Report 180

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

Joint Standing Committee on Treaties
Executive Summary

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

- **Free Trade Agreement between Australia and the Republic of Peru** (Canberra, 12 February 2018);
- **The Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments** (Lima 7 December 1995);
- **Framework Agreement Between Australia, of the one part and the European Union and its Member States, of the other part** (Manila, 7 August 2017);
- **Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea** (New York, 6 March 2018);
- **Agreement on Scientific, Technological and Innovation Cooperation between the Government of Australia and the Government of the Italian Republic** (Canberra, 22 May 2017); and

The **Free Trade Agreement between Australia and the Republic of Peru (PAFTA)** is intended to open new trade and investment opportunities for Australia. Negotiations for PAFTA were entered into in the wake of the collapse of the Trans-Pacific Partnership Agreement and in tandem with the negotiations for the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)**. PAFTA is expected to provide better market access than that obtained under the
TPP-11. The Committee is currently reviewing the TPP-11. It found that many of the issues raised in this inquiry were also addressed in the TPP-11 inquiry and has chosen to review those common issues in more detail in its report on the TPP-11.

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

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

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

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

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

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

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

- Protocol to Amend Annex 2 and Annex 5 of the Thailand-Australia Free Trade Agreement (Protocol);
- Fifth Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the
Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17 (Fifth Protocol);

- Amendments to the Agreement on the Conservation of Albatrosses and Petrels (ACAP); and

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

Chair
Hon Stuart Robert MP

Deputy Chair
Hon Michael Danby MP

Members
Mr John Alexander OAM, MP
Senator Slade Brockman
Mr Chris Crewther MP
Senator David Fawcett
Senator Sarah Hanson-Young
Mr Ross Hart MP (from 21 May 2018)
Senator the Hon Kristina Keneally
Senator Kimberley Kitching
Senator the Hon Ian Macdonald
Mrs Nola Marino MP
Senator Jenny McAllister
Ms Susan Templeman MP

Mr Ross Vasta MP

Mr Andrew Wallace MP

Mr Josh Wilson MP (to 10 May 2018)
Committee Secretariat

Ms Julia Morris, Committee Secretary
Dr Narelle McGlusky, Inquiry Secretary
Mr Anthony Overs, Inquiry Secretary
Mr Kevin Bodel, Senior Research Officer
Ms Cathy Rouland, Office Manager
Terms of Reference

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

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

Recommendation 1

2.48 The Committee supports the Free Trade Agreement between Australia and the Republic of Peru (PAFTA) and recommends that binding treaty action be taken.

Recommendation 2

3.48 The Committee supports the Framework Agreement between Australia, of the one part, and the European Union and its Member States, of the other part and recommends that binding treaty action be taken.

Recommendation 3

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

Recommendation 4

Recommendation 5

6.34 The Committee supports the Agreement on Scientific and Technological Cooperation between the Government of the Italian Republic and the Government of Australia and recommends that binding treaty action be taken.

Recommendation 6

6.35 The Committee supports the Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation and recommends that binding treaty action be taken.
1. Introduction

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

- Free Trade Agreement between Australia and the Republic of Peru (Canberra, 12 February 2018) (PAFTA);
- The Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, Lima 7 December 1995 (IPPA);
- Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (New York, 6 March 2018) (Timor Treaty Maritime Boundaries);
- Framework Agreement Between Australia, of the one part and the European Union and its Member States, of the other part (Manila, 7 August 2017) (EU Framework Agreement);
- Agreement on Scientific, Technological and Innovation Cooperation between the Government of Australia and the Government of the Italian Republic (Canberra, 22 May 2017) (Scientific Technical Cooperation: Italy); and
1.2 The Committee’s resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.

1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.

1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The Peru Free Trade Agreement was the only treaty examined in this report that required a RIS.

1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.7 Copies of the treaties considered in this report and the associated documentation may be obtained from the Committee Secretariat or accessed through the Committee’s website at:


1.8 This report also contains the Committee’s views on four minor treaty actions:
- Protocol to Amend Annex 2 and Annex 5 of the *Thailand-Australia Free Trade Agreement* (Protocol);
- *Fifth Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17* (Fifth Protocol);
- Amendments to the *Agreement on the Conservation of Albatrosses and Petrels* (ACAP); and

**Conduct of the Committee’s review**

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

<table>
<thead>
<tr>
<th>Treaty action</th>
<th>Submission date</th>
<th>No of submissions received</th>
</tr>
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<tbody>
<tr>
<td>Peru FTA</td>
<td>20.03.18</td>
<td>10</td>
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<td>Timor Treaty Maritime Boundaries</td>
<td>20.03.18</td>
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<td>EU Framework Agreement</td>
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<td>WIPO Australian Patent Office</td>
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<td>Scientific Technical Cooperation: Italy</td>
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<tr>
<td>Scientific Technical Cooperation: Brazil</td>
<td>25.05.18</td>
<td>1</td>
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</tbody>
</table>
1.10 The Committee held public hearings into the treaty actions as set out in Table 1.2. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee’s website as listed above.

Table 1.2 Public hearings for treaty actions

<table>
<thead>
<tr>
<th>Treaty action</th>
<th>Public hearing dates</th>
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<tbody>
<tr>
<td>Peru FTA</td>
<td>07.05.18</td>
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<td>Scientific Technical Cooperation: Brazil</td>
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1.11 A list of submissions received for the inquiries is at Appendix A. A list of exhibits received for the inquiries is at Appendix B. A list of witnesses who appeared at the public hearings is at Appendix C.
2. Peru FTA

Free Trade Agreement between Australia and the Republic of Peru; The Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion of Investments

Introduction

2.1 This Chapter reviews two treaty actions: the Free Trade Agreement between Australia and the Republic of Peru (PAFTA) and the Agreement to terminate the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments (IPPA). PAFTA was signed in Canberra on 12 February 2018 and tabled in the Parliament on 26 March 2018.

2.2 The IPPA was signed in Lima on 7 December 1995 and will terminate when PAFTA comes into force.¹

Background

2.3 According to the National Interest Analysis (NIA) PAFTA is a comprehensive free trade agreement intended to open new trade and investment opportunities for Australia. The NIA states that the Agreement not only captures the gains of the Trans-Pacific Partnership (TPP), but also improves on market access outcomes in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11).  

2.4 The NIA states that Peru is a growing market for Australian goods and services exporters. Peru’s GDP is comparable to that of Vietnam ($US189 and $US193 billion respectively), and it has been one of the fastest growing economies in Latin America over the last ten years. In 2016, two-way trade with Peru was worth A$590 million. PAFTA is expected to provide Australian businesses with an opportunity to expand and deepen engagement with Latin American markets. This assessment was reiterated by various submitters to the Committee.  

2.5 Peru will eliminate tariffs on 93.5 per cent of its tariff lines from entry into force of the Agreement, and ultimately will eliminate 99.4 per cent of all its tariffs. New market access opportunities are expected to be available for Australia in areas of major export interest, including the elimination of tariffs on beef, sheep meat, wine, pharmaceuticals, medical devices, paper products and machinery.  

2.6 The red meat and livestock industry pointed out that all tariffs on Australian beef, sheepmeat and goatmeat would be eliminated within 5 years under PAFTA whereas under the TPP it would take 10 years to achieve this result. The Minerals Council of Australia (MCA) notes that tariffs on all product groups that include mining equipment will be eliminated. The progressive reduction of tariffs on dairy products over five years ‘provides Australia with significant export growth potential’ in what is currently a small market for Australia.

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2 NIA, para 3
3 NIA, para 4.
4 National Farmers’ Federation (NFF), Submission 3, p. 1; Minerals Council of Australia (MCA), Submission 5, p. 3; Australian Dairy Industry, Submission 7, [p. 1].
5 NIA, para 5.
7 MCA, Submission 5, p. 8.
8 Australian Dairy Industry, Submission 7, [p. 1].
2.7 Even the relatively small gains achieved for some products are seen by industry as important. For example, the sugar industry claims that the achievement for sugar has broader implications:

While the new market access opportunities for sugar may be modest, the Peru-FTA provides strategic trade policy outcomes. Sugar’s inclusion in the deal sends a clear message that sensitive commodities, such as sugar, which have been excluded from some past Australian trade agreements can and should be included in all trade agreements.\(^9\)

2.8 Additionally, the NIA expects PAFTA to create a platform for significant growth in Australian services exports and investment in Peru. The Department of Foreign Affairs and Trade (DFAT) claim it is one of its ‘most ambitious FTAs on services trade’.\(^10\) Peru’s commitments represent an almost ten-fold improvement over its World Trade Organization (WTO) General Agreement on Trade in Services (GATS) commitments (by sectoral coverage and extent of commitments), which is expected to improve certainty for Australian service suppliers and investors in Peru.\(^11\)

2.9 The MCA cites Austrade and identifies the significant potential for both investment and Australian services in the Peruvian mining sector:

[Peru] is already a major mining province, ranking third in global copper production, second for silver and sixth for gold. Furthermore there is a pipeline of US$58 billion ($74 billion) in new mining investment projects expected to be delivered over the period from 2016 to 2020.\(^12\)

2.10 The MCA sees ‘major opportunities’ for investment between the two countries.\(^13\) It also stresses that PAFTA will assist the delivery of mining services by Australia’s world class mining equipment, technology and services (METS) firms:

Under the free trade agreement, the Australian Government has secured specific services market access commitments from Peru that will create new opportunities for mining and related services. Peru has agreed to provide

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\(^9\) Australian Sugar Industry Alliance, *Submission 8*.  
\(^10\) Mr Andrew Jory, Assistant Secretary, Department of Foreign Affairs and Trade (DFAT), Office of Trade Negotiations, *Committee Hansard*, Canberra, 7 May 2018, p. 17.  
\(^11\) NIA, para 6.  
\(^12\) MCA, *Submission 5*, p. 9.  
\(^13\) MCA, *Submission 5*, p. 5.
market access with no limitations or conditions for Australian businesses providing services related to mining.\textsuperscript{14}

2.11 Further, the MCA lists a range of other services that will benefit from these provisions that are directly relevant to mining: engineering services, research and development services for natural sciences, technical testing and analysis services, scientific and technical consulting services, consulting services relating to construction and environmental services.\textsuperscript{15}

### Reasons for Australia to take the treaty action

2.12 The Regulation Impact Statement (RIS) explains that Australia’s trading relationship with Peru is currently governed by Peru’s obligations under the WTO Agreement. Australia’s exports of beef, sheep meat, horticulture, wheat, barley, rice, canola, sugar and wine are effectively shut out of the Peruvian market because of high tariff barriers. Sugar, dairy, rice and corn are subject to Peru’s price band system, which can result in applied tariffs of up to 29 per cent. There are also tariffs of up to 11 per cent on beef, and up to 9 per cent on sheep meat, almonds, vegetables and wine.\textsuperscript{16}

2.13 Further, Peru’s market access commitments in relation to services are as agreed under the WTO GATS. These commitments do not include services in sectors of commercial interest to Australia, including telecommunications, financial services, professional services, energy and mining-related services, environmental services, construction services, and transport services.\textsuperscript{17}

2.14 The RIS considers that Australian investment is the most important feature in Australia’s commercial ties with Peru. Australia’s commercial presence in Peru has increased significantly with nearly 90 Australian companies now represented in Peru. The RIS estimates that Australian investment in Peru to be around $5 billion. Australia is the fourth largest investor in Peru’s mining and energy sector. Australia’s investment relationship with Peru remains governed by a 1995 bilateral investment treaty. The RIS explains that, while this older treaty provides protections for Australian investors, it does not

\textsuperscript{14} MCA, \textit{Submission 5}, p. 9.

\textsuperscript{15} MCA, \textit{Submission 5}, p. 9.


