



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Timor Sea treaties

FRIDAY, 4 OCTOBER 2002

MELBOURNE

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JOINT COMMITTEE ON TREATIES

Friday, 4 October 2002

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

Senators and members in attendance: Senators Mason and Tchen and Ms Julie Bishop, Mr Ciobo and Mr Wilkie

Terms of reference for the inquiry:

Timor Sea treaties

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Committee met at 10.02 a.m.**BIALEK, Mr Dean Marc (Private capacity)**

CHAIR—I declare open this public hearing of the Joint Standing Committee on Treaties in the rather damp city of Melbourne. The Exchange of Notes Constituting an Agreement between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor; and the proposed Timor Sea Treaty between the Government of East Timor and the Government of Australia were tabled, and thereby referred to the Joint Standing Committee on Treaties, on 25 June 2002 for review. Preliminary evidence on the treaties was taken from representatives of the relevant Commonwealth departments at public hearings in Canberra on 12 July. It was clear, however, that the treaties would attract considerable public interest. The committee therefore called for submissions from interested parties by 31 July. To date, over 80 submissions have been received by the committee and a further hearing was held on 26 August in Canberra.

In reviewing properly the treaties, the committee considered it essential to take evidence in locations other than Canberra. The committee believes it is important that a wide range of individuals and organisations have the opportunity to express their views on these treaties in the context of this review. Over the last two days the committee has taken evidence in Perth and in Darwin. Further public hearings will be held in Canberra next week. Today we will take evidence from the representatives of oil companies and the union movement, as well as Australian non-government organisations with an interest in East Timor.

We will begin proceedings by hearing evidence from Mr Dean Bialek who is a lecturer in law at the University of Melbourne with an interest in the joint development of offshore oil and gas. Mr Bialek, although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have a copy of your submission and you can take it that the submission has been read by the committee. We invite you to make some introductory remarks and then we will proceed to questions.

Mr Bialek—Firstly, I would like to thank the committee for inviting me to present my views on what I consider to be a very important issue from a national interest perspective. I intend to be quite brief to allow you to ask as many questions as required in the time allowed. Obviously this committee is dealing with the issue of whether to make a recommendation to the government that ratification of the Timor Sea Treaty should go ahead. It seems likely now that both countries intend to ratify the treaty, although East Timor has now said that it is waiting until Australia has decided to ratify before it goes ahead with its own ratification process.

As a preliminary observation, 90 per cent seems like a good deal for East Timor. I think joint development is a good option in what is now seen to be an intractable sovereignty dispute in the maritime area between the two nations. By agreeing to such a provisional arrangement in the Timor Sea Treaty, Australia and East Timor have set aside temporarily their sovereignty dispute in an attempt to fast-track development and to ensure the flow of important revenues from the exploitation of non-renewable resources in the Timor Sea.

This treaty is an interim arrangement, as required by article 83 of the United Nations Convention on the Law of the Sea. It will remain in place pending a final solution on maritime boundaries. However, it should not in any way preclude the parallel pursuit of a final delimitation. This being the case, there is still a dispute between the two countries due to their overlapping maritime claims. East Timor has now passed its own Maritime Zones Act and Australia is therefore obliged under international law to engage in meaningful negotiations with East Timor, despite the fact the Timor Sea Treaty might be in place in the interim. Australia should not drag its feet in negotiations on a permanent settlement of the maritime boundaries.

I also want to draw to the attention of the committee the fact that the Timor Sea Treaty is stated in article 2 to be without prejudice to the conclusion of permanent maritime boundaries. As a result, the boundaries of the Joint Petroleum Development Area under the Timor Sea Treaty should not in any way be viewed as limiting East Timor's entitlements in the context of negotiations on permanent boundaries. The committee will have noted that the most pressing issue between the two countries now is sovereignty and the division of petroleum to be derived from the Greater Sunrise petroleum and gas deposits. As the committee will be aware, there is a current process of negotiation with respect to an international unitisation agreement on that particular deposit.

I want to also put to the committee my view that the Vaughan Lowe opinion, presented in Dili in March, is legally flawed in a number of identifiable areas, most specifically in its discussion of the lateral boundaries of the JPDA issue. A maritime delimitation between East Timor and Indonesia is the only accurate indicator of what East Timor is in fact entitled to with respect to the lateral boundaries. Indonesian legislation makes equidistance the presumptive method for delimiting boundaries with its neighbours. While the practice does, as mentioned in the Lowe opinion, support the discounting of the effect of small islands, this is much less of a factor when we are considering archipelagic states.

As you will note in my submission, there is some precedent for Indonesia having ceded a boundary which is less favourable to it than an equidistance line in a 1969 delimitation with Malaysia at the boundary between Borneo and Sarawak. There is a reference to that in my submission. From an academic point of view, there is some possibility that East Timor might manage to negotiate a boundary which has less than full effect on the eastern lateral boundary. If such a line finishes to the east of point A16, then I think it is incumbent upon Australia and East Timor to activate the provision of article 3 in the 1972 agreement, which provides for adjustment of that line to provide for the full maritime entitlements of a sovereign power in East Timor.

Overhead transparencies were then shown—

Mr Bialek—I will refer to a simple map, provided by Geoscience, of the Joint Petroleum Development Area under the Timor Sea Treaty. There is the joint development area, established under the Timor Sea Treaty. Point A16 provides a junction between the 1972 boundary and the Joint Petroleum Development Area. What I want to point out is that the eastern lateral boundary at the moment is basically delimited by reference to the opposite coast of the island of East Timor and the Indonesian islands known as the Leti group of islands. This line here pretty much approximates the line of equidistance between these two territorial frontals. What that means, therefore, is that East Timor could really only claim an area beyond that if it were to negotiate a maritime delimitation with Indonesia in this area, which is north of the 1972 boundary, which

gives less than a full effect to these particular islands. What that would mean, therefore, if there was a delimitation of less than full effect, is that this boundary might finish, for instance, about here. Then I think it would be incumbent upon Australia and Indonesia to activate article 3 of the treaty, which establishes the 1972 boundary. That treaty says that there should be provision for adjustment for negotiations between Australia and Indonesia to shift back the 1972 boundary so as to once again widen the Timor Gap to allow for the full continental shelf entitlements of the sovereign power in East Timor. If it were the case that the 1972 boundary was peeled back, then I think Australia would have the responsibility to negotiate with East Timor to expand the boundaries of the Joint Petroleum Development Area to reflect East Timor's true entitlements under international law. This may also occur in the context of a permanent boundary solution between the two countries.

One of the major concerns at the moment for the petroleum industry is that any shift of this boundary might somehow jeopardise their rights. Obviously the negotiations between Australia and East Timor establish a framework for the development of this particular deposit, known as Greater Sunrise. Because the fiscal arrangements which are being developed at the moment under a unitisation agreement are based upon the positioning of this line, the concern is that any shift of that line, and therefore any change in the division of production—which is currently about 80-20—will have an effect on the fiscal arrangements which apply to the development of this particular resource. What I would like to put to the committee is that they make a recommendation that Australia seeks to ensure, in the negotiation of the international unitisation agreement, that the rights and the fiscal arrangements that are applied to the joint venture partners in Greater Sunrise are basically held, despite the fact that there might be some change in the division of proceeds.

CHAIR—What do you mean by 'held'? Do you mean held in escrow?

Mr Bialek—I mean basically stabilised via a clause in the unitisation agreement. What I like to do is divide the two stages of rights into two tiers. On the first tier we have the relationship between Australia and East Timor. At the moment, that relationship is written into the treaty as being about a 20-80 division.

CHAIR—Of Greater Sunrise?

Mr Bialek—Exactly. Eighty per cent falling under exclusive Australian jurisdiction; 20 per cent falling within the regime that applies in the JPDA. If there were to be a shift, obviously there would be a need to readjust the apportionment of that production division. But, in negotiating the unitisation agreement, I would suggest that Australia seek to include a clause that guarantees the fiscal arrangements that apply to the joint venture partners so that even if there is a shift, the fiscal arrangements that apply are no more onerous than are initially in place at the moment. That just about concludes what I have got to say. I would like to hand over to the committee for some questions.

CHAIR—I will kick-start the questions. You have said that East Timor has now passed its Maritime Zones Act and that obliges Australia to engage meaningfully in negotiations for a conclusion to maritime boundaries. What are the specific obligations on a nation in this circumstance?

Mr Bialek—In article 83 of the United Nations Convention on the Law of the Sea, it is quite express about the fact that nations are to engage meaningfully and in good faith. There is a general obligation under international law and international relations that there be good-faith negotiations towards the conclusion of a permanent boundary. That would, I think, in international law, say that Australia should not drag its feet in terms of reaching a permanent solution. East Timor has been quite frank about the fact that they are going to be seeking a permanent delimitation. In fact, in the first sitting of the East Timorese parliament on 20 May, Mari Alkatiri, the new Prime Minister, stated quite clearly that he and his country view this treaty as merely an interim administrative arrangement in order to secure the legal environment for petroleum development but that they will go forth and seek a permanent delimitation.

CHAIR—The treaty itself says it is ‘without prejudice’ to future negotiations.

Mr Bialek—Correct. That is an expression of what is required under article 83.

CHAIR—You obviously have considerable qualifications and experience in this area of the law. Can you give me some idea of how long it can take for two nations to conclude ultimate maritime boundaries? Are there examples where the negotiations have been going for decades?

Mr Bialek—There are some examples. For instance, there is a boundary negotiation between Indonesia and Vietnam which has been going since 1971, which is still not concluded. There are numerous examples of this having happened. Because of this long protracted practice, I think that it is quite beneficial for countries to enter into interim arrangements so as to ensure they gain the benefit of petroleum development whilst they go forth and try to reach some resolution.

CHAIR—So there are numerous examples of interim arrangements to enable resource development to proceed while maritime boundary delimitation negotiations are going on?

Mr Bialek—Correct.

CHAIR—Is this treaty before us today a usual interim arrangement in terms of its clauses, its articles?

Mr Bialek—It is. It is to a certain extent unique because it does divide the resources on a 90-10 basis. That is quite unusual, although it is obviously up to the countries to decide on how the petroleum deposits are going to be divided so as to take into account various economic and strategic factors. But it is definitely a developing practice. There are now over 20 examples of using joint development agreements globally. It is provided for quite expressly in article 83. This type of arrangement is what is envisaged by that particular provision, and I see it as a good way around sovereignty disputes.

CHAIR—In your opinion what is the basis for the 90-10 split?

Mr Bialek—I think that there is a recognition by Australia that international law has changed to a certain extent on the method to be used in delimiting a continental shelf. There is quite a lot of jurisprudence to the effect that natural prolongation should no longer be the predominant factor and that geological faults or furrows, such as the Timor Trough, should have a lesser

impact upon where lines are drawn. There is, to a certain extent, more predominance placed on reaching a median line solution.

CHAIR—But what about the specific 90-10?

Mr Bialek—The 90-10 is obviously a reflection of the change in international law. Australia also stated in its national interest analysis that it was taking into account the fact that East Timor is a new sovereign nation. It is a developing nation and it is one of the poorest nations in Asia. To a certain extent that is tied up with the amount of aid and with security considerations.

CHAIR—Are you able to suggest any alternative source of revenue for East Timor, apart from aid, in the short term?

Mr Bialek—As much as I have read, there appears to be very little. They are known as a coffee exporter, but the global market in coffee has been quite depressed over the last few years, and that has had a detrimental impact on their potential export earnings. East Timor would definitely view oil and gas as their predominant source of income over the next few years, or in the short term, anyway.

CHAIR—You mentioned that Indonesian legislation reflects the equidistant factors. What steps would have to take place for the eastern boundary—the JPDA—to be moved? What negotiations would have to take place between which of the interested parties in order for that to happen? I assume that you would have to start with East Timor and Indonesia.

Mr Bialek—That is correct. Looking at the overheads, first there needs to be a delimitation between the East Timorese island and these nearby Indonesian islands. That line would need to be drawn in the vicinity of the tip of East Timor and nearest tip of the JPDA. As you have just stated, the Indonesian preference is to draw an equidistant line. There is the practice in some international jurisprudence that suggests that, where islands are situated some distance from the main constituents of a state or the territorial mainland of a state, those islands should be given a lesser effect in determining that line. East Timor, as an archipelagic state, can claim these islands as though they fall within a territorial landscape.

CHAIR—What would be the effect of East Timor's claim, if it made that claim?

Mr Bialek—If, in negotiations, it reached a solution which was slightly east of equidistance, it would have to say to Indonesia and Australia, 'Our entitlements are beyond what is suggested by this particular area and beyond the gap that you left in the 1972 boundary.'

CHAIR—In other words, in order for that to happen, Indonesia would have to waive its equidistant claim.

Mr Bialek—Exactly. It is completely entitled to do so. Even though its legislation makes equidistance the presumptive method, it is completely open to negotiate on a basis that differs from that legislation.

CHAIR—Can you give me a reason why Indonesia might want to do that? Is there anything in Indonesia's national interest that would cause it to change the position stated in its legislation?

Mr Bialek—There is nothing that is apparent to me at the moment.

CHAIR—What would be the next step?

Mr Bialek—The next step would be for Australia and Indonesia to take into account a less than full effect boundary between—

CHAIR—Australia and Indonesia will then be negotiating?

Mr Bialek—Correct. They would have to negotiate to change the extent of the 1972 boundary. Article 3 expressly provides for a renegotiation of this point—the top tip of the JPDA—so as to peel back the boundary to allow for the full maritime claims of a sovereign power in East Timor. For instance, look at points A16 and A15. The provision in the 1972 treaty allows the two parties to pull back at least to A15. That would mean that East Timor's continental shelf entitlements would be beyond those which are currently suggested by the current JPDA line. Firstly, there would be negotiations between East Timor and Indonesia. Secondly, there would be negotiations between Australia and Indonesia to peel back this boundary.

CHAIR—Just at that point, can you give me a reason—just leave East Timor out of the equation for the moment—why it would be either in Indonesia's interest or in Australia's interest to renegotiate the 1972 treaty?

Mr Bialek—It is obviously contrary to Indonesia's interests to do that, because it would lose a small part of the continental shelf. Really, the only thing to hold onto here is a principle known as the 'principle of non-encroachment' in international law. That says that two countries negotiating a maritime boundary should not do so in a way which infringes on the rights of a third party.

CHAIR—Could you expand on 'non-encroachment'?

Mr Bialek—Basically, it says that—for instance—Australia and Indonesia, in negotiating the 1972 boundary, should ensure in doing so that they do not encroach on areas which appertain to another country which is not party to the negotiations.

CHAIR—So, in other words, until East Timor became a republic, there was no third party for Australia and Indonesia to consider?

Mr Bialek—There was a third party when the 1972 boundary was put in place—

CHAIR—There was in 1972.

Mr Bialek—There was the Portuguese authority in East Timor. There was an obligation not to infringe upon the potential maritime claims of Portugal at that time. Subsequent to that, Indonesia annexed East Timor in 1975, but Australia and Indonesia could not reach an agreement on filling this gap. We were left with the Timor Gap Treaty and now subsequently the Timor Sea Treaty.

CHAIR—I understand.

Mr Bialek—As I said, we would have negotiation first between East Timor and Indonesia, then an agreement between Australia and Indonesia to pull back the 1972 boundary so as not to infringe on the maritime entitlements of East Timor, and then an agreement between East Timor and Australia that the line continue on the line that is drawn north of the boundary. For instance, if the boundary comes down through point A15, then Australia and East Timor might say that East Timor's rights should continue in this way. That would of course put more of Greater Sunrise within the joint petroleum development area.

CHAIR—Where would the line end up?

Mr Bialek—It would probably continue on this basis, although it is very difficult to postulate what Australia and East Timor will actually agree to. I think this is quite an unlikely scenario.

CHAIR—Finally, can you tell me more about the concept of non-encroachment? Is it contained in international conventions?

Mr Bialek—There is really nothing about it in international conventions. A couple of decisions of the International Court of Justice refer to it. There is a separate opinion by Judge Jessup in the North Sea continental shelf cases of 1969. There is also a separate opinion by Judge Oda in the Tunisia-Libya delimitation in the International Court of Justice. Both suggest that, in delimitations, parties should be very careful not to encroach upon the rights of third parties in delimiting a certain area.

Mr WILKIE—Mr Bialek, I congratulate you on your submission. I thought it was excellent. If negotiations on delimitation stall—with East Timor claiming that it is part of their territory and us claiming that it is part of ours—can East Timor then grant exploration licences?

Mr Bialek—They can grant exploration licences; I do not think that is contrary to international law. Where you have overlapping claims, it is accepted that it is only contrary to international law to actually go ahead with exploitation production. It is basically set in international law that there is no breach of the obligation to respect another country's maritime claims, unless there is a risk of irreparable prejudice to the other state. Exploration, it is said, does not amount to that type of irreparable prejudice, but actually going in and drilling does amount to irreparable prejudice and is therefore contrary to international law.

