REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME XXXIV

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REPORTS OF INTERNATIONAL ARBITRAL AWARDS

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VOLUME XXXIV

UNITED NATIONS — NATIONS UNIES

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FOREWORD

The present volume reproduces the awards in two arbitrations, namely, the case between the Republic of Ecuador and the United States of America, and the Railway Land Arbitration between Malaysia and Singapore, respectively. It also reproduces the outcome of the Timor Sea Conciliation, involving Timor-Leste and Australia.

This publication was originally conceived in 1948 as a collection of international awards or decisions rendered between States, including cases involving espousing or respondent Governments on behalf of individual claimants. In principle, awards between a private individual or body and a State or international organization were excluded. However, some awards between a State and other entities, or between non-State entities, have exceptionally been included, given the significance of the issues of general international law addressed. The Timor Sea Conciliation has been included in the present volume, on an exceptional basis, in light of its legal and historical interest.

In accordance with the practice followed in this series, awards in English or French are published in the original language, as long as the original language text was available. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat. In order to facilitate consultation of the awards, headnotes are provided in both English and French. In line with previous volumes, only typographical errors made in the original awards have been edited by the Secretariat, with the remainder of the Award reproduced as in its original form of publication.

This volume was prepared by the Codification Division of the Office of Legal Affairs, in collaboration with the Secretariat of the Permanent Court of Arbitration. Further information and electronic copies of each volume can be found at http://legal.un.org/riaa/.

AVANT-PROPOS

Le présent volume reproduit les sentences rendues dans deux procédures d'arbitrage, à savoir l'affaire opposant la République de l'Équateur aux les États-Unis d'Amérique, et l'arbitrage relatif au domaine ferroviaire entre la Malaisie et Singapour. Il reproduit également le document issu de la procédure de conciliation entre le Timor-Leste et l'Australie relative à la mer de Timor.

La présente publication a été conçue en 1948 en tant que Recueil de sentences et de décisions internationales rendues dans des affaires opposant des États, y compris celles dans lesquelles des gouvernements prenaient fait et cause pour des particuliers ou se portaient défendeurs à leur place. En étaient en principe exclues les sentences rendues dans les affaires opposant une personne de droit privé à un État ou à une organisation internationale. Certaines sentences rendues dans des affaires opposant un État à d'autres entités ou des entités non étatiques entre elles y ont toutefois été exceptionnellement incluses, compte tenu de l'importance des questions de droit international général qu'elles soulevaient. La conciliation relative à la mer de Timor a été incluse dans le présent volume, à titre exceptionnel, en raison de son intérêt juridique et historique.

Conformément à la pratique suivie dans le présent Recueil, les sentences rendues en anglais ou en français sont publiées dans la langue originale, dès lors que cette version originale était disponible. Celles qui ont été rendues en anglais et en français ont été reproduites dans une des deux langues originales. Le Recueil fournit une version anglaise des sentences rendues dans d'autres langues en spécifiant, dans une note de bas de page, si la traduction émane du Secrétariat de l'Organisation des Nations Unies. Pour faciliter autant que possible la consultation des sentences, celles-ci sont précédées d'un sommaire publié à la fois en anglais et en français. Comme dans les volumes précédents, seules les erreurs typographiques relevées dans les versions originales ont été corrigées par le Secrétariat, les sentences étant pour le reste reproduites telles quelles.

Le présent volume a été compilé par la Division de la codification du Bureau des affaires juridiques, en collaboration avec le secrétariat de la Cour permanente d'arbitrage. Des informations complémentaires et la version électronique de chaque volume sont disponibles à l'adresse http://legal.un.org/riaa/.

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PARTIE I

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Opinion dissidente du professeur Raúl Emilio Vinuesa

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* * * * *

In the matter of an Arbitration

-before-

an Arbitral Tribunal Constituted in Accordance with Article VII of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993, and the UNCITRAL Arbitration Rules 1976

-between-

The Republic of Ecuador

-and-

The United States of America

Award

Arbitral Tribunal:

Professor Luiz Olavo Baptista (Chair)
Professor Raúl Emilio Vinuesa
Professor Donald M. McRae

Registrar:
Mr. Martin Doe Rodríguez

Registry:
Permanent Court of Arbitration

29 September 2012

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List of Defined Terms

August 23 Note	Diplomatic Note No. Prot 181/2010 dated 23 August 2010
BIT	Bilateral Investment Treaty
DSU	Dispute Settlement Understanding
FCN Treaty	Friendship, Commerce and Navigation Treaty
FTA	Free Trade Agreement
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IUSCT	Iran–United States Claims Tribunal
June 8 Note	Diplomatic Note No. 1352-GM/2010 dated 8 June 2010
MFN	Most-Favored Nation
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969
WTO	World Trade Organization

Introduction

A. The Parties

1. The Clamant in this arbitration is the Republic of Ecuador (hereinafter the "Claimant" or "Ecuador"). The Claimant is represented in these proceedings by:

— Dr. Diego García Carrión, Procurador General del Estado

— Ms. Christel Gaibor, Directora de Asuntos Internacionales y Arbitraje (Encargada), Procuraduría General del Estado

— Ms. Cristina Viteri, Abogada, Procuraduría General del Estado

— Mr. Paul Reichler, Foley Hoag LLP

— Mr. Mark Clodfelter, Foley Hoag LLP

— Mr. Andrew Loewenstein, Foley Hoag LLP

— Mr. Bruno Leurent, Foley Hoag AARPI

2. The Respondent in this arbitration is the United States of America (hereinafter the "Respondent" or "U.S." or "United States"). The Respondent is represented in these proceedings by:

— Mr. Harold Hongju Koh, Legal Adviser, U.S. Department of State

— Mr. Jeffrey D. Kovar, Assistant Legal Adviser, U.S. Department of State

— Ms. Lisa J. Grosh, Deputy Assistant Legal Adviser, U.S. Department of State

— Mr. Jeremy K. Sharpe, Chief, Investment Arbitration, Office of the Legal Adviser, U.S. Department of State

— Mr. Lee M. Caplan, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

— Ms. Karin Kizer, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

— Ms. Neha Sheth, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

B. Background to the arbitration

3. The Claimant filed a Notice of Arbitration on 28 June 2011 pursuant to Article VII of the *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment dated 27 August 1993* (hereinafter the "Treaty").

4. The Claimant contends that since certain questions concerning the interpretation of Article II(7) of the Treaty have not been resolved through consultation or diplomatic channels, that a dispute exists regarding the interpretation and application of the Treaty and therefore submits these questions to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.[1]

II. Procedural history

5. By a Request and Statement of Claim dated 28 June 2011, Ecuador commenced arbitration proceedings against the United States of America, pursuant to Article VII of the Treaty and Article 3 of the UNCITRAL Rules.

6. By letter dated 29 August 2011, Ecuador advised the United States that it had appointed Professor Raúl Emilio Vinuesa as arbitrator. By letter of

[1] Claimant's Request, para. 1.

the same date, the United States advised Ecuador that it had appointed Donald M. McRae as arbitrator.

7. By letter dated 8 February 2012, the Secretary-General of ICSID, acting as the appointing authority pursuant to Article VII(2) of the Treaty, appointed Dr. Luiz Olavo Baptista as President of the Arbitral Tribunal.

8. By letters dated 12 March 2012, the Parties agreed for the PCA to act as registry in these proceedings.

9. On 21 March 2012, the Tribunal held a Preparatory Hearing at the Peace Palace, The Hague, the Netherlands. Present at this meeting were:

The Tribunal:

— Professor Luiz Olavo Baptista
— Professor Raúl Emilio Vinuesa
— Professor Donald M. McRae

For the Claimant:

— Ms. Cristina Viteri
— Mr. Paul Reichler
— Mr. Mark Clodfelter
— Mr. Bruno Leurent

For the Respondent:

— Mr. Harold Hongju Koh
— Mr. Jeffrey Kovar
— Mr. Jeremy Sharpe
— Mr. Lee Caplan
— Mr. John Kim
— Ms. Karen Johnson

For the Permanent Court of Arbitration:

— Mr. Martin Doe Rodríguez
— Ms. Jara Mínguez Almeida
— Ms. Hinda Rabkin

10. On 9 April 2012, taking into account the agreements reached between the Parties and the Tribunal on procedural issues during the 21 March 2012 hear-

ing, the Tribunal issued Procedural Order No. 1 providing, *inter alia*, that the languages of the arbitration would be English and Spanish, and setting out the terms regarding the written submissions, communications, witnesses, experts, and hearings. Procedural Order No. 1 set forth the following schedule of the proceedings:

> **XIV. Procedural Calendar**
>
> 60. In accordance with Article VII(3) of the Treaty, the Tribunal establishes the following schedule of proceedings, without prejudice to the Tribunal's decision on jurisdiction.
>
> 61. By 29 March 2012, the United States shall submit its Statement of Defence.
>
> 62. By 25 April 2012, the United States shall submit its Memorial on Jurisdiction.
>
> 63. By 23 May 2012, Ecuador shall submit its Counter-Memorial on Jurisdiction and Memorial on the Merits.
>
> 64. By 20 June 2012, the United States shall submit its Counter-Memorial on the Merits.
>
> 65. On 25–26 June 2012, a hearing on jurisdiction shall be held at the seat of the PCA in the Peace Palace at The Hague.
>
> 66. By 13 July 2012, Ecuador shall submit its Reply Memorial on the Merits.
>
> 67. By 30 July 2012, the United States shall submit its Rejoinder Memorial on the Merits.
>
> 68. On 6–9 August 2012, a hearing on the merits shall be held at the seat of the PCA in the Peace Palace at The Hague.

11. Procedural Order No. 1 also set forth the following terms regarding confidentiality:

> **XII. Confidentiality**
>
> 49. The award may be made public only with the consent of both parties.
>
> 50. Hearings shall be held in camera and the transcripts shall remain confidential unless the parties agree otherwise.
>
> 51. The pleadings and submissions of the Parties shall remain confidential, except that, on the date of the opening of the hearing on jurisdiction, or as soon thereafter as any redactions may be agreed by the Parties, the Statements of Claim and Defense, as well as Respondent's Memorial on Jurisdiction and Claimant's Counter-Memorial on Jurisdiction, will be made publicly available on the PCA website, and the Parties are free to disclose them, subject to the redaction of any confidential information. On the date of the opening of the hearing on the merits, if any, or as soon thereafter as any redactions may be agreed by the Parties, the Parties' memorials on the merits will be made publicly available on

the PCA website, and the Parties are free to disclose them, subject to the redaction of any confidential information. Failing agreement between the Parties on the appropriateness of any redactions, the matter shall be decided by the Tribunal. Any information provided by a Party which has been designated as confidential by that Party shall be kept confidential and treated as confidential, unless the Tribunal determines that it shall not be redacted.

12. On 29 March 2012, the Respondent submitted its Statement of Defence.

13. On 13 April 2012, the Respondent submitted the Spanish translation of its Statement of Defence.

14. On 25 April 2012, the Respondent submitted its Memorial on Jurisdiction.

15. On 11 May 2012, the Respondent submitted the Spanish translation of its Memorial on Jurisdiction.

16. On 11 May 2012, the Claimant submitted the Spanish translation of its Request for Arbitration and Statement of Claim.

17. On 23 May 2012, the Claimant submitted its Counter-Memorial on Jurisdiction and Memorial on the Merits.

18. By letter dated 1 June 2012, the Respondent applied to have the hearing on jurisdiction extended by one day to present an expert witness. By letter dated 5 June 2012, the Claimant opposed the Respondent's application.

19. On 8 June 2012, the Claimant submitted the Spanish translation of its Memorial on the Merits.

20. On 12 June 2012, the Claimant submitted the Spanish translation of its Counter-Memorial on Jurisdiction.

21. By letter dated 11 June 2012, the Respondent responded to the Claimant's letter dated 5 June 2012 and notified the Claimant and the Tribunal that it intended to present Professor Christian Tomuschat as an expert witness at the hearing on jurisdiction. By letter dated 14 June 2012, the Claimant objected to the presentation of Professor Christian Tomuschat at the hearing on jurisdiction on the basis that the notification provided by the Respondent was untimely according to Article 25(2) of the UNCITRAL Rules. By letter dated 15 June 2012, the Respondent responded to the Claimant's objection.

22. On 20 June 2012, the Tribunal decided that the Respondent's notification of its intent to present Professor Tomuschat as an expert witness was untimely and, consequently, that the hearing on jurisdiction would not be extended by an additional day. The Tribunal indicated, however, that it was prepared to hold a supplementary hearing for the examination of expert witnesses, if it was deemed necessary after the hearing on jurisdiction. The Parties were also invited to consult and attempt to agree on the order of proceedings for the hearing on jurisdiction.

23. On 20 June 2012, the Respondent submitted its Counter-Memorial on the Merits and accompanying documents.

24. By letter dated 21 June 2012, the Claimant requested that the Respondent's Counter-Memorial on the Merits be disregarded in the Tribunal's consideration of the jurisdictional issues since the Memorial allegedly dealt with jurisdictional rather than merits issues.

25. By letter dated 23 June 2012, the Respondent requested that the Claimant's letter of 21 June 2012 be disregarded since, according to Procedural Order No. 1, the Claimant should file its Reply Memorial on 13 July 2012 and only then respond to the Respondent's Counter-Memorial on the Merits.

26. On 22 June 2012, a pre-hearing telephone conference call was held between the Tribunal and the Parties to discuss the order of proceedings for the hearing on jurisdiction.

27. On 25 and 26 June 2012, a Hearing on Jurisdiction was held at the Peace Palace, The Hague, the Netherlands. Present at the meeting were:

The Tribunal:

— Professor Luiz Olavo Baptista
— Professor Raúl Emilio Vinuesa
— Professor Donald M. McRae

For the Claimant:

— Dr. Diego García Carrión
— Ms. Christel Gaibor
— Ms. Cristina Viteri
— Ms. Ana Maria Gutierrez
— Mr. Paul Reichler
— Mr. Mark Clodfelter
— Mr. Andrew Loewenstein
— Mr. Bruno Leurent
— Mr. Yuri Parkhomenko
— Dr. Constantinos Salonidis
— Ms. Christina Beharry

For the Respondent:

— Mr. Harold Hongju Koh
— Mr. Jeffrey Kovar

— Mr. Jeremy Sharpe
— Mr. Lee Caplan
— Ms. Karin Kizer
— Ms. Neha Sheth
— Mr. John Kim
— Ms. Karen Johnson
— Mr. Frank Schweitzer
— Mr. William Echols
— Ms. Maarja Boulos
— Ms. Abby Lounsberry

For the Permanent Court of Arbitration:

— Mr. Martin Doe Rodríguez
— Ms. Hinda Rabkin
— Ms. Melanie Riofrio

28. By letter dated 3 July 2012, the Respondent requested a brief extension to file the Spanish translations of the Counter-Memorial on the Merits and accompanying witness statements.

29. By letter dated 5 July 2012, the Claimant stated that it had no objection to the Respondent's request for a brief extension.

30. On 12 July 2012, the Respondent submitted the Spanish translation of its Counter-Memorial on the Merits.

31. On 13 July 2012, the Respondent submitted revised Spanish translations of its Statement of Defense and Memorial on Jurisdiction.

32. On 13 July 2012, the Claimant submitted its Reply Memorial on the Merits.

33. On 20 July 2012, the Claimant submitted the Spanish translation of its Reply Memorial on the Merits.

34. On 30 July 2012, the Respondent submitted its Rejoinder on the Merits.

35. By letter dated 2 August 2012, the Tribunal informed the Parties that "[t]he Tribunal has reached a decision on the question of its jurisdiction: by a majority consisting of Prof. McRae and Prof. Baptista (with Prof. Vinuesa dissenting), the Tribunal has concluded that it has no jurisdiction, and the case must consequently be dismissed in its entirety, due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty. Under the circumstances, and in particular in view of the imminent Hearing on the Merits scheduled to commence next week, the Tribunal has also, by majority, decided to

inform the Parties of the above decision, with full reasons to follow in due course in its award." The Tribunal consequently cancelled the Hearing on the Merits.

36. By letter dated 2 August 2012, Professor Vinuesa informed the Parties that his decision to dissent from the Tribunal's decision was "under reservation of the right to manifest in due time [his] dissidence over the [Tribunal's] conclusion and the said reasons as well as under reservation of [his] right to agree or disagree over any other reasoning not [expressed by the majority] at the time [he] manifested [his] dissidence."

III. Statement of Facts

37. The following section sets out the facts regarding the background to this arbitration relevant to the present decision.

38. The Parties signed the Treaty on 27 August 1993. The Treaty entered into force on 11 May 1997.

39. By a notice of arbitration dated 21 December 2006, Chevron and TexPet commenced an arbitration against Ecuador under paragraph 3(*a*)(iii) of Article VI of the Treaty and the UNCITRAL Rules claiming *inter alia* a denial of justice under Article II(7) for the manner in which seven commercial cases that were filed by TexPet against Ecuador in Ecuadorian courts were treated by these courts between 1991 and 1994.[2] In 2007, the Ecuadorian government established a Special Commission to review each of its 23 BITs and publicly stated its intention not to renew its BIT with the United States.[3] On 6 July 2009, Ecuador denounced the ICSID Convention.[4]

40. On 30 March 2010, the arbitral tribunal rendered a partial award on claims raised under the Treaty in PCA Case No. 2007–2: *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* (hereinafter "Chevron Partial Award").[5] In that award, the tribunal found Ecuador in violation of *inter alia* Article II(7) of the Treaty because of undue delay by the Ecuadorian courts in adjudicating Chevron and Texaco's claims.[6] The *Chevron* tribunal found that Article II(7) set out an "effective means" standard and therefore "constituted *lex specialis* and not a mere restatement of the law on denial of justice."[7]

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[2] *Chevron Corp. and Texaco Petroleum Co.* v. *Republic of Ecuador* PCA Case No. 2007–2, UNCITRAL Rules 1976, Partial Award on the Merits (30 March 2010), para. 36 [R-1] (hereinafter "*Chevron* Partial Award").