\textsuperscript{17} RIS, para 6.
include the more effective, modern safeguards aimed at better protecting Australia’s right to regulate in the public interest. Nor does it contain procedural safeguards regarding investor-state dispute settlement. The RIS claims that these safeguards provide greater legal certainty and reduce the risk of investors bringing claims against the government for regulations designed for legitimate public policy purposes.\textsuperscript{18}

2.15 The RIS points out that a number of Australia’s competitors, including the United States (US), Canada, European Union (EU), and Singapore, have Free Trade Agreements (FTAs) with Peru. As a result Australian exporters face additional barriers including tariffs, restrictions on the sale of services, additional red tape, and barriers on temporary entry for business people. The RIS considers that this places Australian exporters of goods and services at a significant disadvantage to their competitors.\textsuperscript{19}

2.16 The Australian Government considered that action is required to address the constraints on Australian trade with Peru and concluded that a bilateral FTA was the most effective solution.\textsuperscript{20} The RIS maintains that PAFTA provides unprecedented market access, providing new opportunities for Australian businesses and making Australian exporters more competitive in the Peruvian market. The RIS states that it is in Australia’s interest to secure a preferential advantage in the Peruvian market as soon as possible to enable Australia to keep pace with competitors, many of which have already negotiated FTAs with Peru.\textsuperscript{21}

2.17 Submitters concurred, stressing the lack of a level playing field as a major concern and identifying PAFTA as a significant step in addressing this issue. The National Farmers’ Federation (NFF) indicated the connection between Australia’s small share of the lucrative Peruvian market and competitive disadvantage:

\begin{quote}
In 2016, Peru imported $6 billion of agricultural goods; however, only $6.7 million of this came from Australia, due partly to preferential access for our competitors including the United States, Canada and the European Union.\textsuperscript{22}
\end{quote}

2.18 Likewise, the Australian dairy industry made the same link:

\textsuperscript{18} RIS, para 7.
\textsuperscript{19} RIS, para 8.
\textsuperscript{20} RIS, paragraphs 10–16.
\textsuperscript{21} RIS, para 9.
\textsuperscript{22} NFF, Submission 3, p. 2.
Peru is currently a small market for Australian dairy. In 2017 Australia exported 118 tonnes of dairy products at a value of $USD529k. This is predominantly due to larger supplying nations—Chile, European Union and United States, being more price competitive because of having bilateral agreements in place.\(^{23}\)

**Obligations**

2.19 PAFTA consists of 29 Chapters with associated Annexes. According to the NIA, PAFTA is consistent with Australia’s other international agreements, including in the World Trade Organization. **Chapter 1 (Initial Provisions and General Definitions)** provides that the PAFTA will coexist with Parties’ rights and obligations in other agreements to which they are also a party. The NIA claims that the obligations in PAFTA align with those made by Australia to other FTA partners. Key obligations are outlined below.\(^{24}\)

**Goods**

2.20 Upon entry into force of PAFTA, Australia is required to eliminate or reduce specified tariffs and non-tariff barriers, or restrictive policies, on imports of goods from Peru. These obligations are contained in **Chapter 2 (National Treatment and Market Access for Goods)** and associated annexes. In order to benefit from preferential rates, goods must originate in Peru. The criteria for determining origin are contained in **Chapter 3 (Rules of Origin and Origin Procedures)** and associated annexes. The phased elimination of these tariffs aligns with existing FTAs.\(^{25}\)

2.21 The provisions contained in PAFTA’s goods related chapters (Chapters 2–7), reaffirm existing rights and obligations under the relevant WTO Agreements. In addition, PAFTA will contain provisions included in more modern FTAs that enhance transparency and cooperation. In particular:

- committees on sanitary and phytosanitary measures and technical barriers to trade;
- commitments on transparency;
- allowing for self-certification of rules of origin; and


\(^{24}\) NIA, para 25.

\(^{25}\) NIA, para 26.
- disciplines specific to wine and spirits labelling and organic products to promote greater regulatory coherence across the region.\textsuperscript{26}

\textit{Services and investment}

2.22 Under \textit{Chapter 8 (Investment)}, \textit{Chapter 9 (Cross-Border Trade in Services)} and \textit{Chapter 10 (Financial Services)}, each Party is required to grant market access and non-discriminatory treatment to investments and services from the other Party. That is, services suppliers and investors from Peru must be treated no less favourably than like providers from Australia or other countries on the basis of nationality. Parties are also prevented from requiring investors of the other Party to appoint people of a particular nationality to senior management positions (the ‘senior management and board of directors’ obligation). The obligations will apply unless otherwise specified in the non-conforming measures annexes to the proposed Agreement (Annexes I, II and III). The obligations and non-conforming measures of PAFTA are generally consistent with those of the TPP-11.\textsuperscript{27}

2.23 \textit{Chapter 8 (Investment)} contains a set of modern rules governing the treatment of investors and their investments, balanced with safeguards to preserve the right of the Government to continue regulating in the public interest. It also contains an ISDS mechanism which provides investors with access to an independent arbitral tribunal to resolve disputes for breaches of these investment rules. The ISDS mechanism contains explicit safeguards protecting the Australian Government’s right to regulate in the public interest.\textsuperscript{28}

\textit{Temporary entry for business persons}

2.24 \textit{Chapter 11 (Temporary Entry for Business Persons)} regulates the temporary entry of business persons. It does not create any obligations in relation to citizenship, residence or employment on a permanent basis. Under the Chapter, each Party makes specific commitments guaranteeing access for categories of business persons who, provided they fulfil visa eligibility requirements, will be permitted to enter and temporarily stay in a Party. In PAFTA, Australia has reaffirmed existing commitments under the World Trade Organization to waive labour market testing for several

\textsuperscript{26} NIA, para 27.

\textsuperscript{27} NIA, para 28.

\textsuperscript{28} NIA, para 29.
categories of Peruvian temporary skilled workers, including for intra-company transferees and independent executives.\textsuperscript{29}

\textit{Telecommunications and electronic commerce}

2.25 \textbf{Chapter 12 (Telecommunications) and Chapter 13 (Electronic Commerce)} include obligations consistent with those of the 2017 amendments to the Singapore–Australia Free Trade Agreement and TPP-11. Key obligations include:

- ensure telecommunication companies with a dominant market position, in Peru or Australia, provide telecommunications suppliers from the other country with access to services and key infrastructure on reasonable terms and conditions;
- access to public telecommunication services on a reasonable and non-discriminatory basis;
- prohibition on requiring a service supplier or investor to use or build local data centres in order to conduct business.\textsuperscript{30}

2.26 The right of governments to impose appropriate and proportionate restrictions on the cross-border transfer of information in order to achieve legitimate public policy objectives is preserved.\textsuperscript{31}

\textit{Government procurement}

2.27 \textbf{Chapter 14 (Government Procurement)} includes obligations broadly consistent with those of the TPP-11. Peru’s ability to tender for government procurement contracts through PAFTA are the same as those provided to it under the TPP-11. The NIA notes that Australia has maintained its standard exceptions in sensitive areas, such as Indigenous procurement, defence, and health services.\textsuperscript{32}

\textit{Termination of bilateral investment treaty}

2.28 During the course of PAFTA negotiations, Australia and Peru agreed to terminate the IPPA on the date of entry into force of PAFTA. The NIA states

\begin{itemize}
\item \textsuperscript{29} NIA, para 35.
\item \textsuperscript{30} NIA, para 30.
\item \textsuperscript{31} NIA, para 31.
\item \textsuperscript{32} NIA, para 34.
\end{itemize}
that the IPPA is an older style bilateral investment treaty that contains an ISDS mechanism without the explicit safeguards of modern agreements.\textsuperscript{33}

2.29 The NIA notes that the IPPA will continue to apply for a period of five years from the date of termination to any investment which was made before the entry into force of PAFTA with respect to anything that took place before the date of termination. However, an investor may only submit an ISDS claim under the IPPA within three years of the date of termination.\textsuperscript{34}

Implementation

2.30 According to the NIA, the following regulatory and legislative changes will be required to implement PAFTA:

- changes to the \textit{Customs Tariff Act 1995} and the \textit{Customs Act 1901} to incorporate preferential tariff rates and associated rules of origin for Peruvian goods; and
- changes to the \textit{Foreign Acquisitions and Takeover Regulations 2015} to implement the commitment to a higher threshold for screening by the Foreign Investment Review Board.\textsuperscript{35}

2.31 The RIS notes that both Australia and Peru are aiming for entry into force before the end of 2018.\textsuperscript{36}

Costs

2.32 The NIA states that the expected cost of PAFTA is negligible. PAFTA will be implemented through existing resources and the NIA estimates that loss of revenue from tariff elimination by Australia from PAFTA is negligible. The estimates are based on existing trade between Peru and Australia, and do not take into account any changes to Australia’s trade and investment relationship that may result from the implementation of PAFTA. Nor do these estimates take into account any reductions in tariff revenue as a result of Australia’s commitments under the TPP-11.\textsuperscript{37}

Issues

\textsuperscript{33} NIA, para 32.
\textsuperscript{34} NIA, para 33.
\textsuperscript{35} NIA, para 36.
\textsuperscript{36} RIS, para 45.
\textsuperscript{37} NIA, para 37.
Evidence to the Committee identified four main areas of concern:

- proliferation of trade agreements covering the same markets;
- inclusion of investor-state-dispute mechanisms;
- movement of people; and
- labelling provisions for wine and spirits.

### Proliferation of trade agreements

PAFTA was negotiated between Australia and Peru after the collapse of the TPP negotiations. The TPP-11, which includes Australia and Peru, is currently before the Joint Standing Committee on Treaties (JSCOT) for consideration. Negotiations have commenced for the Pacific Alliance Free Trade Agreement which also includes both countries.\(^{38}\)

The Committee asked what the differences were between the TPP-11 and PAFTA and whether PAFTA was justified. DFAT explained that PAFTA provides better market access for Australian exporters than the TPP-11:

> ... what we got on goods market access was significantly better than what we were able to achieve in the TPP. In particular, we got quota access for sugar, for dairy, for rice and for sorghum, and that was access that we were not able to achieve under the TPP. For many other products, particularly Australia’s trade priorities, we got much faster phase-outs than we were able to get, so the period of time in which the tariff was eliminated was much faster in Peru compared with the TPP. For example, in the TPP beef cuts going into Peru were phased out within 11 years. In the Peru-Australia FTA they’re phased out within five years. Some of the longer phasing periods that, in particular, applied for Australian exports such as pharmaceuticals and medical devices, faced a range of phase-out periods of six years, 11 years or 16 years. Those products are now being eliminated on entry into force.\(^{39}\)

Submitters raised ongoing concerns over the increasing complexity created by the number of trade agreements Australia is committing to, particularly multiple agreements with the same partner. This ‘noodle bowl’ effect is seen as causing confusion for businesses, particularly small businesses, and considered an impediment to participation.\(^{40}\)

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\(^{39}\) Mr Jory, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 17.