Mr WILKIE—As you have stated, the treaty provides for Australia and East Timor to continue to negotiate boundaries in good faith. But our foreign minister has already stated that, that being the case, Australia intends not to move in any way, shape or form over the boundaries that are already there. In that case, what avenues are available to East Timor to bring about negotiations?

Mr Bialek—Very few at the moment. Part of the reason is that obviously Australia has decided to excise matters pertaining to maritime delimitation from its consent to the compulsory jurisdiction of the International Court of Justice and the Law of the Sea Tribunal. Therefore, this makes it very difficult for East Timor to enforce its rights to have the boundaries properly negotiated. Once it becomes party to the Law of the Sea convention, it can turn to what is known as a ‘good-faith obligation’ on Australia to continue with negotiations on a permanent delimitation.

Mr WILKIE—But if no negotiation happens, where do they go from there?

Mr Bialek—They have very few avenues left. There is provision in the Law of the Sea convention that East Timor, once it is a party to that convention, can require Australia to come to what is known as a ‘conciliation commission’ and Australia is obliged to do so if East Timor initiates that particular procedure. The outcome of that procedure is not binding on the countries, but it could form the basis of an agreement between the two countries to delimit the boundaries permanently.

Senator TCHEN—I have a couple of questions on the information that you have given the committee. Firstly, I join the deputy chair in congratulating you on your submission. It is very informative. This is probably a minor point, but, should Indonesia agree to negotiate with East Timor and in fact reach agreement with East Timor on giving less than full effect to the island Pulau Leti in particular, will that shift the location of A16 eastward?

Mr Bialek—It will not automatically shift A16; A16 can only be shifted through negotiations between Australia and Indonesia.

Senator TCHEN—But, should Indonesia agree with East Timor on that point, wouldn’t it also be the basis for Australia to renegotiate with Indonesia to potentially move A16 northward?

Mr Bialek—To move A16 north or south?

Senator TCHEN—To the north—if Indonesia agrees with East Timor that Pulau Leti is less than full effect, presumably the location of Pulau Leti also has an impact on the latitude location of A16?

Mr Bialek—The north-south?

Senator TCHEN—Yes.

Mr Bialek—Not really. There is no provision in the treaty which allows for a renegotiation of latitudinal positioning.

CHAIR—Which treaty is this—the 1972 treaty?

Mr Bialek—Yes, the 1972 treaty. There is no provision which allows for a latitudinal repositioning of the 1972 boundary. So I think that, to a certain extent, the concern expressed by Minister Downer that recognising a less than full effect boundary could call into question the

validity of the 1972 boundary is misplaced. There is nothing that requires Australia to move the 1972 boundary to the south so as to give more of that continental shelf to Indonesia. We are merely talking about shifting A16 to between what is currently A15 and A16.

Senator TCHEN—I see. Earlier in answer to the chair's question about your interpretation of the 90-10 division, you said that your interpretation is that Australia recognises the importance of the median line principle over the natural prolongation principle. To paraphrase the first sentence of the preamble to the treaty, it says in effect that the treaty is a recognition of East Timor's need for economic development and economic support. As it is the first sentence, it seems to set the scene for the whole treaty. Are you saying to me that, from the legal point view, that sentence has no implication for this 90-10 division?

Mr Bialek—I do not think so. To me, the most important provision of the treaty is that the boundaries that are drawn and the splits that are written into the treaty are to be without prejudice. I think that the 'without prejudice' clause is a very important one. Under international law, it has to be given full effect. It is very important that both countries regard it as being without prejudice to a permanent limitation. Also, I think it is important to regard the 90-10 split as being without prejudice to the position of both parties. I know Australia will continue to maintain that its continental shelf extends right to the Timor Trough, despite the fact that it seems to have negotiated a slightly lopsided division of the petroleum that actually exists on the seabed up to the trough. I do not think that you should read anything into the 90-10 split other than that it is a reflection, obviously, of Australia's concern regarding East Timor's economic development. To a certain extent, you could also see it as a reflection of change in international law since the early 1970s.

Senator TCHEN—You said also that you believe two issues in the treaty should be separated: firstly, the issue of boundaries between Australia and East Timor; and, secondly, should the boundary be shifted, there needs to be some statement of guarantee in the treaty, essentially to protect the interests of the joint venture partners, so that any change in fiscal arrangements should not disadvantage them. It seems to me that that would introduce a principle that the private interests of the oil company should override the national interests of Australia and East Timor when we develop national treaties. Is there legal precedence for that?

Mr Bialek—There is no legal precedent, but one needs to take into account the fact that this treaty only has significance if we get under way with some development of the resources. The real impetus behind the conclusion of the treaty is to ensure that we have a legal framework to go ahead with development so that revenues start to flow. I think that, in negotiating certain provisions between Australia and East Timor, the concerns of the oil industry obviously need to be taken into account. Without making certain concessions and taking certain issues into account, obviously there would be no development and the provisions would be useless anyway. So there needs to be some consideration that, in negotiating an international unitisation agreement on Greater Sunrise, the interests of the petroleum companies are taken into account so as not to prejudice their interests as well.

Senator TCHEN—But surely to take the interests of essentially a third party—the oil industries—into account, there has to be an agreement between the government of East Timor and the government of Australia?

Mr Bialek—Yes.

Senator TCHEN—They should take them into account rather than have them being introduced unilaterally by Australia?

Mr Bialek—Sure. I think East Timor would agree with Australia that they need to take into account issues that will have significant repercussions for them—even the possibility that development of the resources will go ahead. East Timor has been quite frank about its willingness to conclude treaties and also its willingness to reach a unitisation agreement for Sunrise—because they, much more than Australia, need the revenues flowing.

Mr CIOBO—With respect to the points you were speaking about previously about the JPDA, as I understand it the whole principle behind all this is that it is an area of competing claims. Therefore, it will always be an issue of, I guess, some contention between the respective sovereign nations as to who in fact has the most legitimate claim. The fact that we have entered into the JPDA highlights, by virtue of the fact that we have agreed to disagree, the very nature of the disagreements that will be ongoing. You were speaking about negotiations that could take place, and so on. Fundamentally, though, East Timor's position, I would expect—and I am seeking your view on this—would always be to try to increase the east-west boundaries by giving full effect to the impact of the various islands, and so on. Does that necessarily mean—and this is the point that I guess a number of witnesses have made to this committee over time—that Australia in any way is any less substantive in terms of the arguments that we are putting forward? We could argue to the contrary, that we could extend all the way to the continental shelf? You have put forward the point of view that it could extend out beyond Greater Sunrise but, by the same token, it could also fall within that. I also seek your comments on this: we could argue that the whole lot is within Australian territorial waters.

Mr Bialek—You could argue that, but there is no real legal basis for such an argument that the lines should actually contract in from where they are at the moment. There is obviously a legal argument that suggests that it is possible to expand them by giving less than full effect. You can never give more than full effect to an island in a delimitation, and so equidistance to a certain extent is the least that East Timor could claim and would be entitled to under international law. Obviously it could seek to expand them, but I think the likelihood of that happening in negotiations between Indonesia and East Timor is quite small. I do not think that Indonesia will agree to such a line. Obviously it is entitled to claim that that equidistant line is appropriate and, if that is the case and the line is drawn on the basis of equidistance, then East Timor cannot really say to Australia, 'Hey, look, our boundaries extend beyond what is suggested by the JPDA. Can we try and negotiate an extension here?' So East Timor is relying on its negotiations with Indonesia just to prop up its arguments to Australia in trying to achieve either a lateral extension of the joint petroleum development area or a lateral extension in the context of a permanent solution.

Mr CIOBO—Are you familiar with the Lowe opinion in relation to it?

Mr Bialek—I am.

Mr CIOBO—Essentially, would I be correct to say that that opinion applies in that case?

Mr Bialek—I think the Lowe opinion is a little misleading on a number of issues, specifically with respect to the lateral boundaries issue. It fails to put the arguments in favour of an approach based on equidistance. It is very strong in its arguments based on giving a less than full effect to the islands. It fails to mention, firstly, that Indonesia is an archipelagic state—meaning that its islands form part of its territory and it can draw base lines around the outermost points of its islands and can treat all the waters within as its own territory. You could say that makes the Indonesian archipelago, including the archipelagic waters, tantamount to a territorial continent—

Mr CIOBO—Mainland.

Mr Bialek—for the purpose of delimitations. I do not think it really puts forth arguments in support of Indonesia's position. It also fails to mention the fact that Indonesia states that equidistance is to be the presumptive method in negotiations with other countries on the establishment of maritime boundaries.

Mr CIOBO—Terrific. Other witnesses have spoken to us about the water column. Could you shed some light for the committee on examples that may exist where there may be different seabed rights from those that exist in relation to the water column, and whether there is any precedent or guiding principle in relation to that?

Mr Bialek—The practice of establishing a different boundary for water column jurisdiction as against the continental shelf is very rare, and it appears that it has been done only twice, both times by Australia: once in the 1978 Torres Strait treaty between Australia and Papua New Guinea, and again in the Timor Sea and the Arafura Sea in negotiations between Indonesia and Australia. These maps will make it clearer.

Overhead transparencies were then shown—

Mr Bialek—This is another map of the Timor Sea. To the north we have the continental shelf boundary on either side of the Timor Gap. To the south we have a line which is provided for in a 1997 treaty between Australia and Indonesia. That purports to create a boundary between Australia and the Indonesian archipelago that applies to the water column jurisdiction. In the shaded area on the map we have basically overlapping claims. Indonesia's continental shelf extends only to the dotted line north of the dark line, but its water column jurisdiction extends to the dark line in the south. In the area between Australia and Timor, Australia has continental shelf jurisdiction to that line and Indonesia has water column jurisdiction. Water column jurisdiction will apply to things like fisheries enforcement and licensing. The continental shelf jurisdiction deals with sedentary species—species living on the seabed—or oil and gas exploration and exploitation. The real issue to consider is that, firstly, the 1997 treaty is not yet in force. I have heard it stated from a number of Australian government officials that the shaded area between Australia and Timor will, because East Timor is now sovereign, have to be excised from the 1997 treaty, and so Australia will have to negotiate a water column boundary with East Timor.

CHAIR—And, presumably, negotiate with Indonesia to excise it?

Mr Bialek—The excision will not be a problem, because Indonesia has already stated that it is willing to excise because it no longer exercises sovereignty over East Timor. The other issue is that, as we know, about 80 per cent of Greater Sunrise actually lies within Australian seabed jurisdiction, but in an area where Indonesia exercises water column jurisdiction. The committee will note that one of the proposals put forward by the Greater Sunrise joint venture partners is to use a floating platform for the exploitation of Greater Sunrise. That brings into question who actually exercises jurisdiction over such a platform. The better opinion in international law is that, because such a platform is inextricably linked with the exploitation of seabed resources and Australia has seabed jurisdiction in that area, it should be able to exercise jurisdiction over that particular platform. There is an obligation under the 1997 treaty, when it enters into force, for Australia to consult with Indonesia on who is to exercise jurisdiction over such a platform, and to reach some agreement as to the safety and environmental procedures and arrangements that are going to pertain to that particular platform or installations of that nature.

Senator MASON—I am fairly new to this issue and my questions might not be as sophisticated as my colleagues'. Can you please show us again the map showing the JPDA and Australia's northern coast? My questions flow from those of the chair and Mr Ciobo. You said that the future negotiations of permanent maritime boundaries could affect the location of the joint petroleum development area and that East Timor may have been disadvantaged by that. Is your argument that, with future negotiations for permanent maritime boundaries, that the revenue split from, us say, Greater Sunrise should be amenable to change?

Mr Bialek—The split is amenable to change; and there are express provisions, for instance in Annex E to the Timor Sea Treaty, which deal with the unitisation of Greater Sunrise. That establishes an 80-20 split but it does say that the split is subject to review; and so there is the chance that the split could be adjusted. There are two reasons for that. Firstly, if we amend the boundary to change the geographical reality then the split of resources either side of that boundary would change. Secondly, new scientific estimates from the joint venture partners might come to light and require an amendment of that particular ratio. I know that the unitisation agreement, which is currently in negotiation, will definitely include more detailed provisions on how such a readjustment is to occur.

Senator MASON—Are you arguing that, if the negotiation of permanent maritime boundaries takes a long time, that could disadvantage East Timor?

Mr Bialek—I do not think necessarily that it will disadvantage East Timor. As I said, I think that there should be full recognition of the fact that the JPDA boundaries are without prejudice to a permanent delimitation. These two things can run in parallel. On the one hand you have the JPDA boundaries but, as I said, they should be without prejudice to any rights that East Timor will seek to assert in negotiations with Australia on a permanent solution.

Mr WILKIE—Yesterday, and in other submissions that we have received, it was suggested that the income coming to the government should be put into a reserve fund until this issue of the boundaries has been sorted out, because it would affect which country gets what percentage of the total pool. That is probably not realistic, although it has been suggested. If in the future those boundaries changed—so that East Timor, for example, would have received more of the income had those boundaries been the same as at the time the treaty was ratified—do you think there would be any option available to them to sue Australia for that loss of income?

Mr Bialek—I do not think so because, as an independent state, East Timor has agreed by its own consent to be a party to the Timor Sea Treaty and the arrangements contained therein. I do not see that it would have any justifiable claim to prior revenues that it would have had access to, had the boundaries been in place at some earlier time.

CHAIR—The last issue that I wanted to explore with you is the Lowe opinion. We will be receiving evidence, I anticipate next week, specifically on the Lowe opinion in the context of Petrotimor. Can you summarise for the committee the areas where you believe the Lowe opinion is, as you said, legally flawed? What is the assumption that the Lowe opinion makes, and what is your response to that in the fundamental areas?

Mr Bialek—The fundamental areas are the lateral boundaries, and it seeks to take some rather wide-ranging and expansionist views on what East Timor's maritime entitlements might be. The committee needs to have a look at the arguments that are put forth on, firstly, the western boundary. There is no justification in the opinion as to how such an expansionist western boundary should be constructed. It just says that it should be to the west of that anticipated in the Timor Sea Treaty. On the eastern side it develops arguments on only one side of the coin. It deals only with the jurisprudence relating to giving less than a full effect to islands. It completely ignores the fact that Indonesia is an archipelagic state and therefore has every right to an equidistant line on the basis of its islands contained within its archipelagic baselines.

CHAIR—Can you give me any precedent of an archipelagic state where that has not been dealt with in that way? Is there any precedent to support Lowe's opinion on how you treat an archipelagic state?

Mr Bialek—There is some precedent, but only in state practice. The vast majority of delimitations that have been reached between archipelagic states have been on the basis of equidistance. I read a report by the very esteemed geographer Victor Prescott, who talks about the fact that it is almost always the case that archipelagic states use an equidistant line to delimit boundaries between them. As I said, Indonesia has in the past reached agreements giving less than full effect to islands.

Mr Bialek—This next overhead shows the Malaysian territory of Sarawak and the island of Borneo, which is Indonesian territory. Obviously Borneo is contained within Indonesia's archipelagic baselines. In 1969 it agreed to a solution between Malaysia and Indonesia which gave less than full effect to some Indonesian islands. This island is known as Natuna Island, and this is the Natuna Sea area. The dotted line lying to the east of the delimitation that was reached between the two countries reflects equidistance between these islands and the Malaysian territory. So there is equidistance there. The other line is the boundary that was achieved between the two countries in negotiations. As you can see, it lies significantly to the west of equidistance, and more so as we head seaward.

Senator MASON—It is a negotiation and not an arbitration?

Mr Bialek—Correct. So there is some evidence that Indonesia has in the past negotiated a less than full effect boundary in the context of its archipelagic baselines. There are various reasons given for this less than full effect boundary. Some commentators, such as Prescott,

suggest that the less than full effect boundary in this case was negotiated as a quid pro quo agreement with Malaysia for acceptance of their archipelagic baselines as a concept in international law. In 1969 there was no Convention on the Law of the Sea, and the concept of archipelagic baselines had not been espoused in any international agreement at the time. Others say that the reason that the Natuna islands were given less than full effect was the fact that these islands form a very small part of Indonesian territory as a whole and therefore should be given less than full effect in determining the boundary—in the same way that Lowe has argued that the islands to the east of East Timor should be given less than full effect because they constitute such a small proportion of Indonesian territory as a whole. There is some precedent here.

Senator MASON—Of what value is a negotiated settlement—negotiated as opposed to arbitrated—as a precedent in international law? I ask because negotiated settlements between states can be based on all sorts of things. They can be highly political or they can be ‘You do that and I’ll do this.’ They could involve issues that are not publicly traversed. Of what value are negotiated settlements as a precedent that, in a sense, perhaps delimit the idea of equidistance as a principle?

Mr Bialek—Maritime delimitation is quite an obscure science. To a certain extent, we have to rely on state practice as a form of precedent, and also it is difficult to follow on from what some of the international arbitrations have come up with. Australia has very expressly put its case that it believes that negotiation is the best way to settle boundaries, because international arbitration will not always take into account the various interests of the parties involved, and they might end up with a resolution that is not satisfactory to either of the parties. It is a little unfortunate that Australia has removed its consent to the compulsory jurisdiction of the various international arbiters of maritime boundary disputes; but there are some quite cogent arguments in favour of its position as well.