[3] Respondent's Memorial on Jurisdiction, p. 12.

[4] Respondent's Memorial on Jurisdiction, p. 12, citing ICSID News Release, "Ecuador Submits a Notice under Article 71 of the ICSID Convention" (7 July 2009).

[5] Claimant's Request, para. 6; Respondent's Statement of Defense, pp. 4–5; Respondent's Memorial on Jurisdiction, pp. 7–10, citing *Chevron* Partial Award, *supra* note 2.

[6] *Chevron* Partial Award, supra note 2, para. 262.

[7] *Chevron* Partial Award, supra note 2, para. 242.

41. By Diplomatic Note No.4–2–87/10 dated 11 June 2010, transmitting a copy of Diplomatic Note No. 1352-GM/2010 dated 8 June 2010 (hereinafter the "June 8 Note"), the Government of Ecuador informed the Government of the United States that it disagreed with certain aspects of the Partial Award, expressly pointing to the interpretation and application of Article II(7) of the Treaty which the Claimant considered erroneous and overbroad.[8] The Note detailed the Claimant's concern that the *Chevron* Partial Award's interpretation of Article II(7) had "put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investment of nationals or companies of the other Party."[9] The Note raised three matters of interpretation which the Claimant sought to clarify with the Respondent:

i. The obligations of the Parties under Article II(7) are not greater than those required to implement obligations under the standards of customary international law;
ii. The Article II(7) requirement of effective means refers to the provision of a framework or system under which claims may be asserted and rights enforced, but does not create obligations to the Parties to the Treaty to assure that the framework or system provided is effective in particular cases;
iii. The fixing of compensation due for losses suffered as a result of a violation of the requirements of Article II(7) cannot be based upon a determination of rights under the law of the respective Party that is different from what the courts of that Party have determined or would likely determine, and thus do not permit arbitral tribunals under Article VI(3) of the Treaty to substitute their judgment of rights under municipal law for the judgments of municipal courts.[10]

The Note then provided specific examples of where, according to the Claimant, the *Chevron* Partial Award incorrectly interpreted and applied Article II(7) of the Treaty.[11]

42. The Note requested that the Government of the United States confirm by diplomatic note its agreement with the Claimant's interpretation and application of Article II(7) of the Treaty.[12] The Note also gave notice that if such a confirming note was not forthcoming, "an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty."[13]

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[8] June 8 Note, p. 1 [R-2]; Respondent's Memorial on Jurisdiction, p. 10; Claimant's Counter-Memorial on Jurisdiction, paras. 13–14.

[9] June 8 Note, p. 1.

[10] June 8 Note, p. 3.

[11] June 8 Note, p. 2.

[12] June 8 Note, p. 3.

[13] June 8 Note, p. 4.

43. On 17 June 2010, following Ecuador's request, Ecuador's ambassador to the United States, Mr. Luis Benigno Gallegos, met with the US Legal Advisor, Mr. Harold Hongju Koh, to discuss the interpretation of Article II(7). According to the Claimant, Ecuador "explained its views on the three matters of interpretation raised therein and sought the United States' views."[14] The US Legal Advisor informed Ecuador that the United States would study Ecuador's views and initiate its inter-agency process for determining the United States' position on this issue.[15]

44. On 7 July 2010, the Claimant brought a claim before the District Court of The Hague to set aside the interim and partial awards, contending among other things that the tribunal committed legal error in its finding of a breach of Article II(7) of the Treaty and that the error justified setting aside the *Chevron* Partial Award.[16]

45. On 23 August 2010, the Respondent sent a reply by Diplomatic Note No. Prot 181/2010 to Ecuador's Minister of Foreign Affairs (hereinafter the "August 23 Note"), attaching a letter from the Assistant Secretary of State for Western Hemisphere Affairs which stated that "the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised," and that the United States "look[s] forward to remaining in contact about this".[17] According to the Claimant, due to the lack of response from the Respondent, the Ecuadorian Embassy in Washington "made multiple attempts to call Mr. Koh [the U.S. Legal Adviser] in order to follow up on its request for the United States to provide its interpretation of Article II(7)."[18]

46. On 4 October 2010, Mr. Koh placed a telephone call to Ambassador Gallegos at the Ecuadorian Embassy in Washington.[19] According to the Respondent, "the Legal Adviser informed Ambassador Gallegos, in an informal conversation, that it would be difficult to consider a request for interpretation of the Treaty while Ecuador was in the process of terminating that agreement."[20] In the Claimant's view, Mr. Koh "stated that the United States would give *no response at all*,"[21] saying that "his Government will not rule on this

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[14] Claimant's Counter-Memorial on Jurisdiction, para. 15.

[15] Claimant's Counter-Memorial on Jurisdiction, para. 16.

[16] Plaintiff's Writ of Summons, *Ecuador* v. *Chevron*, Cause-List No. 2011/402 (7 July 2011), District Court of The Hague, paras. 111, 113 [R-31].

[17] Letter from U.S. Assistant Secretary of State for Western Hemisphere Affairs Arturo A. Valenzuela to Ecuadorian Minister for Foreign Affairs, Trade and Integration Ricardo Patiño (23 August 2010) [R-3] (hereinafter "Valenzuela Letter").

[18] Claimant's Counter-Memorial on Jurisdiction, para. 18, citing Witness Statement of Luis Benigno Gallegos (23 May 2012) (hereinafter "Gallegos Witness Statement"), para. 7 (emphasis in original).

[19] Claimant's Counter-Memorial on Jurisdiction, para. 19.

[20] Respondent's Statement of Defense, p. 7.

[21] Claimant's Counter-Memorial on Jurisdiction, para. 19, citing Gallegos Witness Statement, para. 8 (emphasis in original).

matter," but did not provide any explanation for the United States' refusal.[22] Ambassador Gallegos reported on this conversation to Ecuador's Minister of Foreign Affairs, Trade and Integration, describing in Spanish what, according to the Ambassador, Mr. Koh had told him in English.[23]

47. On 25 November 2010, Ecuador's Constitutional Court ruled that the Treaty's investor-State and State-State provisions were unconstitutional due to the binding nature of arbitral decisions rendered under the Treaty.[24]

48. In November 2010, Ecuador announced its intention to terminate all of Ecuador's BITs.[25] The Parties' diplomatic relationship underwent difficulty in April 2011 when the Claimant declared the U.S. ambassador to Ecuador *persona non grata* and ordered her immediate departure from Ecuador, which prompted a reciprocal response from the United States.[26]

49. In April 2011, Ecuador requested its parliament to terminate 13 BITs, including its BIT with the United States, formally denounced its BITs with France, Sweden, Germany, and the United Kingdom, and terminated its BIT with Finland.[27]

IV. Key applicable legal provisions

A. The Treaty

Preamble

> The United States of America and the Republic of Ecuador (hereinafter the "Parties");
>
> Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;
>
> Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
>
> […]

Article II

> […]

[22] Claimant's Counter-Memorial on Jurisdiction, para. 19.

[23] Claimant's Counter-Memorial on Jurisdiction, para. 21, citing Gallegos Witness Statement, para. 9.

[24] Respondent's Memorial on Jurisdiction, p. 13, citing Opinion No. 043–10-DTC-CC, Case No. 0013–10-TI, Opinion of the Constitutional Court (25 November 2010), pp. 11, 13 [R-14].

[25] Respondent's Memorial on Jurisdiction, p. 13.

[26] Respondent's Memorial on Jurisdiction, p. 14.

[27] Respondent's Memorial on Jurisdiction, p. 14.

7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

[…]

Article V

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Article VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (*a*) an investment agreement between that Party and such national or company; (*b*) an investment authorization granted by that Party's foreign investment authority to such national or company; or (*c*) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the Parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(*a*) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(*b*) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(*c*) in accordance with the terms of paragraph 3.

3. (*a*) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (*a*) or (*b*) and that six months have elapsed from the data on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(*b*) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(*a*) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(*b*) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(*a*) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry our without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (*b*) of the ICSID Convention

Article VII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations

Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply *mutatis mutandis* to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

B. The Vienna Convention on the Law of Treaties ("VCLT")

Article 26

"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[…]

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

V. Relief Requested

50. The Respondent requests that the Tribunal render an award:

i. dismissing the Claimant's request in its entirety and with prejudice;
ii. ordering such further and additional relief as the Respondent may request and the Tribunal may deem appropriate;
iii. ordering that the Claimant bear the costs of this arbitration, including the Respondent's costs for legal representation and assistance, pursuant to Article VII(4) of the Treaty and Article 40 of the UNCITRAL Rules.[28]

51. The Claimant requests that the Tribunal render an award:

i. dismissing the Respondent's objections to jurisdiction in their entirety.[29]

VI. Summary of the Parties' Arguments

52. The Respondent objects to the jurisdiction of the Tribunal, alleging the absence of a "dispute" under Article VII of the Treaty. The Respondent argues that the Claimant has failed to satisfy the two essential elements necessary to establish the existence of a dispute under international law: concreteness and positive opposition. The Respondent also submits that the Claimant was obliged to and did not engage in meaningful consultations in good faith with the Respondent prior to resorting to arbitration. The Respondent further

[28] Respondent's Memorial on Jurisdiction, p. 67.

[29] Claimant's Counter-Memorial on Jurisdiction, para. 138.

contends that it is under no obligation to respond to the Claimant's assertions regarding the proper interpretation of the Treaty. In addition, the Respondent maintains that Article VII does not create advisory, appellate, or referral jurisdiction and argues that exercising jurisdiction would be contrary to the Treaty's object and purpose and would have far-reaching and destabilizing consequences for investment treaty arbitration.

53. The Claimant contends that Article VII of the Treaty authorizes the Tribunal to make a binding decision in a dispute concerning the interpretation and application of Article II(7) and that international law imposes no requirement of allegation of treaty breach or any other measure of concreteness beyond what the Claimant articulated in its Request. Furthermore, the Claimant maintains that a dispute does exist since the Respondent has expressly stated its positive opposition to the Claimant's interpretation of Article II(7) and that its positive opposition can also be inferred. The Claimant further argues that upholding its Request would not create appellate, advisory, or referral jurisdiction and that extra-legal concerns should not prevent the Tribunal from exercising jurisdiction over a legal dispute regarding the interpretation and application of the Treaty.

1. The Respondent's Position

54. The Respondent objects to the jurisdiction of the Tribunal due to the absence of any "dispute" between Ecuador and the United States under Article VII of the Treaty. The Respondent argues that "the United States never consented to submit to purely advisory matters of this kind to arbitration under Article VII."[30] According to the Respondent, Ecuador's "'dispute' is not with the United States, but with the award rendered by the *Chevron* tribunal, an investor-state arbitration constituted under Article VI."[31] The Respondent argues that "Ecuador fails to cite even one case where an international tribunal has taken jurisdiction under a State-to-State compromissory clause like Article VII when the disputed interpretation or application involved third persons and not the other Treaty Party."[32]

a) The ordinary meaning of the terms of Article VII

55. The Respondent maintains that the use of the term "dispute" in Article VII, together with the fact that the Tribunal is to render a "binding decision" demonstrates the Parties' intention to create contentious jurisdiction, rather than advisory, appellate, or referral jurisdiction.[33] The Respondent contests the Claimant's emphasis on the word "any" preceding the word "dispute", submit-

[30] Respondent's Memorial on Jurisdiction, p. 15.

[31] Respondent's Memorial on Jurisdiction, p. 15.

[32] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 110.

[33] Respondent's Memorial on Jurisdiction, p. 16.

ting that "[w]hether it is 'any' or even 'all', the Article makes clear that there must be a dispute. The limitation in the provision is the word 'dispute'".[34]

56. Relying on the expert opinion of Professor Tomuschat, the Respondent contends that the word "dispute" has "obtained a specific meaning in international practice" which requires that the parties to a treaty put themselves "in positive opposition with one another over a concrete case involving a claim of breach under the treaty."[35]

57. The Respondent charts the development of the definition of "dispute" in the jurisprudence of the ICJ, citing *Mavrommatis*, *Southwest Africa*, and *Northern Cameroons*. The Respondent highlights the ICJ's pronouncement in *Southwest Africa* that "it must be shown that the claim of one party is positively opposed by the other…a mere assertion is not sufficient to prove the existence of a dispute" and its statement in *Northern Cameroons* that the Court may "pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication, an actual controversy."[36]

58. The Respondent avers that a dispute concerning the interpretation or application of the Treaty cannot arise in the abstract and that the Claimant's claim fails because "it presents nothing more than abstract legal questions about the general meaning of Article II(7)."[37] The Respondent argues that the Claimant mischaracterizes the phrase "interpretation or application" in Article VII by attempting to "disconnect it from the requirement of a 'dispute'" and thus distorts the plain meaning of the text.[38] According to the Respondent, the plain meaning of the phrase "dispute concerning the interpretation or application" is that a "claim concerning the interpretation of the Treaty must also be concrete, involving allegations of non-compliance with the Treaty and positive opposition between the Parties."[39] Furthermore, the Respondent argues that "the distinction between interpretation or application is not relevant to the question of the Tribunal's jurisdiction here" since the inclusion of "interpretation" in Article VII was meant to ensure that disputes over the interpretation of the Treaty in the context of an allegation of Treaty non-compliance would be justiciable.[40]

59. The Respondent alleges that disputes under Article VII of the Treaty must be "between the Parties" and cannot arise out of a separate controversy

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[34] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 104.

[35] Respondent's Memorial on Jurisdiction, p. 17, citing Expert Opinion of Professor Christian Tomuschat (24 April 2012), paras. 5–7 (hereinafter "Tomuschat Opinion"); Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 103–106. Respondent's hearing slides, "The Vienna Convention on the Law of Treaties", no. 5–7.

[36] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 105–106. Respondent's hearing slides "The Vienna Convention on the Law of Treaties", no. 8–9.

[37] Respondent's Memorial on Jurisdiction, p. 17.

[38] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 102, 122.

[39] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 102.

[40] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 119–120.

or a dispute with a third party.[41] The Respondent submits that the Claimant takes issue with the *Chevron* tribunal's interpretation of Article II(7) and not with the Respondent, who the Claimant has not accused of failing to perform its obligations under the Treaty.[42]

60. According to the Respondent, the phrase "for binding decision in accordance with the applicable rules of international law" in Article VII confirms that Article VII covers legal and not political disputes, which requires a conflict of claims or rights between the Parties, based on the Treaty, that is capable of binding resolution by the application of legal rules and principles.[43] The Respondent argues that the Claimant has "no legal dispute with the United States to resolve under international law" since there are no facts at issue or concrete disagreement between the Parties concerning the interpretation of Article II(7).[44]

61. The Respondent further argues that the term "binding" in Article VII "reflects traditional notions of res judicata" and that "in the absence of a concrete case, there would be no future set of facts to which the decision could apply".[45] The Respondent submits that any award issued by the Tribunal could not apply to the *Chevron* case because the decision of the Article VI tribunal is, by its own terms, "final and binding on the Parties to the dispute."[46]

b) Article VII read in context

62. The Respondent contrasts Article V and Article VI of the Treaty with Article VII, noting that they provide the essential context for interpreting Article VII in accordance with Article 31(1) of the VCLT. With respect to Article V, the Respondent asserts that it provides a forum for discussion of a wide range of subjects including "any *matter* relating to the interpretation or application of the Treaty" and that, unlike a dispute, a "matter" does not need to arise out of assertions by Parties of contrary rights or claims and thus establishes a much broader scope for discussions between the Parties.[47] The Respondent contends that "to the extent Ecuador's claim is that the United States refused to enter into negotiations with it to agree on the meaning of Article II(7), it is Article V and not Article VII that provides the mechanism for raising that complaint."[48]

63. The Respondent also contrasts Article VII with the investor-State dispute resolution mechanism in Article VI, which contemplates annulment

[41] Respondent's Memorial on Jurisdiction, p. 17.

[42] Respondent's Memorial on Jurisdiction, pp. 17–18.

[43] Respondent's Memorial on Jurisdiction, p. 18.

[44] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 112–113.

[45] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 112–113.

[46] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 113–114.

[47] Respondent's Memorial on Jurisdiction, p. 18; Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 114–115.

[48] Respondent's Memorial on Jurisdiction, p. 19.

and set-aside proceedings under the applicable arbitration rules and law as the exclusive means for challenging awards rendered by investor-State tribunals. According to the Respondent, "[Article VI] serves as the principal mechanism for binding dispute settlement" and an award rendered by an Article VII tribunal could not prevent a future Article VI tribunal from finding a different interpretation of Article II(7) which the Claimant would be obliged to comply with.[49] The Respondent argues that "this confirms that a State-to-State tribunal constituted under Article VII has no appellate jurisdiction over such awards."[50] Relying on Professor Reisman's expert opinion, the Respondent asserts that Articles VI and VII create "two distinct tracks of arbitration" that assign different disputes to each track.[51] However, the Respondent rejects Claimant's characterization that "the U.S. has put forward a theory of exclusive jurisdiction whereby Article VI and Article VII are in conflict somehow," contending that they are two different articles with different grants of jurisdiction.[52] The Respondent submits that "there may be cases of alleged breach which could be brought directly by an investor under Article VI or by a State under Article VII, but that question is not presented by this case."[53]

64. Article VII is, according to the Respondent, a "residual procedural mechanism for ensuring Party compliance with the Treaty in limited circumstances," for example to resolve a dispute over a Party's failure to pay an award rendered under Article VI of the Treaty. [54]

c) Article VII read in light of the Treaty's object and purpose

65. The Respondent alleges that, when read in light of the Treaty's object and purpose as required by Article 31(1) of the VCLT, Article VII provides a tribunal "jurisdiction only to adjudicate a (1) concrete case alleging a violation of the Treaty by one Party that is (2) positively opposed by the other Party" and that the Claimant has failed to satisfy either requirement.[55] The Treaty's object and purpose is the "encouragement and reciprocal protection of investment" and, while Article VI serves as the principal avenue for dispute resolution involving investors, "Article VII is meant to address real controversies regarding a Party's failure to live up to its Treaty obligations."[56] The Respondent fur-

[49] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 116.