\(^{40}\) Australian Chamber of Commerce and Industry (ACCI), Submission 6.
2.37 DFAT defended the decision to go ahead with both TPP-11 and PAFTA and argued that there are resources available to assist businesses to determine which agreement will best suit their needs:

... traders face a range of applicable standards. Some of those standards come from the WTO system. Many of what we call technical barriers to trade and sanitary or phytosanitary standards are set by the WTO system. There will be tariffs. There will be a rule of origin that is needed to meet that particular tariff if it’s under a free trade agreement. There could be technical standards. And so, essentially, with the system as it is at the moment, either you have a free trade agreement, which can provide an expedited process, or arguably an easier process than some of those WTO processes and one which can still apply or is clarified through a free trade agreement process ... there are many factors that an exporter has to take into account, and there is a range of tools that the government and the department has to try to help exporters navigate those particular questions.41

2.38 The Committee asked how possible inconsistencies between the provisions of the various trade agreements would be reconciled. DFAT explained that, in general, the higher standard applies:

... it’s not unusual that there are these different provisions in different agreements governing trade and, in general terms, the higher standard will apply. For some areas, such as goods trade, the trader can choose. So, when the trader makes a decision to use a particular rule of origin that attaches to a particular treaty in order to get a particular tariff preference, they are, in essence, electing to use that agreement and ... the provisions of that agreement.42

2.39 The Committee pointed out that while PAFTA requires labour market testing for contractual service suppliers, the TPP-11 waives this provision for six countries, including Peru. The Committee queried how Australian businesses would be able to identify which provisions applied to them if they were dealing with Peru. DFAT explained that an Australian business could choose to operate under either of the agreements depending on their own needs, in particular the length of time the contractual service supplier was required:

There are differences between the length-of-stay commitments. The current visa system for contractual service suppliers ... allows for a length of stay for a contractual service supplier of up to four years. The commitment that we took

41 Mr Jory, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 18.
42 Mr Jory, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 23.
in the Peru-Australia Free Trade Agreement for contractual service suppliers was for a stay of two years. And the commitment that ... we took in TPP-11 was for a stay of one year.\textsuperscript{43}

**Investor-state dispute settlement mechanisms**

2.40 Concerns were again raised regarding investor-state dispute settlement (ISDS) mechanisms. The Australian Fair Trade and Investment Network (AFTINET) reiterated its argument that the system has significant flaws and that such mechanisms should not be included in free trade agreements.\textsuperscript{44} AFTINET welcomes the exclusions and carveouts but retains reservations regarding the safeguards included in the PAFTA ISDS provisions.\textsuperscript{45}

2.41 On the other hand, the MCA supports the inclusion of ISDS clauses in PAFTA. The MCA consider that the provisions enhance ‘certainty and predictability around regulatory matters’ for businesses and that the safeguards protect Australia’s and Peru’s ability to implement public policy and regulate in the public interest.\textsuperscript{46} The MCA stressed that the advantages the ISDS mechanism provide for investors in both countries will encourage two-way investment flows:

> These provisions will allow investors of either country to seek mediation and arbitration where they claim the other country’s government has not complied with its commitments under the Investment Chapter. From the point of view of Australian companies considering investing in Peru, the ISDS provisions will mean there is greater certainty that the investment commitments can be enforced — and the same certainty will be provided to Peruvian investors in Australia. In this way ISDS is an important supporting mechanism for the agreement’s substantive investment commitments.\textsuperscript{47}

2.42 DFAT confirmed that the ISDS provisions in PAFTA are confined to commitments in the Investment Chapter and cannot be used in regard to

\textsuperscript{43} Mr Jory, DFAT, *Committee Hansard*, Canberra, 7 May 2018, p. 23. See also Mr Michael Willard, Assistant Secretary, Global Mobility Branch, Immigration, Citizenship and Multicultural Policy Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 7 May 2018, p. 22.

\textsuperscript{44} Australian Fair Trade and Investment Network (AFTINET), *Submission 2*, p. 3.

\textsuperscript{45} AFTINET, *Submission 2*, p. 12–13.

\textsuperscript{46} MCA, *Submission 5*, p. 11.

\textsuperscript{47} MCA, *Submission 5*, p. 12.
any other aspects of PAFTA, including the Financial Services Chapter or the Technical Barriers to Trade Chapter.\textsuperscript{48}

\textit{Movement of people}

2.43 Concerns were raised, during the inquiry into both treaty actions, regarding the provisions for recognition of trade qualifications of foreign workers entering Australia temporarily. DFAT confirmed that the current requirements will not be changed by the Agreement:

Whatever the requirements are for the skills or qualifications of a Peruvian electrician coming to Australia today to be recognised will be exactly what happens when PAFTA enters into force, because there is nothing in the agreement that requires us to change our system in relation to the recognition of those qualifications or skills.\textsuperscript{49}

\textit{Conclusion}

2.44 The Committee recognises the need for the Australian Government to ensure that Australian businesses were not disadvantaged by the collapse of the TPP negotiations, and that the bilateral arrangements agreed to in PAFTA go towards providing certainty and opportunities for Australian businesses in the Peruvian market.

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

2.46 The Committee notes that Australia and Peru have agreed to terminate the IPPA on the date of entry into force of PAFTA and the conditions of that termination. The Committee supports the termination but, as it will happen

\textsuperscript{48} Mr Paul Andre Schofield, Director, Investment and Services Law Section, Department of Foreign Affairs and Trade (DFAT), \textit{Committee Hansard}, Canberra, 7 May 2018, p. 20; Department of Foreign Affairs and Trade (DFAT), \textit{Submission 10}.

\textsuperscript{49} Mr Todd Dias, Assistant Director, FTA Services Branch, Department of Foreign Affairs and Trade (DFAT), \textit{Committee Hansard}, Canberra, 7 May 2018, p. 19.
automatically when PAFTA comes into effect, has not made any recommendation regarding the IPPA.

2.47 The Committee supports PAFTA and recommends that binding treaty action be taken.

Recommendation 1

2.48 The Committee supports the *Free Trade Agreement between Australia and the Republic of Peru* (PAFTA) and recommends that binding treaty action be taken.
3. EU Framework Agreement

*Framework Agreement Between Australia, of the one part and the European Union and its Member States, of the other part*

Introduction

3.1 This Chapter reviews the *Framework Agreement between Australia, of the one part, and the European Union and its Member States, of the other part* (the EU Framework).

3.2 The Agreement was signed at Manila on 7 August 2017, and tabled in the Parliament on 26 March 2018.

Background

3.3 According to the National Interest Analysis (NIA), the Agreement will formalise a range of bilateral cooperation and dialogue processes.

3.4 The NIA states that the Agreement will establish a legally-binding framework for cooperation on a broad range of issues of mutual interest, including economic and trade matters, research and innovation, counter-terrorism, development, non-proliferation, human rights, democracy
promotion, climate change and environment, education, information society, digital economy, culture, and justice.¹

3.5 Further, the NIA explains that the Agreement is consistent with Australia’s relationship with most of its other non-EU G20 partners.²

**Reasons for Australia to take the treaty action**

3.6 The NIA claims that the Agreement positions the Australia-EU bilateral relationship for a deeper and stronger partnership to pursue international peace and to promote shared democratic values. The NIA explained that this would be pursued through the following key areas, discussed below.

3.7 The NIA explains that the Agreement provides for joint action in areas such as foreign and security policy, development cooperation, trade and investment, climate change and environment, research, science, innovation and education.³

3.8 Australia has an interest in working with the EU to enhance and improve security, stability, good governance and coordination of development cooperation in the changing strategic landscape in the Indo-Pacific region.⁴

3.9 The NIA states that Australia and the EU have begun work toward the goal of a bilateral Free Trade Agreement (FTA), continuing a shared interest in strengthening economic cooperation and ensuring an effective rules-based international trading system.⁵

3.10 The Agreement would be separate from the FTA, which will have its own ratification process.⁶

3.11 The NIA suggests that strengthened cooperation, including on jointly-funded projects, may help to maximise the long-term development impact of Australia’s aid investments.⁷

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² NIA, para 4.

³ NIA, para 6.

⁴ NIA, para 7.

⁵ NIA, para 8.

⁶ NIA, para 9.

⁷ NIA, para 10.
3.12 The evolving global research environment provides opportunities for deeper forms of collaboration between Australian and European research institutions. Australia is already the EU’s fourth highest non-EU collaborator in research and innovation.\(^8\)

3.13 Deeper research links may provide opportunities for new forms of collaboration between Australian and European research institutions, and may include international education experiences for students.\(^9\)

3.14 People-level connections should remain strong, supporting tourism and working holiday or work and holiday visa arrangements.\(^10\)

**Obligations**

3.15 The NIA explains that the Framework Agreement has three purposes, as set out in **Article 1**:  
- to establish a strengthened partnership between the Parties;  
- to provide a framework to facilitate and promote cooperation across a broad range of areas of mutual interest; and  
- to enhance cooperation in order to develop solutions to regional and global challenges.\(^11\)

3.16 The key obligations that the Agreement covers are outlined below.

**Foreign Policy and Security Matters**

3.17 **Articles 3–11** of the Agreement require the Parties to promote:

- development of the bilateral relationship;  
- democratic, human rights and rule of law principles;  
- regular political dialogue between leaders, ministers and Parliaments; and  
- regular consultation between senior officials.\(^12\)

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\(^8\) NIA, para 11.  
\(^9\) NIA, para 12.  
\(^10\) NIA, para 13.  
\(^11\) NIA, para 14.  
\(^12\) NIA, paras 16–18.
3.18 **Article 5** reaffirms Parties’ commitment to promoting peace and stability, and establishment of crisis management operations. The Agreement requires Parties to:

- implement existing obligations under disarmament, non-proliferation and other relevant treaties;
- implement their existing obligations dealing with small arms and light weapons;
- cooperate in promoting the aims and objectives of the Rome Statute;
- cooperate bilaterally and internationally in the fight against terrorists; and
- cooperate in regional and international organisations.\(^{13}\)

**Global Development and Humanitarian Aid**

3.19 **Articles 12–13** of the Agreement require Parties to strengthen coordination on development assistance to ensure that development activities have greater impact, reach and influence.\(^{14}\)

**Economic and Trade Matters**

3.20 **Articles 14–31** of the Agreement deal with trade-related provisions of a general nature, including:

- requirement for dialogue including an annual trade policy dialogue;
- commitment to promoting a positive environment for bilateral trade and investment; and
- requirement to inform each other where possible of regulatory issues with a potential impact on trade and investment.\(^{15}\)

3.21 The Agreement will feature obligations on specific issues such as investment, competition policy, financial services, and sanitary, phytosanitary and animal welfare issues. The Agreement will also support Australia’s commitment to working on joint initiatives such as commitment to a digital economy, small parcel/mail item level reporting, and risk management and air cargo security.\(^{16}\)

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\(^{13}\) NIA, paras 19-23.

\(^{14}\) NIA, paras 24-25.

\(^{15}\) NIA, para 26.

\(^{16}\) NIA, paras 27–30.
Justice, Freedom and Security

3.22 **Articles 32–40** of the Agreement require:

- strengthening of private international law and legal and judicial cooperation in civil and commercial matters;
- cooperation on mutual legal assistance in criminal matters; and
- cooperation on law enforcement, combating terrorism, transnational organised crime and corruption, combating illicit drugs, combating cybercrime, combating money laundering and the financing of terrorism, migration and asylum, and the protection of personal data.\(^{17}\)

3.23 The Agreement provides for consular protection for the Parties where permanent representation is not available.\(^{18}\)

Research, Innovation and the Information Society

3.24 **Articles 41–42** of the Agreement require Parties to enhance cooperation in the areas of science, research and innovation in support of, or complementary to, the treaty between the EC and Australia relating to scientific and technical cooperation, and the exchange of views on respective policies on information and communication technologies.\(^{19}\)

Education and Culture

3.25 **Articles 43–44** of the Agreement require the promotion of closer cooperation between Parties in the education, cultural and creative sectors.\(^{20}\)

Sustainable Development, Energy and Transport

3.26 **Articles 45–54** of the Agreement require the Parties to:

- strengthen cooperation on the protection of the environment and mainstreaming environmental considerations;
- enhance cooperation in the field of climate change;
- maintain regular dialogue and cooperation at political, policy and technical levels;

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\(^{17}\) NIA, paras 31–37, 39.  
\(^{18}\) NIA, para 38.  
\(^{19}\) NIA, paras 40–43.  
\(^{20}\) NIA, paras 44–45.
• meet obligations in respect of energy, transport, agriculture, sustainable forest management and employment and social affairs;
• strengthen dialogue and cooperation on issues of common interest relating to fisheries and maritime affairs; and
• encourage mutual cooperation, exchange of information and sharing of policy experiences in the fields of health and effective management of cross-border health problems.21

**Joint Committee**

3.27 [Article 56](#) of the Agreement obliges Australia and the EU to establish a Joint Committee which will facilitate the implementation and further the general aims of the Agreement, as well as maintain overall coherence in Australia–EU relations. The Joint Committee will be co-chaired by both Parties, and may establish sub-committees and working groups to progress specific issues.22

**Implementation**

3.28 According to the NIA, no new Australian legislation or regulations would be required to implement the Agreement. The NIA also states that any necessary technical, logistic or administrative arrangements required to implement the Agreement will be concluded on a case-by-case basis between Australian and EU competent authorities.23

**Costs**

3.29 The NIA states that a Regulation Impact Statement is not required.

**Issues**

**Need for the agreement**

3.30 The Committee questioned representatives of the Department of Foreign Affairs and Trade (DFAT) on the need for what is essentially an aspirational framework agreement, and how the Agreement was conceived.