CHAIR—You are stimulating all sorts of other inquiries here. The deputy chairman now has another question.

Mr WILKIE—Suggestions have been made by a number of companies that we should not ratify the treaty until the unitisation agreement has been finalised. I wonder if you have an opinion on that.

Mr Bialek—That concern is obviously well founded as far as the companies’ interests are concerned. I do not think that it should necessarily be a precondition to the ratification of the Timor Sea Treaty. Nor should ratification of the Timor Sea Treaty be used as leverage by either of the states to ensure that the other state ratifies the unitisation agreement as well. It would obviously be helpful if the companies had a secure legal framework for the exploitation of all resources within the JPDA, including those which straddle boundaries. But I think it is appropriate for the countries, if they cannot reach an agreement on the terms for unitisation of Greater Sunrise at the moment, to go ahead with ratification of the Timor Sea Treaty so that Bayu-Undan can go ahead. I think the unitisation agreement is going to be quite difficult to achieve. It will happen eventually but probably not until at least half-way through next year. So I do not see that there should be any barriers or obstacles put in front of the ratification of the Timor Sea Treaty in that interim period.

CHAIR—Finally, would you indicate to the committee how the conciliation commission that you mentioned would come about?

Mr Bialek—There is a compulsory dispute settlement mechanism under the Law of the Sea convention that will only apply between Australia and East Timor once East Timor signs and ratifies that particular convention. As we discussed earlier, Australia has obviously exercised its right to exclude maritime disputes from the compulsory dispute settlement mechanism under the convention. But there is a right for another party to ask Australia to come to a conciliation commission, where the other country has exercised its right to exclude certain subjects from the jurisdiction of either the ICJ or the International Tribunal on the Law of the Sea. Under the convention, Australia would be obliged to come to that conciliation commission, and both parties would have the opportunity to present their case. The commission is made up of five members: two are appointed by either state and the fifth is appointed by the initial four. The commission would consider the arguments of the parties and would make recommendations in a report—to East Timor and Australia, in this case—as to how to go ahead with negotiations on a permanent delimitation. As I said before, they are under no obligation to accept what the commission comes up with, but there is an obligation in the convention to consider the outcomes of that commission in going forth with negotiations on a permanent delimitation.

CHAIR—Thank you very much, Mr Bialek. Your submission has been most helpful and we thank you very much for your time this morning. I am sure the committee will find your evidence of great use in preparing its report.

Mr Bialek—Thank you. It has been a pleasure.

[11.10 a.m.]

COGHILL, Mr Geoffrey Colin, Taxation Manager, Indirect Taxes, BP Australia Pty Ltd

CHAIR—Welcome, Mr Coghill. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have the submission from BP Australia. Would you like to make some introductory remarks, and then we will proceed to questions?

Mr Coghill—BP is interested in this matter because we are a supplier of fuel which is destined for use in the area and are associated with the JPDA. We sell fuel to Phillips Petroleum in Australia, which they take into the area. To the best of my knowledge, we are not a party to any exploration activities in the JPDA. If we are, it is certainly not part of the purpose of my being here today. We also sell fuel to people in East Timor, which is used in aircraft which fly to the area. We recognise that the committee of the Australian parliament may not be particularly interested in what happens with supplies we make in East Timor, but they are relevant to the extent that we have problems in sorting out what taxes do apply within the broader aspect of this treaty.

What are we concerned about? Why am I here? What we and our customers need is certainty as to what taxes do apply under this treaty—I think the effective date is 19 or 20 May—but it seems that we cannot really apply those until the treaty is ratified. The problem that we have of course is with transaction taxes. Unlike income taxes, we have to be applying transaction taxes as and when we make sales. If we charge the customers and they think they should not be charged, they are going to get very upset and want their money back. If we do not charge them, we might have a problem getting the money from them later on. We find there is a lack of published material to assist in the understanding of the effect of these treaties. For example, there are provisions within the treaty about the Australian GST. It appears to us, though, that the Australian GST does not apply because, simply, the Australian GST law does not cover that part of the world.

Finally, in macro, the intent of the treaty is not capable of reasonable implementation by suppliers of goods and services. I am talking about the 90-10 split requirement. If you are making a supply to somebody and you are supposed to apply 10 per cent of the tax which would apply in one country and 90 per cent to another, when the supply may not even have come from either country, it is completely outside any normal accounting procedures for people making supplies to those areas.

A PowerPoint presentation was then made—

Mr Coghill—I will now move on to some of the detail. Article 13 of the treaty itself talks about the area being deemed to be, and treated as by Australia and East Timor, part of the country. That establishes the broad framework. But if the law of the country does not apply that tax, then it seems that it is probably not of consequence. As I said, the JPDA does not come within Australian GST law; it is not part of Australia as defined in that law and therefore is

outside the GST. That is a bit strange, when the treaty itself talks about applying GST when it cannot, because it is outside of that act.

The treaty talks about the application of customs, quarantine and migration, and it says that some things shall not be subject to customs duties. It does not, so far as we can see, say anything about excise anywhere within the treaty. We assume that excise is applicable, but some people might assume that customs applied. Either way, you get back to the issue that, if you are exporting it from Australia there is probably not any excise anyway, because it is outside Australia for those particular laws. When we get to the taxation code within the treaty, it talks about what taxes are covered. It says that the goods and services tax is covered so far as Australian taxes are concerned. It does not mention excise. Presumably it does not cover it. As I said before, the GST is out of scope anyway.

The next screen simply shows what is covered in East Timor. The East Timorese authorities seem to be somewhat more diligent, if that is the word, in terms of seeking to recover revenue. It is more a matter of assertion than necessarily law that a tax applies to something. We find it very difficult communicating with East Timor, with language difficulties and one thing and another. The next screen is about whether the taxes are in or not. Customs duties are specifically excluded; and some are included. But as excise is like a customs duty, it is not included. We believe that it is not intended to be applicable, but it would be useful to have an affirmative statement within the documentation to make it quite clear that excise is not included.

One of the things that we do is supply fuel to aircraft and boats that go into that area. Article 6 is about shipping and air transport. It was suggested to us by somebody that our supply of fuel is okay, because it is covered by that article. That is different. Article 6 is about the taxation of people who supply shipping and air transport, and the income tax consequences. It is not about the taxation treatment of supplies that we make to people who are going to take their ships or helicopters into that area. Article 18 of the indirect taxes code talks about taxing in both contracting states, in accordance with the applicable law. Again, the point is that, if the law is not applicable within that law, it is of no consequence. That also introduces the concept of the framework percentage amount, where we would be applying 90 per cent of the applicable East Timor tax and 10 per cent of the applicable Australian tax to the transaction—were it taxable under the Australian law in the first place.

We need certainty and clarity on the various scenarios under which we might be involved in making supplies. We would be making supplies of oil, which we would potentially be sending from Darwin to the JPDA. At the moment, we supply fuel to Phillips Petroleum. Somewhat fortunately for us, we supply that fuel from within Australia to them at a location in Australia, and they then export that fuel to the JPDA. So far as we are concerned it is pretty crystal clear. We have made a domestic transaction, and it is their problem as to how to deal with the fact that they have exported it and whether they have any tax liability on having taken it into the JPDA. Were we supplying it directly, we would have this confusing situation. Presumably there would be no Australian tax impact because, so far as Australian laws are concerned, we would be exporting it. But we do not know whether the East Timor authorities would be seeking to say that we, in fact, owed some tax to them for something we had supplied out of Australia, under this treaty.

Similarly, if we sent it from Dili in East Timor to the JPDA, they would no doubt be seeking to tax it under this treaty. To take the Australian situation, as I read this treaty, if we sent it from Singapore into the JPDA area, we would be subject to 90 per cent of the East Timor tax and 10 per cent of the Australian tax on the sale of that fuel. The idea of somebody sending oil out of Singapore having an accounting system that could track that sort of liability is beyond us. It just would not happen. Similarly, we supply fuel to aircraft for travel into the area. We supply fuel to helicopters in Dili. At the moment, the East Timor authorities are of the view that we ought to be paying tax on that. We tend to think that that is really an export transaction; but it is somewhat unclear.

Restating the framework percentage and how it works, it is 90 per cent of whatever the taxes would be plus 10 per cent of any other taxes. As I said, it is just unworkable. In our view, if such a scheme is to be workable, a reverse charge type of mechanism would be the better way to go. I do not know whether you are familiar with that concept at all.

CHAIR—Perhaps you could elaborate.

Mr Coghill—It is the sort of thing that applies, for example, under the GST law with regard to a foreign party supplying a boat which is doing a domestic transaction within Australia. That party would not normally fall within the Australian GST law. They do not want to be registered; they do not want to pay GST, et cetera. If in the absence of other provisions they would have to be registered and pay the GST, and, similarly, if they are making a supply to somebody who is registered—ourselves, for example—we can agree that we, the recipient of the charge, will pay the GST. So the reverse charge means that we accept the liability that they have for the GST on that particular supply that they have made to us. We are obviously entitled to an input tax credit on it and so, under the Australian GST law, we report both their liability and our right to the credit. It saves them from having to be registered for a one-off transaction, et cetera.

It is a similar concept here. It says that we are the people who are domestic in this particular environment. We understand the local law, and so we can apply it. If the people who are the recipients of these services in a JPDA area are getting things with a tax liability of 90-10 from a fairly wide group of suppliers who would not really be very familiar with this particular bit of law—and it is really quite discrete to this part of the world, this spot in the ocean—then it would be better for them to look after the tax liability arising from the supplies made to them and to remit the appropriate taxes back to governments. They would be the people who truly understand what is going on and what the law is about.

Concerning the East Timor flights that I mentioned a moment ago, we supply fuel to those people. They do not seem to be addressed by the treaty. We think that they are really international flights and voyages, in the normal sense of the word; and that, as such, they ought to be free of the taxes, but we need confirmation that that is the intent, under the interpretation of the two governments. If their intent is otherwise, we similarly need some clarity and confirmation. It would be indeed strange if we made supplies to those aircraft—say, helicopters flying from Australia to East Timor—and they sought to apply tax to that. Currently they have got a significant range of taxes: excise duty and excise and sales tax applying to fuel use for aircraft. That is the material that I wanted to present to committee members.

CHAIR—Would we be able to have a hard copy of your PowerPoint presentation?

Mr Coghill—Certainly.

CHAIR—Thank you. You have said, in relation to a number of areas of concern, that BP would require confirmation of the intent and the interpretation of the two governments. What steps has BP taken to obtain such confirmation from the respective governments, the parties to this treaty?

Mr Coghill—With the governments themselves?

CHAIR—Has BP contacted Treasury, for example, over the application of GST for an interpretation?

Mr Coghill—I have spoken with Treasury. I have had a few conversation with them, yes.

CHAIR—Has there been a submission—if I could put it that high—from BP to Treasury for an interpretation of the GST applicability of this treaty?

Mr Coghill—Not a submission as such. I think the way the communication went was that your secretariat copied that to the people in Treasury, who then contacted me, and so I have spoken to an Adrian Clark-Walker in recent times. I have also had some discussions with other people within Treasury's indirect tax area who have only recently started there, having been at the ATO.

CHAIR—So BP has only raised this issue since this public inquiry of the treaties committee began?

Mr Coghill—Yes; I guess so. The first we became aware of it was when one of our staff members in our air business became aware that things were happening with the treaty; I am not sure how he picked it up. It is not as if the tax authorities come out to us and say, 'Hey, all you suppliers to this part of the world, there is a new treaty and this is what it means to you.' That sort of thing does not happen.

CHAIR—I assume that interested parties would also want to make themselves aware of the status of particular negotiations between the countries, given that they impact so markedly on their business.

Mr Coghill—That is what we are doing.

CHAIR—Has BP contacted Customs, for example, for an interpretation of the application of customs duties?

Mr Coghill—Our discussions with Treasury revealed that they regard it as being an export, from the Australian perspective. I am suggesting that we have provisions within the agreement that say that certain things might happen, yet the law seems to make it clear that they do not apply. It seems strange to me that—

CHAIR—Because of your contention that the JPDA does not form part of Australia for the purposes of taxing?

Mr Coghill—Yes.

CHAIR—I assume that BP finds itself in this position—that is, as a supplier of fuel and the like to oil companies that are involved in petroleum development—around the world.

Mr Coghill—Yes; not that I have any particular knowledge of it.

CHAIR—You have not worked for BP outside Australia?

Mr Coghill—Not while involved in the tax area.

CHAIR—So your only experience of BP's tax obligations is in connection with Australian activities?

Mr Coghill—And some minor experience in New Zealand; but that sort of thing would not be relevant to this.

CHAIR—Perhaps you could give some thought to this. We understand that the treaty before us is not unusual, in that countries often conclude treaties to enable petroleum resource development to proceed while maritime boundaries are being concluded and that oil companies are then given a certain legal and fiscal security to proceed with resource development.

Mr Coghill—No doubt that is true. My concern is as a supplier rather than as a developer, of course.

CHAIR—I understand that. Presumably in these circumstances, suppliers are interested in the terms of the particular treaties. Has BP been involved as a supplier to oil companies that are operating subject to similar sorts of treaties?

Mr Coghill—Most probably yes; but I do not know the answer to that.

CHAIR—What I was trying to elicit from you is whether or not BP has found itself in this position before, or if there is something unique about the Timor Sea Treaty that is proposed for suppliers.

Mr Coghill—I am sorry, but I do not know the answer. I could make some inquiries, but I do not have any knowledge at all.

CHAIR—In relation to the question of the application of GST, what has been the response of Treasury?

Mr Coghill—That it is not within Australia and therefore the GST does not apply.

CHAIR—So Treasury have informed you that GST does not apply?

Mr Coghill—Yes, verbally.

CHAIR—That is a concern to BP?

Mr Coghill—It is not a concern. I am not sure as to the inference in your question.

CHAIR—I just asked if it was a concern. You do not accept Treasury's view?

Mr Coghill—I am happy with Treasury's view. Sorry, I thought you were suggesting that we were concerned that a tax may not apply. Of course GST is at no cost to business—it is in and out—but we would be concerned if it did apply and if it we had to apply it at a rate of 10 per cent—so it would be 10 per cent of the 10 per cent—because that would be unworkable.

CHAIR—But you are not suggesting that is the case?

Mr Coghill—I am not suggesting that is the case. But it would be a worry if, even though Australian GST and Australian excise did not apply, we made a supply out of Australia and 90 per cent of East Timor customs duty, excise and sales tax all applied to that delivery into that area. That would be a nightmare.

CHAIR—It seems that the concerns of BP are that its tax obligations vis-a-vis Australia and vis-a-vis East Timor are not clear. Is that what you are saying?

Mr Coghill—Yes, they are not clear. If a supplier is to be expected to apply a 90-10 split, it is not reasonable to ask them to apply that sort of thing in their invoicing processes, because commercial systems are not set up to do that sort of thing.

CHAIR—Could it apply a 50-50 split?

Mr Coghill—No. Anything outside of the straight domestic arrangements is not capable of ready implementation—either free or fully taxable, according to domestic arrangements, is the only practical thing to do.

CHAIR—Under the Timor Sea Treaty, as it stood between Australia and Indonesia, the split was 50-50.

Mr Coghill—I suspect that you are talking about income tax as opposed to these indirect taxes.

CHAIR—I am assuming that the terminology used in this current treaty is not dissimilar from that used in the previous treaty. I might be wrong.

Mr Coghill—Under the former Timor Sea Zone of Cooperation Arrangements, everything that we sent was simply free of taxes.

CHAIR—So this treaty has changed?

Mr Coghill—Yes, to the best of my knowledge that would appear to be the case. I know we had no tax liability previously if we sent something there.

CHAIR—Has BP done that in relation to any work done in the Timor Sea prior to East Timor's independence?

Mr Coghill—Certainly there was provision in our systems for making such sales; I was involved when we set them up. As to whether we made any sales, they would have been rare. You would understand that there have been only fairly basic exploration activities to date and so, obviously, the supplies made would have been minimal.

CHAIR—But I assume there were some supplies, because there has been some development.

Mr Coghill—Some companies would have been making some supplies, but—

CHAIR—You don't know if they were from BP?

Mr Coghill—No.

Mr WILKIE—Mr Coghill, I think you have some reasonable concerns there, which we probably need to look at. Do you think the problems lie with the treaty, or can the treaty be ratified and can we sort these problems out later?

Mr Coghill—They are more about mechanics. I imagine that the parties could agree to overlay a reverse charge mechanism on it and to let the operator remit the taxes, and to make the suppliers free of taxes.

Mr WILKIE—We can make recommendations that these sorts of things occur, and it is up to the government as to whether it implements them or not. But, if the treaty were to be ratified in its current form, could these problems you have with taxation arrangements be sorted out later? Or would the ratification of the treaty mean that they are the rules that apply and you could not do that?