[50] Respondent's Memorial on Jurisdiction, p. 20.

[51] Respondent's Memorial on Jurisdiction, p. 20, citing Expert Opinion of Professor W. Michael Reisman dated 24 April 2012, para. 23 (hereinafter "Reisman Opinion").

[52] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 328:21–25.

[53] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 328:25–329:3.

[54] Respondent's Memorial on Jurisdiction, p. 20.

[55] Respondent's Memorial on Jurisdiction, pp. 20–21.

[56] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 117–118.

ther contends that, "in case of doubt, [these provisions] are to be interpreted in favor of the natural liberty and independence of the party concerned."[57]

66. The Respondent argues that, under the ordinary meaning of Article VII, read in context and in light of its object and purpose, decisions of tribunals constituted under Article VII are binding only between the Parties to the case and regarding the subject matter in dispute.[58] The Respondent alleges that the Claimant is attempting to bind other tribunals and third parties through this Tribunal's award.[59]

d) The requirement of a "concrete case" alleging a treaty violation

67. In the Respondent's view, Article VII applies only to a "dispute" between the Parties concerning the interpretation or application of the Treaty. The Respondent argues that a "dispute" must entail an "*actual controversy* before the Tribunal concerning a Party's alleged breach of the Treaty" and that it "must be *concrete* in the sense that one Party claims that the other Party's act or omission has violated its legal rights, thereby warranting judicial relief capable of affecting the Parties' rights and obligations."[60] The Respondent alleges that "at the core of the concreteness requirement is a Party's complaint about the other Party's act, omission, or course of conduct."[61]

68. According to the Respondent, the requirement of a "concrete case" regarding an alleged treaty violation has "been recognized by nearly every form of international dispute-settlement tribunal, from investor-State to State-to-State tribunal."[62] The Respondent rejects the Claimant's attempt to cite cases which refute the existence of the concreteness requirement, arguing that all these cases "arose out of clear allegations of treaty violation or are otherwise manifestly distinguishable because the Parties consented to broader jurisdiction."[63] Furthermore, the Respondent argues that "the stark separation between interpretation and application that Ecuador proposes is artificial" since in all cases, even those cited by the Claimant, "there may be elements of both interpretation and application."[64] The Respondent notes that the compromissory clauses of some of the cases cited by the Claimant are broader than

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[57] Respondent's Memorial on Jurisdiction, p. 21, citing *Arbitral Decision Rendered in Conformity with the Special Agreement Concluded on December 17, 1939, Between the Kingdom of Sweden and the United States of America Relating to the Arbitration of a Difference Concerning the Swedish Motor Ships Kronprins Gustaf Adolf and Pacific*, reprinted in 26 Am. J. Int'l L. 834, p. 846 [R-41].

[58] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 341:4–20.

[59] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 342:4–25.

[60] Respondent's Memorial on Jurisdiction, p. 21.

[61] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 127.

[62] Respondent's Memorial on Jurisdiction, pp. 21–22.

[63] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 128, 136–137.

[64] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 137.

Article VII of the Treaty. In any event, the Respondent argues that these cases would also meet the concreteness requirement.[65]

69. The Respondent cites the Anglo-Italian Conciliation Commission decision in the *Cases of Dual Nationality*, which explicitly addressed the issue of the "concrete case" requirement and determined that it lacked jurisdiction to entertain abstract claims.[66] The Respondent contends that the Anglo-Italian Commission, looking at a compromissory clause with virtually identical operative language as the one at issue in the case at hand, found that it could not entertain the United Kingdom's request to interpret the meaning of a provision outside of a concrete case, lest it improperly engage in judicial lawmaking.[67]

70. The Respondent takes issue with the Claimant's attempts to distinguish the *Cases of Dual Nationality*. First, while the Anglo-Italian Commission expresses concern over making abstract pronouncements when not all the parties to a multilateral agreement are party to the proceeding, the Respondent argues that there is no difference between the non-party States and Italy, who also did not consent to the exercise of such competence by the Anglo-Italian Commission.[68] Second, the Respondent disputes that the compromissory clause in *Cases of Dual Nationality* was somehow inherently limited to concrete cases. According to the Respondent, nowhere in the Anglo-Italian Commission's decision is there support for this theory. The Anglo-Italian Commission "interpreted the scope of its jurisdiction only by reference to Article 83(2) of the Treaty".[69]

71. The Respondent further points to pronouncements by the ICJ on the importance of a "concrete case" to establish its contentious jurisdiction.[70] The Respondent in particular relies on the *Northern Cameroons* case where the ICJ stated that its contentious jurisdiction allows it to "pronounce judgment *only* in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties."[71] The Respondent argues that the same "concreteness" concept is found in the dispute settlement mechanism of the WTO. Under that mechanism, a dispute only arises in "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member."[72] The Respondent cites *United States Measures Affecting Imports of Woven Wool Shirts and*

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[65] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 138–139.

[66] Respondent's Memorial on Jurisdiction, p. 21, citing *Cases of Dual Nationality*, XIV UN Reports of International Arbitral Awards 27 [R-30].

[67] Respondent's Memorial on Jurisdiction, p. 21, citing *Cases of Dual Nationality*, *supra* note 66.

[68] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 131.

[69] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 132.

[70] Respondent's Memorial on Jurisdiction, p. 23.

[71] Respondent's Memorial on Jurisdiction, p. 23, citing *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom), Judgment on Preliminary Objections of 2 December 1963, 1963 I.C.J. Reports 13, p. 34 [R-10][C-129] (hereinafter "*Northern Cameroons*").

[72] Respondent's Memorial on Jurisdiction, p. 24, citing WTO Dispute Settlement Understanding, Article 3.9 [R-17] (hereinafter "DSU").

Blouses, where the WTO Appellate Body ruled that "we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to make law by clarifying existing provisions of the WTO agreement outside the context of resolving a particular dispute."[73]

72. The Respondent asserts that investor-State tribunals similarly require an actual controversy in a concrete case to take jurisdiction. The Respondent cites *Maffezini* v. *Spain*, where the tribunal concluded that a "dispute must relate to clearly identified issues between the parties and must not be merely academic."[74] Professor Schreuer has observed that "[t]he disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of [investor-State tribunals] to clarify legal questions *in abstracto*."[75] The Respondent further points to *ad hoc* tribunals that had come to similar conclusions, such as the *Aminoil* arbitration where the tribunal found that despite years of negotiations and the expression of divergent legal positions over the rights and obligations under various concession agreements, a concrete step such as nationalization had to be taken for there to be a dispute which would found arbitral jurisdiction.[76]

73. The Respondent distinguishes several of the cases relied upon by the Claimant, arguing that none of these cases were abstract or involved requests for interpretation outside the context of an actual controversy.[77] The Respondent divides the cases cited by the Claimant into "breach cases," where the claim involved an allegation of breach, and "consent cases," where the parties agreed to a broader jurisdictional grant. The Respondent contends that these cases "demonstrate precisely how the United States understands Article VII to operate in practice."[78] In the "consent cases," *Case A/2* and *Case A/17* before the Iran–U.S. Claims Tribunal, the Respondent submits that the U.S. and Iran consented that the Iran–U.S. Claims Tribunal address various issues concerning the interpretation of the Algiers Accords outside of the context of a concrete case.[79] However, even then the Respondent alleges that "[t]here often was a conflict of rights at issue. There may not have been allegations of breach as such, but there was a real conflict of issues."[80]

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[73] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 132.

[74] Respondent's Memorial on Jurisdiction, pp. 24–25, citing *Emilio Agustin Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000), para. 94 [R-45] (hereinafter "*Maffezini*").

[75] Respondent's Memorial on Jurisdiction, p. 25, citing C. Schreuer, The ICSID Convention: A Commentary (2d ed. 2009), p. 94 [R-82].

[76] Respondent's Memorial on Jurisdiction, pp. 25–26, citing *In the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (AMINOIL)*, Award (24 March 1982), 21 I.L.M. 976 [R-53] (hereinafter "*Aminoil*").

[77] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 140.

[78] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 137.

[79] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 140, 158–159.

[80] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 333:6–10.

74. The Respondent also distinguishes the "breach" cases. In *Revaluation of the German Mark*, the premise of the claimant's case was that Germany had violated the terms of the London Debt Agreement by revaluing its mark and refusing to make payments on the basis of new par values as allegedly required by the guarantee clause. The Respondent therefore argues that the tribunal did not abstractly interpret the guarantee clause in the treaty but did so in the context of a concrete allegation of breach.[81] In *Rights of U.S. Nationals in Morocco*, while France brought the case before the ICJ and raised interpretive questions about its obligations, the U.S. had alleged multiple treaty violations, notably that France had breached the MFN clause in a commercial treaty by depriving U.S. nationals of economic and consular rights.[82]

75. In the case of *Certain German Interests in Polish Upper Silesia*, the Respondent first notes that the compromissory clause covered the broader category of "differences of opinion".[83] The Respondent also addresses the statement in that case that a court could provide an abstract interpretation of a treaty since it had already done so in Judgment Number 3. The Respondent submits that Judgment Number 3 was the *Treaty of Neuilly* case in which Bulgaria and Greece submitted a question of treaty interpretation to the PCIJ's summary chamber by special agreement. Judgment Number 3 therefore falls squarely into the category of "consent cases" according to the Respondent.[84] The Respondent further distinguishes *Upper Silesia* by arguing that the case arose out of clear allegations by Germany that Poland had breached the underlying peace treaty by expropriating the property of German nationals. The second question posed by Germany to the PCIJ, concerning what attitude should have been adopted by Poland so as not to breach the treaty, was in fact not decided by the PCIJ, since Germany did not convert this abstract question into a justiciable one.[85]

76. In the case of the *Statute of the Memel Territory*, the Respondent first notes that the compromissory clause also covered "differences of opinion" and takes issue with the Claimant's attempts to assimilate "disputes" with "differences of opinion". The fact that this particular treaty provided that "differences of opinion" would be treated as disputes of an international character does not alter the definition of a "dispute" in international practice.[86] The Respondent asserts in any event that the concreteness requirement is satisfied since the Allied Powers accused Lithuania of wrongly dismissing the president of the Memel Territory directorate.[87] Furthermore, the Respondent notes that the court refused to rule on the more abstract question of whether "the right to

[81] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 140–143.

[82] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 145–146.

[83] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 147–148.

[84] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 148:13–20.

[85] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 148:21–150:25.

[86] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 151:8–150:7.

[87] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 153:4–9.

dismiss the President exists only under certain conditions or in certain circumstances and what those conditions or circumstances are."[88]

77. In the *Pensions of Officials of the Saar Territory*, the Respondent notes once again that the clause in question is broader, covering "serious differences of views." The Respondent also contends that, although the parties did not plead their cases in terms of treaty breaches, the arbitration nonetheless arose out of Germany's allegations that the Commission had breached the Baden–Baden Agreement by drawing on the pension reserve fund to pay pensions.[89]

78. The Respondent also argues that the *Amabile* case is inapposite, since in that case the U.S.–Italian Conciliation Commission merely established a general rule of procedure regarding the admission of written testimony, which it was competent to do pursuant to the terms of the Peace Treaty. In any event, the Commission did not do so in the abstract but in order to assess evidence proffered by Ms. Amabile in support of her claim.[90]

79. Finally, the Respondent alleges that the *U.S. Air Services Agreement* case clearly falls within the category of breach cases, since the question at issue concerned the conflicting rights claimed by the United States and France under the Services Agreement with real consequences flowing from the determination of those rights to various airlines.[91]

80. The Respondent maintains that it has long taken the position that State-to-State dispute settlement clauses that it included in FCN treaties and BITs permit only the resolution of "disputes between the Parties concerning the interpretation and application of the Treaty" and that the U.S. government has pronounced that "it is in the interest of the United States to be able to have recourse to [State-to-State dispute settlement] in case of treaty violation."[92]

81. Furthermore, the Respondent notes that the Claimant has also recognized the requirement of an actual controversy. The Claimant argued before the *Chevron* tribunal that "simply making an arbitration demand stating that a dispute exists is insufficient to invoke the BIT."[93]

82. The Respondent contends that in the case at hand the Claimant "presents no coherent theory for determining when a controversy has sufficient concreteness to constitute a dispute" and denies the existence of such a

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[88] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 154:5–13.

[89] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 155:12–156–13.

[90] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 157:6–158:7.

[91] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 331:5–13.

[92] Respondent's Memorial on Jurisdiction, pp. 26–27, citing U.S. Senate Report on Commercial Treaties with Belgium and Vietnam (28 August 1961), Appendix, Department of State Memorandum on Provisions in Commercial Treaties Relating to the International Court of Justice, p. 7 [R-110].

[93] Respondent's Memorial on Jurisdiction, p. 27, citing *Chevron Corp. and Texaco Petroleum Co.* v. *Republic of Ecuador*, PCA Case No. 2007–2, Interim Award (1 December 2008), para. 94 [R-32] (hereinafter "*Chevron* Interim Award").

requirement, relying solely on positive opposition to found the dispute.[94] The Respondent notes that this leaves undetermined "what theoretical framework could possibly guide this Tribunal's analysis to Ecuador's conclusion?"[95]

83. The Respondent points to the report by the Claimant's expert, Professor Pellet, where he recognizes a concreteness requirement, at least for purposes of Article V and submits that the U.S.' failure to respond to Ecuador's demand breached the U.S.' obligation to consult under Article V. The Respondent disagrees with Professor Pellet's conclusion that the U.S. has breached its Article V obligations and notes that the Claimant has never claimed this breach, but it does "agree with Professor Pellet's basic approach to Article V" where a dispute is based on an act, omission, or a course of conduct that is alleged to violate the BIT.[96] The Respondent submits that Professor Pellet's analysis is strained when he examines whether there is a dispute concerning the interpretation of Article II(7) of the BIT, and that even Professor Pellet concedes that "the problem is that this dispute concerns the implementation of Article V and not, primarily, the interpretation of Article II(7)." The Respondent, however, rejects Professor Pellet's reasoning that, since the Parties would probably not agree on the meaning of Article II(7) when consulting under Article V, it would be more efficient for the Tribunal to directly decide the issue.[97]

84. The Respondent asserts that the Claimant has manifestly failed to establish the existence of a concrete case as required under Article VII. The Respondent contends that "by its own admission, Ecuador makes no allegation that the United States has failed to comply with the Treaty," citing the Claimant's pronouncements that:

> Ecuador has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek compensation from the United States. It does not seek an order against the United States.[98]

The Respondent avers that the Claimant is asking the Tribunal to rule on "open-ended questions, not connected to any concrete facts" pointing to the fact that the Claimant asked the Tribunal at the First Preparatory Meeting to rule on the Claimant's precise obligations under Article II(7), such as how to organize its court system to comply with the Treaty and how aggressively it must act to speed up cases and by which methods.[99]

85. The Respondent stresses that the questions the Claimant put to the Tribunal "provide the strongest justification for why the 'concrete case'

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[94] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 134.

[95] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 134.

[96] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 134–135.

[97] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 135–136.

[98] Respondent's Memorial on Jurisdiction, pp. 27–28, citing Transcript (Preparatory Meeting), 21 March 2010, p. 18.

[99] Respondent's Memorial on Jurisdiction, p. 28.

requirement is essential."[100] The Respondent contends that these questions lead to an advisory opinion and that the Tribunal is not "a general advisor" of the Claimant regarding how it is to implement changes to its judiciary.[101] Furthermore, the concreteness requirement "prevents Article VII from being construed so broadly as to deprive a Party of its discretion to interpret the BIT or to undermine the bilateral economic dialogue under a BIT."[102]

e) Lack of positive opposition by the Parties

86. The Respondent argues that to establish the existence of a "dispute", the Claimant must prove that the Parties are in "positive opposition" to one another in a concrete case involving a breach of the Treaty.[103] Despite certain statements to the contrary in its Counter-Memorial, the Respondent submits that, at the hearing on jurisdiction, the Claimant accepted the requirement of positive opposition to found a dispute.[104]

87. To establish the lack of positive opposition in this case, the Respondent notes the Claimant's acknowledgment that the Respondent "did not affirmatively oppose Ecuador's unilateral interpretation of Article II(7) of the Treaty."[105] The Respondent stresses that "it has never taken a position on the substance of Ecuador's interpretation of Article II(7)…either before or after Ecuador presented its Diplomatic Note."[106] The Respondent objects to the Claimant's reference to the Respondent's pleadings to found positive opposition. The Respondent relies on *Georgia* v. *Russia* to argue that "jurisdiction must be established at the time of an application" and that therefore the positive opposition must have materialized as of 28 June 2011.[107]

88. In any event, the Respondent denies that its pleadings put it in positive opposition, rejecting the argument that the characterization of the Claimant's interpretation as unilateral means that the Respondent necessarily disagrees with it.[108] The Respondent submits that its calling the Claimant's interpretation unilateral is a fact, and is without prejudice as to whether the Respondent agrees with the Claimant's interpretation.[109] Furthermore, the Respondent rejects the Claimant's view that because the Respondent's expert, Professor Reisman, characterized the *Chevron* award as *res judicata*, then this

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[100] Respondent's Memorial on Jurisdiction, p. 28.