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21 NIA, paras 46–50.

22 NIA, para 51.

23 NIA, para 57.
3.31 DFAT explained that Australia had a non-binding Memorandum of Understanding status arrangement with the EU which covered aspects of bilateral cooperation that extended as far back as 2008.24

3.32 DFAT further explained how the Agreement was developed and why it is necessary:

My understanding is that in 2010 it was agreed, between then Prime Minister Gillard and her counterpart on the EU side, that we might seek to elevate that to a treaty level or a legally binding agreement, and negotiations began soon after that and continued till 2017, when the agreement was signed. In terms of why we need it, it is something that the EU does with many of its core bilateral partners [such as] Japan, Korea, Indonesia [and] Canada.25

3.33 DFAT also explained that the Agreement binds Australia to an ongoing commitment to cooperate in the areas outlined in the Agreement, however it does not necessarily bind Australia to specific activities.26

Proposed FTA

3.34 During the examination of the treaty action there appeared to be some confusion between the evidence provided in the NIA and that provided by the public hearing witnesses concerning the exact relationship between the Agreement and the development of an FTA.

3.35 The NIA stated that Australia and the EU have begun work toward the goal of a bilateral FTA, with Australia advocating for the launch of negotiations in 2018. The NIA explained that the Agreement would complement a future FTA.27

3.36 The NIA also explained that the Agreement would be separate from an FTA, which will have its own ratification process.28

3.37 Further, Article 15(5) of the Agreement makes clear that:

24 Ms Lucienne Manton, Assistant Secretary, EU and Western Europe Branch, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 7 May 2018, p. 26.
27 NIA, para 8.
28 NIA, para 9.
... the Agreement neither requires nor precludes the negotiation and conclusion of an FTA between the Parties in the future to complement and extend the economic provisions in this Agreement.29

3.38 The Committee sought clarification on the relationship between the Agreement and an FTA. DFAT discussed the relationship:

There’s clearly a reference in the framework agreement to the free trade agreement, but they’re going down separate tracks with separate processes and with separate mandates.30

3.39 Asked whether the Agreement will guide or complement an FTA process, DFAT explained:

I think it would complement it ... It's hard for me to see how it would guide it other than in the most general way, since it says that the agreement neither requires nor precludes the negotiation and conclusion of an FTA. But certainly it complements it in the sense that the references to open trade and investment throughout the framework agreement are ones that we would seek to pick up in the free trade agreement.31

Joint Committee

3.40 The Committee discussed with DFAT the establishment of a Joint Committee under the Agreement, its purpose and composition.

3.41 DFAT briefly summarised the proposed Joint Committee’s remit:

We are looking for the joint committee to monitor the development of the bilateral relationship comprehensively and to set priorities and to determine plans of action in relation to the purpose of the agreement. It will be an opportunity for all portfolios to bring together their current priorities and to have those considered at a high level.32

3.42 When asked about the composition of the Joint Committee, DFAT explained that the establishment and composition of the proposed committee had not yet been agreed, but did clarify that it is likely to involve senior government

29 NIA, para 9.
30 Ms Alison Burrows, Special Negotiator EU/FTA, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 7 May 2018, p. 28.
31 Ms Burrows, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 28.
32 Ms Manton, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 29.
officials at a minimum. DFAT anticipates that the Joint Committee would meet once a year.33

Conclusion

3.43 The Committee recognises the need for this aspirational Agreement to reaffirm commitment to high-level political dialogue, shared values and common principles that underpin the bilateral relationship between Australia and the European Union.

3.44 The Committee is satisfied that the Agreement will complement, rather than guide or direct, any future FTA negotiations.

3.45 The Committee specifically recognises that, as per Article 15(5) of the Agreement, any future FTA negotiated to complement and extend the provisions in the Agreement is neither required nor precluded.

3.46 The Committee notes concerns raised in submissions, however the views on issues presented are not under direct consideration in this inquiry. If a Free Trade Agreement is reached in the future, the Committee will conduct a thorough inquiry of its terms.

3.47 The Committee supports the Agreement and recommends that binding treaty action be taken.

Recommendation 2

3.48 The Committee supports the Framework Agreement between Australia, of the one part, and the European Union and its Member States, of the other part and recommends that binding treaty action be taken.

33 Ms Manton, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 29.
4. Timor Treaty-Maritime Boundaries

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

Introduction

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

Background

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

¹ Professor Donald R. Rothwell, Submission 8, para 2.
area in order to establish a ‘stable environment for petroleum exploration and exploitation’ without prejudicing either country’s maritime boundary claims.\(^2\) The Timor Gap Treaty\(^3\) was an interim measure to allow development of the oil and gas reserves in the area:

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

4.3 When Timor-Leste gained its independence in 2002, the Timor Sea Treaty\(^5\) was signed, implementing a similar joint development scheme between Australia and the new nation as that in the Timor Gap Treaty.\(^6\) In this case the split was 90/10 in favour of Timor-Leste. Annex E of the Timor Sea Treaty provided for the unitisation of two of the oil and gas deposits, Sunrise and Troubadour, which became known as the ‘Greater Sunrise’ field.

4.4 While these two agreements dealt with ongoing development of the petroleum reserves in the area, attempts to come to agreement over the permanent maritime boundary failed. Instead the two parties agreed on a division of the proceeds from the new Greater Sunrise field and a 50-year moratorium on the maritime boundaries.\(^7\) As a result three treaties governed maritime arrangements in the Timor Sea without establishing any permanent maritime boundary between Australia and Timor-Leste:

- *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields* (International Unitisation Agreement) signed in 2003; and

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\(^2\) Robert J. King, *Submission 6*, p. 29.

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

\(^4\) Professor Donald R. Rothwell, *Submission 8*, para 5.

\(^5\) *Timor Sea Treaty between the Government of East Timor and the Government of Australia*.

\(^6\) Professor Donald R. Rothwell, *Submission 8*, para 6.

\(^7\) Robert J. King, *Submission 6*, p. 65.
- Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS) signed in 2006.

**Conciliation process**

4.5 Timor-Leste was not satisfied with the outcome of these arrangements and after repeated attempts to renegotiate the Timor Sea Treaty failed, it commenced proceedings against Australia under the United Nations Convention on the Law of the Sea (UNCLOS) in April 2016. This was the first time that the compulsory conciliation process had been invoked. A Conciliation Commission was established consisting of five members who met from July 2016 to September 2017, bringing down its report on 9 May 2018.

4.6 Australia and Timor-Leste took opposing views on the delimitation of any proposed maritime boundary. Timor-Leste supported the principle of ‘equidistance’ under which a median line should be drawn between the two countries. Australia favoured principals of ‘natural prolongation’ which take into consideration geographic and geomorphic conditions, as defined by UNCLOS:

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

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

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8 Professor Donald R. Rothwell, Submission 8, para 8.
11 Report and Recommendations of the Compulsory Conciliation Commission, p. 68.
13 Robert J. King, Submission 6, pp. 86–87; Professor Donald R. Rothwell, Submission 8, para 8; Report and Recommendations of the Compulsory Conciliation Commission, pp. 28–29.

The treaty under review in this Chapter, the Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea, was subsequently agreed to and signed in March 2018. It replaces the Timor Sea Treaty and the International Unitisation Agreement.\footnote{NIA, para 3.}

The outcome is seen as a ‘vindication of the [UNCLOS] process’ and setting a precedent for conciliation to ‘be utilised to settle other law of the sea disputes’.\footnote{Professor Donald R. Rothwell, Submission 8, para 8.} At the time of presentation of the treaty in the Parliament, the Hon. Julie Bishop, MP, Minister for Foreign Affairs, called it a ‘landmark for international law and the rules based order’.\footnote{Hon. Julie Bishop, MP, Minister for Foreign Affairs, House of Representatives Hansard, 26 March 2018, p. 70.}

The Agreement establishes permanent maritime boundaries between Australia and Timor-Leste in the Timor Sea. It also establishes the Greater Sunrise Special Regime for the joint development, exploitation and management of the Sunrise and Troubadour (Greater Sunrise) petroleum deposits.

Figure 4.1, adapted from the Conciliation Commission Report, depicts the maritime boundaries established by the Agreement. The western and eastern lateral boundaries, running from point TA-1 to TA-5 and TA-10 to TA-13 respectively, are continental shelf (seabed) boundaries only. The water column boundaries in these areas are subject to delimitation between Timor-Leste and Indonesia.\footnote{NIA, para 27.}

The southern boundary, running from TA-5 to TA-10, is both a continental shelf and exclusive economic zone (water column) boundary. The western segment of the southern boundary runs above the median line between
Australia and Timor-Leste. The eastern segment of the southern boundary runs along the median line between Australia and Timor-Leste.\textsuperscript{19}

**Figure 4.1** Permanent maritime boundary between Australia and Timor-Leste

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

\textsuperscript{19} NIA, para 28.
Reasons for Australia to take the treaty action

*Permanent maritime boundaries*

4.14 The permanent maritime boundaries established by the Agreement are designed to allay the longstanding concerns of both Australia and Timor-Leste. The NIA states that, while the Treaty was negotiated consistent with Articles 74(1) and 83(1) of UNCLOS, the settlement is based on a ‘mutual accommodation between the Parties without prejudice to their respective legal positions’. It represents a negotiated compromise which, the NIA claims, both countries, and the Conciliation Commission, consider is fair and balanced.\(^{20}\)

4.15 Questioned on the reception of the result by Australia and Timor-Leste, the Department of Foreign Affairs and Trade (DFAT) acknowledged that there were some reservations but overall, both sides were satisfied with the outcome:

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

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

4.16 The NIA expects permanent boundaries to provide economic benefit to both Parties and allow for continued development of natural resources in the Timor-Sea by providing certainty and stability for companies with investments in the Timor Sea.\(^{22}\)

4.17 The Agreement recognises that both Australia and Timor-Leste may exercise sovereign rights in respect of the Special Regime Area encompassing the

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\(^{20}\) NIA, para 10.

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

\(^{22}\) NIA, para 15.
Greater Sunrise gas fields. The Agreement establishes the Greater Sunrise Special Regime for the joint development, exploitation and management of the Greater Sunrise fields for the benefit of both Parties.23

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

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

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

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

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

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

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23 NIA, para 16.
24 Mr Larsen, DFAT, Committee Hansard, Canberra, 7 May 2018, pp. 33–34.
25 NIA, para 17.
26 JSCOT, Report 168, p. 15.
27 Mr Larsen, DFAT, Committee Hansard, Canberra, 7 May 2018, p. 34.
of the Greater Sunrise fields. The Parties are expected to build on the work done by the Conciliation Commission, including its engagement with the Sunrise Joint Venture, to find an outcome that is commercially viable and delivers substantial benefits to Timor-Leste.28

4.22 The Agreement includes transitional arrangements that are expected to provide certainty for affected companies. This is consistent with Australia’s obligations under the Timor Sea Treaty and International Unitisation Agreement to provide equivalent conditions and terms and reflects both Parties’ interest in ensuring that existing operations continue with minimal impact.29

4.23 DFAT stressed the importance of the transitional arrangements particularly to existing commercial interests operating in the area:

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

Supporting Timor-Leste’s economic development

4.24 The NIA argues that a stable and prosperous Timor-Leste is in Australia’s national interest. Australia is Timor-Leste’s largest partner in development and security. The Australian Government will provide an estimated $96.1 million in total development aid to Timor-Leste in 2017-18.31

4.25 The NIA notes that despite the progress since independence, the country’s economic challenges are considerable. Timor-Leste’s economy is oil-dependent with petroleum revenues accounting for 70 per cent of GDP and almost 90 per cent of total government revenue between 2010 and 2015. The

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28 NIA, para 18.
29 NIA, para 19.
30 Ms Lisa Scholfield, Acting Head of Resources Division, Department of Industry, Innovation and Science (DIIS), Committee Hansard, 7 May 2018, p. 39.
31 NIA, para 20.
sole producing petroleum field that Timor-Leste currently derives its revenue from, Bayu-Undan, is nearing the end of its producing life.\textsuperscript{32}

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

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

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

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

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

\textsuperscript{32} NIA, para 22.