Mr Coghill—I am no expert on the law but I would hope that a reverse charge mechanism, as I said, could be applied over the top of these arrangements.

Mr CIOBO—Mr Coghill, I am trying to clarify something: BP obviously does not have a retail outlet within the JPDA, does it?

Mr Coghill—No, we do not have any floating retail outlets.

Mr CIOBO—So, to all intents and purposes, it is a delivery address for BP?

Mr Coghill—That is right. We could put it on board a boat which would deliver to that location.

Mr CIOBO—Therefore, wouldn't the sale take place wholly within one jurisdiction?

Mr Coghill—I think the treaty talks about where the fuel is going to, doesn't it?

Mr CIOBO—For example, I do not know whether BP sells fuel to Qantas Airways or someone like that, do you?

Mr Coghill—Yes.

Mr CIOBO—So, if you sell fuel for Qantas Flight 1, which I think goes from Australia to London, I am assuming you do not work out tax rates as it lands in Singapore and then another tax rate as it lands at Heathrow.

Mr Coghill—Exactly: it is quite clear under Australian law that, if we are selling fuel for a purpose where the vessel has an international destination, it is free of Australian taxes.

Mr CIOBO—Your point is that this treaty conflicts with that general principle, is it?

Mr Coghill—Yes.

Mr CIOBO—If you were, just for the time being, to exclude the provisions of this treaty that relate to taxation, it is a simple case of saying that, wherever the transaction takes place, the taxes are attached within that jurisdiction.

Mr Coghill—That is the normal case, yes.

Mr CIOBO—Wouldn't it be reasonable to conclude that the provisions as they apply within the treaty simply seek to reinforce the point of sale rather than whether an aircraft is landing or flying to an area within the JPDA?

Mr Coghill—It is my understanding that the treaty talked about goods which went into the area. I am trying to find the appropriate provisions. It talks about entering the JPDA for these purposes and not being subject to customs duty. It is my understanding that they were taxing goods going to that area.

Mr CIOBO—That is what I am saying. Isn't that an extension of saying basically that the transaction is occurring within one or the other of the two jurisdictions? If you are selling it out of BP head office Melbourne—I am not sure if that is where you are headquartered—then that is your retail outlet and you apply the tax regime that is applicable as a full sale within Australia. Alternatively, if BP has a retail outlet in Dili, then you apply the taxation regime that applies in East Timor. If you supply out of Singapore, then you apply the taxation regime which is applicable to Singapore.

Mr Coghill—Yes. If the tax regime is not being applied to where the goods are going then I do not see how the 90-10 has any significance at all.

Mr CIOBO—That is my point.

Mr Coghill—So what is the treaty on about?

CHAIR—The treaty is on about revenues, I imagine, but also the tax treatment.

Mr Coghill—Yes, but this is the indirect taxes bit—it is talking about the framework percentage applying to these transactions.

CHAIR—But isn't this consistent advice you have received from Treasury?

Mr Coghill—The advice we received from Treasury is that the Australian GST law does not cover anything which has been exported from Australia. It is outside that law, because of the Australian GST law. The treaty says, 'I'm applying the Australian GST to that part of the world, to the extent that the Australian GST applies.' You cannot do anything because, by definition, Australian GST does not apply. That puts Australian GST to the side. If the East Timorese maintain that their taxes apply because they say that is part of East Timor in their view, then we end up with 90 per cent of the East Timor tax—nil Australian tax; 90 per cent East Timor tax. That is not very helpful either, in terms of administration.

Senator MASON—Ninety per cent tax on the point of destination of materials?

Mr Coghill—That is my interpretation. Have I got it wrong?

Senator MASON—It is unusual.

Mr Coghill—In the extreme.

CHAIR—You mentioned that it is difficult dealing with the East Timorese government, but has BP made any submission to the East Timorese government for clarification—quite apart from this treaty—on how its supplies ex Dili will be treated?

Mr Coghill—Yes, my air colleagues have been endeavouring to communicate with them, to no avail so far.

CHAIR—What do you mean? There is no response yet?

Mr Coghill—No real response. It is a different environment there.

CHAIR—I appreciate that.

Senator TCHEN—What I have to say is partly for my own benefit, in case I forget when the committee come to discussion. I would counsel BP to discuss this issue with a good tax lawyer and perhaps a good constitutional lawyer and possibly also an international lawyer. It seems to me that the advice you got from the Australian Treasury is strictly correct at the moment.

Mr Coghill—Sorry; did you say that it is?

Senator TCHEN—It is strictly correct at the moment, because certainly the JPDA lies outside the boundary of Australian domestic indirect taxation laws. However, it seems to me that the effect of article 13 will bring the JPDA into line with the application of Australian tax

law. The normal procedure is that once an international treaty is signed between Australia and another country then domestic legislation will be brought in to enact those relevant aspects in the treaty that require domestic law implementations. So once this treaty is signed, it may well be that Australian tax law will be changed to include the JPDA, so that where GST applies, excise will apply and so on.

Mr Coghill—Are you suggesting that the Australian GST act would be changed?

Senator TCHEN—Possibly; because it seems to me that, once the treaty is signed, it may well occur. This is something which the committee will need to seek advice on as well. But I suggest that you should seek advice and perhaps come back to this committee as soon as you can. This is how it works: we sign a treaty with another country, and then the government will introduce legislation into parliament to implement those provisions in Australia. At the moment, the advice which you have—and which I believe, to my uninformed mind, is correct—is that the JPDA is outside of Australia's indirect taxation application. However, once this treaty is signed then Australia will be obliged to introduce legislation to implement article 13—in which case the JPDA, by that legislation, might become part of Australia's indirect law implementation area.

Mr Coghill—It is my informal understanding that Treasury does not see this as being of any particularly large monetary consequence and would not be terribly excited about progressing with that.

CHAIR—Not the Treasury I know!

Senator TCHEN—I am sure it is of very small consequence to the Australian Treasury!

Mr Coghill—As a matter of principle, I would be concerned if somebody is to suggest that, in order for us to have some certainty as to what the Australian government thinks might happen and what legislation it intends to apply to this, we ought to go and get constitutional advice to feed back to the Australian government. I think that is a very unfortunate request to make of—

Senator TCHEN—I am sorry, Mr Coghill. It is not my request; it is my advice to you. Certainly, we will probably be seeking advice as well.

CHAIR—It is free advice.

Mr Coghill—I would much rather the government set out what it thought and obtained the advice at its expense. This matter is a great administrative nuisance to us and involves relatively small dollars. I think it is incumbent upon the government to make it clear as to what it ought to be.

CHAIR—I think what Senator Tchen is trying to say is that the current position is that the treaty has been negotiated with East Timor and it sets out the broad framework of the arrangement between the two governments. It does not purport to set out the entire relationship between the respective governments and third parties—such as Australia and third parties, and East Timor and third parties. It is a treaty between the two countries. As Senator Tchen said, in

the event that the treaty is ratified, each government will go off and develop domestic legislation that will enable the treaty to operate. So I am sure he is suggesting that because we are at a point where, should this treaty be ratified, there will be domestic legislation, it might be that BP would want to put a particular case as to how the tax laws with respect to domestic legislation should apply. If it does not, then that is BP's position. Ultimately, it will be subject to however the domestic legislation pans out.

Senator TCHEN—Mr Coghill, you also have to take into account that the dollar value of any subsequent legislation to the Australian Treasury is minimal, but to the East Timorese Treasury it might be quite significant.

Mr Coghill—On the indirect taxes, it is probably not likely to be very significant. Obviously, the income tax aspect is extremely significant to all of the partners.

Senator TCHEN—Are the income taxes covered?

Mr Coghill—Yes.

Mr CIOBO—Which article are you saying imposes the 90-10 regime? Is it article 6?

Senator MASON—Is it 13(b)?

Mr Coghill—It is certainly not on the slide I have up there.

Mr CIOBO—It is not on that slide?

Mr Coghill—No.

Mr CIOBO—Which article are you saying imposes that?

Mr Coghill—I cannot recall exactly, but the whole framework percentage is mentioned in—

Mr CIOBO—On that slide that you just had up, it said:

It appears that one interpretation could result ...

One interpretation of what?

Mr Coghill—Of the law.

Mr CIOBO—Of which article?

Mr Coghill—I am sorry, I have forgotten exactly where the words 'framework percentage' applied.

Senator MASON—Is it article 18?

Mr Coghill—Here we go—it is article 18. It says:

Goods introduced into the JPDA, whether or not from a Contracting State, and services provided to a person in the JPDA, may, at or following introduction, be taxed in both Contracting States in accordance with applicable Australian goods and services tax law or the East Timor value added tax or sales tax law as the case may be, but the taxable amount in relation to such goods and services shall be an amount equivalent to the framework percentage of the amount that would be the taxable amount but for this paragraph.

It is talking about how goods introduced into the JPDA, whether or not from a contracting state, shall be subject to taxes.

Mr CIOBO—The issue then is whether the term ‘goods introduced’ means ‘sale within’—that is, the retail takes place within the JPDA—or whether it simply applies to a delivery address within the JPDA. That is essentially the crux of the issue.

Mr Coghill—Yes, that is right. If we supplied goods which we introduced into the area, is this saying that we are subject to tax them according to the framework percentage?

Mr CIOBO—So the issue to be clarified by the ATO is whether ‘goods introduced’ applies only to sales or whether it applies to delivery address. I would expect that, if it were just delivery address, I would then need to divvy up further sales tax, on the basis of the split of the framework, for every single item which every person brings into or out of the JPDA and which they have purchased within one jurisdiction—that is, I purchase something in Australia and then travel into the JPDA, if you take it on the assumption that it is ‘goods introduced’ in a very literal sense. However—and this is not my legal opinion—what that is probably getting at is whether you have got a retail sale within the JPDA, but that is just—

Senator MASON—It is even more complicated. You have raised a good issue. Mr Ciobo’s point about article 18 is that it is not just ‘goods introduced’; it is also ‘services provided to a person’. That makes it even more complex. I am not sure what that means.

CHAIR—Don’t ask the witness; he is asking us!

Mr Coghill—Fortunately, we are not providers of services ourselves.

Senator MASON—No, but there will be other services provided up there.

Mr Coghill—For example, the helicopter company to which we provide fuel is providing services. There is a provision regarding some tax on the freight and what have you. This is our essential problem. If we make a sale to Phillips Petroleum, as I said, we give them the product in Darwin and it is a local domestic sale—end of story. We are not interested anymore; that is their problem. They have to deal with article 18. If they ask us, ‘Will you kindly put it on board a boat?’ and we take it across and deliver it to them, then, as we read this, we are into the framework percentage problem.

Senator MASON—I understand that. Thank you.

CHAIR—I can assure BP that, in the process of writing our report, we will highlight this issue and perhaps make a recommendation accordingly, at which point the government will

respond to any recommendation that we have made in this regard. So, one way or another, there will be a response to the concerns that you have raised.

Mr Coghill—Thank you.

CHAIR—Thank you very much for your time and thanks to BP for raising these issues with us. It may well be that there are other suppliers in a similar position that have not made a submission to this committee, so via BP's involvement this issue is now on the table.

[11.51 a.m.]

PARGETER, Reverend David, Director, Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia

ZIRNSAK, Dr Mark Andrew, Social Justice Development Officer, Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. You can take it that the submission of the Uniting Church in Australia has been read by the committee members, but would you like to make some introductory remarks? We will then proceed to questions.

Rev. Pargeter—I have just a few introductory comments and then Dr Mark Zirnsak and I will respond to questions as they arise. Our unit is part of the Synod of Victoria and Tasmania's operations in Victoria and we represent a unit within the organisation that deals with social justice issues. We oppose Australia ratifying the current Timor Sea Treaty between the government of Australia and the government of East Timor. Our unit respectfully requests the Joint Standing Committee on Treaties to recommend that the treaty be modified to ensure that East Timor receives sovereignty over all oil and natural gas deposits in the Timor Sea that it would possibly be entitled to under the international law governing maritime boundaries.

The annual synod of the Uniting Church, comprising about 500 representatives, has been meeting this week. In the last couple of days it unanimously passed a resolution calling on the Australian government to ensure that East Timor receives sovereignty over all oil and natural gas deposits in the Timor Sea that it would be entitled to under the international law governing maritime boundaries. Our unit does accept the Exchange of Notes Constituting an Agreement between the Government of the Democratic Republic of East Timor and the Government of Australia concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor, and that it is needed to allow existing oil and natural gas exploitation activities to continue uninterrupted. However, we are concerned that the moneys that East Timor would otherwise be entitled to will be placed in an interest bearing escrow account and will only be paid to East Timor with the entry into force of the Timor Sea Treaty. We are deeply concerned about the pressure that this places on East Timor to accept the Timor Sea Treaty—a treaty that is unlikely to serve its long-term interests.

The Uniting Church in Australia has made an active and ongoing commitment to the wellbeing and human rights of the people of East Timor. We recognise that we are dealing with a fledgling nation. At the meeting of the National Assembly of the Uniting Church in 1994, representatives from throughout Australia called on the Australian government to recognise the right of self-determination of the East Timorese people. They further committed the Uniting Church to encourage the leaders of the Catholic and Protestant churches in East Timor in their desire to work for social justice and in their efforts to achieve meaningful participation by East

Timorese indigenous people in decisions that affect their future. East Timor needs to be able to generate sufficient income for development and to provide for the basic social and economic rights of its people. East Timorese non-government organisations have stated that revenues from oil and natural gas currently represent East Timor's greatest hope for meeting the East Timorese people's basic needs, including economic development, health and education.

The Uniting Church is deeply concerned regarding the justice and morality of the Timor Sea Treaty. We are concerned that the treaty has been imposed on East Timor at a time when it is in a very weak bargaining position. Any negotiations on the maritime boundary are likely to take years, whilst East Timor's economic needs are immediate and urgent. East Timor is also conscious of its need to maintain a good relationship with Australia. The Uniting Church is concerned that the Timor Sea Treaty is largely based on the immoral Timor Gap Treaty. We are also concerned that if the Timor Sea Treaty comes into force, despite the statement in article 2(b) of the treaty, it will influence the final determination of the maritime boundaries at the expense of East Timor. If Australia takes oil and natural gas from the Timor Sea that belong to the people of East Timor, it will no doubt damage our longer-term relationships with the people of East Timor. Submissions made to this committee already make it clear that many East Timorese see the situation as being one of a wealthy and powerful country robbing a weak and impoverished one. If Australia is genuine about supporting the East Timorese people, it will allow them to have the oil and natural gas deposits that would belong to them under international law governing maritime boundaries.

CHAIR—Thank you. Reverend, you said that the Uniting Church accepts the exchange of notes, for it will allow existing development to continue. What do you say to the point that the developers will not proceed to the construction phase—for example, of Bayu-Undan, from whence revenues will flow—without a treaty being in place? In other words, if a treaty is not in place, Phillips, the operator of the joint venture of Bayu-Undan, says that it will not proceed to further development.

Rev. Pargeter—Again, it is an example of holding a small, fledgling nation to ransom to enter into an arrangement that it cannot really bargain on.

CHAIR—For a moment, let us put ourselves in the shoes of Phillips Petroleum. It says that without legal and fiscal certainty it will not invest further in the construction phase of Bayu-Undan. Would it not be preferable to provide treaty status to enable the development to go ahead so that revenues can flow, given that the treaty is said to be without prejudice to other negotiations in relation to the ultimate maritime boundaries between Australia and East Timor?

Dr Zirnsak—The question that I have in response to that is: in terms of companies doing their analysis of that investment, what would the monetary difference really be for them between Australia having sovereignty over that area and East Timor having sovereignty over the area? Are the tax arrangements going to be so different? We have not had access to that information. We realise that with East Timor the tax arrangements are likely to be higher on the companies than perhaps if Australian taxation law applied. But I am wondering if the investments are so marginal that this is really a major issue for the companies in terms of having that certainty.

CHAIR—We have had evidence from Phillips in Perth. It seems that the tax treatment has been negotiated to a position that Phillips is happy with; that is, the East Timorese and the Australian income tax regime. However, the joint venturers say that they will not proceed further without legal and fiscal security as provided by a treaty.

Dr Zirnsak—They are perhaps trying to apply leverage for what they regard as their interests as against the interests of the people of East Timor.

CHAIR—Let's take this scenario: Australia refuses to ratify the treaty, the joint venturers in Bayu-Undan refuse to go to construction phase, and the contracts with the Japanese companies that are said to be in place for January 2006 do not go ahead. Is not the result that there is no revenue flow to East Timor or to Australia?

Dr Zirnsak—That would be of concern but there would be the ability of Australia and East Timor to negotiate a treaty rapidly. I think the issue is sorting out what the East Timorese see as their position and what Australia sees as its interests.

CHAIR—When you say 'renegotiate a treaty', you mean renegotiate the boundaries?

Dr Zirnsak—Renegotiating the boundaries that are defined within this treaty is obviously an option.