[101] Respondent's Memorial on Jurisdiction, pp. 28–29.

[102] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 130.

[103] Respondent's Memorial on Jurisdiction, p. 29.

[104] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 164.

[105] Respondent's Memorial on Jurisdiction, p. 29.

[106] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 167; Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 334:19–22.

[107] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 167–169.

[108] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 169.

[109] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 170, 190.

necessarily means that the U.S. agrees with the *Chevron* award as binding for Ecuador's obligations *vis-à-vis* the United States as well.[110] The Respondent stresses that Professor Reisman's opinion only described the *Chevron* award as *res judicata* in the context of explaining the relationship between Article VI and Article VII of the Treaty and in no way implied that the award was *res judicata* for future tribunals.[111]

89. The Respondent contests the Claimant's argument that the Respondent put itself in positive opposition through its silence: "[s]ilence alone cannot establish positive opposition. It is only when a party's actions make it clear that its views are positively opposed to the other party, that silence can serve as an objective determination of positive opposition."[112] The Respondent points to the ILC guidelines on unilateral interpretive declarations which states that silence is a common and indeterminate response and can express either agreement or disagreement with the proposed interpretation.[113] The Respondent also relies on Professor Tomuschat's view that "in the absence of an obligation to provide an answer, silence alone cannot be deemed to constitute rejection."[114] The Respondent notes that the Claimant has conceded that the Respondent "has taken no action whatsoever," meaning that it cannot have created positive opposition.[115]

90. The Respondent defines positive opposition, with reference to international jurisprudence, as "a conflict of legal views or interests between two parties."[116] To establish positive opposition, the Respondent argues that a "tribunal must make an 'objective determination' that 'the claim of one party is positively opposed by the other.'"[117] The Respondent notes that positive opposition is often established by diplomatic exchanges or is manifested in public statements.[118] The Respondent sets out the two factors required to establish positive opposition:

> one party must allege that the party's acts, omissions, or course of conduct amount to international wrongdoing, or otherwise conflict with or offend the first party's rights under the treaty. Second, the accused Party must deny the allegation of wrongdoing, either expressly or implicitly.[119]

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[110] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 190–191.

[111] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 191.

[112] Respondent's Memorial on Jurisdiction, p. 29.

[113] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 192–193.

[114] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 193.

[115] Respondent's Memorial on Jurisdiction, pp. 29–30.

[116] Respondent's Memorial on Jurisdiction, p. 30, citing *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment of 30 August 1924, 1924 P.C.I.J., Series A, No. 2 [R-4] (hereinafter "*Mavrommatis*"); *East Timor (Portugal* v. *Australia*), Judgment (30 June 1995), 1995 I.C.J. Reports 90, pp. 99–100 [R-55].

[117] Respondent's Memorial on Jurisdiction, p. 30, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), Advisory Opinion (30 March 1950), 1950 I.C.J. Reports 65, p. 74 [R-6][C-137] (hereinafter "*Interpretation of Peace Treaties*").

[118] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 165–166.

[119] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 107.

The Respondent submits that taking a position on the underlying matter may be done explicitly or implicitly through action. However, one party cannot force the other into positive opposition nor can one party unilaterally create a dispute.[120]

91. The Respondent argues that the cases cited by the Claimant in claiming that the existence of a dispute can be established by a party's conduct, including silence, actually contradict the Claimant's assertion. The Respondent analyses *Georgia* v. *Russia*, *Cameroon* v. *Nigeria*, and *UN Headquarters* and contends that in those cases, one party had claimed that the other had breached international obligations owed to that party, which demanded a response. The Respondent alleges that in the case at hand, no allegation of a breach of the Treaty has been put forward, and there is therefore no obligation to respond to the Claimant's request for interpretation.[121]

92. As regards *Georgia* v. *Russia*, the Respondent maintains that Georgia had claimed that Russia had violated a human rights treaty and that Russia had expressly and publicly denied those claims, which is why the ICJ determined that the parties were in positive opposition. *Georgia* v. *Russia* is thus inapposite to the matter at hand since the Claimant has never alleged any breach of the Treaty, nor has the Respondent publicly or privately affirmed or denied the Claimant's interpretation of Article II(7).[122] With respect to *UN Headquarters* and *Cameroon* v. *Nigeria*, the Respondent contends that the actions of the accused parties, allegedly contrary to their treaty obligations, provided clear evidence that they opposed the claim of breach, thus giving rise to a dispute. In *UN Headquarters*, the United States passed a law in direct violation of its alleged international obligations.[123] Meanwhile, in *Cameroon* v. *Nigeria*, the ICJ found that Nigerian troops had engaged in "incidents and incursions" into the territory claimed by Cameroon.[124] Furthermore, in that case, the parties had agreed that there was a dispute over part of the border but not over the entirety of the border and therefore the question was one of the scope of the dispute, not its existence.[125] The Respondent submits that *Cameroon* v. *Nigeria* is inapposite to the case at hand: "there have been no troop invasions, no border skirmishes, and no admission of even the smallest

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[120] Respondent's Memorial on Jurisdiction, p. 30.

[121] Respondent's Memorial on Jurisdiction, pp. 30–31.

[122] Respondent's Memorial on Jurisdiction, p. 31, citing *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia), Judgment on Preliminary Objections (1 April 2011), ICJ, para. 112 [R-9][C-122] (hereinafter "*Georgia* v. *Russia*"); Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 172–173.

[123] Respondent's Memorial on Jurisdiction, p. 32, citing *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion (26 April 1988), 1988 I.C.J. Reports 12, p. 28 [R-57] (hereinafter "*UN Headquarters Agreement*").

[124] Respondent's Memorial on Jurisdiction, p. 33.

[125] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 177.

of disputes."[126] In this case, the Claimant does not allege that the Respondent has taken any action whatsoever contrary to its obligations under the Treaty.[127]

93. The Respondent asserts that the Claimant cannot "unilaterally create 'positive opposition'" since positive opposition requires an objective determination by the Tribunal that one party's claims of a treaty breach are refuted by the other party.[128] Even if the US Legal Adviser had stated that the United States "will not rule" on the Claimant's request that it agree to the Claimant's interpretation—a fact the Respondent denies—this would not create positive opposition over the interpretation of Article II(7).[129] The Claimant cannot show that the Respondent contradicted a claim of treaty violation by Ecuador in diplomatic or public statements, and thus no objective assessment of this alleged statement could lead to the conclusion that the Parties were in positive opposition.[130] The Respondent maintains that the ICJ has concluded similarly, finding in *Certain Property* that diplomatic exchanges between Liechtenstein and Germany demonstrating a clear difference of views manifested positive opposition over whether there was a breach of an international obligation.[131] Unlike the German Foreign Minister's statement to the Foreign Minister of Liechtenstein that it was "known that the German Government [did] not share the legal opinion" of Liechtenstein on this matter, which the ICJ took to establish the requisite positive opposition, the US Legal Adviser allegedly stated that the Respondent "would not rule" on the Claimant's request—not that it disagreed with the Claimant's interpretation of Article II(7) of the Treaty.[132]

94. The Respondent contends that the Claimant cannot force the Parties into positive opposition by ultimatum. It cannot unilaterally put the Respondent in the "untenable position" of having no choice but to agree with the Claimant's interpretation or be deemed to be in positive opposition by remaining silent.[133] Furthermore, the Respondent alleges that "the most Ecuador can do is to say that the failure of the United States to answer Ecuador's either/or demand […] created the dispute […] But that alleged dispute is over whether Ecuador had a right to issue such an ultimatum or demand and whether the Respondent had an obligation to answer. It's not over the interpretation or application of Article II(7)."[134]

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[126] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 178.

[127] Respondent's Memorial on Jurisdiction, pp. 31–32.

[128] Respondent's Memorial on Jurisdiction, p. 34.

[129] Respondent's Memorial on Jurisdiction, p. 34.

[130] Respondent's Memorial on Jurisdiction, p. 34.

[131] Respondent's Memorial on Jurisdiction, p. 34, citing *Case Concerning Certain Property* (Liechtenstein v. Germany), Judgment (10 February 2005), 2005 I.C.J. Reports 6, para. 25 [R-7] (hereinafter "*Certain Property*").

[132] Respondent's Memorial on Jurisdiction, p. 35, citing *Certain Property*, *supra* note 131, para. 23.

[133] Respondent's Memorial on Jurisdiction, pp. 35–36.

[134] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 108–109.

95. Finally, the Respondent argues that it cannot see how its silence prejudices the Claimant or requires the Claimant to give U.S. investors greater advantages than Ecuador agreed to provide, since Ecuador's interpretation was successful in one investor-State arbitration. The Respondent alleges that the Claimant seems to be treating the *Chevron* award as binding precedent in the future, rather than providing it with its proper force as final and binding only as between Chevron and Ecuador.[135]

f) The Respondent does not owe the Claimant an obligation to respond to or confirm the Claimant's unilateral interpretation of the Treaty

96. The Respondent disputes the Claimant's theory that the principle of good faith obligates the Respondent to respond to or confirm the Claimant's unilateral interpretation of Article II(7).[136] The Respondent asserts that the Claimant has no right under the Treaty or general international law to demand that the Respondent confirm its own interpretation of Article II(7) or be thereby forced to submit to arbitration. For the Claimant to be able to unilaterally create a dispute about the substance of its claim would "turn international treaty practice on its head."[137] The Respondent contends that States retain the discretion to mutually agree to a joint interpretation but are under no obligation to reach such agreement.[138]

97. According to the Respondent, a State may bind itself under international by a unilateral act but cannot bind another State by that act.[139] Allowing the Claimant to bring into being a mechanism not provided by the Treaty which would force the Respondent to pronounce itself on the interpretation of provisions of the Treaty whenever the Claimant found it necessary, is inconsistent with the notion of mutuality which underlies the obligations on State parties to a treaty.[140]

98. The Respondent maintains that nothing in the Treaty contains any provision obligating the Respondent to interpret the Treaty "beyond the four corners of the text itself."[141] The Respondent notes that the only provision in the Treaty under which the Respondent is committed to engage in consultations regarding the meaning of the Treaty provisions is Article V which, as the Respondent's expert Professor Tomuschat opines, "would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement."[142] The Respondent also cites *Oppenheim's International Law* for

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[135] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 194–195.

[136] Respondent's Memorial on Jurisdiction, p. 36.

[137] Respondent's Memorial on Jurisdiction, p. 36.

[138] Respondent's Memorial on Jurisdiction, p. 37.

[139] Respondent's Memorial on Jurisdiction, p. 37.

[140] Respondent's Memorial on Jurisdiction, pp. 37–38.

[141] Respondent's Memorial on Jurisdiction, p. 38.

[142] Respondent's Memorial on Jurisdiction, pp. 38–39, citing Tomuschat Opinion, para. 14.

the proposition that "[w]hile consultations must be undertaken in good faith, they do not give to any of the states involved a right to have its views accepted by the others or to stop them acting in whatever way they propose."[143] The Respondent contends that it did in fact respond to the Claimant by stating that "it would remain silent on Ecuador's interpretation." While this may not have been the desired response, the Respondent argues that it was made in good faith and is fully consistent with the Treaty.[144]

99. The Respondent counters the Claimant's assertion that the principles of good faith and *pacta sunt servanda* obligate the Respondent to respond to its demand for interpretation.[145] The Respondent alleges that the principle of good faith is one of the basic principles governing the creation and performance of legal obligations but "is not itself a source of obligations where none would otherwise exist."[146] Any legal obligation to respond to the Claimant's demand must therefore have a basis in the Treaty.[147] The Respondent adds that in *Cameroon* v. *Nigeria*, the ICJ rejected Nigeria's argument that Cameroon's failure to give Nigeria prior notice of its intent to bring a claim before the ICJ was a breach of good faith.[148] The Respondent submits that the Claimant's efforts to argue here that the Respondent did not fulfill its obligations under the Treaty in good faith are similarly unavailing. According to the Respondent, given that the Claimant never invoked Article V, it cannot now argue that the United States did not consult in good faith.[149]

100. Furthermore, the Respondent contends that the principle of good faith is incumbent on both Parties and that it is difficult to find good faith in the Claimant's decision to invoke Article VII of the Treaty only a few months after having successfully petitioned its courts to declare that provision unconstitutional.[150]

101. The Respondent also disputes the Claimant's reliance on the principle of *pacta sunt servanda* as a means to require the Respondent to express a view on the proper interpretation of the Treaty. While the Respondent concedes that every treaty in force is binding upon the parties and must be performed in good faith, the Claimant can point to no obligation that the Respondent has failed to perform under the Treaty, or that it has acted in bad

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[143] Respondent's Memorial on Jurisdiction, p. 39, citing Robert Jennings & Arthur Watts, *Oppenheim's International Law* (9th ed. 1992) at s. 537 [R-83].

[144] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 186.

[145] Respondent's Memorial on Jurisdiction, p. 39.

[146] Respondent's Memorial on Jurisdiction, p. 39, citing *Case Concerning Border and Transborder Armed Actions Case* (Nicaragua v. Honduras), Judgment on Jurisdiction and Admissibility (20 December 1988), 1988 I.C.J. Reports 69, p.105 [R-62] (hereinafter "*Border and Transborder Armed Actions*").

[147] Respondent's Memorial on Jurisdiction, p. 39.

[148] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 187.

[149] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 187–188.

[150] Respondent's Memorial on Jurisdiction, p. 40.

faith, or that the lack of response by the Respondent somehow prevents the Claimant from performing its obligations under the Treaty.[151]

102. The Respondent argues that international law does not compel States to respond to unilateral interpretive declarations, nor does it prohibit them from remaining silent when confronted with such declarations.[152] The Respondent notes that, when confirmed by the other State party, interpretations contained in such declarations may become part of the context in which the terms of a treaty are to be read.[153] The Respondent however, avers that it is aware of no instance where a party unilaterally imposed its view on another party through arbitration and that such an attempt was firmly rejected in *Cases of Dual Nationality*.[154]

103. Furthermore, the Respondent cites State and treaty practice in support of its position.[155] The Respondent contends that it can find no treaty imposing the obligation of responding to a demand for interpretation, nor an example of a State party responding to such a demand under the belief that it was obliged to do so.[156] The Respondent maintains that, where it and its treaty partners have made express provisions for States to offer their unilateral views on the meaning of a provision of an investment treaty, "they have created a discretionary rather than a mandatory right," such as under the North American Free Trade Agreement (hereinafter "NAFTA") where a non-disputing party to the NAFTA may make a submission to an investor-State tribunal on a question of interpretation of the treaty, as well as under the United States' more recent BITs and FTAs.[157] The Respondent agrees with Professor Pellet's opinion, relying on the *S.S. Wimbledon* case, that limits on sovereign discretion must be express. The Respondent argues that no such express limitation can be found in Article V or any other provision of the Treaty.[158]

104. Where State practice exists, the Respondent claims that this practice confirms that States have the discretion—rather than the obligation—to agree to a joint interpretation.[159] The Respondent points to the examples of the Netherlands consenting to offer its interpretation of the Czech–Netherlands BIT under the consultations provision of that treaty, and that of Argentina and Panama issuing an exchange of notes to reach a joint interpretation on the meaning of the MFN clause in the Argentina–Panama BIT.[160] In neither case did the States in question act as if under an obligation to offer an interpretation.[161]

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[151] Respondent's Memorial on Jurisdiction, pp. 40–41.
[152] Respondent's Memorial on Jurisdiction, pp. 41–42.
[153] Respondent's Memorial on Jurisdiction, pp. 42–43.
[154] Respondent's Memorial on Jurisdiction, p. 43.
[155] Respondent's Memorial on Jurisdiction, p. 43.
[156] Respondent's Memorial on Jurisdiction, p. 43.
[157] Respondent's Memorial on Jurisdiction, pp. 43–44.
[158] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 185.
[159] Respondent's Memorial on Jurisdiction, p. 44.
[160] Respondent's Memorial on Jurisdiction, p. 45.
[161] Respondent's Memorial on Jurisdiction, p. 45.

105. The Respondent contends that investment treaties which provide for the issuance of joint interpretations to clarify the meaning of a treaty, expressly require the parties' mutual agreement, such as is found in Article 1131 of NAFTA.[162] Similar provisions to Article 1131 of NAFTA have been included in the 2012 U.S. Model BIT and recent U.S. FTAs, but remain the exception rather than the rule in international practice.[163] The Respondent points to Professor Reisman's opinion that Article VII of the Treaty is not equivalent to Article 1131 of NAFTA, and that in any event "even NAFTA Article 1131 does not compel joint interpretations."[164]

106. The Respondent submits that issuing an interpretation of a treaty obligation requires a complicated inter-agency process and is only done in a contentious case with a genuine dispute.[165]

g) The Claimant has not fulfilled its obligation to consult

107. The Respondent argues that, as the ICJ held in *Georgia* v. *Russia*, a tribunal cannot exercise jurisdiction until all preconditions are fulfilled under the relevant compromissory clause. According to the Respondent, under Article VII of the treaty, this would require the Claimant to seek to resolve the dispute through consultations or other diplomatic channels after the dispute had arisen.[166] The Respondent contends that, even accepting the Claimant's theory that a dispute arose in October 2010 when Mr. Koh told Ambassador Gallegos that the U.S. would not provide a response to Ecuador's Diplomatic Note, the Claimant failed to meaningfully pursue consultations, under Article V or otherwise, prior to commencing arbitration under Article VII.[167] The Respondent alleges that all the actions relied upon by the Claimant to satisfy its obligations to consult took place prior to the date on which the Claimant itself alleges that the dispute crystallized.[168]

h) Article VII does not create advisory, appellate or referral jurisdiction

108. The Respondent claims that had the Parties to the Treaty intended to provide the Tribunal with broader powers to address abstract legal questions, they would have had to do so expressly.[169] The Respondent alleges that

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[162] Respondent's Memorial on Jurisdiction, p. 46.