\textsuperscript{33} NIA, para 23.

\textsuperscript{34} La’o Hamutuk, \textit{Submission 3}, p. 3.

\textsuperscript{35} Mr Jeremy Bruer, Assistant Secretary, South-East Asia Maritime Branch, South-east Asia Division, DFAT, \textit{Committee Hansard}, 7 May 2018, p. 36.
4.29 The NIA expects the development of the Greater Sunrise fields to result in substantial additional revenue to Timor-Leste. According to Professor Rothwell, the Greater Sunrise field has been ‘valued at between $AU40-50 billion’ and it could ‘yield revenue in the vicinity of $US8-10 billion’. The NIA notes that the exact benefit to Timor-Leste and Australia will depend on a range of factors including the economics of the project and prevailing market prices for oil and gas.

4.30 Submitters to the inquiry raised the question of Australia paying compensation to Timor-Leste for the revenue Australia previously gained from the Timor Sea oil and gas fields now within Timor-Leste maritime boundaries. Article 10 of the Agreement specifically states that ‘neither Party shall have a claim for compensation with respect to Petroleum Activities conducted in the Timor Sea’.

4.31 However, submitters suggest that this provision does not prevent Australia from voluntarily compensating Timor-Leste. Submitters claim that Australia’s conduct in this regard has damaged its international reputation and that that damage will remain if Australia does not take steps to redress this issue.

4.32 DFAT reiterated that the treaty does not provide for compensation and refuted any suggestion that ‘there was anything wrongful with the previous arrangements’.

4.33 The Committee asked DFAT for any information on the economic value of the extractions under the prior treaty arrangements and DFAT provided the following figures:

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

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36 Professor Donald R. Rothwell, Submission 8, paragraphs 1 and 26.
37 NIA, para 24.
38 Mr Ian Melrose, Submission 2; La’o Hamutuk, Submission 3; Uniting Church of Australia, Submission 11.
39 Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea, Article 10.
40 La’o Hamutuk, Submission 3, pp. 3–4; Timor Sea Justice Campaign, Submission 5, p. 2; Uniting Church of Australia, Submission 11, p. 3.
41 Canberra Friends of Dili, Submission 4; Timor Sea Justice Forum NSW, Submission 7, p. 3.
42 Mr Larsen, DFAT, Committee Hansard, 7 May 2018, p. 34.
is approximately US$13.8 billion. Of this approximately US$12.4 billion of that has gone to Timor-Leste, with US$1.4 billion going to Australia. The petroleum revenues are from the Elang Kakatua and Kakatua North oil fields; the Litan oil field and the Bayu-Undan gas-condensate field.43

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

Supporting Australia’s existing maritime boundaries

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

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

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

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

43 Department of Foreign Affairs and Trade (DFAT), Submission 12.
44 Mr Ian Melrose, Submission 2, para 2.2.
45 NIA, para 25.
46 Professor Donald R. Rothwell, Submission 8, para 27; Professor A.L. Serdy, Submission 1, para 6.
47 Professor Donald R. Rothwell, Submission 8, para 27.
informed the Committee that Indonesia had suggested that ‘we have technical discussions at some point in relation to the Perth treaty’.48

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

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

Obligations

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

**Permanent maritime boundaries**

4.40 **Articles 2 to 5** establish maritime boundaries between Australia and Timor-Leste in the Timor Sea, which are depicted for illustrative purposes at Annex A of the Treaty (see Figure 4.4).50

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

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


50 NIA, para 26.

51 NIA, para 29.
4.42 Article 6 provides that the Treaty does not prejudice negotiations between Timor-Leste and Indonesia on their maritime boundaries in the Timor Sea. It explicitly protects the rights and freedoms of other states under UNCLOS.\(^{52}\)

4.43 Article 8 requires Australia and Timor-Leste to work to reach agreement on how if any resources that straddle the new continental shelf boundary will be exploited and shared.\(^{53}\)

4.44 Article 11 affirms the permanence of the Treaty and the maritime boundaries it creates. It also makes clear the interlinked nature of all elements of the Treaty. This reflects the fact that the boundaries and other elements of the treaty were part of a holistic and comprehensive package, facilitated by the Conciliation Commission.\(^{54}\)

**Greater Sunrise Special Regime**

4.45 Article 7 establishes the Greater Sunrise Special Regime (Special Regime). Within this area, Australia and Timor-Leste jointly exercise their rights as coastal states pursuant to article 77 of UNCLOS, until the Special Regime ceases to be in force. After the Special Regime ceases to be in force, the Parties shall individually exercise their rights as coastal states on the basis of the continental shelf boundary established in article 3 of the Treaty. In other words, the continental shelf boundary in the Special Regime Area only becomes relevant after the Special Regime ceases to be in force.\(^{55}\)

4.46 The Parties decided that the Greater Sunrise Special Regime should continue for the life of the Greater Sunrise fields regardless of the outcome of the delimitation between Timor-Leste and Indonesia, and that this was part of the overall fair and balanced outcome. This is reflected in article 7(6) and in the interlinked nature of the Agreement as described in article 11.\(^{56}\)

4.47 Annex B of the Treaty establishes a governance and regulatory structure and details the exercise of jurisdiction in the Special Regime Area over matters including customs, immigration, quarantine, security and crime.\(^{57}\)

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\(^{52}\) NIA, para 30.

\(^{53}\) NIA, para 31.

\(^{54}\) NIA, para 32.

\(^{55}\) NIA, para 33.

\(^{56}\) NIA, para 34.

\(^{57}\) NIA, para 35.
4.48 Article 2 of Annex B specifies that Australia and Timor-Leste both have title to petroleum produced in the area, with upstream government revenue shared either 30:70 or 20:80 in Timor-Leste’s favour, depending on whether the Greater Sunrise fields are developed by means of a pipeline to an LNG processing plant in Timor-Leste or Australia. This differential was designed to reflect the different distribution of downstream economic benefits which may flow from either option.\(^{58}\)

4.49 Articles 3 and 4 of Annex B confirm that the fiscal regime and new Production Sharing Contract for the Greater Sunrise fields will reflect both Parties’ obligations to provide conditions and terms equivalent to those set out in the International Unitisation Agreement and Timor Sea Treaty.\(^{59}\)

4.50 The Designated Authority, a statutory authority of Timor-Leste, will be the day-to-day regulator in the Special Regime Area. Its powers are set out in article 6 of Annex B.\(^{60}\)

4.51 Under article 7 of Annex B, a Governance Board, comprising representatives from Australia and Timor-Leste, will exercise oversight over ‘strategic matters’, with decisions to be made by consensus. The Regime includes a Dispute Resolution Committee, an independent body, to break deadlocks that arise on the Governance Board, as set out in article 8 of Annex B.\(^{61}\)

4.52 Article 9 of Annex B sets out the process and criteria for approving a Development Plan for the Greater Sunrise fields. Article 14 of Annex B sets out the requirements for a local content plan, which is to be included in the Development Plan, reflecting both Parties’ commitment to ensure substantial benefits flow to Timor-Leste from the development of the Greater Sunrise fields.\(^{62}\)

4.53 Article 10 of Annex B confirms that exclusive jurisdiction over a pipeline from the Special Regime Area will accrue to the Party in whose territory the pipeline lands. This jurisdiction applies both in the Special Regime Area and outside it. There is an obligation on the Party exercising exclusive

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\(^{58}\) NIA, para 36.

\(^{59}\) NIA, para 37.

\(^{60}\) NIA, para 38.

\(^{61}\) NIA, para 39.

\(^{62}\) NIA, para 40.
jurisdiction to cooperate with the Designated Authority to ensure effective management.63

4.54 **Articles 15 to 20** of **Annex B** detail the jurisdictional arrangements which apply in the Special Regime Area.64

4.55 **Article 23** of **Annex B** deals with the duration of the Greater Sunrise Special Regime and confirms that the Special Regime will continue until the Commercial Depletion of the Greater Sunrise fields, as defined in **Article 1** of the Agreement.65

4.56 **Annex C** of the Agreement sets the boundaries of the Special Regime Area. These boundaries are based on the definition of the Unit Area in the International Unitisation Agreement.66

**Relationship of the Agreement to previous agreements and transitional arrangements**

4.57 **Articles 9 and 10** of the Agreement reflect the relationship between the Agreement and previous agreements between Australia and Timor-Leste. These provisions recognise the Agreement builds on the agreements the Parties have had in place for many years and is forward-looking in nature.67

4.58 **Article 9** of the Agreement confirms that the Timor Sea Treaty and the International Unitisation Agreement will terminate when this Treaty comes into force. **Article 10** clarifies that neither Party has a claim for compensation.68

4.59 **Annex D** provides for transitional arrangements for petroleum activities undertaken in the Timor Sea.69

4.60 **Article 1** of **Annex D** provides that Petroleum Activities conducted under the Timor Sea Treaty and International Unitisation Agreement will continue

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63 NIA, para 41.
64 NIA, para 42.
65 NIA, para 43.
66 NIA, para 44.
67 NIA, para 45.
68 NIA, para 46.
69 NIA, para 47.
under conditions or terms equivalent to those in place under those agreements.\textsuperscript{70}

4.61 **Article 1** of **Annex D** provides that Timor-Leste will receive all future upstream revenue derived from Petroleum Activities from the Bayu-Undan Gas Field and Kitan Oil Field. In addition to the general obligation to maintain conditions equivalent, the Parties agreed to grandfather existing arrangements for these fields, recognising they are near to the end of their production life. This includes maintaining the existing fiscal regime for upstream and downstream components for the exploitation of the Bayu-Undan Gas Field (**Article 2**), and other elements as set out in the Exchange of Correspondence on Bayu-Undan and Kitan Transitional Arrangements.\textsuperscript{71}

4.62 **Article 3** of **Annex D** confirms that Australia exercises exclusive jurisdiction over the Bayu-Undan pipeline, including for the purposes of taxation.\textsuperscript{72}

4.63 The Agreement also provides for protection of the rights of the existing titleholder to the Buffalo oil field (under exploration permit WA-523-P), which will transfer to Timorese jurisdiction, as set out in **Article 4** of **Annex D**.\textsuperscript{73}

**Dispute resolution**

4.64 **Article 12** specifies that Australia or Timor-Leste can submit disputes on the interpretation or application of the Agreement to an arbitral tribunal, where the dispute cannot be resolved by negotiation within six months. **Article 12(4)** specifies a number of articles for which disputes cannot be submitted to an arbitral tribunal. These include disputes over the articles establishing permanent maritime boundaries, and disputes which fall within the remit of the Dispute Resolution Committee established under **article 8** of **Annex B**.\textsuperscript{74}

4.65 For five years after entry into force of the Agreement, Australia and Timor-Leste can also jointly submit disputes to members of the Conciliation Commission, if the issue cannot be resolved by negotiation within six months, under **article 12(1)**. This provision acknowledges the unique role played by the Conciliation Commission in facilitating the Agreement. **Annex**

\textsuperscript{70} NIA, para 48.