CHAIR—We have heard evidence that maritime boundary disputes can take decades. One instance was given of a maritime boundary dispute that is some 30 years old. Is East Timor in a position to wait 30 years or anything like that period of time—any period of time—before it gets a revenue flow?

Dr Zirnsak—You are getting exactly to our point, which is that East Timor is being held in a weak bargaining position, therefore it is being forced to accept a treaty that may prejudice what it may otherwise be legally entitled to. Within our submission, as you would be aware, we raised the fact that this treaty in a sense sets the boundaries unless there is a negotiation otherwise or after the expiry of 30 years, presumably by which time the current deposits would have been fully exploited.

CHAIR—Let's be pragmatic for a moment. Can you indicate any other source of revenue for East Timor in the interim?

Rev. Pargeter—No, other than foreign aid.

Dr Zirnsak—Again that goes to our point: it highlights the weak bargaining position of East Timor with regard to this treaty.

CHAIR—East Timor's government, albeit a fledgling government, entered into this treaty in March 2002. As recently as September the Prime Minister of East Timor urged the Australian government to ratify the treaty. Do you have any comment in relation to that?

Rev. Pargeter—Clearly, he is faced with the options you are putting to us: if there is delay on this then they could be waiting 30 or 40 years for any income stream.

CHAIR—Surely that is not a position the Uniting Church would want to see East Timor in?

Rev. Pargeter—No.

Dr Zirnsak—That is correct but we would like to see a treaty that does not constrain East Timor's claims, which it is making through international law, about what its potential maritime boundaries could be.

CHAIR—This treaty specifically says that it is without prejudice to the further negotiations required to delimit the boundaries between Australia and East Timor. It is an interim arrangement.

Dr Zirnsak—We are aware that legal advice has been offered to East Timor suggesting that what that may be interpreted to mean by any future international arbitration is that the lateral boundaries will be fixed by this treaty and the non-prejudice part will be within the Joint Petroleum Development Area. The issue that the east and west lateral boundaries may be constrained by this treaty is one set of legal advice that we are aware of. That causes us concern because, quite clearly, East Timor is disputing those lateral boundaries in terms of the claims it is making.

CHAIR—Whose legal advice is that?

Dr Zirnsak—That is the legal advice that was offered by Dean Bialek. Having read his material I know he has raised that in writing. Also some legal advice was offered through—and I cannot remember the names of the legal advisers—the Portuguese petroleum company.

CHAIR—So that is Petrotimor's legal advice?

Dr Zirnsak—Yes. I recognise that there are some concerns about that legal advice because they clearly have a vested interest in the area as well. We are conscious of that.

CHAIR—Particularly from Mr Bialek—he has taken issue with the Lowe opinion, which is the Petrotimor advice.

Dr Zirnsak—We understand that, but Mr Bialek himself has raised concerns that the non-prejudice statements may still not apply when it comes to the lateral boundaries, given that two parties will have ratified a treaty and that further international arbitration is unlikely to overturn them. That is in the material we have read from him before. Whether he has changed his opinion subsequently, we are not aware.

CHAIR—The point I am trying to get to is that delimitation disputes between countries can go on for a very long time. There are clearly conflicting legal opinions, the law of the sea continues to evolve, Australia has a particular perspective in relation to the continental shelf and East Timor may or may not have another claim. I do not think we should take Petrotimor's

advice as reflecting that of the East Timorese government; I am sure it can produce its own advice at some point. We also have Indonesia's involvement. As we have heard from Mr Bialek this morning, Indonesia will have to agree to change its boundaries with East Timor. A whole raft of matters will have to be addressed before any petroleum company could say with certainty that it has legal and fiscal security to commence investing and developing the petroleum resources. Would you agree?

Rev. Pargeter—I can see the argument, but what prevents us from putting ourselves in the shoes of the East Timorese government that has to make a choice between little or nothing?

CHAIR—The Australian parliament is required to consider a treaty in Australia's national interest. It is the obligation on this committee to consider Australia's national interest because we are a committee of the Australian parliament.

Rev. Pargeter—And it is not in our interest to ensure long-term economic sustainability for East Timor?

CHAIR—It is part of the national interest to consider the relationship with our neighbours—absolutely. But are you saying that as it stands this treaty, which is without prejudice to future negotiations, is weighed heavily in Australia's national interest?

Rev. Pargeter—I think it is weighing heavily in the developer's interests.

CHAIR—But not in Australia's national interest?

Rev. Pargeter—What is Australia's national interest in this? Purely fiscal?

CHAIR—You could also say it is in Australia's interest to develop a relationship with its neighbour, East Timor, and on that basis it has agreed to a 90-10 split of the revenues from the petroleum that is developed in the area.

Dr Zirnsak—Within the Joint Petroleum Development Area.

CHAIR—Which is without prejudice to future negotiations.

Dr Zirnsak—But we also recognise that the East Timorese government has repeatedly said that it believes it is entitled to a greater share—if not all of the Greater Sunrise deposits—so we are conscious of that. That deposit represents a much higher potential area of revenue than that which is currently in the Joint Petroleum Development Area.

CHAIR—But you are also aware that the Prime Minister of East Timor is urging the Australian government to ratify this treaty so that a revenue flow can be sourced to East Timor.

Dr Zirnsak—Yes, we recognise that. Our concern there is that that is being driven by being in a weak bargaining position and being desperately in need of the funds.

CHAIR—But East Timor’s position is preserved under this treaty, for it is without prejudice to future negotiations over the maritime boundaries.

Dr Zirnsak—As we have raised with you, our concern is the presentation by Mr Bialek, from whom you heard before, that despite that declaration there may be a locking in of the lateral boundaries for future negotiations.

CHAIR—So you would prefer that this treaty just be put to one side and we go back to the drawing board?

Dr Zirnsak—Not entirely. We would rather see a treaty negotiated rapidly that does allow funds to flow to East Timor but that will not prejudice in any way the claims that East Timor is making.

CHAIR—What sort of treaty would you suggest?

Dr Zirnsak—One that will make it very clear that there will be no prejudicial finding with regard to the lateral boundaries. I think that would need to be explicit.

CHAIR—Doesn’t it use precisely those words—‘without prejudice’?

Dr Zirnsak—But the interpretation that has been applied to ‘without prejudice’ could be applied to simply the boundary within the Joint Petroleum Development Area.

CHAIR—While we sort out that issue, it would be your preferred position that this treaty be put aside?

Dr Zirnsak—We are certainly aware that that is the position that a large number of the East Timorese NGOs have taken, and they see that as in the interests of the East Timorese people.

Mr WILKIE—The United Church’s position, based on the synod’s vote over the weekend, is that the treaty should go ahead but that 100 per cent should be going to East Timor, as per international law?

Dr Zirnsak—Yes.

Mr WILKIE—You are not saying that it should be put aside, you are saying that it should be 100 per cent?

Rev. Pargeter—Yes.

Mr WILKIE—Obviously the treaty in that situation would still provide for—

CHAIR—I am sorry, I think that has now confused the position somewhat.

Mr WILKIE—That statement was made in the earlier comments—that the synod unanimously passed a resolution giving 100 per cent of rights to East Timor under international

law if the treaty were to go ahead. If I am not mistaken, the Uniting Church is arguing that the 90-10 split is the problem and it should be 100 per cent.

Dr Zirnsak—No, that is not what is being said in terms of the Joint Petroleum Development Area.

Mr WILKIE—Okay; I misunderstood.

Dr Zirnsak—We also recognise that the exact issue of international law is not entirely clear. We are aware of the range of legal positions that are offered so we realise it is not a clear-cut issue. We are suggesting that East Timor obviously has deep development needs and those needs need to be strongly considered. The difference between East Timor getting a larger share of this or not will probably be paid in terms of mortality rates within East Timor; that is, basic health care and basic education. These needs are very great; therefore, we are suggesting quite strongly that the final treaty that is agreed to should not prejudice those needs, and perhaps Australia should be acting in a generous way, maybe not even seeking to maximise what it can legally claim under international law. Perhaps we could act in a generous way in allowing East Timor those necessary development funds.

CHAIR—I would like to clarify that because it is somewhat confusing. The position I thought I had reached with you was that, in relation to this treaty that is split 90-10 and that has the JPDA defined with the east and west boundaries as they are, it is the Uniting Church's position that you would rather that that treaty be put aside because you are concerned about the precedent that would be set by virtue of East Timor accepting those boundaries even for the purposes of a 'without prejudice' treaty.

Rev. Pargeter—That is correct.

CHAIR—Thank you.

Mr WILKIE—You are aware that the treaty, according to the Prime Minister of East Timor, is an interim arrangement purely so he can get some money into his country. Therefore he would continue to negotiate what he believes would be the final position at a later time. What are your thoughts on that?

Rev. Pargeter—It is political pragmatism. What other choice does he have?

Mr WILKIE—Would that not be better than having no money coming into the country at this stage?

Rev. Pargeter—That has to be East Timor's call. We recognise that. We also bear in mind that the East Timorese NGOs are arguing that it would be better to hold out for a while to get a better deal. But they are not in a good bargaining position to do that, and clearly there are forces arranging against them to prevent them from doing that.

Mr WILKIE—I would like to expand on another area that you have touched on. There are two letters that we have here as submissions. One relates to the Statute of the International Court of Justice. Obviously, under the treaty arrangements there will be ongoing negotiations

about the borders. But you are arguing that at the end of the day the negotiations may succeed or fail but there is no actual court to which the East Timorese can go to have a final determination on the boundaries. Do you believe that adversely affects their position and long-term interests?

Dr Zirnsak—Yes, it does. Having read Mr Bialek’s legal opinions, I think there is an outside possibility that East Timor could challenge Australia’s withdrawal from the International Court of Justice. There is a remote possibility that they may succeed in the International Court of Justice ruling that East Timor still has jurisdiction because the court may interpret that Australia’s withdrawal was not made in good faith. That is still open to them. We are aware that the two parties could agree to form an ad hoc international tribunal to try to settle the dispute as well. So there are possibilities there, but our sense of the Australian government’s current position is that it would perhaps seek to challenge those avenues, which does leave East Timor in a weaker bargaining position.

Senator MASON—Gentlemen, the chair raised a fundamental question before about the role of this committee. The general role of this committee is of course to look at Australia’s national interest. While your submission reflects the sincere view that this treaty may not be in East Timor’s national interest, you mentioned before in response to the chair’s question that this treaty may not be in Australia’s national interest. Why is that?

Rev. Pargeter—I was limiting Australia’s national interest to being purely fiscal, and that is what was emerging from the conversation. I wonder whether there is another set of parameters to Australia’s national interest—whether it is about responsibility in a region, dealing fairly with fledgling nations, playing the role of a senior statesman within the region, dealing fairly with people who have minimal options and honouring statements that East Timor deserves the right to self-determination. That goes well beyond the ballot box; it goes to how such a fledgling nation can develop infrastructure and an economic basis for survival and development. It is in our national interest to enable East Timor to do that as effectively and quickly as it possibly can, and I think we have an obligation to do that.

Senator MASON—That is great. As the chair said, and in my experience on this committee, we rarely have people coming to us and saying, ‘Australia shouldn’t ratify this treaty, because it is not in another nation’s interest,’ but you are saying that the basket of interests is broader than simply the fiscal. In your first submission, which is dated 17 July, you mention:

Appeal to the International Court of Justice or the compulsory dispute resolution mechanisms of the *UN Convention on the Law of the Sea* may redress this power imbalance in the negotiations resulting in a more just and fair outcome for East Timor at Australia’s expense.

I am sure you mean ‘at Australia’s expense’ in the broad sense you just mentioned.

Rev. Pargeter—Yes, rather than just financial.

Senator MASON—I understand that. A couple of issues flow from that. Firstly, we have heard evidence from the first witness today that both Australia and East Timor believe that these issues should be negotiated and not arbitrated. I think we agree that that was the evidence we heard. Secondly, what happens if the arbitrated settlement is worse for East Timor, and what

evidence do you have to support your contention that it might be better for East Timor? It is winner take all stuff, isn't it?

Dr Zirnsak—That is the potential risk. As we have indicated, we recognise that the legal issues are not absolutely certain with regard to those final outcomes and that potentially, yes, there is the possibility that East Timor could come off financially worse if international arbitration were to result in a maritime boundary along the Timor Trough. We understand that to be the case, but obviously there are also risks for Australia in that. Again, looking at the legal advice—

Senator MASON—But perhaps we could afford to lose the gamble; I am not sure if East Timor could.

Dr Zirnsak—Again, that goes to the heart of the submission in terms of the disproportionate—

Senator MASON—I would like to move on from that. We are speculating about what an arbitrator might say, which gets to my point: isn't the basket of issues that you mentioned before, Reverend Pargeter, precisely why this should be a negotiated settlement and not one arbitrated solely on legal grounds? Do you agree that all the social, diplomatic and security issues that you mentioned lend themselves to a negotiated settlement and not to an arbitrated settlement?

Dr Zirnsak—I would agree that a negotiated settlement is obviously preferable, but with recognition of the power imbalance. Our difficulty is that to get a fair negotiated settlement it requires Australia to act in good faith, because there is such a power imbalance in the current negotiations. As you would be well aware, when Australia made its declaration on the International Court of Justice and the UN Convention on the Law of the Sea, the Prime Minister of East Timor called it an unfriendly act. So quite clearly he indicated that, from his perspective, there was a concern about Australia flexing its muscle in the negotiations.

Mr WILKIE—Isn't it fair to say that it is easier to reach a negotiated settlement when you have told the other partner that that is the only avenue they have available to them and that if they cannot reach an agreement there is no other way of going about it?

CHAIR—Just a minute. Australia has negotiations on foot with a number of countries over maritime boundaries—Norway, France and New Zealand. There are a number of other countries that are in this position. So I do not know whether it might be useful for the purposes of this inquiry that we are not just talking about Australia and East Timor; we are talking about Australia and a number of other countries.

Mr WILKIE—We know; that is why we did it.

CHAIR—That is not evidence.

Mr WILKIE—Yes, it is.

Rev. Pargeter—Under the arrangements that are being considered it is a fairly minimal income stream into East Timor's economy. Is it in the nation's interest to have East Timor as a constant recipient of foreign aid?

Senator MASON—It is a fair point. Dr Zirnsak, you said that arbitration has its risks and is perhaps not that good and that, if we go the negotiated settlement way, we can look at the basket of issues that Reverend Pargeter mentioned. If we are looking at negotiation, I accept that there is inequality of bargaining power; but, as the chair flagged, if we negotiate certain outcomes that set legal precedents—and the evidence earlier this morning was that state practice can in fact set certain precedents—is that wiser for us or is it wiser, for example, to give more foreign aid? You understand my point, don't you?

Dr Zirnsak—I do.

Senator MASON—When you start negotiating with states about maritime boundaries, surely we are better off playing hard ball and using international law as well as we can for our own national interest. We can more readily accommodate the basket of issues that you mentioned, sir, in foreign aid and support from NGOs and so forth.

Rev. Pargeter—But that statement becomes incongruent with the government's position that East Timor has a right to self-determination. All you are creating is a vassal state that in many ways is totally dependent on the generosity of another nation. In relation to the issue that you mentioned about referring to other countries, they are not in weak bargaining positions. We are talking about a known fledgling nation on the tip of an archipelago that has no strength in the region.

Senator MASON—I accept that. You understand that if we were to give out, in a sense, concessions that we might not otherwise give—even if it is to a country like East Timor, which I accept is a fledgling nation that is having difficulties—that could affect our international legal position in bargaining in other areas. My question still remains: aren't we better off bargaining as we always do, whether it is with Norway, France or East Timor, and then through diplomatic and aid means addressing the issues that you mentioned before? That is my point.

Dr Zirnsak—I think the issue of aid is a fraught one. We are well aware that, if you want to get into a discussion about aid, there is concern about countries using aid to benefit their own suppliers and producers. Aid gets channelled into your own companies in order to provide that assistance to other countries. So there is a financial—

Senator MASON—I see that there are problems with aid; but you see the legal problems, don't you, when you start to have your legal position affected by some sense of good neighbourliness or good citizenship? Generally, those sorts of issues are arbitrated or negotiated on the basis of legal standing and fiscal outcomes. They have to be.

Rev. Pargeter—I understand your argument. For me the dilemma—and we can talk about this from our organisational perspective—is that there is always the letter of the law and the spirit of the law. You can resort to using legalistic mechanisms for resolving disputes, but we all know that at the end of it people do not feel they have been dealt with justly. I think we have a responsibility to enable the East Timorese people to feel that they have been dealt with justly

and fairly in this relationship, so it is perceived that that has been done and it has not been arbitrated through legal frameworks, and there is the sense that they have been dealt with fairly.

Mr CIOBO—Is it the contention of the Uniting Church that Australia has approached this negotiation in bad faith?

Rev. Pargeter—Yes, it is.

Mr CIOBO—My second question then is: if the East Timorese were in a situation where they had a comparable standard of living to Australia's, would you be appearing before this committee if we were ratifying this treaty today?