[163] Respondent's Memorial on Jurisdiction, p. 46.

[164] Respondent's Memorial on Jurisdiction, pp. 46–47, citing Reisman Opinion para. 44.

[165] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 317:20–319:19.

[166] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 110.

[167] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 311:7–16.

[168] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 110–111.

[169] Respondent's Memorial on Jurisdiction, pp. 47–48.

"[a]bsent the expressed consent of both Parties, the Tribunal has no authority to act as an advisory, appellate or referral body."[170]

109. The Respondent notes that the question the Claimant has asked the Tribunal is similar to those posed to the ICJ in its capacity as an advisory body competent to offer non-binding opinions under the ICJ Statute. The Treaty is, however, devoid of any equivalent enabling provisions.[171]

110. The Respondent asserts that Article VII also does not provide for appellate jurisdiction, unlike the Dispute Settlement Understanding which grants the Appellate Body of the WTO the power to decide "issues of law covered in the [underlying] panel report and legal interpretations developed by the panel."[172] The Respondent notes that, when in the past it has considered the creation of appellate jurisdiction, it has done so expressly, as in recent BITs and investment chapters of FTAs.[173] The Respondent argues that the inclusion of express provisions regarding the potential creation of appellate jurisdiction in its BIT practice shows that Article VII of the Treaty is not and was never intended to function as an appellate mechanism.[174]

111. The Respondent contends that, although the Claimant claims that it does not intend to ask the Tribunal to overturn the *Chevron* case, a press statement issued by the Claimant "implied that its goal in this arbitration is to undo the award."[175] The Respondent notes that the Claimant's request for an interpretation was prompted by the *Chevron* award and that its letter to the Tribunal of 21 June 2012 states that "Ecuador's Memorial on the Merits and attachments set forth Ecuador's interpretation of Article II(7) and explain why the interpretation given by the Arbitral Tribunal in Chevron Corp and Texaco Petroleum Company versus the Republic of Ecuador was incorrect."[176] The Respondent argues that this indicates that Ecuador is seeking to relitigate the *Chevron* award and is thus equivalent to a request for appeal, over which the Tribunal does not have jurisdiction.[177] The Respondent alleges that the Claimant is at least seeking to attack the *Chevron* award collaterally in violation of Article VI of the treaty, pursuant to which that award is to be treated as final and binding.[178]

112. The Respondent points to the case of *X* v. *Y*[179] and *Lucchetti* v. *Peru*[180] as examples of cases where disguised appeals were not granted. In *X*

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[170] Respondent's Memorial on Jurisdiction, p. 48.

[171] Respondent's Memorial on Jurisdiction, p. 49.

[172] Respondent's Memorial on Jurisdiction, p. 50, citing DSU, *supra* note 72, Article 17.6.

[173] Respondent's Memorial on Jurisdiction, p. 50.

[174] Respondent's Memorial on Jurisdiction, p. 50.

[175] Respondent's Memorial on Jurisdiction, p. 51.

[176] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 200.

[177] Respondent's Memorial on Jurisdiction, p. 51.

[178] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 203–204.

[179] *X S.A.* v. *Y Ltd.*, Case 4A_210/2008/ech, Oct. 29, 2008 (Swiss Federal Court, 1st Civ. Law Division), 27 ASA Bull., No. 2, 309, p. 323 [R-12].

[180] *Empresas Lucchetti S.A. and Lucchetti Peru S.A.* v. *Republic of Peru*, ICSID Case No. ARB/03/04, Award (7 February 2005) [R-50] (hereinafter "*Lucchetti*").

v. *Y*, company X, after a partial award was rendered against it by the tribunal, commenced a new arbitration under the same contract seeking a declaration on the validity of the parties' underlying agreement, as well as setting aside proceedings in Swiss courts. It then asked the initial tribunal to stay its proceedings. The Swiss Federal Court rejected company X's impermissible attempt to defeat the tribunal's partial award and the initial tribunal declined to stay its proceedings.[181] In *Lucchetti* v. *Peru*, after the claimant had brought a case against Peru under the Chile–Peru BIT, Peru began arbitration under the State–State arbitration clause and asked the *Lucchetti* tribunal to suspend its proceedings in light of the concurrent State-to-State dispute, which the tribunal refused to do.[182] The Respondent also relies on Professor Orrego Vicuña's view that resorting to State-to-State arbitration to avoid the obligation the State has accepted with respect to an investor "constitutes an '*abus de droit*' sufficient for the inter-State tribunal to decline its jurisdiction."[183]

113. The Respondent highlights its expert Professor Reisman's opinion that the Claimant's attempt to use the State-to-State track to invent a procedure for appellate review is at odds with the two-track jurisdictional regime of the Treaty.[184] The Respondent argues that taking jurisdiction and ruling on the questions presented in this case would force the Respondent into a proceeding to relitigate a final award in which it had not participated.[185]

114. Finally, the Respondent submits that Article VII does not allow for referral jurisdiction which would permit the consideration of preliminary legal questions by a third party.[186] The Respondent contends that when States establish referral jurisdiction, they do so expressly by two methods: the "case-stated" method where a national court *sua sponte* refers a question to an international court for binding decision, such as under Article 9F of the Treaty of Lisbon, or by "evocation" procedures where a disputing party may request the removal of a legal issue from one court to another for decision, such as is found in the 1922 Treaty of Upper Silesia.[187] The Respondent avers that States know how to establish referral mechanisms and the absence of these mechanisms in the Treaty indicates that the Parties intended to confer no such power on the Tribunal.

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[181] Respondent's Memorial on Jurisdiction, pp. 51–52.

[182] Respondent's Memorial on Jurisdiction, p. 52, citing *Lucchetti*, *supra* note 180.

[183] Respondent's Memorial on Jurisdiction, pp. 52–53, citing Francisco Orrego Vicuña, *Lis Pendens Arbitralis,* Parallel State and Arbitral Procedures in International Arbitration: Dossiers—ICC Institute of World Business Law, p. 207, 214 [R-92].

[184] Respondent's Memorial on Jurisdiction, p. 53, citing Reisman Opinion para. 51.

[185] Respondent's Memorial on Jurisdiction, p. 53.

[186] Respondent's Memorial on Jurisdiction, p. 53.

[187] Respondent's Memorial on Jurisdiction, pp. 53–54.

i) A finding of jurisdiction would exceed the tribunal's judicial function and would constitute judicial law-making

115. The Respondent alleges that because the Tribunal is empowered to take only original and contentious jurisdiction, it cannot rule on Ecuador's request for an abstract interpretation of Article II(7) as this would exceed its judicial function.[188] The Respondent submits that the Claimant's request for an interpretation that would bind future tribunals is outside the scope of Article VII, since it would "deprive them of the right to be the masters of the meaning of their treaties."[189] The Respondent points to the *Nuclear Tests* case, where Judge Gros stated that the tendency to submit political disputes to adjudication would result in the "institution, on the international plane, of government by judges."[190] The Respondent also highlights the warning of the *Aminoil* tribunal against arbitral tribunals stepping into the shoes of the parties to regulate their affairs without their express consent.[191]

116. The Respondent argues that the Claimant is asking the Tribunal to act as an international legislator, not arbitrator, and to substitute its own interpretation of a provision of the Treaty for that of sovereign consent.[192] The Respondent points again to the reasoning in the *Cases of Dual Nationality* where the Anglo-Italian Conciliation Commission ruled that a dispute settlement provision providing for jurisdiction over "disputes concerning the application or interpretation" of the treaty in question did not grant it jurisdiction to decide abstract and general questions, stating that "the arbitrator cannot substitute the legislator".[193] The Respondent contends that the Claimant is making the same request of this Tribunal that the United Kingdom made to the *Cases of Dual Nationality* tribunal, since it asks the Tribunal to issue an interpretation of a provision of the Treaty absent party consent and outside the context of a concrete case.[194]

j) Exercising jurisdiction would be contrary to the Treaty's object and purpose and would destabilize international adjudication

117. The Respondent argues that granting the Claimant's request would "jeopardize the system of investment treaties, particularly investor-State dispute settlement provisions" and would have the effect of "judicializing diplomacy",

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[188] Respondent's Memorial on Jurisdiction, p. 55.

[189] Respondent's Memorial on Jurisdiction, pp. 55–56.

[190] Respondent's Memorial on Jurisdiction, p. 56, citing Separate Opinion of Judge Gros, *Nuclear Tests Case* (Australia v. France), 1974 I.C.J. Reports 253, p. 297 [R-77] (hereinafter "*Nuclear Tests*").

[191] Respondent's Memorial on Jurisdiction, p. 56, citing *Aminoil*, *supra* note 76, pp. 1015–16.

[192] Respondent's Memorial on Jurisdiction, p. 57.

[193] Respondent's Memorial on Jurisdiction, pp. 57–58, citing *Cases of Dual Nationality*, *supra* note 66, pp. 29, 35.

[194] Respondent's Memorial on Jurisdiction, pp. 58–59.

chilling the free exchange of views essential to foreign relations.[195] The equivalent to Article VII is found in a countless number of investment treaties and, should the Claimant's request be granted, this would open the door to State-to-State arbitrations for matters that the parties never consented to litigating.[196]

118. The Respondent submits that taking jurisdiction would undermine stability, predictability and neutrality, which it argues are "key principles built into Article VI".[197] The Treaty does not provide for further review or appeal other than the permissible annulment or set-aside proceedings.[198] The Respondent argues that an "authoritative interpretation" rendered by an Article VII tribunal could be used to collaterally attack an award rendered pursuant to Article VI of the Treaty, such as the *Chevron* award, and the Claimant could seek to use an award rendered by the Tribunal to deny enforcement of the *Chevron* award.[199]

119. Second, the Respondent asserts that granting the Claimant's request would undermine the depoliticization of investment disputes, a principal rationale for investor-State arbitration. In any actual or impending investor-State arbitration, the State of the investor would then face the threat of arbitration.[200] The Respondent points to the opinion of its expert, Professor Reisman, who contends that allowing the Claimant's request to proceed would encourage respondent States and States of investors to initiate State-to-State arbitrations to reverse the effect of awards.[201] The Respondent argues that this would "erode the effectiveness of BITs' investor-State arbitration."[202] The Respondent rejects Professor Amerasinghe's opinion and deems his conclusion—that the Parties "intended to deviate from their BIT practice and establish a novel control mechanism by which one *ad hoc* tribunal is authorized, sub silentio, to render an authoritative and definitive interpretation that bind other *ad hoc* tribunals"—to be not only improbable but wholly unsupported by law."[203]

120. Third, the Respondent submits that if the Claimant's request is granted, it would create a "new and unprecedented referral mechanism for investment arbitration" which is not under the purview of Article VII.[204] A respondent State could seek fast-track State-to-State arbitration to obtain an interpretation of a treaty provision to influence ongoing investor-State arbitrations.[205] The Respondent disputes the Claimant's argument that exercising

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[195] Respondent's Memorial on Jurisdiction, p. 59.

[196] Respondent's Memorial on Jurisdiction, p. 59.

[197] Respondent's Memorial on Jurisdiction, p. 59.

[198] Respondent's Memorial on Jurisdiction, p. 60.

[199] Respondent's Memorial on Jurisdiction, p. 60.

[200] Respondent's Memorial on Jurisdiction, pp. 60–61.

[201] Respondent's Memorial on Jurisdiction, p. 61, citing Reisman Opinion para. 54.

[202] Respondent's Memorial on Jurisdiction, p. 61.

[203] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 208.

[204] Respondent's Memorial on Jurisdiction, p. 62.

[205] Respondent's Memorial on Jurisdiction, p. 62.

jurisdiction would lead to less politicization by clarifying the Parties' rights and obligations under the Treaty.[206] The Respondent avers that "by dragging the investor's home State into the dispute, Ecuador is ensuring that the potential friction becomes actual diplomatic tension."[207]

121. Finally, the Claimant's broad interpretation of Article VII would judicialize significant aspects of the Parties' bilateral relationships and could limit potentially useful lines of communication and agreement between the Parties.[208] The Respondent avers that the Tribunal's assumption of jurisdiction in this case would "drastically change this dynamic" and both Parties would have to exercise extreme caution with every request for discussion of the Treaty, since even silence could land the Parties in State-to-State arbitration.[209] The Respondent contends that if the Claimant's broad interpretation of "disputes" were adopted, consultations under Article V—which allows discussions on "any matters" and which is meant to foster discussion—would always proceed under the threat of arbitration.[210] According to the Respondent, the structure of Article V which foresees consultations on disputes as well as other matters indicates that these are two separate categories. Furthermore, the Respondent maintains that the Claimant's position would permit a Party to bypass consultations under Article V altogether and turn immediately to arbitration, as the Claimant has attempted to do in the case at hand.[211]

122. The Respondent submits that finding jurisdiction would establish a dangerous general precedent for the interpretation of other treaties, and that discussions among treaty partners about the meaning of treaties would be chilled, as they would proceed under the constant threat of State-to-State arbitration.[212] The Respondent notes that similar State-to-State dispute resolution clauses appear in many bilateral and multilateral treaties beyond the investment protection area, such as the UN Convention Law of the Sea (hereinafter "UNCLOS"), and asserts that the Tribunal's acceptance of the Claimant's proposal could have far-reaching destabilizing consequences that could "unravel the longstanding system of international treaties."[213]

123. The Respondent concludes that the Claimant "invites the Tribunal not just to exceed its authority in this case, but more fundamentally, to displace the role of bilateral diplomatic discussion and to destabilize the entire system of inter-State arbitration."[214]

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[206] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 211.

[207] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 211.

[208] Respondent's Memorial on Jurisdiction, p. 62.

[209] Respondent's Memorial on Jurisdiction, p. 63.

[210] Respondent's Memorial on Jurisdiction, p. 64.

[211] Respondent's Memorial on Jurisdiction, p. 64–65.

[212] Respondent's Memorial on Jurisdiction, p. 66.

[213] Respondent's Memorial on Jurisdiction, p. 66.

[214] Respondent's Memorial on Jurisdiction, p. 67.

2. The Claimant's Position

a) The factual background

124. As a preliminary matter, the Claimant notes that it accepts that the *Chevron* Partial Award is final and binding and does not seek in these proceedings to "affect, let alone appeal, set aside or nullify that award."[215] However, the Claimant submits that the *Chevron* Partial Award gave rise to "considerable uncertainty regarding the meaning of Article II(7) and the scope of Ecuador's obligations thereunder, in particular whether Ecuador is now obliged to take additional steps (and if so, what they might be) in order to satisfy the requirements of that Article."[216]

125. According to the Claimant, it waited more than eight months before proceeding to arbitration despite what it characterizes as "Mr. Koh's categorical refusal to respond to Ecuador's request for the U.S. interpretation of Article II(7)." The Claimant submits that it elected arbitration as a last resort after "having its efforts to engage in discussion firmly and definitively rebuffed."[217]

b) The ordinary meaning of Article VII

126. Article VII of the Treaty confers jurisdiction over "any dispute… concerning the interpretation or application of the Treaty."[218] In the Claimant's view, the ordinary meaning of the provision as well as the jurisprudence and practice of international courts and tribunals confirm that the Tribunal has jurisdiction over abstract disputes as long as the dispute in question concerns the "interpretation or application" of the Treaty.[219] The Claimant disputes the Respondent's submission that there is an *a priori* requirement that the dispute concern a breach of treaty obligations or that international law imposes a greater requirement of concreteness than what is contained in the clause.[220]

127. The Claimant submits that the plain meaning of Article VII, when interpreted in accordance with Article 31 of the VCLT establishes that the "Parties have conferred this Tribunal with the widest possible grant of jurisdiction: the competence to arbitrate 'any dispute…concerning the interpretation and application of the Treaty.'" The Claimant contends that the PCIJ interpreted a similar compromissory clause to confer jurisdiction over a "dispute…of any nature" because the clause's jurisdictional reach was "as comprehensive as

[215] Claimant's Counter-Memorial on Jurisdiction, para. 11.

[216] Claimant's Counter-Memorial on Jurisdiction, para. 12.

[217] Claimant's Counter-Memorial on Jurisdiction, para. 22.

[218] Claimant's Counter-Memorial on Jurisdiction, para. 25.

[219] Claimant's Counter-Memorial on Jurisdiction, para. 25. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 223:14–224:14.