\textsuperscript{71} NIA, para 49.

\textsuperscript{72} NIA, para 50.

\textsuperscript{73} NIA, para 51.

\textsuperscript{74} NIA, para 52.
E specifies how a dispute can be submitted to an arbitral panel under article 12, as well as the arbitral panel’s constitution, registry, and rules of procedure.75

Implementation

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

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

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

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

Costs

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

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75 NIA, para 53.
76 NIA, para 54.
77 NIA, para 55.
78 NIA, para 56.
79 NIA, para 57.
4.70 According to the NIA, Australia will incur no other additional financial costs through this treaty action. The costs of participating in the governance of the Greater Sunrise Special Regime are expected to be absorbed by DIIS. The NIA states that these costs largely mirror existing arrangements for the Joint Petroleum Development Area.\(^8^0\)

4.71 The Designated Authority responsible for the carrying out the day-to-day regulation and management of petroleum Activities in the Special Regime Area shall be financed from fees collected under the applicable Petroleum Mining Code and the Greater Sunrise Production Sharing Contract.\(^8^1\)

**Future treaty action**

4.72 Under **article 11**, Australia and Timor-Leste can only amend the Agreement by their express agreement to do so.\(^8^2\)

4.73 Adjustments to the continental shelf boundary under **article 3** would not require further treaty action but might require further changes to Australian legislation. **Article 3** specifies when and how adjustments can be made.\(^8^3\)

4.74 Adjustments required to the exclusive economic zone boundary under **article 4** would require further treaty action, subject to Australia’s treaty-making requirements, as well as changes to Australian legislation. Changes to the exclusive economic zone boundary would depend on the outcome of the delimitation between Timor-Leste and Indonesia.\(^8^4\)

4.75 The Agreement requires Australia and Timor-Leste to agree additional arrangements for the Special Regime and to implement transitional arrangements. These arrangements would not require treaty action but may be made binding on the Parties through domestic legislation, executive action, or through contracts with third parties such as the Sunrise Joint Venture. These arrangements would not alter Australia’s obligations under the Agreement, but would provide greater detail on how the obligations would be implemented.

**Conclusion**

\(^8^0\) NIA, para 58.
\(^8^1\) NIA, para 59.
\(^8^2\) NIA, para 61.
\(^8^3\) NIA, para 62.
\(^8^4\) NIA, para 63.
4.76 As noted in its review of the termination of CMATS, the Committee strongly supports the settlement of disputes over maritime boundaries being negotiated bilaterally and in good faith and congratulates both the Australian Government and the Government of Timor-Leste on concluding this treaty.

4.77 The Committee notes that despite the long running controversies surrounding the settlement of a permanent maritime boundary between Australia and Timor-Leste, submitters to this inquiry are overwhelmingly supportive of the outcome of this treaty action.

4.78 The Committee has taken an ongoing interest in the issues raised during this inquiry. After reviewing the termination of CMATS, the Committee requested that it be briefed every six months until such time as a bilateral agreement was reached between Australia and Timor-Leste. It consequently received a private briefing on 29 November 2017.

4.79 The Committee urges the Australian Government to fully support the ongoing development of the transitional arrangements in order to minimise any impact on the companies currently operating in the affected area and hence any detrimental economic impact on either country.

4.80 The Committee supports the Agreement and recommends that binding treaty action be taken.

Recommendation 3

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


5.1 This Chapter reviews the Agreement between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty (the Agreement). The Agreement was tabled in the Parliament on 8 May 2018 and is expected to enter into force by 1 January 2019.

Background
5.2 The Australian Patent Office, a current function of IP Australia, has been an International Authority under the Patent Cooperation Treaty (PCT) since 31 March 1980.¹

5.3 A minor treaty² process was undertaken in October 2017 to enable a 12-month extension of the Agreement between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty (Existing Agreement) as it was due to expire on 31 December 2017. This extension, until 31 December 2018, was agreed to allow sufficient time for the Australian Government to undertake a major treaty process in 2018 on this Agreement. This Agreement renews the Existing Agreement on largely the same terms, subject to the technical changes.³

5.4 The National Interest Analysis (NIA) explains that the Agreement must enter into force by 1 January 2019 to provide for continued operation of the Australian Patent Office as an International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA). The Agreement will continue until 31 December 2027. The NIA states that, if the domestic treaty process is concluded, the Agreement will be signed before 31 December 2018, with the Agreement to enter into force by 1 January 2019.⁴

**Reasons for Australia to take the treaty action**

5.5 The PCT, which facilitates the filing and assessment of a patent application in multiple jurisdictions, provides for the appointment of ISA and IPEA, jointly an International Authority. The PCT provides for the Assembly of the International Patent Cooperation Union, an organ of the World Intellectual Property Organization (WIPO) General Assembly, to appoint a national patent office as an International Authority, subject to an agreement being

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² The Committee reviewed this minor treaty action on 16 October 2017 and reported on it in Report 175: OECD Tax Measures BEPS; International Solar Alliance-Agreement; Air Services-Three Agreements, November 2017.

³ NIA, para 2.

⁴ NIA, para 3.
concluded between the International Bureau of WIPO and the relevant office. In the case of Australia, the agreement is between the Government of Australia and the International Bureau.\(^5\)

5.6 Under the PCT, the Agreement effects the appointment, and provides for the functioning of, the Australian Patent Office as an International Authority, and is necessary to allow IP Australia to be a competent search and examination authority for ‘international applications’ for patents filed from Australia.\(^6\)

5.7 Almost a quarter of IP Australia’s total patent workload comes from its role as an International Authority. IP Australia explained that it processes approximately 30,000 applications annually, of those approximately 3,000 file PCT applications each year.\(^7\)

5.8 According to the NIA, the purpose of the PCT is to simplify and streamline the process of filing for patent protection in several countries via a single international patent application.\(^8\) This serves to avoid having to meet the various requirements that can be found in different jurisdictions. As of April 2018, the PCT has 152 contracting states. IP Australia clarified that the process enables the client to make a single application to start the process but that to obtain an international patent the client must then follow through in each individual country:

> In most cases you would have to file an application with IP Australia. That application would serve as an application in all 152 contracting states to the PCT. In order to actually advance to a patent in any one of those countries … you would have to enter the national phase in that country. So you would need to have, probably, a local representative in that particular country to deal with the patent office in that country.\(^9\)

5.9 The NIA notes that use of the PCT provisions saves time, work and money for any person seeking a patent in a number of countries. The appointment of International Authorities to conduct the required international search and examination functions, avoids unnecessary repetition of this work in each

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\(^5\) NIA, paragraphs 4 and 6.

\(^6\) NIA, para 4.

\(^7\) Dr Benjamin Mitra-Karn, Acting General Manager, IP Australia, *Committee Hansard*, Canberra, 18 June 2018, pp. 3-4.

\(^8\) NIA, para 5.

\(^9\) Mr Les McCaffery, Assistant General Manager, IP Australia, *Committee Hansard*, Canberra, 18 June 2018, p. 3.
country. The NIA suggests this provides significant cost savings to patent applicants. IP Australia confirmed this assessment:

When you file in Australia, we will search and examine on the basis of Australian law and the international system, and that’s generally set out by the TRIPS protocol— the trade related aspects of intellectual property under the WTO. That sets a standard base. Then countries have their own bits and pieces. So we will provide an international search report. You can then take that to all of these offices. Rather than have them re-examine everything, they look at [the] Australian search report and say: ‘That makes sense, yes. We’ll just check that procedure X, which is specific to us, is applied. Yes. Here’s your patent. Thank you very much.’

5.10 The Committee asked what type of costs were involved for the applicant to have an application processed:

… you should go to a patent attorney to get your patent application drafted because it’s a technical document. You’re specifying a legal monopoly, and you will have exclusivity on the monopoly for up to 20 years. Once you’ve gone to an attorney and paid our fees, you’re probably looking at a cost of between $6,000 and $12,000. IP Australia’s fees, which are $1,000, are a part of that. That’s for the application, for the search and for the renewal of the patent for up to 10 years. Our fees, which really relate to drafting and setting up the monopoly and the invention they’re claiming, are a small part of the total costs.

5.11 The Committee inquired how long it takes an application to be processed. IP Australia explained:

The process is that applicants have to request examination. IP Australia manage that process, so we will send out a direction to request examination so that there’s an orderly processing of work. Once the examination report issues, there is a 12-month period for an applicant to place their application in order for acceptance. Following that, the application is advertised, and, if there’s no opposition, it will then proceed to a grant approximately three to six months after acceptance has taken place.

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10 NIA, para 5.
11 Dr Mitra-Kahn, IP Australia, Committee Hansard, Canberra, 18 June 2018, pp. 5–6.
12 Dr Mitra-Kahn, IP Australia, Committee Hansard, Canberra, 18 June 2018, p. 4.
13 Mr Steven Barker, Assistant General Manager, IP Australia, Committee Hansard, Canberra, 18 June 2018, p. 2.
5.12    According to the NIA, the existence of the Australian Patent Office as an International Authority has considerable benefits for industry and technology. The examination and support staff of the Australian Patent Office are readily accessible to applicants and their legal advisers. This represents a large skills and knowledge base conveniently available to the business and research sector in Australia.14

5.13    IP Australia told the Committee that they currently employ over 1 000 highly qualified staff. Three hundred and ninety of those work specifically on patents providing advice and assistance across a diverse range of disciplines:

... one-third have PhDs, and the remaining staff have master degrees and bachelor degrees. They constitute coverage for all the research areas and technologies which can be patented, which are all technologies available. We have anything from chemists, through to metallurgists, through to engineers and any number of other technologies.15

5.14    In addition to providing International Authority services to Australian inventors, the Australian Patent Office provides International Authority services to developing countries as well as to Brunei Darussalam, New Zealand, the Republic of Korea, Singapore, the United Arab Emirates, and the United States of America. IP Australia told the Committee that it charges $2,200 per international search report requested by these countries and that it received approximately 500 requests during the past year:

... it would be around a million dollars for search work for those countries. For example, we received 209 from the United States last year; 184 from WIPO; 160 from New Zealand; 89 from Singapore; and then smaller numbers from Malaysia, Korea, South Africa and India.16

5.15    The Committee asked if the number of patent applications has increased in line with population growth in Australia. IP Australia indicated that it has remained steady or declined slightly over the past three years.17 Asked if this was a reliable indicator of Australia’s level of innovation compared to other countries, IP Australia cautioned that while Australia’s patent applications per capita is relatively low, other factors need to be taken into consideration:

14 NIA, para 9.
15 Dr Mitra-Karn, IP Australia, Committee Hansard, Canberra, 18 June 2018, p. 4.
16 Dr Mitra-Kahn, IP Australia, Committee Hansard, Canberra, 18 June 2018, p. 3.
17 Dr Mitra-Kahn, IP Australia, Committee Hansard, Canberra, 18 June 2018, p. 5.
It’s worth remarking that a lot of invention doesn’t necessarily require patents. A lot of science doesn’t lend itself to being patented. Countries that have, for example, particularly heavy engineering or certain pharmaceutical technologies, have a lot more patenting per capita than countries that have more services, which is what Australia tends to have a larger part of the economy being.\textsuperscript{18}

5.16 IP Australia explained that Australians also file ‘roughly 3½ times as many patents abroad as they file in Australia’, whereas many patents filed in Australia are from overseas clients:

In Australia 90 per cent of patent applications are filed by foreign entities and 10 per cent are filed by domestic applicants. So you’re counting how many patents are applied for by people wanting to sell things in Australia and dividing that with the Australian population.\textsuperscript{19}

5.17 Overall IP Australia considers Australia’s system supports innovation:

We tend to be in the top 10, top 5, top 3 international rankings. The system’s meant to encourage investment and innovation. We think it does that in that it’s internationally comparable and internationally competitive, the fees are relatively low and the processing times are what the applicants want them to be, because we operate on customer-driven requests.\textsuperscript{20}

5.18 Almost a quarter of IP Australia’s total patent workload comes from its role as an International Authority and the NIA claims that this work is critical to maintain IP Australia’s capacity to search and examine patent applications. The NIA considers that continuation of IP Australia’s status as an International Authority is therefore necessary to maintain IP Australia’s viability as a patent office. The NIA also suggests that as an International Authority, IP Australia can continue to influence the development of the international IP system from a position of operational credibility.\textsuperscript{21}

5.19 IP Australia re-iterated the important role the Australian Patent Office plays for Australian inventors and enumerated the consequences of the Agreement not being ratified:

The most immediate consequence is that Australian inventors who want to file a PCT application would have to have a search report done by the Korean IP

\textsuperscript{18} Dr Mitra-Kahn, IP Australia, \textit{Committee Hansard}, Canberra, 18 June 2018, p. 5.