Rev. Pargeter—I did not catch the first part of what you said.

Mr CIOBO—If the situation were such that East Timor had a comparable standard of living to Australia and we were negotiating, to all intents and purposes, the same treaty, would you be appearing before us as witnesses?

Rev. Pargeter—If all those conditions that we were saying were placing the East Timorese in a very weak bargaining position had been corrected and if they were now on an equally—

Mr CIOBO—What I am saying is that if we had the same treaty but East Timor's standard of living was comparable to Australia's would you be appearing as witnesses?

Rev. Pargeter—Probably not.

Mr CIOBO—So it is not in fact the treaty that is the problem; it is the disparity in the bargaining positions.

Dr Zirnsak—Because it prejudices the treaty negotiations in the first place.

Mr CIOBO—Hang on, I asked if East Timor had a comparable standard of living and we negotiated the same outcome, and you said you probably would not be appearing as witnesses.

Dr Zirnsak—Because we would accept in that case that East Timor would not be in a position where it would have to accept the treaty—

Mr CIOBO—So it is not the actual terms of the treaty per se that are the problem, from your perspective; it is the disparity between the bargaining positions—not the outcome but the process.

Rev. Pargeter—But the outcome is affected by the process—that is a circular argument.

Mr CIOBO—So I would have to assume that you would still be turning up. It is a crucial issue. Fundamentally, we are looking at the terms of a treaty here and your position is that we have gone into this in bad faith in that the Australian government has sought to rob East Timor of resources that you claim they are entitled to. From my perspective the terms of the treaty are

fundamental. So what I am trying to ascertain is whether in fact your position is (1) that you are concerned about the terms of the treaty or (2) that you are concerned about the bargaining position. I do not dispute for one second that they are impacted upon by both sides.

Rev. Pargeter—They are interactive; I do not know how you can separate one from the other.

Mr CIOBO—That is why I asked whether you would still be witnesses and it was your answer, when you said, ‘No, we wouldn’t be,’ that made me then draw the conclusion that in fact it is not the terms of the treaty that you are concerned about; it is the disparity in bargaining positions.

Rev. Pargeter—That smells like trickery. All we are trying to do here is establish that there is an Australian government prepared to enter this in good faith.

Mr CIOBO—It is not trickery; it is fundamental.

Rev. Pargeter—We have a country in a very weak position and we, as a country, are saying that it is their position that is at fault here and you cannot separate that from the treaty that they are being asked to enter into.

Mr CIOBO—So how does Australia ever negotiate an outcome that satisfies or in any way addresses that concern about the disparity between the two countries? What triggers your concern? Obviously there will always be this disparity at this point when Australia enters into negotiations with a country that is newly developed and that does not have the same standard of living.

Rev. Pargeter—Can I put this to you then: how does East Timor access its natural resources in order to sustain a viable economy?

Mr CIOBO—That is exactly what this treaty does; that is exactly what this treaty puts in place. More importantly, the question is: how do we ever reach an agreement that is satisfactory to the Uniting Church with a country that does not have a comparable standard of living to ours?

Dr Zirnsak—The issue is that there does need to be recognition of that imbalance in negotiations and therefore the Australian government would need to be demonstrating that it is negotiating in good faith.

Mr CIOBO—There is that recognition; that is why it is split 90-10. We have done that; that is why the split is 90-10.

Dr Zirnsak—Certainly East Timor has not perceived that with regard to, for example, withdrawal from the International Court of Justice, as we have quoted before. You had the Prime Minister of East Timor being willing to actually come out and say something quite strong on that, compared to what the East Timor NGOs then say. As you would be well aware, their position would be even stronger and more critical.

Mr CIOBO—So perhaps the fault is that we, the Australian government and the Australian NGOs, have not been strong enough in our rhetoric on how extensively we could claim. If we perhaps increase our rhetoric in response and say that we should be claiming all the way to the continental shelf, and if we had NGOs saying, ‘Lo and behold, we have lost too much sovereignty with respect to this treaty,’ would that make this a more balanced outcome?

Dr Zirnsak—We would look at the justice of the issue and the level of need. We are not basing that position on rhetoric; I am merely using the fact that those statements have been made publicly to indicate how the East Timorese have perceived this.

Mr CIOBO—But that is not a very objective test, is it? It is not a very objective measure on that basis.

Senator MASON—We might need your help when we are negotiating agricultural trade treaties with the United States. Do you see the problem?

Mr CIOBO—My point is that it is hardly an objective measure. It is a very subjective measure, and it is the kind of subjective measure in which, as I said, the fault perhaps should lay with the Australian government in that we have not been vocal enough in claiming that we have given away significant resources.

Dr Zirnsak—The objective test for us is looking at what the different legal claims are. What East Timor appears to be claiming is possible under international law, so that is the objective. The objective measure is that they have legal claims that could be upheld, so we have looked at that and considered that. They are not making claims that are completely without basis and where they have no ability to make those claims. If they were making claims that were completely without basis, where they would have no ability to make those claims, clearly we would not be appearing before you to raise these concerns. So that is the objective evidence. We are also looking at how they perceive the justice of the situation. Part of our position as a church, in addition to looking at the justice side, also includes the issue of standing in solidarity with those who are disadvantaged.

Mr CIOBO—Do you concede that Australia also has a legitimate case when Australia could put forward the argument that we are entitled to a greater proportion than we are currently receiving under this treaty?

Dr Zirnsak—We know there are legal positions.

Mr CIOBO—Are they any less robust than the position that East Timor has put forward?

Dr Zirnsak—I am not a legal expert so I cannot answer that.

Mr CIOBO—Shouldn't you concern yourself with issues such as that?

Dr Zirnsak—We have attempted to look at the literature as extensively as we can and to speak to people on these issues.

Mr CIOBO—At this point, if I can run on the assumption that Australia's claims are as legitimate as East Timor's claims—

Dr Zirnsak—On what basis are you making that claim?

Mr CIOBO—I am stating a hypothetical at the moment.

Dr Zirnsak—You are asking us to prove our position but you can make a hypothetical!

Mr CIOBO—The basis is that the whole reason we are currently having a dispute with East Timor is that there are legitimate arguments that can be made on both sides, hence the reason we have a negotiated outcome—in other words, an agreement to disagree. So, running along that line for the moment—because you stated that you are unaware of the extent to which Australia could possibly claim and you have not necessarily concerned yourself with as much of the validity of that argument as I am suggesting that perhaps you should have—my point is that, if you follow that assumption and say, 'Australia could claim up to this extent,' or, 'We've negotiated with East Timor to this extent,' that may very well represent a neutral middle ground between both countries.

CHAIR—In the interim.

Mr CIOBO—That is correct.

Dr Zirnsak—You have made a statement; it is not a question.

Mr CIOBO—I am asking you for your opinion on that.

Dr Zirnsak—I guess what we are saying with regard to this treaty, going back to the issue of the lateral boundaries, is that this treaty does potentially—

Mr CIOBO—That is one point of view.

Dr Zirnsak—Yes, it is.

Mr CIOBO—I am saying there is another point of view—that is, it could in fact be much narrower than that.

Dr Zirnsak—Okay, you are offering a variety of opinions.

Mr CIOBO—That is the whole basis of why we have this area that we have negotiated an agreement on: because it is in dispute.

Dr Zirnsak—Indeed, so you are hearing our opinion; we have offered that opinion. Obviously, in forming that opinion, it is the opinion we are holding to.

Mr CIOBO—My concern, Dr Zirnsak, is that you highlight one legal opinion to support your argument that we have gone into this agreement in bad faith and that, as a result of our bad

faith negotiations, East Timor is in a position where it is disadvantaged. So I am putting forward the other perspective: that the boundaries may in fact not run in favour of East Timor's position and that Australia may have a greater claim to sovereignty and to the resource base that lies within the Joint Petroleum Development Area. So, as such, what we have here in this treaty as an interim measure may in fact reflect middle territory.

Rev. Pargeter—In that case, what stopped Australia claiming its maximum?

Mr CIOBO—Perhaps we entered into the negotiations in good faith. That is my whole point.

Rev. Pargeter—This was the argument before: do we want a set of standards to apply that we are going to apply in other countries? If we are already beginning to arbitrate on the basis of whether it is fair or unfair, we have entered into another set of territories.

Senator MASON—To summarise, you have raised the inequality of bargaining power, which is a fair issue. We all understand that, irrespective of the fact that international relations rarely take that into account—in fact international politics never has; it has always talked about a state's national interests. Let us put that to one side for a second. There seem to be three ways we can address it—two are legal ways—firstly, through arbitration, which is risky, we all agree; secondly, we can have a negotiated settlement; and, thirdly, we can have a diplomatic aid solution. You seem to want No. 2, which is a negotiated legal settlement but which is tapered in favour of East Timor.

Rev. Pargeter—Because what is good for East Timor would, in the end, be good for Australia.

Senator MASON—Sure. But I suggest—and I think that Mr Ciobo flagged this as well—that the third option, diplomatic aid, can be tapered in East Timor's favour without the legal precedence and repercussions following from a negotiated settlement that may have other adverse legal implications for this country. They are the three ways we can, in a sense, address the inequality of bargaining power that has come up this morning.

Rev. Pargeter—Yes.

Mr CIOBO—Further to that, this treaty is in fact a negotiated settlement that is tapered towards East Timor.

Senator MASON—That is another question.

CHAIR—As an interim measure.

Senator TCHEN—I am a little confused about exactly what the Uniting Church's position is on this treaty. Initially in your written submission you were totally unequivocal that you believed that Australia should not ratify this treaty. But during your evidence you seemed to modify your position a bit. In particular, Reverend Pargeter said that it is East Timor's call. Since East Timor has actually reached agreement with Australia on this treaty, that indicates you have withdrawn from your position of opposing this treaty.

Rev. Pargeter—No. It was a recognition of fact that in the final analysis it has to be what is negotiated between East Timor and Australia, not between East Timor and the Uniting Church in Australia. We are purely an onlooker on the relationship. We have a longstanding relationship with the East Timorese people and have been supporting their journey towards self-determination. In so doing, as neighbours we recognise the very weak bargaining position they are in. If we were able to influence a better bargain for them, we would see that as a positive outcome of our involvement. But in the end we recognise that it has to be between East Timor and Australia.

Senator TCHEN—Thank you. I want to clarify a couple of points because, as you indicated, it is very much a matter of view whether or not this treaty should go ahead. Some very important factors in this view are how we see the relative positions of East Timor and Australia and whether justice is being served in the treaty. So perception is very important. I want to clarify some of the facts that you cited in your submission. I am a bit concerned that if those facts are as you state them obviously they give one perception, but if the facts are not entirely as you have stated them the perception will be different. On the second page of your submission you note:

... Australia has reduced its overseas development assistance to East Timor by 12.7% in the 2002-2003 budget ...

Can you inform the committee where this figure has come from?

Dr Zirnsak—That figure came from an analysis provided by ACFOA of the 2002-03 budget.

Senator TCHEN—I am sorry, who provided it?

Dr Zirnsak—ACFOA, the Australian Council for Overseas Aid.

Senator TCHEN—I see. Does that take into account all Australian development assistance to East Timor?

Dr Zirnsak—That is our understanding—what was in the overseas aid budget.

Senator TCHEN—We probably need to check that. You went on to say that media reports claimed that the current Timor Sea treaty would deliver Australia in excess of \$55 billion in oil and natural gas revenue over the next 30 years. There are two parts to that but, firstly, the \$55 billion is the total revenue, is it not, rather than the total profit?

Dr Zirnsak—It is the total reserves. I would accept that that should probably have read 'reserves'. I realise that that is not going to be tax revenue.

Senator TCHEN—So it is not income, it is revenue?

Dr Zirnsak—No, our understanding would be that that is reserves. We also recognise that the figures on reserves have been frustratingly flexible. We have not been able to fully ascertain the exact values of those deposits. Even looking at the committee's background papers we have not been able to find that.

Senator TCHEN—That is the current estimate. I understand that this is very close to the current estimate of total reserves within the JPDA.

Dr Zirnsak—Our understanding is that that includes the Greater Sunrise and Laminaria deposits as well, not just what is in the Joint Petroleum Development Area.

Senator TCHEN—You went on to say that this would belong to East Timor if international law for maritime boundaries were applied. You seem to imply that there is no question that international law for maritime boundaries would in fact put those reserves in East Timor territory. Yet I note that you acknowledged earlier that international law for maritime boundaries is in fact uncertain.

Dr Zirnsak—Yes.

Senator TCHEN—Do I take it that your assertion here is therefore uncertain as well?

Dr Zirnsak—Yes, it is. That is based on the fact that we have also been trying to do research as we go. Obviously, as more materials become available, we have been seeking to ensure that our position is as fair and objective as possible.

Senator TCHEN—Just as a matter of curiosity, in the next paragraph I note that you have said that the unit is deeply concerned about the justice and morality of the Timor Sea Treaty between the government of Australia and the government of East Timor. Later, on another concern, you repeat that. I notice that the words ‘Timor Sea Treaty between the Government of Australia and the Government of East Timor’ are in italics. I hope that that does not imply that you believe that the government of Australia and the government of East Timor do not represent the national interests of the people of Australia and East Timor respectively.

Dr Zirnsak—That title was simply taken from the title that was used for the treaty which was formally provided to us by the committee. That was how it was listed on the initial description of the treaty that was sent to us from the committee.

Senator TCHEN—Thank you; I am much relieved.

CHAIR—Thank you for your time this morning; we appreciate it. Could you pass on our thanks to the Uniting Church in Australia for their submissions and for the interest that they are taking in this matter.

Proceedings suspended from 12.43 p.m. to 1.23 p.m.

CHAMBERLAIN, Mr Peter, Timor Response Manager, Oxfam Community Aid Abroad

ENSOR, Mr James Marshall, Director of Public Policy, Oxfam Community Aid Abroad

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make an opening statement and then we will proceed to questions?

Mr Ensor—Yes, we do have some introductory remarks. The overall goal of our work in East Timor is to support the East Timorese to direct their own social, economic and political development. Accordingly, it is important to emphasise that in our submission and in the evidence that we give today we are representing our own views on this matter and not representing the views of our East Timorese partner organisations, the East Timorese government or, more generally, East Timorese civil society groups. We are currently the lead for a large joint Oxfam international program in East Timor. Since the Indonesian annexation of East Timor, Oxfam has actively supported East Timorese self-determination and justice through a combination of international advocacy and support to organisations in East Timor.

In the newly independent East Timor we continue to support and implement projects—including health, water and sanitation, agriculture and education—at a national level and in a number of districts and key sectors. Our overall approach is to promote the active participation of East Timorese men and women in society. The program in particular focuses on facilitating and developing linkages between the regional, national, district and community level, and in particular between civil society and government. We work primarily through partner groups—typically non-government organisations—and with the East Timor government. Our government partners include the Ministry of Fisheries and Forestry, the Ministry of Education, the Department of Water Sanitation Services, as well as district and village level authorities.

Central to our work in East Timor is the capacity building of East Timorese civil society organisations in order to facilitate active community engagement in public policy issues, including the national development plan, the newly established constitution and the Timor Sea Treaty. To this end, Oxfam and East Timor have taken a number of initiatives with respect to the Timor Sea Treaty. These include encouraging East Timorese organisations to engage in dialogue with the Timor Sea office; translating the treaty, including the memorandum of understanding and the exchange of notes, into Bahasa Indonesian in order for the East Timorese organisations to have access to the information; funding a research paper into the issues surrounding the Timor Sea and sharing that with NGOs in the country; funding three members of the Independent Information Centre for the Timor Sea to attend this committee's hearings in Darwin; and supporting a range of district level discussions around the Timor Sea.

From our discussions with East Timorese civil society groups, we can offer the committee the following observations as to how this issue is being perceived in East Timor. East Timorese groups genuinely appreciate the opportunity to make submissions and appear before the committee. Initially many members of the Independent Information Centre for the Timor Sea

were against the signing of the Timor Sea Treaty. However, some have changed their opinion, based on discussions with the Timor Sea office. In general there is a feeling by members of the Independent Information Centre for the Timor Sea that the treaty is unfair to East Timor and that Australia is not acting in good faith. This is based upon the available interpretation that they have of annex E. Although some would now support the East Timorese government's position that the treaty should be ratified expeditiously, the general feeling is that Australia is not supporting the economic future of East Timor and is not acting in good faith. Specifically, there appears to be anger regarding Australia's withdrawal from the International Court of Justice regarding the United Nations Convention on the Law of the Sea, and this is perceived as an act of bad faith. This, combined with the wording of the Timor Sea Treaty, and in particular annex E, has created the impression that Australia, while generous with the treaty regarding Bayu-Undan, is attempting to gain unfair access to the remaining Greater Sunrise deposits outside the Joint Petroleum Development Area. There is also a view that the international unitisation agreement on the portion of the Greater Sunrise lying outside the Joint Petroleum Development Area should be negotiated independently of ratification of the Timor Sea Treaty, based upon fair negotiation of maritime boundaries.