[220] Claimant's Counter-Memorial on Jurisdiction, para. 25.

possible."[221] It also notes that the wording of Article VII includes the adjective qualifier *any*, "which entails that the covered disputes may be of any nature."[222]

128. The Claimant stresses the disjunctive nature of the phrase in Article VII "interpretation *or* application," arguing that "it signifies the Parties' intention to confer upon the tribunal jurisdiction over disputes concerning both the interpretation of the Treaty, and separately, disputes concerning its application," which are two distinct separate legal grounds for the submission of disputes to arbitration.[223] The Claimant avers that "interpretation" and "application" are two separate concepts, referring to the Harvard Law School Draft Convention on the Law of Treaties, which defines "interpretation as 'the process of determining the meaning of a text'" and application as "the process of determining the consequences which, according to the text, should follow in a given situation."[224] The Claimant also refers in this regard to the Dissenting Opinion of Judge Ehrlich in the *Chorzów Factory Case* and to the Indus Waters Tribunal's Order on Interim Measures.[225]

129. Therefore, according to the Claimant, disputes over interpretation and application can be arbitrated independently of one another. The Claimant refers to the *Oil Platforms* case where Judge Higgins wrote that the phrase "'application or interpretation' contains 'two distinct elements which may form the subject-matter of a reference to the Court.'"[226] The Claimant also

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[221] Claimant's Counter-Memorial on Jurisdiction, para. 27, citing *Mavrommatis*, *supra* note 116, p. 11.

[222] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 225:20–23. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 64:22–65:1 ("the use of the adjective qualifier 'any' denotes that disputes covered by Article VII may be of any nature. This follows from the construction of the Permanent Court of International Justice of a similarly worded compromissory clause in the Mavrommatis Case.").

[223] Claimant's Counter-Memorial on Jurisdiction, para. 28. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 65:8–17 ("The use of the disjunctive 'or' establishes beyond any doubt the Parties' intention to confer upon tribunals operating under Article VII jurisdiction over disputes concerning solely the interpretation of the provisions of the Treaty; in other words, disputes that arise irrespective of the application of such provisions and specific factual situations.").

[224] Claimant's Counter-Memorial on Jurisdiction, para. 29, citing Harvard Law School's Draft Convention on the Law of Treaties [C-134].

[225] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 226:11–22, citing *Case Concerning the Factory at Chorzów*, Dissenting Opinion of Judge Ehrlich (Judgment-Jurisdiction), 1927, P.C.I.J. Series A, No. 9, p. 39 [C-127] ("Interpretation constitutes the process of 'determining the meaning of a rule' while application is the process of 'determining the consequences which the rules attaches to the occurrence of a given fact.'"); Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 227:23–228:4 ("The term 'or' introduces alternative elements which can each satisfy a given solution. In the words of the distinguished Indus Waters Tribunal, [i]f a purely interpretive dispute were not arbitrable under Article VII, the word 'or' inserted between interpretation and application would be meaningless, and this would be at odds with the cardinal rule of treaty interpretation that '[e]ach and every clause of a treaty is to be interpreted as meaningful rather than meaningless.'").

[226] Claimant's Counter-Memorial on Jurisdiction, para. 30, citing *Case Concerning Oil* Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Separate Opinion of Judge Higgins (12 December, 1996), 1996 I.C.J. Reports 803, para. 3 [C-144].

points to the Separate Opinion of Judge Schwebel in the *UN Headquarters Agreement* case, who in the context of discussing breach, wrote that while every allegation of breach entails elements of interpretation, "even in the absence of allegations of treaty breaches a lack of 'concordance of views of the parties concerning [the treaty] interpretation' can independently give rise to a dispute over interpretation."[227]

130. The Claimant argues that the United States itself acknowledged the distinction between disputes regarding the interpretation of treaties and those regarding their application, in the *United States Diplomatic and Consular Staff in Tehran* case, where the United States asserted claims under the Iran–US FCN's compromissory clause that conferred jurisdiction over "any dispute…as to the interpretation or application" of the treaty.[228] The United States accepted that under that provision, disputes regarding interpretation are separately justiciable from disputes over application and argued that "if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty is incorrect or that the Treaty did not apply to Iran's conduct in the manner suggested by the United States, the Court could clearly be confronted with a dispute relating to the 'interpretation or application of the Treaty'."[229] The Claimant also notes that in the negotiating history of the FCN treaty, the United States sought to reinstate the reference to "application" since as it explained that the "United States wanted to avoid any narrowing of the jurisdictional provision."[230] The Claimant submits that "[h]ad interpretive disputes been predicated on allegations of treaty breaches…the compromissory clause's grant of jurisdiction could not have been 'narrowed' by deleting the reference to 'application'."[231]

131. The Claimant also notes that the enumeration of various categories of legal disputes that a State may subject to compulsory jurisdiction under Article 36(2) of ICJ Statute makes the distinction between interpretation and application.[232] In its view, the same distinction is implicitly acknowledged by the Respond-

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[227] Claimant's Counter-Memorial on Jurisdiction, para. 31, citing *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Separate Opinion of Judge Schwebel (26 April 1988), 1988 I.C.J. Reports 12, p. 51 [C-118].

[228] Claimant's Counter-Memorial on Jurisdiction, para. 32, citing *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Memorial of the Government of the United States of America (12 January 1980), p. 153 [C-151] (hereinafter "*Consular Staff*").

[229] Claimant's Counter-Memorial on Jurisdiction, para. 32, citing *Consular Staff*, *supra* note 228, p. 153.

[230] Claimant's Counter-Memorial on Jurisdiction, paras. 32–33, citing *Consular Staff*, *supra* note 228.

[231] Claimant's Counter-Memorial on Jurisdiction, para. 34. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 226:23–227:14.

[232] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 229:11–23 ("Indeed, the enumeration of various categories of legal disputes the State may subject to the compulsory jurisdiction of the ICJ under Article 36(2) of the statute of the Court makes this very distinction. It distinguishes between disputes concerning, 'the interpretation of a treaty,' and, 'the existence of any fact, if established, would constitute a breach of an international obligation.' According to

ent's expert, Prof. Tomuschat, who allegedly "does not exclude the possibility that disputes may arise in the absence of […] allegations" by one of the parties.[233]

132. The Claimant emphasizes that this is a dispute about interpretation and not a dispute about the failure to give an interpretation.[234] It is not suggesting that the Respondent breached any obligation in failing to respond to its Diplomatic Note and it expressly acknowledges that it disagrees with its own expert Professor Pellet in this regard.[235] Nonetheless, it contends that such a failure "can give rise to an inference, and that's the relevance of their failure to respond in this case."[236]

133. Finally, the Claimant argues that the Treaty does not provide that investor-State tribunals have exclusive jurisdiction over disputes concerning the protection of investment.[237] It notes that Article VII does not contain the subject matter limitations found in Article VI. Moreover, it avers that the Respondent's own Treaty practice demonstrates that Article VII was not intended to exclude investment protection disputes from the jurisdictional reach of State-to-State Tribunals. In this regard, the Claimant points to the Cameroon–US BIT and to the US 2004 and 2012 Model BITs and concludes that "there are thus no grounds for accepting the [Respondent's] thesis that Article VII was intended sub silentio to exclude all but a few narrow categories of disputes from the jurisdiction of inter-State tribunals."[238]

134. The Claimant thus concludes that the Parties are entitled under Article VII "to convene an international tribunal with authority to render a legally binding decision when there is a dispute between them regarding the meaning of a provision of a treaty, and nothing more. […] This is a clear consequence of the text of Article VII, and none of the limiting factors the United States is invoking can detract from this conclusion."[239]

c) The interpretation by international courts and tribunals of compromissory clauses similar to Article VII of the Treaty

135. The Claimant counters the Respondent's argument that no international court or tribunal has taken jurisdiction over an interpretive dispute in the abstract, referring to several international judgments by the PCIJ, ICJ, and Iran–U.S. Claims Tribunal that exercised jurisdiction over an abstract inter-

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Manley Hudson's 1943 seminal treatise on the jurisprudence of the Permanent Court of International Justice, this distinction in Article 36(2) reflects an understanding that, 'Application will usually involve interpretation, but interpretation will not always include application.'").

[233] *Id.*, pp. 229:23–230:8.

[234] *Id.*, pp. 357:17–358:358:3.

[235] *Id.*, p. 345:6–17.

[236] *Id.*, p. 358:1–3.

[237] *Id.*, p. 291:19–293:25.

[238] *Id.*, p. 294:1–296:3.

[239] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 66:9–24.

pretive dispute. In its view, "other international courts and tribunals have routinely interpreted compromissory clauses similar to Article VII as conferring contentious jurisdiction over disputes concerning issues of treaty interpretation disconnected to any allegation or backdrop involving Treaty breach."[240]

136. First, the Claimant argues that the PCIJ in *Certain German Interests in Polish Upper Silesia* explicitly accepted that a tribunal could exercise jurisdiction to adjudicate an abstract dispute over treaty interpretation.[241] In particular, the Claimant submits that the PCIJ observed that Article 14 of the Covenant provided the PCIJ with the power to hear any international dispute which the Parties submit to it and that there were numerous clauses providing for the PCIJ's compulsory jurisdiction over questions of the interpretation and application of a treaty, including Article 23 of the Geneva Convention which "appear also to cover interpretations unconnected with concrete cases of application."[242] The Claimant submits that the PCIJ further noted that "there is no lack of clauses which refer solely to the interpretation of a treaty" including provisions of the PCIJ's Statute, and that therefore the PCIJ held that it could exercise jurisdiction over abstract issues of treaty interpretation:

> [t]here seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; *rather would it appear that this is one of the most important functions which it can fulfill*. It has, in fact already had occasion to do so in Judgment No. 3 [*Treaty of Neuilly*].[243]

137. The Claimant's expert, Professor McCaffrey, observes that the PCIJ simply provided the term "interpretation" its natural meaning.[244] As to the Respondent's assertion that the applicable compromissory clause referred to "differences of opinion" rather than disputes, the Claimant argues that "a conflict of legal views is itself enough to give rise to a dispute" and that "there is no difference between difference of opinion and dispute regarding interpretation."[245]

138. The Claimant points to the *Case Concerning Rights of Nationals of the United States of America in Morocco* as a further example of a court exercising jurisdiction over a purely interpretive dispute in the abstract.[246] According

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[240] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 251:1–252:4.

[241] Claimant's Counter-Memorial on Jurisdiction, paras. 35–36, citing *Certain German Interests in Polish Upper Silesia*, Judgment (Merits), 1926 P.C.I.J. Series A, No. 7 [C-130] (hereinafter "*Upper Silesia*").

[242] Claimant's Counter-Memorial on Jurisdiction, para. 37, citing *Upper Silesia*, *supra* note 241, pp. 18–19.

[243] Claimant's Counter-Memorial on Jurisdiction, para. 37, citing *Upper Silesia*, *supra* note 241, pp. 18–19.

[244] Claimant's Counter-Memorial on Jurisdiction, para. 38, citing Expert Opinion of Professor Stephen McCaffrey, para. 37 (hereinafter "McCaffrey Opinion").

[245] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 243:11–245:16.

[246] Claimant's Counter-Memorial on Jurisdiction, para. 39, citing *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgment (27 August 1952), 1952 I.C.J. Reports 176 [C-85] (hereinafter "*Rights of US Nationals*").

to the Claimant, despite no allegations of treaty breach being made, the ICJ proceeded to rule on France's and the United States' differing interpretations of the MFN clauses in relation to U.S. consular jurisdiction in the French Zone of Morocco.[247] The Claimant notes that in that case the "United States itself put an abstract question of interpretation to the same tribunal in reply to the French submission, seeking confirmation of particular consular rights that had been granted by the same treaty."[248]

139. The Claimant also cites the jurisprudence of the Iran–U.S. Claims Tribunal.[249] For example, in *Case No. A/2*, Iran relied on analogous compromissory clauses under the General Declaration and Claims Settlement Declaration, which conferred jurisdiction over "any dispute" as to "the interpretation or performance of any provision" of the Declarations, to demand a decision on whether the Declarations permitted Iran to bring claims against U.S. nationals.[250] The tribunal ruled that, even in the absence of allegations of a breach of the Declarations, "the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran."[251] In *Case No. A/17* the tribunal also ruled, on the basis of the same clause in the Declarations, that it could provide the "merely interpretive guidance" requested by the United States as to whether the IUSCT had jurisdiction over certain pending claims before the Chamber that had been brought by Iranian banks against U.S. banking institutions.[252]

140. The Claimant thus argues that "these two cases prove beyond argument that tribunals operating under compromissory clauses like Article VII may decide purely interpretive disputes, even in the absence of an allegation of breach by the other Party" and it notes that the Respondent was a party to both cases and relied on these provisions as a basis for jurisdiction.[253] The Claimant indicates that in none of the cases did there exist an allegation of breach: there was "nothing more concrete [than] the [P]arties different interpretations of the Algiers Declarations."[254] The Claimant also refutes the assertion by the Respondent that these were the result of special consents by the parties, observing that "neither of these awards makes any reference to such

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[247] Claimant's Counter-Memorial on Jurisdiction, paras. 39–40, citing *Rights of US Nationals, supra* note 246, p. 203.

[248] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 248:7–13.

[249] Claimant's Counter-Memorial on Jurisdiction, para. 41.

[250] Claimant's Counter-Memorial on Jurisdiction, para. 41, citing *Islamic Republic of Iran* v. *United States of America*, Case No. A/2, Decision No. DEC 1-A2-FT (26 January 1982), Iran–U.S. Claims Tribunal, Decision, Part II [C-139] (hereinafter "*Case No. A/2*").

[251] Claimant's Counter-Memorial on Jurisdiction, para. 39, citing *Case No. A/2*, *supra* note 250. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 233:14–234:4.

[252] Claimant's Counter-Memorial on Jurisdiction, para. 42, citing *United States of America* v. *The Islamic Republic of Iran*, Iran–U.S. Claims Tribunal, *Case A/17*, Decision No. DEC .37-A17-FT (18 June 1985) [C-152]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 234:5–21.

[253] *Id*., pp. 234:22–235:13.

[254] *Id*., p. 237:18–21.

special consent" and that the only document filed by the Respondent to support this theory comes from "a completely separate case, Case A/18" and in no way constitutes a special grant of jurisdiction.[255]

141. The Claimant further points to other arbitral tribunals which have exercised jurisdiction over disputes concerning treaty interpretation in the abstract. In *Pensions Officials of the Saar Territory*, the tribunal did not decline to exercise jurisdiction over a matter of treaty interpretation, despite there being no allegations of treaty breaches.[256] In *Interpretation of the Statute of the Memel Territory*, the PCIJ, under a compromissory clause which provided that "any difference of opinion in regard to questions of law or fact concerning these provisions," held that a difference of opinion regarding questions of law or fact could arise without any allegation of a treaty breach, noting that the clause had two prongs, one which allowed the Court to examine infractions, the other which concerned differences of opinion.[257]

142. The Claimant disputes the Respondent's interpretation of the *Cases of Dual Nationality*, arguing that the Anglo-Italian Conciliation Commission declined jurisdiction because the compromissory clause "expressly required the existence of a prior concrete claim."[258] The Claimant argues that Article 83 of the Peace Treaty required the satisfaction of five elements before the Commission could exercise jurisdiction over interpretive disputes relating to the Peace Treaty: (1) a Member State of the UN or one of its nationals had to submit a claim under the Peace Treaty for the return of property under Article 78; (2) the Italian government had to refuse to honor the property claim; (3) any dis-

[255] *Id.*, pp. 235:14–236:19 ("[N]ot only does the document fail to support the assertion of a special grant of jurisdiction, it actually undercuts the U.S. position because it affirms the Tribunal's purely interpretive jurisdiction, even in circumstances where a previous decision has been rendered. The parallels to our situation are striking. While the U.S. argues here that you should not assert jurisdiction because it would interfere with Article VI tribunals, in Case A/18, the United States stated that it had no such concern with respect to private investor claims heard by the Iran Tribunal's three Chambers. Thus the case, Case A/18, rendered by the Tribunal operating under a similar compromissory clause to Article VII, disproves the United States's allegations that you cannot 18 exercise jurisdiction over disputes, absent a breach or absent a special consent.").

[256] Claimant's Counter-Memorial on Jurisdiction, para. 44, citing *Pensions of officials of the Saar Territory (Germany, Governing Commission of the Saar Territory)*, III UN Reports of International Arbitral Awards 1553 (1934), pp. 1555–1556 [C-145].

[257] Claimant's Counter-Memorial on Jurisdiction, para. 45, citing *Interpretation of the Statute of the Memel Territory*, Judgment (Preliminary Objection) (24 June 1932), 1932 P.C.I.J. Series A/B, No. 47, pp. 247–248 [C-138]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 245:9–246:23 ("[The PCIJ] noted that the two procedures envisaged in Article 17, one over infractions and one over differences of opinion regarding questions of law or fact, related to two different objects […]: 'The object of the procedure before the council is the examination of 'an infraction of the provisions of the Convention,' which presupposes an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regard to questions of law or fact.' Such difference of opinion may arise without infraction having been noted.").

[258] Claimant's Counter-Memorial on Jurisdiction, paras. 47–48. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 239:4–242:9.

pute arising out of that property claim had to be submitted to a two-member Conciliation Commission; (4) the two-member Conciliation Commission had to fail to resolve the dispute within three months; and (5) a third person had to be appointed to form a three-member Commission.[259] Only once the above conditions were fulfilled could a three-member Conciliation Commission be properly seized to exercise jurisdiction over the interpretation of the Peace Treaty.[260] The Claimant highlights that Article 83(2) grants the three-person Commission "jurisdiction over all *subsequent* disputes concerning the application or interpretation of the specific treaty provisions *connected to the dispute originally submitted* to the two-member Conciliation Commission."[261]

143. The Claimant submits, that in that case, the United Kingdom had simply attempted to obtain a ruling on the abstract question of whether nationals of UN governments could submit a claim if they had previously held Italian nationality and intended for the ruling to be binding on all future cases involving claims by dual nationals.[262] Given the limitations imposed on it by Article 83 of the Peace Treaty, the Claimant argues that the Anglo-Italian Conciliation Commission was mindful not to exceed its jurisdiction under a multilateral treaty and issue an abstract interpretation that would bind all parties without their express consent.[263] However, the Claimant maintains that "the treaty-based limitations found in the Peace Treaty have no analogues in Article VII of the Ecuador–US BIT" which provides the Tribunal with plenary power to exercise jurisdiction over "any dispute" relating to the Treaty's interpretation or application.[264]

144. The Claimant further asserts that the Commission did not shy away from offering general interpretations of provisions of the Peace Treaty in the context of specific claims. In the *Amabile* case for example, the US–Italian Conciliation Commission ruled on a broadly formulated question put to it by the United States on whether the submission of a claim based only on *ex parte* testimonial instruments obligated Italy to investigate the claim further

[259] Claimant's Counter-Memorial on Jurisdiction, para. 50.