\textsuperscript{19} Dr Mitra-Kahn, IP Australia, \textit{Committee Hansard}, Canberra, 18 June 2018, p. 5.

\textsuperscript{20} Dr Mitra-Kahn, IP Australia, \textit{Committee Hansard}, Canberra, 18 June 2018, p. 5.

\textsuperscript{21} NIA, para 10.
Obligations

5.20 The main changes between the proposed Agreement and the Existing Agreement are that minor details have been moved from treaty articles into annexes to provide greater consistency between the Agreements of all countries acting as International Authorities; and more flexibility for International Authorities to make administrative changes while the Agreement is in force. The annexes of the Agreement provide for:

- **Annex A** — increased transparency by requiring details of developed countries for which an IP Office agrees to act as an International Authority. The Australian Patent Office currently acts for Australia, Brunei Darussalam, New Zealand, Republic of Korea, Singapore, United Arab Emirates, and the United States of America;
- **Annex B** — the respective IP Office to determine, as part of operating as an International Authority, if it will also provide the service of supplementary international patent searches. The Australian Patent Office has currently chosen to not provide supplementary international searches;
- **Annex C** — specifying that patentable subject matter that can be searched and examined will be in accordance with the provisions of Australian patent law;
- **Annex D** — the schedule of fees the respective office charges for providing search and examination services;
- **Annex E** — the possible use of additional patent classification symbols and systems in addition to those used by the International Patent Classification;
- **Annex F** — specifying the language that search and examination activities will be conducted in, which for the Australian Patent Office will be English;

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- **Annex G**—the IP Office to choose to provide international type searches under Article 15(5) of the PCT.\(^{23}\)

5.21 **Article 2** sets out the basic functions of the Australian Patent Office as an International Authority. The Australian Patent Office shall carry out international search and international preliminary examination in accordance with the PCT, its Regulations, the Administrative Instructions and the proposed Agreement.\(^{24}\)

5.22 **Article 2(2)** provides that in carrying out international search and international preliminary examination, the Australian Patent Office is to apply and observe all the common rules of international search and international preliminary examination and, in particular, shall be guided by the PCT Search and Preliminary Examination Guidelines.\(^{25}\)

5.23 **Article 2(3)** provides that the Australian Patent Office shall maintain a quality management system in compliance with the requirements set out in the PCT International Search and Preliminary Examination Guidelines.\(^{26}\)

5.24 **Article 2(4)** provides that the Australian Patent Office and the International Bureau of WIPO are expected to render mutual assistance in the performance of these procedures.\(^{27}\)

**Implementation**

5.25 As the Agreement continues the arrangements under the Existing Agreement, the NIA states that the means of implementing the Agreement are already in place and no additional action is required by either the Commonwealth or the States and Territories. The terms of the Agreement are implemented by the *Patents Act 1990* and the associated Regulations.\(^{28}\)

**Costs**

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\(^{23}\) NIA, para 15.

\(^{24}\) NIA, para 11.

\(^{25}\) NIA, para 12.

\(^{26}\) NIA, para 13.

\(^{27}\) NIA, para 14.

\(^{28}\) NIA, para 16.
5.26 According to the NIA, there are no contributions payable by Australia under the Agreement nor any anticipated increases in Australia's contribution to WIPO as a result of entry into the Agreement.\textsuperscript{29}

5.27 Further, the NIA states that the Agreement does not increase costs to industry. The NIA notes however that the absence of this agreement would increase the cost and difficulty for Australian inventors to access and make use of the international patent system, as noted by stakeholders.\textsuperscript{30}

Conclusion

5.28 The Committee acknowledges the importance of the work done by IP Australia and the Australian Patent Office, for Australian and international clients.

5.29 The Committee supports the Agreement and recommends that binding treaty action be taken.

Recommendation 4


\textsuperscript{29} NIA, para 17.

\textsuperscript{30} NIA, para 18.
6. Scientific Technical Cooperation: Italy and Brazil

Agreement on Scientific and Technological Cooperation between the Government of the Italian Republic and the Government of Australia; Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation

Introduction

6.1 This Chapter reviews two treaty actions: the Agreement on Scientific and Technological Cooperation between the Government of the Italian Republic and the Government of Australia (the Italy Agreement), and the Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation (the Brazil Agreement).

6.2 The Italy Agreement was signed in Canberra on 22 May 2017. The Brazil Agreement was signed in Canberra on 7 September 2017. The two Agreements were tabled in the Parliament on 8 May 2018.

Background
6.3 The two Agreements propose to strengthen the science, technology and innovation relationships between Australia and Brazil and Italy, respectively.¹

6.4 The Agreements provide formal frameworks to support strong and productive scientific and technological relationships. They will also set out principles for the management of collaborative activities, including cost sharing and allocation of benefits.²

**Reasons for Australia to take the treaty actions**

6.5 The National Interest Analysis (NIA) documents explain that bringing the Agreements into force will reinforce Australia’s commitment to international cooperation in scientific and technological fields. Science and innovation are central to Australia’s economic policy in delivering economic growth, productivity and job creation, as reflected in the National Innovation and Science Agenda.³

6.6 The NIA documents suggest that the intent of the Agreements is to guide the conduct of the relationships between Australia and the two countries. They include provisions for shared responsibility in collaborative activities, and equitable sharing of the costs and benefits associated with collaboration. The Agreements may expand opportunities for collaboration and may be important for enhancing formal links between researchers and organisations.⁴

6.7 The Agreements set out Cooperative Activities which individuals and organisations from each country may undertake. Such activities include, but are not limited to, joint research and development programs, exchanges of scientific and technological information, exchanges of individual


² NIA-B, paras 5–6; NIA-I, paras 5–6.

³ NIA-B, para 9; NIA-I, para 9.

⁴ NIA-B, para 10; NIA-I, para 10.
researchers, students and other appropriate personnel, conferences, seminars and workshops and other forms of cooperative activities as may be agreed.\(^5\)

**Italy**

6.8 The NIA states that Italy is an important strategic partner for Australia’s international cooperation in science and innovation, with strengths in the physical sciences, particularly astronomy and astrophysics. Italy is a key partner in the multilateral Square Kilometre Array Project.\(^6\)

6.9 Italy was Australia’s 8th ranked joint publication partner with over 8,000 joint publications during the period 2011–2015. Australia was Italy’s 11th. The top research fields for joint publications were clinical medicine, physical sciences and astronomy, biological sciences, basic medical research, earth and related environmental sciences.\(^7\)

**Brazil**

6.10 The NIA states that Brazil and Australia share similar economic, resources and environmental challenges and opportunities, making Brazil an important collaboration partner for Australia in the future.\(^8\)

6.11 Brazil was Australia’s 18th ranked joint publication partner with over 800 joint publications during the period 2011–2015. Australia was Brazil’s 9th ranked partner over the same period. The top research fields for joint publications were clinical medicine, health sciences, basic medical research, agriculture, forestry and fisheries and psychology. Brazil also has strengths in mining and resources management.\(^9\)

6.12 To promote collaboration, the Brazil Agreement sets out cooperative activities which individuals and organisations from Australia and Brazil may undertake. Such activities include, but are not limited to, joint research, work plans and projects, exchanges of scientific and technological information, exchanges of individual researchers, students and other

\(^5\) NIA-B, para 11; NIA-I, para 11.

\(^6\) NIA-I, para 7.

\(^7\) NIA-I, para 8.

\(^8\) NIA-B, para 7.

\(^9\) NIA-B, para 8.
appropriate personnel, conferences, seminars and workshops and other forms of cooperative activities as may be agreed.\(^\text{10}\)

**Obligations**

6.13 The NIA documents explain that the Agreements oblige the Parties to strengthen their overall science and technological relationships by promoting cooperation in all areas of science, technology and innovation in accordance with their respective domestic laws and regulations.\(^\text{11}\)

**Italy**

6.14 **Articles 7** of the Italy Agreement obliges entities undertaking cooperative activities to take all necessary steps to ensure that their legal and commercial positions are adequately and effectively protected. The Article also covers the dissemination of scientific and technological information.\(^\text{12}\)

6.15 **Article 8** provides that the protection and ownership of intellectual property rights will be the responsibility of and jointly decided by, the cooperating organisations.\(^\text{13}\)

6.16 **Article 9** obliges parties to use their best efforts to facilitate the entry and exit from each territory of personnel material and equipment.\(^\text{14}\)

**Brazil**

6.17 **Article 6** of the Brazil Agreement enables the Parties to designate a Joint Committee for Cooperation on Science, Technology and Innovation to facilitate the implementation of the Agreement.\(^\text{15}\)

6.18 **Article 7** obliges cooperating entities to negotiate and conclude arrangements to implement cooperative activities as necessary. Article 8 considers the facilitation of entry and exit from each territory of personnel

\(^{10}\) NIA-B, para 11.

\(^{11}\) NIA-B, para 12; NIA-I, para 12.

\(^{12}\) NIA-I, paras 14–15.

\(^{13}\) NIA-I, para 16.

\(^{14}\) NIA-I, para 18.

\(^{15}\) NIA-B, para 14.
material and equipment. Articles 6, 7 and 9 consider intellectual property and sharing information matters.\(^\text{16}\)

**Implementation**

6.19 The NIA documents state that Australia’s obligations under both Agreements can be implemented without new legislation or amendment to existing legislation. Australian practice is already consistent with the provisions of the Agreements.\(^\text{17}\)

**Costs**

6.20 The NIA documents state the Agreements do not commit Australia to any financial outlays.\(^\text{18}\)

6.21 The NIA for the Brazil Agreement explained that any costs related to the establishment of a Joint Committee will be absorbed through existing departmental budgets.\(^\text{19}\)

**Issues**

**Defence-related activities**

6.22 The Committee noticed some minor wording differences between the two Agreements, particularly concerning cooperation objectives and principles.

6.23 Article 5 of the Brazil Agreement states that defence-related science technology and innovation activities are excluded from areas of cooperation.

6.24 Article 2 of the Italy Agreement specifies that the Parties shall promote cooperation for peaceful purposes.

6.25 However, there is no clause or article in the Italy Agreement specifically excluding defence-related activities as there is in the Brazil Agreement.

6.26 The phrase ‘for peaceful purposes’ does not appear in the Brazil Agreement.

6.27 In 2017, the Committee considered and reported on the Agreement relating to Scientific and Technical Cooperation between the Government of Australia and the

\(^\text{16}\) NIA-B, paras 14–21.

\(^\text{17}\) NIA-B, para 25; NIA-I, para 20.

\(^\text{18}\) NIA-B, p. 6; NIA-I, p. 5.

\(^\text{19}\) NIA-B, p. 6.
Government of the United States of America. Article 4 of that Agreement states that the Parties shall support cooperative activities for peaceful purposes. Any phrase particularly excluding defence-related activities is not evident.  

