46	*Sterna hirundo*	제비갈매기	Common Tern
47	*Sterna albifrons*	쇠제비갈매기	Little Tern
48	*Sterna leucoptera (Chlidonias leucopterus)*	흰죽지갈매기	White-winged Black Tern
49	*Sula dactylatra*	검은제비갈매기	Masked Booby

50	*Sula leucogaster*	갈색얼가니새	Brown Booby
51	*Fregata ariel*	군함조	Lesser Frigate Bird
52	*Calonectris leucomelas*	슴새	Streaked Shearwater
53	*Puffinus carneipes*	붉은발슴새	Pale-footed Shearwater (Flesh-footed Shearwater)
54	*Puffinus tenuirostris*	쇠부리슴새	Slender-billed Shearwater (Short-tailed Shearwater)
55	*Hirundo rustica*	제비	House Swallow(Barn Swallow)
56	*Hirundo daurica*	귀제비	Red-rumped Swallow
57	*Acrocephalus arundinaceus (Acrocephalus orientalis)*	개개비	Great Reed Warbler (Oriental Reed- Warbler)
58	*Motacilla flava*	긴발톱할미새	Yellow Wagtail
59	*Motacilla cinerea*	노랑할미새	Grey Wagtail