On balance, Oxfam Community Aid Abroad believe that the Australian government should ratify the Timor Sea Treaty. At the same time, we believe the committee should broaden the ratification process to incorporate the following six actions as parallel recommendations to the Australian parliament: firstly, to ensure that the treaty's 'without prejudice' clauses in no way inhibit the extent of East Timor's maritime claims; secondly, that the Australian government formally commits to engage in good-faith negotiations towards the achievement of permanent maritime boundaries. A definitive time frame should be agreed in which boundaries could be settled or otherwise referred to an impartial independent arbitrator: you will note from our submission that we suggest that the time frame not exceed five years. Thirdly, we believe that the Australian government should immediately reinstate adherence to the dispute settlement mechanisms of the International Court of Justice and the International Tribunal on the Law of the Sea. Australia's withdrawal from the compulsory jurisdiction of dispute settlement mechanisms under UNCLOS and the statute of the ICJ, according to some commentators, has severely limited East Timor's options in seeking third party resolution of the boundary issue.

Fourthly, we believe that the Australian government should suspend the current December 2002 deadline for the conclusion of the international unitisation agreement with Greater Sunrise in recognition of the need for independent and fair negotiation of maritime boundaries. Fifthly, we believe that there should be recognition by the Australian government that the treaty does not provide East Timor with guarantees for participation in upstream and downstream aspects of petroleum development in the Timor Sea and, therefore, the Australian government should undertake to prioritise training and employment opportunities for East Timorese nationals and residents and undertake to ensure that the production sharing contracts include provisions that prioritise East Timorese interests, in particular with respect to capacity building in petroleum related industries. The government should ensure that all efforts are made to assess the viability of bringing Greater Sunrise gas onshore to East Timor and declare that Australia will not use the treaty's ministerial council to override or impede decisions of the joint commission or the designated authority. The sixth recommendation that we make is that the Australian government excise the Timor Gap from Australia's submission to the United Nations Commission on the Continental Shelf. There is analysis to suggest that that would further complicate and delay progress towards a boundary settlement with East Timor. That concludes our opening remarks.

CHAIR—Thank you. Perhaps I could take you to those recommendations contained in your submission that you have just gone through. If we look at the first recommendation, I take it that Oxfam's position is that Australia, and East Timor presumably, should ratify this treaty contingent on these conditions. The first one you mention is the 'without prejudice' clause. That clause is already in the treaty, is it not?

Mr Ensor—It is in the treaty, yes.

CHAIR—Your second point is, 'Declare that the Treaty in no way inhibits the extent of East Timor's maritime claims.' Given the 'without prejudice' clause, what more are you suggesting should be done?

Mr Ensor—There are two issues that seem to be raised by a number of commentators on the issue that may complicate this matter. The first is that analysis by some commentators notes that the International Court of Justice and other bodies have in some cases accepted the agreements that have been made, such as in the case of the Timor Sea Treaty, as equitable because they were reached by mutual agreement through negotiations. The second issue is that some commentators have suggested that the extent to which parties to a joint development are bound by their commitment to commercial agreements and contracts of joint development could in some instances inhibit the capacity, particularly of East Timor in this instance, to derive any benefits as a result of the renegotiation of boundaries because of the nature of some of the commercial contracts that might be entered into. These are two specific issues that have been raised that, even if the treaty is signed with the current 'without prejudice' clause, some commentators are suggesting could inhibit East Timorese options down the track.

CHAIR—There is nothing in the terms of the treaty itself that inhibits the extent of East Timor's maritime plans; you are saying that there are external possibilities?

Mr Ensor—Yes, there are suggestions being made by external commentators in those two particular areas that indicate that down the track there could be some barriers created.

CHAIR—And one of the concerns is that the ICJ can take account of a precedent set—for example, in this case by the signing of a treaty that refers to a specific boundary?

Mr Ensor—Yes, that specifically the ICJ and other arbitral bodies have accepted those boundaries as fair and equitable based on the fact that they have been previously negotiated.

CHAIR—So this could apply to Australia as well then—that the ICJ, in different negotiations and in different cases not involving Australia and East Timor, you are suggesting, could take Australia's position as a precedent?

Mr Ensor—Yes. That is what some of the commentators of the research that we have done have suggested is possible.

CHAIR—Your next point is 'that Australia recognises its international legal obligation to engage with East Timor in "good faith"'. There is nothing in the treaty that indicates that Australia would do otherwise than act in good faith, and it has an international legal obligation to do so.

Mr Ensor—That is correct.

CHAIR—We will leave the point on time frame to one side. Your next point is: ‘Declare that Australia will refrain from improper intervention in the inevitable boundary negotiations between East Timor and Indonesia.’ You are not suggesting that there is anything in this treaty that would indicate that Australia intends to intervene, improperly or otherwise, are you?

Mr Ensor—No, we are not.

CHAIR—Have you had any indication, or is there anything that you base a concern on, that Australia would seek to intervene improperly in East Timorese-Indonesian negotiations?

Mr Ensor—No, there is not.

CHAIR—Are you aware of the concept of non-encroachment?

Mr Ensor—Yes.

CHAIR—Is it the case that parties to maritime boundary disputes—let us take East Timor and Indonesia—are obliged to take into account the rights of a third party that might be affected by that treaty?

Mr Ensor—Yes, that is my understanding.

CHAIR—In your next point you have said that Australia should declare that it ‘will promptly engage with Indonesia to adjust Points A16 and A17 of the 1972 seabed boundaries’. Does that not depend on East Timor and Indonesia first negotiating their maritime boundary dispute?

Mr Ensor—Yes, and that is on that assumption.

CHAIR—You have commented on the attitude of the East Timorese in relation to Australia. Can you comment on the attitude of the East Timorese in relation to the likelihood that they will gain some advantage over Indonesia in their negotiations on the boundary between East Timor and Indonesia?

Mr Ensor—I am not sure if we have had a particular dialogue on that.

Mr Chamberlain—No, I cannot think of anything.

CHAIR—It seems to me that so much of the argument about the eastern boundary of the JPDA—in other words, whether or not Greater Sunrise is in or out of the JPDA—depends upon a renegotiation of the boundaries between East Timor and Indonesia before you would get to the next step of Australia and Indonesia looking at points A16 and A17, which would happen before you would get to the point where East Timor and Australia would then negotiate their maritime boundaries.

Mr Ensor—That might be the case. It should not preclude negotiations between Australia and East Timor.

CHAIR—Are you aware that there might well be a sequential line of negotiations that would have to take place before you would get to a point where Australia and East Timor could negotiate with certainty on their maritime boundary dispute?

Mr Ensor—No, I am not aware of sequential requirements.

Mr CIOBO—On page 3 of your submission you make reference to article 11, which places an obligation upon East Timor and Australia to give preference to the employment and training of East Timorese people, but then you state your concern that this is not referred to within the production-sharing contracts. What is your concern with the terms of the treaty with respect to the employment preference to East Timorese people, and is that deficient?

Mr Ensor—We are suggesting a public commitment made by the Australian government as well as inclusion in the treaty. There is certainly concern amongst East Timorese groups about the extent to which they can benefit from upstream and downstream industries. Revenue flows are obviously important, but the emphasis in our submission is on capacity building of East Timorese organisations and individuals to maximise benefits in a range of associated industries.

Mr CIOBO—We have had witnesses appear before this committee who have put forward the suggestion that it should be weighted more heavily towards Australian nationals. What would be your views on that?

Mr Chamberlain—If you look at some of the development indicators for East Timor, you can see the upstream and downstream factors are going to be absolutely critical to the country; it should not just be seen as a revenue stream. Recently, there was a UNDP Human Development Index report on East Timor. It found that it is the lowest-ranking country in Asia. Against a range of factors such as life expectancy, income, education levels et cetera, East Timor came out the lowest in Asia. It came 152 out of 162 countries that have had this process done worldwide. It is really critical for East Timor that there are jobs, that there is education and that there is training in the development of the Timor Gap.

There are other statistics around that 41 per cent of the population live on less than \$A1 a day, and the per capita income is around \$US377 per annum. That is why we think it is critical that the upstream and downstream factors are taken into consideration, not just in the treaty but in subsequent negotiations with oil companies.

Mr CIOBO—Does Oxfam have any suggestions on regimes that may exist that would give adequate recognition and enforcement to employment preference? Is there anything you can point to?

Mr Chamberlain—I am not aware of specific regimes. I think it is more a question of making a public commitment to that effect.

Mr Ensor—One of the issues we have faced, and which we are going through in East Timor at the moment, is the emphasis in our program on being very much around capacity building of

East Timorese to take control of their own development. So we have employment processes in place where we deliberately place people in areas where they can train, facilitate and develop Timorese skills and expertise. Once that is developed, we then have an active process of removing expatriate staff. We also have an active process in so much of our water and sanitation work—handing over the skills to East Timorese to not only construct water and sanitation facilities but maintain them. It requires an up-front investment to do that and to facilitate that skills transfer, but it needs to be a deliberately conscious act.

There are many oil and mining companies around the world, particularly larger firms that we deal with on other issues, which now have very active programs and strong capacities to invest heavily in skills of local people—Rio Tinto and BHP, for example, in the Pilbara region. I know BHP have a target of eight per cent Aboriginal employment; Rio Tinto have similar sorts of mechanisms in place. So there are precedents for industry taking a very proactive stance on these sorts of issues.

Mr CIOBO—Are you aware of, or are you involved in, any of these types of programs with respect to the training of East Timorese for (1) the construction phase and (2) the exploitation phase of Bayu-Undan, for example?

Mr Chamberlain—No, I am not aware of any such project. It will be starting from a pretty low base—the skill base in East Timor is low. Attention is often drawn to the destruction of physical infrastructure in East Timor, but the loss of capacity during the colonial Portuguese period and the Indonesian period is almost of more long-term harm. I am not aware of any schemes that do that currently. I imagine it would be for the oil and gas companies to initiate the development of those kinds of skills.

Senator MASON—Thank you for your submission. Mr Ensor, when you were giving your introductory comments, I think it is fair to say there was some inherent tension: you commenced by saying that Oxfam believes Australia should ratify this treaty and yet you also mentioned that civil society groups in East Timor, and indeed NGOs based in East Timor, felt that Australia was acting unfairly and not in good faith in the development of the treaty. I think those were your words; I may have missed some of them. On the one hand you are recommending it; on the other hand you are saying groups that you talk to all the time and groups in East Timor think the treaty should not be ratified. In the end, why did you think it was in Australia's interest or, indeed, in East Timor's interest that the treaty be ratified?

Mr Ensor—It is a good question. My opening remarks were just to make it clear that we as an organisation are making a judgment in our own right and, in doing so, we are balancing a range of views of various stakeholders that we engage with in East Timor: our partner organisations, East Timorese government agencies and individuals who have a diversity of views. On balance, it is our view that the importance of economic certainty associated with ratification for East Timor outweighs the uncertainties that have been quoted by some commentators around implications. That is why we are framing our recommendations quite specifically in terms of saying, 'Yes, Australia should ratify.' But we are recommending that this committee makes recommendations to the Australian parliament that certain commitments and actions are undertaken to, in effect, broaden that ratification process so that some of the broader and longer term issues and concerns that are being addressed can achieve some sort of outcome.

Senator MASON—Mr Ciobo will not mind me mentioning this, but he whispered to me before that your submission seems quite pragmatic. We just heard from the Uniting Church, which have a view similar to yours in some ways but they were in effect in opposition to ratification because it would disadvantage East Timor unfairly and so forth.

Mr Chamberlain—I think we also looked at the cold hard realities of what this will mean for the government budget in East Timor. Currently, their budget sits at about \$US77 million annually. That is heavily supported by international donors through the Trust Fund for East Timor and other bilateral means. That may well carry them through to 2004-05, but beyond that it is very unlikely they will get that degree of budgetary support. Donors are expecting that an agreement will be reached and their exit strategy, if you like, is the revenue stream that will come from the Timor Gap. I think the political and social consequences of them not having a viable source of income would be very serious—there is that reality also.

Senator MASON—It is interesting that you mention that, Mr Chamberlain, because I know that the chair and others in the course of this inquiry have been at pains to make the point that certainty in terms of fiscal outlays and so forth and certainty in terms of capital being injected into the country is critical—something that some people perhaps believe is not as important as others might. It is interesting that Oxfam takes that view. Mr Ensor, one of the recommendations that you wish the parliament to act on in addition to ratifying the treaty is: ‘Establish a definitive time frame, not to exceed 5 years, in which boundaries will be settled, with or without the joint development agreement, or otherwise referred to an impartial independent arbitration.’ You mention in your written submission that this goes back to the argument about the continental shelf as opposed to equidistance but that Australia, because of its prior negotiations, would like to leave this situation perhaps unclear—I do not know about unclear—but certainly as it was back in the early seventies when it benefited Australia in its negotiations with Indonesia and Portugal. Why would it be in Australia’s national interest to take up your suggestion to establish a definitive time frame which could lead to us having to settle for an impartial independent arbitration which might benefit Australia—you never know—but might also harm Australia’s national interests, particularly in its relationships with Indonesia or its maritime boundaries with Indonesia? Why would we want to take up that suggestion?

Mr Ensor—Two reasons come to mind. The first is the provision of economic and political certainty on the matter. We are not legal experts, but we understand that the fact that East Timor has passed its domestic legislation relating to the Maritime Zones Act creates an obligation under UNCLOS for there to be good-faith negotiations to resolve the issue. Obviously the longer it takes for that issue to be resolved the greater the likelihood of a sense of uncertainty being exacerbated, particularly amongst industry, about further development of the resources in that area. The second reason involves the broader geopolitical and humanitarian issues associated with Australia’s relationship with East Timor and the need for that relationship to be established and maintained on a footing of mutual goodwill, respect and trust between the elected representatives of both countries. It seems to us to be important for Australia to act in good faith in entering those negotiations. We are not advocating a particular outcome from those negotiations—we are not suggesting that the East Timorese claim is ultimately the claim that should be agreed to, nor are we suggesting that the current boundary based on the prolongation argument should be retained—but, for those two reasons, there should be an act of good-faith negotiations.

Senator MASON—It is interesting that you raise that, Mr Ensor, because just before lunch we had some dialogue with the Uniting Church relating to this point—firstly, that arbitration is all very well but is risky for both sides; secondly, that the evidence is that both Australia and East Timor would rather settle the issue of permanent maritime boundaries through negotiation; and, thirdly, that an impartial independent arbitration could affect our relations not only with East Timor but also with some of our other regional neighbours. As you say, we are compelled in any case to continue to find a solution, but to necessarily draw Australia into impartial independent arbitration after five years is perhaps problematic.

Mr WILKIE—I think we would all like to see negotiation on boundaries take place which would come to a satisfactory resolution for both parties. The treaty provides for that and, as you have said, East Timor has put forward legislation on its own boundaries; therefore negotiation should be taking place. I share the view that it is disappointing that the ICJ can no longer be the independent arbiter. What I am concerned about—and I am interested in your comments—is that, having said that the treaty provides for negotiation and we should then participate in that, the Minister for Foreign Affairs has said that notwithstanding that there is that provision in the treaty we do not intend to change in any way, shape or form the current boundaries. I am wondering how we can have dialogue when we have those sorts of statements being made. Do you have an opinion?

Mr Ensor—That is exactly the point that is being raised, particularly by East Timorese groups. My opening comments about the perceptions that exist rightly or wrongly about Australia's attitude towards the negotiation process are informed by statements that have been made over recent months that indicate at least to Timorese groups a reluctance on Australia's part to modification of the existing boundary.

Mr WILKIE—My other question relates back to the employment issue. The current treaty says that preference would be given to East Timorese workers. I do not have a problem with that, but the previous treaty had preference being given to Australian and Indonesian workers. Would Oxfam Community Aid Abroad be adverse to having a similar provision to that which was in the old treaty so there would be a preference for both East Timorese and Australian workers?

Mr Chamberlain—I wonder whether it needs stating. The current suggestion is for Bayu-Undan to be processed in Darwin; therefore there will be very positive consequences for jobs in the Northern Territory. Obviously, the way in which Greater Sunrise finds a process is yet to be decided, but I do not know that it needs stating. Those benefits will flow through, but it is legitimate to say that there should be benefits to employment in Australia, in particular the Northern Territory.

Mr WILKIE—Thank you. And could I thank you for your submission.

Mr CIOBO—In relation to the point the deputy chair raised, there is a connotation that it is almost a belligerent position that the foreign minister has taken.

CHAIR—I have yet to see the statement in writing. This is everybody's version of what the foreign minister said.

Mr CIOBO—It is one connotation. Given that there is a very legitimate case to be put—and we have had it from a number of witnesses—that Australia’s claim to the continental shelf does have standing at law, is it simply not also possible that a statement to that effect merely highlights that Australia believes in the legitimacy of its case and that this negotiated ground represents just that, a negotiated ground? It does not necessarily mean that there is any sense of belligerence.