6.28 The Committee questioned representatives of the Department of Industry, Innovation and Science (DIIS) about the exclusion of defence-related matters. DIIS explained:

It’s a standard clause that we include in all of our science and innovation agreements in some form or measure. Sometimes the wording’s a little different but it’s always for peaceful purposes. Defence related collaboration is not in our remit.

6.29 The Committee pursued the issue, seeking further clarification on the separation of cooperation activities. DIIS elaborated, using the recent United States treaty as an example:

That treaty, equally, has the clause that, basically, it’s for peaceful purposes. So it’s a division in terms of the legal instruments that we have science and technology treaties that just cover peaceful purposes, and then where it has a defence element it’s done under a different agreement through a different structure. I think it’s one of those things where it becomes more complicated when you bring the defence issue in. Generally, we want to do overarching science and technology agreements and have those as a framework. Of course, if they want there to be collaboration around defence science and technology … it’s under separate agreements.

Conclusion

6.30 To the casual observer, in particular those with no broader knowledge of the minor technical wording details of such agreements, it would appear that the specific exclusion of defence-related activities applied to the Brazil Agreement only, and not the Italy Agreement.

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22 Ms Sarah Brown, Chief of Staff, Office of the Chief Scientist, Committee Hansard, Canberra, 18 June 2018, p. 9.
6.31 The Committee appreciates the clarification provided by DIIS concerning the wording of the Agreements. Further, the Committee would prefer agreements of a similar nature, such as the two under consideration here, to have consistency of language. This would remove any doubt about the meaning of objectives, principles or other matters in any similar or comparable agreements.

6.32 The Committee acknowledges and appreciates the support for these Agreements documented in submissions provided by the Australian Academy of Science.

6.33 The Committee supports the Agreements and recommends that binding treaty action be taken.

**Recommendation 5**

6.34 The Committee supports the Agreement on Scientific and Technological Cooperation between the Government of the Italian Republic and the Government of Australia and recommends that binding treaty action be taken.

**Recommendation 6**

6.35 The Committee supports the Agreement between the Government of Australia and the Government of the Federative Republic of Brazil for Cooperation on Science, Technology and Innovation and recommends that binding treaty action be taken.
7. Minor Treaty Actions

Minor treaty actions

7.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.

7.2 Minor treaty actions are presented to the Committee with a one-page explanatory statement and are listed on the Committee’s website. The Committee can choose to formally inquire into these treaty actions, or accept them without a formal inquiry and report.

7.3 The Committee has been asked to consider the following four minor treaty actions.

Protocol to Amend Annex 2 and Annex 5 of the Thailand—Australia Free Trade Agreement (Protocol)

7.4 The Protocol makes minor amendments to the Thailand—Australia Free Trade Agreement (TAFTA) to promote the expansion of trade in certain dairy goods. TAFTA is one of two Free Trade Agreements that Australian industry can use to trade with Thailand—the other is the ASEAN—Australia—New Zealand Free Trade Agreement (AANZFTA).

7.5 The Protocol provides for amendments to Annex 2 and Annex 5 of TAFTA. Annex 2 contains the tariff schedules, including tariff quotas, of the two countries. Annex 5 lists agricultural products which both countries have nominated as sensitive and which are subject to special safeguard measures.

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7.6 The Protocol requires Thailand to increase the tariff quotas for skim milk powder set out in Annex 2 of TAFTA by 10 per cent. It also requires Thailand to increase its volume trigger levels for certain dairy products subject to special safeguard measures listed in Annex 5 of TAFTA. Specifically, it would increase the volume trigger levels for imposing special safeguard measures on anhydrous milk fat, whey, cheese and other products by 10, 20 and 10 per cent respectively. These amendments will enable Australian industry to export a greater volume of dairy products to Thailand at preferential tariff rates. There are no obligations on Australia to alter its tariff quotas or volume trigger levels.³

Fifth Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17 (Fifth Protocol)

7.7 The treaty action prolongs the Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17 (the Treaty) for the fifth time, through until 30 June 2019.⁴

7.8 Officials are negotiating a permanent successor treaty to cover the continued presence of Australian personnel in the Netherlands. The fifth protocol will ensure continuity of legal coverage pending finalisation of negotiations on the permanent successor treaty and completion of domestic treaty-making requirements, including consideration by the Joint Standing Committee on Treaties (JSCOT) (the successor treaty will be tabled as a Category 1 treaty action). The practical, legal and financial effects of the proposed treaty action are likely to be negligible, but the benefits to Australian interests are significant.⁵

7.9 In response to the downing of Malaysia Airlines Flight MH17, significant numbers of Australian personnel were deployed to the Netherlands to

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provide assistance in relation to tasks such as the identification of victims and the investigation of the cause of the incident.\(^6\)

7.10 The Treaty defines the rights, obligations and arrangements between Australia and the Netherlands necessary to facilitate Australia’s deployment to, and operations in, the Netherlands. It ensures that all deployed personnel are accorded appropriate protections. It was signed in The Hague by Australia and the Netherlands, and entered into force for both parties on 1 August 2014, without following the usual process of review by JSCOT. The entry into force of this Treaty was expedited via the National Interest Exemption mechanism.\(^7\)

7.11 Due to Dutch domestic requirements, the duration of the Treaty was limited to twelve months. The Treaty has subsequently been extended four times (respectively to 1 August 2015, 31 December 2016, 30 June 2017 and 30 June 2018).\(^8\) The Fifth Protocol is required to ensure Australian personnel are accorded appropriate protections pending entry into force of the permanent successor treaty. The permanent successor treaty will be put through a Dutch parliamentary procedure, thereby enabling it to be of unlimited duration.\(^9\)

**Amendments to the Agreement on the Conservation of Albatrosses and Petrels (ACAP)**

7.12 The treaty action concerns Resolution 6.1 (Resolution), adopted on 11 May 2018 by the Meeting of the Parties to the *Agreement on the Conservation of Albatrosses and Petrels* (ACAP). The Resolution amends the list of species contained in Annex 1 of the Agreement by replacing ‘Ardenna creatopus, syn. Puffinus creatopus’ with ‘Ardenna creatopus’, leaving only Ardenna creatopus as the nomenclature for this petrel species. Annex 1 lists all the species to which the Agreement applies.\(^10\)

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7.13 The practical, financial and legal effect of the amendment for Australia is negligible. The change in nomenclature for the species reflects an updated understanding about the taxonomy of the species.\textsuperscript{11}

7.14 The Meeting of the Parties unanimously adopted the Resolution pursuant to Article XII(S) (Amendment of the Agreement) of the Agreement, which requires amendments to the Annexes to be adopted by a two-thirds majority of Parties.\textsuperscript{12}

7.15 In accordance with Article XII(S) of the Agreement, the proposed amendment to Annex 1 will come into force automatically on the ninetieth day after its adoption, namely, on 9 August 2018, except for those Parties that have lodged a reservation in accordance with Article XII(6). Australia does not propose to lodge a reservation to the Resolution, unless this Category 3 treaty action remains outstanding.\textsuperscript{13}


7.16 The *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocols of 1978 and 1997 relating thereto* (MARPOL) is one of the key international instruments addressing marine pollution from ships. It is administered by the International Maritime Organization (IMO), a specialised agency of the United Nations. The Marine Environment Protection Committee (MEPC) is the IMO Committee with responsibility for MARPOL.\textsuperscript{14}

7.17 The treaty action is for Australia’s tacit acceptance of technical amendments to Annex VI of the *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocols of 1978 and 1997 relating thereto*.

\textsuperscript{11} Explanatory Statement 5 (2018), para 2.

\textsuperscript{12} Explanatory Statement 5 (2018), para 3.

\textsuperscript{13} Explanatory Statement 5 (2018), para 5.

(MARPOL) relating to Emission Control Areas (ECAs) and Bunker Delivery Note (BDN) information. The amendments: designate two new ECAs (the Baltic Sea and the North Sea) for nitrogen oxide (NOx) emissions; provide for temporary exemptions from the NOx emission limits in a limited set of circumstances; make minor consequential amendments to the Regulations for the Prevention of Air Pollution from Ships; and revise the information to be provided in the BDN.\textsuperscript{15}

7.18 Under MARPOL, amendments to the Annexes are deemed to be accepted after a period determined by MEPC (of not less than ten months), unless prior to that date, not less than one third of the Parties, or Parties the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world’s merchant fleet, have communicated to the IMO their objection to the amendments.\textsuperscript{16}

7.19 The proposed amendments are deemed to be accepted on 1 July 2018 and will enter into force on 1 January 2019.\textsuperscript{17}

7.20 The practical, legal and financial effects of the treaty action for Australia are negligible as Australia does not currently have ships operating in the Baltic or North Seas, and the other changes are administrative in nature and do not impose any new requirements on industry.\textsuperscript{18}

7.21 \textit{Marine Order 97 (Marine pollution prevention—air pollution) 2013} (made under the \textit{Navigation Act 2012} and the \textit{Protection of the Sea (Prevention of Pollution from Ships) Act 1983}) will be amended to implement the proposed treaty action. The amendment will provide for temporary exemptions from the NOx emission limits in a limited set of circumstances, particularly for newly constructed or repaired vessels, and as such is minimal in nature.\textsuperscript{19}

\textbf{Conclusion}

7.22 The Committee determined not to hold a formal inquiry into any of the minor treaty actions, and agreed that binding treaty action may be taken in each case.

\textsuperscript{15} Explanatory Statement 6 (2018), para 1.

\textsuperscript{16} Explanatory Statement 6 (2018), para 5.

\textsuperscript{17} Explanatory Statement 6 (2018), para 6.

\textsuperscript{18} Explanatory Statement 6 (2018), para 2.

\textsuperscript{19} Explanatory Statement 6 (2018), para 9.
Hon. Stuart Robert MP
Chair
13 August 2018
A. Submissions

Peru FTA
1. Dr Deborah Gleeson et al
2. Australian Fair Trade and Investment Network (AFTINET)
3. National Farmers' Federation
4. Australian Red Meat and Livestock Industry
5. Minerals Council of Australia
6. Australian Chamber of Commerce and Industry
7. Australian Dairy Farmers
8. Australian Sugar Industry Alliance (ASA)
9. Canegrowers
10. Department of Foreign Affairs and Trade

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

EU Framework Agreement
1 Australian Fair Trade and Investment Network (AFTINET)
2 Australian Digital Alliance
3 Australian Council of Trade Unions
4 National Farmers' Federation
5 Department of Foreign Affairs and Trade
6 European Australian Business Council (EABC)

Scientific Technical Cooperation: Italy
1 Australian Academy of Science

Scientific Technical Cooperation: Brazil
1 Australian Academy of Science
B. Exhibits

Peru FTA

1  *Marginalising Health Information: Implications of the TPP for Alcohol Labelling*, Paula O’Birien, Deborah Gleeson, Robin Room and Claire Wilkinson, (Submission 1)

2  *Commentary on ‘Communicating Messages About Drinking’: Using the ‘Big Legal Guns’ to Block Alcohol Health Warning Labels*, Paula O’Brien, Deborah Gleeson, Robin Room, and Claire Wilkinson, (Submission 1)

Timor Treaty-Maritime Boundaries

1  *La’o Hamutuk articles*, (Submission 2)
C. Witnesses

Monday, 7 May 2018

CANBERRA

Peru FTA
Department of Foreign Affairs and Trade
Department of Home Affairs
Department of Jobs and Small Business
Department of Agriculture and Water Resources

Timor Treaty Maritime Boundaries
Department of Foreign Affairs and Trade
Attorney-General’s Department
Department of Industry, Innovation and Science

EU Framework Agreement
Department of Foreign Affairs and Trade
Department of Home Affairs

Monday, 18 June 2018
Canberra

**WIPO Australian Patent Office**

**IP Australia**

**Scientific Technical Cooperation: Italy and Brazil**

**Office of the Chief Scientist**

**Department of Industry, Innovation and Science**