[260] Claimant's Counter-Memorial on Jurisdiction, para. 50.

[261] Claimant's Counter-Memorial on Jurisdiction, para. 49.

[262] Claimant's Counter-Memorial on Jurisdiction, para. 51.

[263] Claimant's Counter-Memorial on Jurisdiction, para. 51.

[264] Claimant's Counter-Memorial on Jurisdiction, para. 52. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 241:10–242:1 ("[T]he United States' […] assertion that the compromissory clause in the Dual Nationals case is virtually identical to Article VII is simply not true. It ignores the fact that the Commission read both paragraphs of Article 83 of the compromissory clause together as a whole. There is no parallel whatsoever with Article VII of the BIT. Unlike Article 83 which limited jurisdiction to claims arising in giving effect to the provisions of the Treaty, Article VII gives this Tribunal plenary authority to arbitrate any dispute concerning interpretation or application of the Treaty. As Professor McCaffrey states in his opinion, and I'm citing from Paragraph 33, 'It is striking that the Dual Nationals Claims was the only case the United States could find that purportedly supports its restricted approach, and that the decision its exhaustive research turned up is one in which the Tribunal's jurisdiction was confined to disputes concerning certain specified provisions of the applicable multilateral treaty.'").

if it was not *prima facie* frivolous or fraudulent.[265] Not only did the US–Italian Conciliation Commission provide such an interpretation, but it also observed that its interpretation was intended to serve as "future guidance."[266]

145. The Claimant further refers to the *Air Services Agreement* case, wherein France objected to one question of treaty interpretation submitted by the United States because it was not connected to the application of the Treaty in specific circumstances.[267] According to the Claimant, the Tribunal "also emphasized that it was not requested to state whether or not the existence of any fact or situation constitutes a breach of an international obligation. It thus distinguished this category of legal disputes from legal disputes concerning only the interpretation of a treaty; and, in respect of this, it cited the distinction [the Claimant] pointed out earlier in this respect in Article 36 of the ICJ Statute."[268]

146. Finally, the Claimant cites the tribunal in *Question of the Revaluation of the German Mark* as another example of a justiciable dispute being found to exist independently of any claim of breach:

> The Applicant's right to an authoritative interpretation of the clause in dispute…is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in exchange for the disputed clause. They have a right to know what is the legal effect of the language used. The [t]ribunal in the exercise of its judicial functions is obliged to inform them.[269]

d) International law imposes no additional measure of concreteness or allegation of breach

147. The Claimant submits that "[j]ust as international law contains no requirement that a breach allegation must exist for a dispute to arise, so too is there no such requirement in relation to whether a dispute is sufficiently concrete."[270] The Claimant refers to Professor McCaffrey's observation that while States more often bring cases to the ICJ that arise out of alleged breaches than

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[265] Claimant's Counter-Memorial on Jurisdiction, paras. 53–54, citing *Amabile Case—Decision No. 11*, XIV UN Reports of International Arbitral Awards 115 (1952), pp. 119–129 [C-116] (hereinafter "*Amabile*").

[266] Claimant's Counter-Memorial on Jurisdiction, para. 43, citing *Amabile, supra* note 265, p. 129.

[267] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 250:20–254:16, citing *Case concerning Air Service Agreement of 27 March 1946 between the United States of America and France*, XVIII UN Reports of International Arbitral Awards 417 (1978) [C-154] (hereinafter "*Air Services Agreement*")

[268] *Id.*, p. 251:17–23.

[269] Claimant's Counter-Memorial on Jurisdiction, para. 56, citing *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a cause for application of the clause in article 2(e) of the Annex I A of the 1953 Agreement on German External Debts*, XIX UN Reports of International Arbitral Awards 67 (1980), p. 89 [C-149]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 242:10–243:10.

[270] Claimant's Counter-Memorial on Jurisdiction, para. 58.

those calling for an interpretation of a treaty does not mean that the latter class of cases cannot be brought before international tribunals.[271] The Claimant refers to the cases mentioned above to argue that international jurisprudence is filled with examples of tribunals taking jurisdiction in the absence of breach allegations since the absence of such allegations does not render interpretive disputes inadequately concrete.[272]

148. The Claimant further argues that, while an allegation of breach is one possible manifestation of the existence of a dispute, the existence of a concrete case does not depend on the existence of a breach.[273] The Claimant submits that the Respondent mischaracterizes the ICJ's judgment in *Northern Cameroons* to elevate the concreteness requirement far beyond what the ICJ intended.[274] In *Northern Cameroons*, Cameroon applied to the ICJ to declare that the United Kingdom had breached its obligations in applying the Trusteeship Agreement. However, two days after its application, the Trusteeship Agreement was terminated by the UN and therefore the United Kingdom ceased to have rights and obligations with regard to Cameroon under the Trusteeship Agreement. The Claimant submits that it is in this context that the ICJ declined to exercise jurisdiction, since "it would be impossible to render a judgment capable of effective application."[275] Thus, the ICJ explained:

> the function of the Court is to state law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of interest between the parties. The Court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.[276]

149. The Claimant distinguishes *Northern Cameroons* from the case at hand, noting that in these proceedings there is "an ongoing controversy involving the substantive interest related to the determination of obligations under Article II(7)." The Tribunal's interpretation will have a clear practical consequence since it will remove uncertainty regarding existing legal rights and obligations of the Contracting Parties and will have continuing applicability on future acts of interpretation or application of Article II(7) by the Contracting Parties or tribunals constituted under Article VI.[277]

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[271] Claimant's Counter-Memorial on Jurisdiction, para. 58, citing McCaffrey Opinion, para. 42.

[272] Claimant's Counter-Memorial on Jurisdiction, para. 58.

[273] Claimant's Counter-Memorial on Jurisdiction, para. 59.

[274] Claimant's Counter-Memorial on Jurisdiction, para. 59.

[275] Claimant's Counter-Memorial on Jurisdiction, para. 60, citing *Northern Cameroons*, *supra* note 71, pp. 32–34.

[276] Claimant's Counter-Memorial on Jurisdiction, para. 60, citing *Northern Cameroons*, *supra* note 71, pp. 32–34.

[277] Claimant's Counter-Memorial on Jurisdiction, para. 62. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 254:17–255:13 and Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 68:9–18.

150. The Claimant submits that its three experts agree that the Claimant's Request satisfies the requirement of concreteness within the meaning of *Northern Cameroons* and international law generally.[278] The Claimant thus concludes that it has complied with the element of concreteness and "has a right to know the legal effect of the language used in Article II(7), and the Tribunal, in the exercise of its judicial function under Article VII, must not overstep its authority by reading terms of limitation into Article VII that simply do not exist."[279]

e) The existence of a dispute regarding the interpretation and application of Article II(7) can be established by the Respondent's express statements

151. The Claimant asserts that the existence of a dispute concerning Article II(7) of the Treaty is clear from the Respondent's express statements.[280] The Claimant notes that the existence of a dispute is the threshold question and cites the *Mavrommatis* definition of a "dispute": "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[281] The Claimant argues that under this meaning of dispute, "a dispute concerning interpretation can arise with no more than opposing attitudes regarding the meaning of a treaty."[282] The Claimant also asserts that the question of the existence of a dispute is "a matter for objective determination" that "must turn on an examination of the facts," including the Parties' exchanges and their conduct prior and after the commencement of legal proceedings, with substance prevailing over form.[283]

152. The Claimant argues that the Parties are fundamentally in agreement on the applicable legal principles. It contends that both the Claimant and the Respondent agree on the following applicable principles:

(i) the concept of dispute in international law is defined in *Mavrommatis*;
(ii) the existence of a dispute must be objectively determined by the Tribunal, and does not depend on the subjective views of the Parties, as explained in *Cameroon v. Nigeria* and *South West Africa*;
(iii) it must be shown that the claim of one party is positively opposed by the other; and

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[278] Claimant's Counter-Memorial on Jurisdiction, para. 63, citing Pellet Opinion, para. 38, McCaffrey Opinion, para. 46, Amerasinghe Opinion, para. 21.

[279] *Id.*, pp. 255:25–256:8, citing *Northern Cameroons*, *supra* note 71 and *Air Services Agreement*, *supra* note 267.

[280] Claimant's Counter-Memorial on Jurisdiction, para. 64.

[281] Claimant's Counter-Memorial on Jurisdiction, para. 65, citing *Nuclear Tests, supra* note 190, para. 58, and *Mavrommatis*, *supra* note 116, p. 11.

[282] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 225:15–17.

[283] Claimant's Counter-Memorial on Jurisdiction, para. 65, citing *Interpretation of Peace Treaties*, *supra* note 117; *Georgia* v. *Russia*, *supra* note 122, para. 30; *Fisheries Jurisdiction Case* (Spain v. Canada), Judgment (Jurisdiction) (4 December 1998), 1998 I.C.J. Reports 432, para. 31 [C-132].

(iv) positive opposition does not require that the respondent has verbally expressed its disagreement.[284]

153. The Claimant contends that the facts demonstrate that the Parties are in dispute concerning the interpretation of Article II(7). The Claimant finds that the Respondent has manifested positive opposition to the Claimant's interpretation in the following ways: (1) the Respondent considered the Claimant's position to be "unilateral" which means that the Respondent does not share the Claimant's interpretation given to Article II(7);[285] and (2) the Respondent's position that the *Chevron* tribunal's interpretation is *res judicata* not only for purposes of that dispute but also for the Claimant's relationships with other parties.[286] In relation to the latter, the Claimant asserts that "[b]y advancing the position that *Chevron*'s interpretation of Article II(7) is not restricted to that arbitration, the United States has placed itself in positive opposition to Ecuador."[287] The Claimant also argues that the Respondent's refusal to respond to the Claimant's Request suggests that the Respondent agrees with the *Chevron* tribunal's interpretation and therefore expressly demonstrates that a dispute exists.[288]

f) The existence of a dispute regarding the interpretation and application of Article II(7) can be established by inference

154. The Claimant also submits that the Respondent's opposition can be established by inference from its refusal to respond to the Claimant's Request regarding the interpretation of Article II(7) when a response was called for. The Claimant argues that a response was called for because "Ecuador will have wrongfully suffered as a result of the misinterpretation of the provision by the tribunal in the *Chevron* case, by the pressing need it has to determine what it must do to be in compliance with the provision and by its interest in avoiding future wrongful liability."[289] The Claimant contends that if the Respondent had agreed with its interpretation of Article II(7), it would have said so and thus obviated the need for this arbitration. The Claimant asserts that the Respondent's persistent silence with respect to the Claimant's request for interpretation

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[284] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 257:14–258:14, citing *Mavrommatis*, *supra* note 116; *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Preliminary Objections, Judgment (11 June 1998), 1998 I.C.J. Reports 275, para. 89 [C-128] (hereinafter "*Cameroon* v. *Nigeria*"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 June 1971), 1971 I.C.J. Reports 16, p. 24 [R-189].

[285] Claimant's Counter-Memorial on Jurisdiction, paras. 66, 69–70.

[286] Claimant's Counter-Memorial on Jurisdiction, para. 66, citing Reisman Opinion, paras. 47–51.

[287] Claimant's Counter-Memorial on Jurisdiction, paras. 66, 71.

[288] Claimant's Counter-Memorial on Jurisdiction, para. 72.

[289] Claimant's Counter-Memorial on Jurisdiction, para. 67.

gives rise to the inference that the Respondent agrees with the *Chevron* award's interpretation of Article II(7) and disagrees with the Claimant's interpretation.[290]

155. The Claimant argues that the objective determination of a dispute can be obtained by inference.[291] The Claimant points to the ICJ's pronouncement in *Cameroon* v. *Nigeria* that "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*."[292] The Claimant observes that the basis on which the ICJ inferred that a dispute existed in that case was that Nigeria withheld its agreement with Cameroon on the land boundary and yet refused to indicate its position on that issue.[293] The ICJ also held in the *Certain Property* case that the inquiry into positive opposition is undertaken "for the purpose of verifying the existence of a legal dispute" but that positive opposition is not a necessary precondition for finding that a dispute exists.[294]

156. The Claimant argues that the Respondent's refusal to address the interpretation of Article II(7) is therefore compelling evidence that a dispute exists. As the ICJ held in *Georgia* v. *Russia*, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for."[295] The Claimant argues that this principle of international law was authoritatively elucidated in *Cameroon* v. *Nigeria*, where the ICJ held that Nigeria's refusal to respond to Cameroon's boundary delimitation request, claiming that there was no dispute, was in fact supportive of the inference that a dispute did exist.[296] The Claimant disputes the Respondent's attempt to distinguish *Cameroon* v. *Nigeria* from the case at hand. The Claimant argues that the cross-border incursions that the Respondent cites as significant concerned only a small portion of the border and were on the whole irrelevant to the core jurisdictional issue of whether a dispute existed as regarded the entire course of the boundary. The Claimant stresses that the ICJ specifically "disclaimed reliance on the very facts that the United States invokes to try and distinguish *Cameroon* v. *Nigeria*."[297]

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[290] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 82–92.

[291] Claimant's Counter-Memorial on Jurisdiction, para. 74.

[292] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 89.

[293] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 263:8–12.

[294] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Certain Property*, *supra* note 131, para. 24.

[295] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Georgia* v. *Russia*, *supra* note 122, para. 30. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 258:15–21.

[296] Claimant's Counter-Memorial on Jurisdiction, paras. 76–78, citing *Cameroon* v. *Nigeria*, *supra* note 284. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 263:7–12 ("[T]he Court found that Nigeria's silence in regard to whether it agreed or disagreed with Cameroon's boundary claim was sufficient grounds for inferring that a dispute existed, even though Nigeria was, 'entitled not to advance arguments,' on the issue. That is, Nigeria was under no legal obligation to state its position.").

[297] Claimant's Counter-Memorial on Jurisdiction, paras. 79–81, citing *Cameroon* v. *Nigeria*, *supra* note 284, paras. 88, 90. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June

157. The Claimant points to yet another reason why *Cameroon* v. *Nigeria* "is especially pertinent to our case." The Claimant recalls that, when specifically asked to state whether the assertion that there was no dispute signified that there was an agreement between Nigeria and Cameroon on the geographical coordinates of the boundary, "instead of responding to this question from the Court, Nigeria replied by maintaining its stance that there was no dispute." The ICJ drew the inference from this refusal to respond that a dispute existed. In the Claimant's view, the factual situation is analogous to the case at hand:

> The United States, like Nigeria, has refused to state whether it agrees or disagrees with Ecuador's claims. It simply maintains there is no dispute. And just as Nigeria refused to answer the Court's question about whether it agreed with Cameroon, so too the United States has refused to comply with the Tribunal's Procedural Order calling upon it to state in a Counter-Memorial on the Merits filed on 20 June whether it agrees or disagrees with Ecuador's claims in regard to Article II(7).[298]

158. The Claimant further refers to the *Headquarters Agreement* advisory opinion. In that case, the United States argued that there was no dispute because it had never expressly opposed the UN Secretary-General's views and had not referred to the matter as a "dispute". However, the ICJ rejected these arguments and found that a dispute did exist.[299] According to the Claimant, the Court also made clear in its judgment that a claim for breach of treaty obligations is not a prerequisite for finding that a dispute exists.[300]

159. The Claimant counters the Respondent's comments on the *Georgia* v. *Russia* case. While the Claimant acknowledges that the ICJ's findings of a dispute was based on Russia's express denials of ethnic cleansing, the ICJ's "factual determination was not germane to its explanation of the general rule that the existence of a dispute may be inferred from the failure of a State to respond 'in circumstances where a response is called for.'"[301]

160. In the case at hand, the Claimant argues that a response from the Respondent was called for. The Claimant cites *Georgia* v. *Russia* for the proposition that a response is called for where "the parties engaged in 'exchanges' that refer[ed] to the subject-matter of the treaty with sufficient clarity to enable a State against which a claim is made to identity that there is, or may be, a dispute with regard to that subject-matter" and that "[w]here having been

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2012, pp. 265:2–266:2 ("[T]he Court found on the basis of Nigeria's statements and actions, including military actions, that three small sectors of the boundary were disputed. But in regard to the entirety of the very extensive land boundary, the Court expressly stated that Nigeria's actions were not the basis for its finding that a dispute existed.").

[298] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 264:9–265:1.

[299] Claimant's Counter-Memorial on Jurisdiction, para. 82, citing *UN Headquarters Agreement*, *supra* note 123, para. 36.

[300] Claimant's Counter-Memorial on Jurisdiction, para. 83, citing *UN Headquarters Agreement*, *supra* note 123, para. 42.