Mr Ensor—That may well be the case. In our opening statement we deliberately referred to perceptions of Australia’s attitude in East Timor based on the views that were being expressed to our staff in East Timor by organisations and individuals that they work with. We recognise in our submission specifically that Australia’s position in relation to the boundary does have legitimacy in that it is based on the 1958 Convention on the Continental Shelf and it is consistent with article 67 of UNCLOS, which still recognises the legitimacy of the natural prolongation boundary-setting mechanism. But we do say that another article of UNCLOS—article 83—requires parties to negotiate on boundaries where the distance between coastlines is less than 400 nautical miles.

Mr CIOBO—To achieve an equitable outcome?

Mr Ensor—To achieve an equitable outcome.

Mr CIOBO—I guess that was more for my purposes because I wanted it on the record that the connotation that is put to the foreign minister’s statement is just that, a connotation.

CHAIR—The discussion about the ultimate boundary dispute negotiations between Australia and East Timor essentially revolves around whether Greater Sunrise ought to be in East Timor’s territory or in Australia’s territory. Is that not a fair position to put?

Mr Ensor—That is probably the bottom line around the negotiation.

CHAIR—So it comes down to where Greater Sunrise is. You have been critical of the Australian government over its withdrawal from the ICJ.

Mr Ensor—Yes.

CHAIR—If we were to appear before the ICJ, given the legal precedent that would be set by the decision in that case, would you have expected Australia to give up its claim to natural prolongation?

Mr Ensor—Per se or in relation to this particular issue?

CHAIR—In relation to a dispute between Australia and East Timor that hypothetically went before the ICJ.

Mr Ensor—And the ICJ made that particular finding?

CHAIR—Would you be suggesting that Australia ought to give up its case based on natural prolongation; that is, the continental shelf?

Mr Ensor—In the event that the ICJ found or made a determination that the appropriate boundary between Australia and East Timor was in some way different from the principle of natural prolongation, we think that there would be a strong case for Australia complying with that finding.

CHAIR—In other words, the outcome of that litigation could be that they uphold Australia's natural prolongation case?

Mr Ensor—Correct.

CHAIR—In other words, East Timor would be in a vastly worse-off position if that were the case, because if Australia took the continental shelf then Greater Sunrise would be entirely in Australian waters.

Mr Ensor—Correct.

CHAIR—Or it could find that the appropriate measure was equidistance, in which case Greater Sunrise would be in East Timor's waters.

Mr Ensor—Correct.

CHAIR—So, as Senator Mason said, it is a case of winner takes all?

Mr Ensor—Those are two extreme findings that the ICJ might make. There may be a whole range of findings and recommendations that the ICJ may make between those two extremes that are not winner takes all.

CHAIR—There could be. I am not asking you to assess the risk, but there is always the risk that the ICJ could support natural prolongation as the law.

Mr Ensor—Yes.

Mr Chamberlain—Isn't there also a risk that, if there is no settlement, Greater Sunrise gets exploited and, de facto, that is how the dispute is resolved?

CHAIR—The point I am trying to get to is that a litigated outcome may not be in the best interests of one or the other party if you see interest as a far broader framework of social, political and environmental measures. It could be a legal decision that benefits one rather than the other. Surely a negotiated outcome would be preferable, given that you could take into account all of the circumstances in which East Timor and Australia find themselves as neighbours.

Mr Ensor—Yes, and in our submission we are advocating a commencement of good-faith negotiations as soon as possible on boundary issues and that could obviously potentially result in more of a win-win outcome than some of the possibilities for outcomes around the ICJ.

CHAIR—If Australia were to re-engage, if you like, with the ICJ, as you have suggested be recommended to the parliament, and the ICJ finds against Australia's natural prolongation case—it finds, as a matter of law, against Australia's case based on the continental shelf—that, I presume, would have precedent effect on Australia's position vis-a-vis other countries with which it shares a maritime boundary. That is a risk Australia would have to factor in.

Mr Chamberlain—It is a risk but the treaty with Indonesia was negotiated with a sovereign state. Indonesia entered into that treaty of its own free will. Quite legitimately the difference with East Timor is that no Timorese government agreed to the shelf prolongation argument.

CHAIR—But the East Timorese government, whether it was new or not, has agreed to this treaty.

Mr Chamberlain—This current arrangement, yes.

CHAIR—I am trying to work out whether your concern is on the legal basis or on a humanitarian basis in relation to Australia's claim to the continental shelf. Let's say, for the purposes of argument, that East Timor was the 52nd state of the United States and so we were arguing a boundary dispute between an economic powerhouse and Australia. Would you not expect in those circumstances for Australia to continue to push its continental shelf case to ensure that Greater Sunrise was within Australian waters rather than US waters—a US type bargaining position I mean?

Mr Ensor—I think in any negotiation it is the right of any elected government to push a case based exclusively on national interest. No-one is contesting that and in that scenario it may well be appropriate for Australia to push that line of argument. What we are suggesting is that Australia's national interest needs to be balanced against, or include an analysis of, the broader social, political and economic implications of our relationship with primarily East Timor, given the current extreme levels of poverty in East Timor. There is a proven link between pervasive poverty and the political and social instability that can create not only within a country but also more broadly. We are suggesting that there are elements of both that need to be taken into account in our definition of national interest.

CHAIR—Our national interest will of course be different if the other party to this treaty were a United States type economic powerhouse.

Mr Ensor—I think in each instance it does not matter what the issue is or the negotiation is or the parties that you are negotiating with. Your national interest is going to reflect the geopolitical dynamic between those negotiating parties, so there will be variation on a case-by-case basis.

CHAIR—Yes, quite.

Mr WILKIE—In terms of the International Court of Justice, it is probably worth pointing out that Australia ratified that treaty in the early 1940s and we have never had an adverse finding against us. It is only recently that we have withdrawn. I do not think you are arguing that we should go to a legal framework. I think you are arguing that if at the end of the day we cannot reach a negotiated settlement, which is definitely the preferred outcome, that option should not be left unavailable to East Timor. But we are all hoping that that will be the case.

Mr Ensor—That is correct.

CHAIR—Thank you for your interest in this issue. We appreciate the time you have spent before the committee this afternoon and the provision of your submission.

[2.10 p.m.]

MATHESON, Mr Alan, International Officer, Australian Council of Trade Unions

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House in the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Matheson, would you like to make some introductory remarks, and then we will proceed to questions?

Mr Matheson—Thank you very much. On behalf of the ACTU, we certainly appreciate the opportunity to appear before the committee. The ACTU has given strong support to the processes of ratification within the treaty process. In part that is because we believe the process itself has some integrity, but also because it is the process by which the International Labour Organisation treaties have been ratified for 50 years, and we have frequently advocated this kind of process. We therefore support it. I would like to make some reference to that at a later stage. Secondly, I certainly would like to apologise for the non-attendance of Sharan Burrow, the President of the ACTU. She is caught up with a couple of industrial situations at the present moment and spent most of last night with the firefighters. We both leave tomorrow for Manila for a regional meeting of trade unions, having just returned a week ago from a Pacific meeting of trade unions. So I apologise for that.

CHAIR—Mr Matheson, I am sure that it is the lot of a president of the ACTU to be tied up in industrial disputes, so no apology is necessary.

Mr Matheson—It is a dilemma. In this particular case, there are some limitations placed on me because this is an issue in which she has been intensely involved. She has been to Timor; she has convened a number of meetings in Darwin; she has had quite substantive discussions with some of the companies—Phillips and Woodside—and it is an issue that has been a part of not only the history of the ACTU but also a part of where she is coming from.

I appreciate the opportunity and would like to brief you on just two or three points coming out of our submission to you. Having seen some of the listings of your submissions, I am not certain whether we will be contributing anything significant, except to say that the trade union movement in Australia has had a long involvement with Timor, going back 25 years, and particularly in the independence period our own development agency has been involved in a whole range of activities, including health training, vocational training, capacity building, community radio, health and the university library. So we have a stake in the Timorese and their future.

Currently, the ACTU is involved in continuing our development programs. We have full-time staff based in Dili, together with consultants working in a couple of the industrial areas, port management and in the strengthening of the central trade union. Some of our affiliates—education and health in particular—are involved in teacher training in the education and health areas and in strengthening the nurses association. So we have a stake in where we will go as unions and as a nation with Timor. We have made some points in our submission. Of interest in

terms of the concern being felt in Timor; in paragraph 3 of our submission we talk about a meeting that was coordinated by the KSTL—the national embryonic union movement. That originally was planned for a roundtable of 20 people.

CHAIR—Could you tell me what KSTL stands for?

Mr Matheson—It is Tetum for the East Timor Trade Union Confederation.

CHAIR—Which is different to the Labour Advocacy Institute?

Mr Matheson—Yes, that is primarily labour lawyers.

CHAIR—Right.

Mr Matheson—That small roundtable of originally 15 or 20 people from some of the sectors was established to talk about the treaty. Bear in mind that this was earlier this year and very little discussion had been taking place within the broader community within Timor. When word got out about it, within 10 days we were confronted by something like 120 people coming from all parts of the community—East Timorese, NGOs, women's groups, human rights groups and labour groups—who saw this meeting as one of the first opportunities for the Timorese to talk about the treaty. Much of the discussion of the treaty is taking place within the political process, with bureaucrats and within the companies. There are two dilemmas: the structures within Timor—whether it is the parliament or whether it is the NGOs—are not strong and viable. So there is a dilemma in terms of how the Timorese participate.

The other issue that we would like to draw to your attention is our belief that this is a unique treaty. In paragraph 4 we make reference to the fact that, of course, Australia has a national interest. We have previously appeared before parliamentary treaty processes exploring our national interest, but this is a peculiar treaty in the sense that the whole wellbeing of a nation depends on how we work this treaty out. I therefore have two comments to make. Firstly, the treaty itself is unique with respect to the future. Secondly, because of this uniqueness, our recommendation 5 suggests that the committee might explore its own role in relationship to the treaty. I understand and recognise this is not a part of the treaties committee, but we are suggesting this because of the uniqueness of this treaty.

Also, the rim to the north of Australia is an unstable rim—from Indonesia to Timor, Papua, PNG, the Solomon Islands and Vanuatu. The Australian and New Zealand governments have a team in the Pacific at the moment, talking with the Melanesian Spearhead Group about the situation in the Solomon Islands. In terms of Australian interests, we cannot afford to have that rim of countries develop into an even more unstable position. It is interesting that the legal aid organisation from Timor has just produced a 10-page analysis of Japanese aid into Timor in its newsletter. According to their analysis from Japanese sources—and Japan is one of the largest donors at the present moment and a stakeholder in the Timor Gap development—Japan is there because it sees the need for economic and political stability.

Paragraph 5 sets out our recommendations regarding the uniqueness of the treaty and the committee itself looking again at what its role might be because of this unique relationship. I have been listening to your discussion about the Oxfam exchanges. I am certainly no lawyer and

really do not want to get into a discussion of ‘how deep is the deep sea’ concerning Australia and Timor. In our own submission, you will find that we believe the committee should strongly emphasise those paragraphs within the treaty process that suggest that there is a need for resolution.

From all of our contacts in Timor, there can be no doubt that this is an issue causing considerable anxiety for the Timorese, in part because they fought a battle of independence for 25 years. They are uncertain of their own political role and of their own security within the region. Their participation in the treaty process is significant. They already feel marginalised. In terms of Australia’s national interest, it is of paramount importance that we do not, through insecurity, uncertainty and anxiety about Australia’s role, fail to ensure that the Timorese community itself is well briefed on the ratification process.

Capacity building is a major problem in relation to Timorese participation in the development. You would be aware of the linguistic policies being developed within Timor. If you put those alongside the linguistic demands of gas and oil development, you will see we have real dilemmas. We have Portuguese as the official language and we have secondary policies within Tetum, Bahasa and English, but the operating language in gas and oil development is English. In relation to 3(1)(a), (b) and (c) and Australia’s role in providing that capacity building, that is a major challenge for us. Employment and working conditions is a very fluid situation. In 4(1)(c) and 4(1)(b), for example, we talk about the ILO declaration on fundamental principles. These are the half-dozen core labour conventions relating to freedom of association, child labour, forced labour and equality. Those declarations are already being incorporated into codes right across the international industrial scene. They are incorporated within the United Nations Global Compact and are being incorporated within the OECD guidelines. So it is not fundamentally a union issue, although we are committed to it; it is an issue being picked up far more broadly by the UN, by governments and by companies.

CHAIR—Does the ACTU have a position on the employment preference for East Timor which is set out in the treaty? We have heard from, I believe, an affiliate union that they would like to see an employment preference clause that includes nationals and permanent residents of Australia.

Mr Matheson—I go back to your discussion of the legality of the boundaries, which I followed with interest. The ACTU would hope that, within the negotiations that would take place between the two governments and between the companies and the governments, there would be negotiated positions regarding the equitable distribution of labour. We are aware that in the early stages, realistically, there is not going to be equal participation, just because there are skills we have that they do not have. There is a concern that the development could take place without any Australian or Timorese involvement. I would assume that, in the developments that are taking place in the north-west—and, I would assume, in the continuing discussions about developments with Papua New Guinea—the same discussions will take place to ensure that Australians get access to an equitable proportion of those jobs.

CHAIR—Is the ACTU’s case, then, that the treaty should contain an article that gives Australians and East Timorese employment preference?

Mr WILKIE—That was the case in the previous treaty.

Mr Matheson—That is right. That was negotiated in the previous treaty—

CHAIR—With Indonesia?

Mr WILKIE—With Indonesia, yes.

Mr Matheson—But with all parties involved—government, companies and unions. There was a tripartite commitment in the previous treaty with Indonesia.

CHAIR—I understand that. I am asking whether the ACTU's position is that this treaty should include an article that gives Australian and East Timorese employment preference.

Mr Matheson—That would be a preferable paragraph within the treaty.

Mr WILKIE—That was my main question too. I have read Sharan's submission and I hope you will pass on my thanks to her for the work she has put in. She has gone to a lot of effort in generating this submission and it is unfortunate that she could not be here today, but I understand the circumstances.

Senator MASON—Mr Matheson, I just wanted to commend you on the fact that in your submission you talk about this being a unique treaty. That is something which has occupied us with Oxfam previously and the Uniting Church earlier today. The submission states that 'the outcomes of this treaty will effectively determine the future of the whole population of East Timor' because this is their biggest resource and biggest source of capital. I was trying to think of a similar situation which Australia has been involved in. You might be able to help me here. Was it the superphosphate industry that comprised something like 90 per cent of Nauru's GNP? I suppose this is a similar situation, is it?

Mr Matheson—Yes. And look where Nauru is at the present moment.

Senator MASON—That is what I was thinking of. That is precisely my point.

Mr Matheson—I think Nauru is a great case. Nauru is now in the top five of money launderers internationally. The last figures I saw were between \$70 million and \$150 million Russian drug money being laundered through the front door in Nauru. While compensation and payments came, I do not whether they came too late. But certainly the governance of Nauru would not be what you would be hoping for in terms of the Timorese. My guess is that, having seen the kinds of treaties that go through the committee and certainly those that we as Australians become party to, there cannot be too many other treaties that have this uniqueness about them in terms of the future dependency of a country.

The figures that I saw this morning would suggest that the only other alternatives are coffee, a little bit of agriculture and tourism with some hopes, but that is a long-term position. The gas-oil development is the only alternative in the immediate future for Timor or it becomes donor dependent. A donor dependent government is not a government. That must cause anxiety to every one of us—government, non-government, community, union and employers. Do we want a Timor that becomes anxious about its relationship with Australia? This is why I think there is a uniqueness about it in terms of the committee's role in trying to understand what the Timorese

are saying. I think you are a part of the building block between Australia and Timor at this point. That must also make it a little different from the other treaties that sit on the table before you.

Senator MASON—You make a very interesting point. Today we have been grappling with that idea. It is our duty on this committee to assess the Australian national interest. None of us make any apologies for that; that is our job. But your point and the point of others—and I think you made it better than anyone else today—is that in assessing Australia's national interest in relation to this treaty with East Timor considerations are broader and more far-reaching than is normally the case.

Mr Matheson—I believe that, if we do not get the treaty process right, in five years we will have another joint Australia-New Zealand government mission into Timor to try to sort things out, as we have done in Bougainville and the Solomons. Had it not been for the refugee situation, we would have been in Nauru, but refugees provided another way of stabilising the situation. But, if we do not get the treaty process right with Timor, it seems to me that we will have the Australian government in five years up there trying to work out governance. It is the capacity building and governance which will provide the background and the backbone to an effective treaty ratification process in terms of what it will deliver in Dili.

CHAIR—That is a very good point to conclude this afternoon's hearings on. Mr Matheson, I also pass on our thanks to the ACTU for its submission and the time taken being involved in this issue. Thank you very much for your appearance before the committee today.

Mr Matheson—Thank you.

Resolved (on motion by **Mr Wilkie**, seconded by **Senator Mason**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 2.29 p.m.