[301] Claimant's Counter-Memorial on Jurisdiction, para. 84, citing *Georgia* v. *Russia*, *supra* note 122, para. 30.

presented with such a request, a State fails to respond, a dispute can be said to exist."[302] The Claimant maintains that Ecuador has unquestionably satisfied this standard, given that the June 8 Note specifically detailed the subject-matter of its concerns. The Claimant avers that the situation is similar to the one presented in *Cameroon* v. *Nigeria* since the Respondent was apprised of the Claimant's concerns and failed to respond.[303] The Claimant argues that a response from the Respondent was especially warranted because the *Chevron* tribunal's interpretation of Article II(7) introduced uncertainty regarding the nature and scope of the Claimant's obligations under Article II(7). The *Chevron* tribunal's interpretation conflicts with that given by the tribunal in *Duke Energy* v. *Ecuador*, as well as with the Claimant's longstanding view that the obligations reflect only customary international law.[304] Without clarification, the Claimant argues, it will be *de facto* forced to implement the *lex specialis* rule described in the *Chevron* award despite believing it to be incorrect. The Claimant therefore has a justifying and compelling need to clarify its obligations under Article II(7).[305]

161. The Claimant further contends that the Respondent's failure to take active steps to fulfill the object and purpose of the Treaty and ensure its effectiveness is inconsistent with its obligations to perform the Treaty in good faith and to comply with the principle of *pacta sunt servanda*.[306] The Claimant argues that the Respondent's inaction is inconsistent with the Preamble to the Treaty which states that one of the Parties' cooperative objectives is to stimulate the flow of private capital and economic development through agreement upon the standards of treatment to be accorded to the investments of the other Party.[307] In its view, a ruling by an Article VII tribunal on the proper interpretation of the Treaty would promote and protect investment by eliminating uncertainty in the standards of treatment required by the Treaty.[308] The Claimant avers that the Respondent's failure to respond under the circumstances creates a strong inference of a dispute.[309]

162. In the Claimant's view, "the only reasonable inference to be drawn from the [Respondent's] conduct is that it disagrees with [the Claimant's] interpretation of Article II(7)."[310] The Claimant argues that the Respondent must have its own interpretation of Article II(7) given that text of Article II(7)

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[302] Claimant's Counter-Memorial on Jurisdiction, para. 86, citing *Georgia* v. *Russia*, *supra* note 122, para. 30.

[303] Claimant's Counter-Memorial on Jurisdiction, paras. 87–88, citing Pellet Opinion, para. 25.

[304] Claimant's Counter-Memorial on Jurisdiction, para. 89.

[305] Claimant's Counter-Memorial on Jurisdiction, para. 91.

[306] Claimant's Counter-Memorial on Jurisdiction, para. 92.

[307] Claimant's Counter-Memorial on Jurisdiction, para. 93.

[308] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 356:3–15.

[309] Claimant's Counter-Memorial on Jurisdiction, para. 93.

[310] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 266:12–15.

was taken verbatim from the U.S. model, but simply does not want to share its views.[311] The Claimant notes that when the Respondent made a deliberate decision not to respond the Claimant's diplomatic note, it "was deviating from its own established policy and practice in regard to treaty partners."[312] The Claimant is of the view that "if the [Respondent] had agreed with Ecuador, there would have been no reason for it to break with its standard diplomatic practice, to deliberately refuse to respond to [the Claimant], or to refuse to consult, to discuss, or exchange views with [the Claimant] on Article II(7)."[313] Moreover, the Claimant notes that the Respondent had every incentive to inform the Claimant that it had the same interpretation of Article II(7), if that were the case, since it would have avoided arbitration and all the costs and consequences associated with it.[314]

163. The Claimant further argues that the Respondent's support for the *Chevron* Tribunal's interpretation of Article II(7) "as opposed to [the Claimant's] interpretation can be presumed from the [Respondent's] interest in securing greater protections for the investments of its own nationals, which is what the Chevron interpretation accomplished."[315] The Claimant also avers that the support is evident by the Respondent's conduct in these proceedings: "[i]ts efforts to foreclose consideration of Ecuador's interpretation, if successful, would eliminate any risk that this Tribunal might agree with Ecuador or adopt another interpretation of Article II(7) different from the one adopted by the Chevron Tribunal."[316] In addition, the Claimant contends that, even if the Respondent's refusal to respond to the Claimant's claim could be attributed to a political decision not to interfere with the interpretations of investor-State tribunals, it would constitute still further evidence that the Respondent opposes that claim.[317]

164. The Claimant also argues, relying on Professor Cheng and Judge Fitzmaurice, that the Respondent's lack of response conflicts with the principle of good faith because such a duty calls for the Respondent to make reasonable efforts to ensure that Article II(7) is interpreted and applied correctly.[318] The Claimant alleges that the Respondent's withholding of its position on the inter-

[311] *Id*., p. 266:15–24.

[312] *Id*., p. 270:2–13.

[313] *Id*., pp. 270:21–271;4

[314] *Id*., p. 217:12–24.

[315] *Id*., p. 274:13–18.

[316] *Id*., p. 275:4–13.

[317] *Id*., pp. 279:1–281:16.

[318] Claimant's Counter-Memorial on Jurisdiction, para. 94. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 271:5–12 ("If the United States had agreed with Ecuador, good faith would have prompted it to say so to Ecuador rather than leave a treaty partner and ally unsure as to what its actual treaty obligations were or how to comply with them. Since we believe in the good faith of the United States, it can only be inferred that the United States did not agree with Ecuador on Article II(7), and chose not to respond to Ecuador's request because it did not wish to express its disagreement. Even assuming that Article II(7) applies equally to both States, the Chevron Tribunal's interpretation still primarily benefits U.S. investors since there are more than of them in Ecuador than there are Ecuadorian investors in the United States.").

pretation of Article II(7) forces the Claimant to accord to American investors advantages that may exceed those to which they are entitled under the Treaty.[319] The Claimant submits that Article V of the Treaty further underscores that a response was called for since it enshrines the Parties' commitment to discuss matters relating to the interpretation or application of the Treaty.[320] According to the Claimant, the principle of good faith in a treaty relationship serves to ensure trust and confidence and creates legitimate expectations concerning the development of a legal relationship between the parties and the Respondent's failure to respond thus gives rise to a legitimate inference that it disagrees with the Claimant's interpretation of Article II(7).[321]

165. The Claimant disputes the Respondent's assertion based on *Cameroon* v. *Nigeria* that absent an applicable treaty obligation, a State may not justifiably rely on the principle of good faith to support a claim.[322] In that case, Nigeria had argued that Cameroon's failure to inform it that it had accepted the ICJ's jurisdiction and intended to file an application breached the principle of good faith.[323] The ICJ rejected this argument holding that "there is no specific obligation in international law for States to inform other States parties to the [ICJ] Statute that they intend to subscribe or have subscribed to the Optional Clause," nor to inform of their "intention to bring proceedings before the [ICJ]".[324] Therefore, the Claimant maintains that its invocation of the principle of good faith bears no resemblance to Nigeria's.[325]

166. The Claimant further disputes the relevance of the fact that it terminated its BIT with Finland or tasked a Special Commission to review each of its 23 BITs. The Claimant argues that the domestic measures it might have undertaken or was considering taking did not affect its obligations on the international plane.[326] The Claimant argues that any discretion the Respondent may have to reserve its position on the interpretation of Article II(7) is subject to good faith which means that it "must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of the other." The Claimant thus asserts that, while the Respondent retains its discretion not to submit an interpretation, it cannot in good faith seek to avoid the inference that a dispute exists.[327]

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[319] Claimant's Counter-Memorial on Jurisdiction, paras. 94–95.

[320] Claimant's Counter-Memorial on Jurisdiction, para. 96.

[321] Claimant's Counter-Memorial on Jurisdiction, paras. 97–98, citing *Nuclear Tests*, *supra* note 190, para. 49.

[322] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[323] Claimant's Counter-Memorial on Jurisdiction, para. 99, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 36.

[324] Claimant's Counter-Memorial on Jurisdiction, para. 99, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 39.

[325] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[326] Claimant's Counter-Memorial on Jurisdiction, para. 100.

[327] Claimant's Counter-Memorial on Jurisdiction, para. 101, citing B. Cheng, General Principles of Law as Applied by Courts and Tribunals (2006), pp. 133–134 [C-119].

g) The exercise of the Tribunal's contentious jurisdiction

167. The Claimant takes issue with the Respondent's characterization of the Claimant's request as seeking the exercise of appellate, referral, or advisory jurisdiction.[328]

168. The Claimant alleges that these proceedings do not bear the hallmark of an appeal, which by definition would involve a superior court review of a lower court decision with binding effect on that decision.[329] The Claimant stresses that, while it disagrees with the *Chevron* tribunal's interpretation, it accepts the award as final and binding subject to the procedures available to it under relevant municipal law.[330] The Claimant further disputes the allegation that the Ecuadorian government has expressed a desire to use the State-to-State arbitration as an appeal, stating that the Ecuadorian government only said that initiating the State-to-State arbitration is consistent with the overall goal of "avoiding the generation of an ominous precedent for Ecuador" being pursued in the District Court in The Hague.[331] Moreover, the Claimant notes that the remainder of the press release quoted by the Respondent clarified that Ecuador's motivation for commencing these proceedings was to resolve "the problems of interpretation of the BIT… and to avoid future legal claims that could harm Ecuador."[332]

169. Secondly, the Claimant takes issue with the Respondent's characterization of its Request as asking the Tribunal to exercise referral jurisdiction.[333] According to the Claimant, referral jurisdiction is a procedure under which one court refers a legal question to a "coordinate court for resolution" which, once decided, is applied in the underlying proceeding. The Claimant alleges that "an essential prerequisite is missing: a court has not referred a question to this tribunal for use in another proceeding." Moreover, no such referral could be made since the *Chevron* tribunal's mandate has expired and, even if the decision of the District Court in The Hague were appealed, the appeals court could not refer any question to an arbitral tribunal constituted under the Treaty.[334]

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[328] Claimant's Counter-Memorial on Jurisdiction, para. 103.

[329] Claimant's Counter-Memorial on Jurisdiction, para. 105. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 289:10–290:4.

[330] Claimant's Counter-Memorial on Jurisdiction, para. 105. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 286:25–287:4 ("Ecuador agrees that this arbitration cannot collaterally attack the Chevron Award because that award, under the terms of Article VI, is final and binding, subject only to the procedures available under Dutch law.").

[331] Claimant's Counter-Memorial on Jurisdiction, para. 106.

[332] Claimant's Counter-Memorial on Jurisdiction, para. 107, citing Press Release of the Ecuadorian Office of the Attorney General (4 July 2011) [C-146].

[333] Claimant's Counter-Memorial on Jurisdiction, para. 109.

[334] Claimant's Counter-Memorial on Jurisdiction, para. 111. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 291:11–18 ("The dispute that Ecuador has brought before you was not referred to you by any other court or arbitral tribunal seeking your guidance on a matter pending before that court or tribunal. The present dispute is between Ecuador and the United States, and has never been presented to another court or tribunal; it has only been presented here. This is not a case of referral.").

170. Finally, the Claimant submits that these proceedings cannot constitute an exercise of advisory jurisdiction, since this would involve the provision of non-binding legal advice to organs or institutions that have requested such opinions.[335] According to the Claimant, advisory opinions are not a binding means of settling disputes whereas here the Parties are in dispute regarding the interpretation of Article II(7) and any award made by the Tribunal will be binding upon them.[336] The Claimant is of the view that the Respondent's argument in this regard "is really a repackaging of the [Respondent's] claim that there is no dispute between the Parties."[337]

171. Furthermore, the Claimant disputes the Respondent's arguments that exercising jurisdiction over its request for an interpretation of Article II(7) would exceed the judicial function of the Tribunal under Article VII of the Treaty.[338] The Claimant stresses that "[t]he clarification of the *content* of Articles II(7) and VII, as opposed to the act of their *creation*, is independent from States' consent; therefore there can be no question of judicial law-making in this case."[339]

172. The Claimant argues that the Respondent's reliance on the separate opinion of Judge Gros in the *Nuclear Tests* case and on the *Aminoil* award is misplaced.[340] With respect to the opinion of Judge Gros, the Claimant avers that the context in that case was the absence of any properly pleaded legal right or cause of action by Australia. Therefore, the exercise of jurisdiction by the ICJ in that case would have been tantamount to usurping the legislative function from States. Meanwhile, the case at hand deals with existing rules of law since the legal validity of Article VII is not in dispute.[341] As regards the *Aminoil* award, the Claimant contends that it is not seeking an equitable revision of Article II(7) or Article VII as was sought in that case; nor are the provisions an "incomplete contract."[342] The Claimant submits that it is not asking the Tribunal to "create a new rule of international law empowering it to exercise jurisdiction over Ecuador's request. Nor does Ecuador ask the Tribunal to substitute Article II(7) for a new rule of international law. Rather, Ecuador asks that the Tribunal decide the proper interpretation of an *existing* rule of international law that is manifest in Article II(7) of the Treaty."[343]

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[335] Claimant's Counter-Memorial on Jurisdiction, para. 112.

[336] Claimant's Counter-Memorial on Jurisdiction, para. 112. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 290:5–22 ("[T]here is a dispute between Ecuador and the United States in regards to Article II(7), over which the Tribunal may exercise jurisdiction under Article VII. So, if Ecuador is right that there is a dispute that satisfies Article VII, the United States' characterization of this arbitration as an Advisory Opinion necessarily fails. The United States is not helped by arguing that the question that Ecuador has put to this Tribunal is virtually identical to the kinds of questions that the ICJ is asked when it is requested to give Advisory Opinions.").

[337] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 290:10–12.

[338] Claimant's Counter-Memorial on Jurisdiction, para. 113.

[339] Claimant's Counter-Memorial on Jurisdiction, para. 114.

[340] Claimant's Counter-Memorial on Jurisdiction, para. 116.

[341] Claimant's Counter-Memorial on Jurisdiction, para. 116.

[342] Claimant's Counter-Memorial on Jurisdiction, para. 117.

[343] Claimant's Counter-Memorial on Jurisdiction, para. 118.

h) The Parties' dispute is a legal dispute whose resolution will not have the far-reaching consequences alleged by the Respondent

173. The Claimant takes issue with the Respondent's characterization of the dispute as a political disagreement, noting that the ICJ made clear in *Border and Transborder Armed Actions Case* that political aspects do not render a dispute non-legal:

> The Court is aware that political aspects may be present in any legal disputes brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in *the sense of a dispute capable of being settled by the application of principles and rules of international law*, and secondly, that the Court has jurisdiction to deal with it, and that jurisdiction is not fettered by any circumstance rendering the application inadmissible…. [I]t cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.[344]

174. The Claimant avers that, since the issues in these proceedings are capable of resolution by principles and rules of international law, there is no doubt it is a legal dispute over which the Tribunal can take jurisdiction.[345] The Claimant responds to the Respondent's characterization of its June 8 Note as a "unilateral interpretive declaration." The Claimant argues that its Note was not a unilateral declaration but an invitation to discuss the interpretation of Article II(7) that, once rebuffed, left the Claimant no choice but to seek an authoritative interpretation from the Tribunal.[346]

175. The Claimant further submits that taking jurisdiction is consistent with the object and purpose of the Treaty and would not have the destabilizing consequences alleged by the Respondent.[347] First, the Claimant avers that the decision would have no effect on the *Chevron* award and is not a re-litigation or appeal of that award.[348]

176. Secondly, the Claimant disputes the Respondent's assertion that an exercise of jurisdiction would undermine the stability and predictability of the dispute settlement process; in the absence of a doctrine of precedent in international investment law, an authoritative interpretation would "promote uniformity and stability of the law."[349] Moreover, according to the Claimant,

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[344] Claimant's Counter-Memorial on Jurisdiction, para. 119, citing *Border and Transborder Armed Actions*, *supra* note 146.

[345] Claimant's Counter-Memorial on Jurisdiction, para. 120.

[346] Claimant's Counter-Memorial on Jurisdiction, paras. 121–122.

[347] Claimant's Counter-Memorial on Jurisdiction, paras. 123–124. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 355:19–357:16.

[348] Claimant's Counter-Memorial on Jurisdiction, para. 125, citing Reisman Opinion para. 52. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 287:1–9 ("[T]his arbitration cannot collaterally attack the Chevron Award because that award, under the terms of Article VI, is final and binding, subject only to the procedures available under Dutch law.").

[349] Claimant's Counter-Memorial on Jurisdiction, para. 126.

exercising jurisdiction would not politicize investment disputes, but rather would remove uncertainty from the Parties' legal relations and would further the Parties' agreement on the treatment to provide to investors consistent with the objectives of the Treaty.[350] In its view, "ascertaining jurisdiction […] would be a strong message to the States that [the] commitments must not be taken lightly, and that may dissuade some […] cat-and-mouse games that could be observed otherwise."[351]

177. The Claimant also denies that the assertion of jurisdiction by the Tribunal would result in other States initiating such arbitrations to stop investment arbitration proceedings initiated by investors. It argues that these are two different tracks (Article VI and Article VII) and that "the Article VI Arbitrators are totally free to let the proceedings before them develop or to stay the proceedings, depending on the judgment they make, on the seriousness or the frivolity of the interpretative issue raised by the State in the Article VII arbitration."[352] The Claimant relies on *Lucchetti* v. *Peru* as an example of where the arbitrators decided not to stay the proceedings.[353]

178. The Claimant disputes the Respondent's assertion that exercising jurisdiction would judicialize aspects of the Parties' relationship and hinder the exchange of views. First, the Claimant emphasizes that it is the Respondent who shut down lines of communications regarding this exchange.[354] Secondly, whatever the effect of Article VII, the Parties included it in the Treaty with the express understanding that it coexists with the possibility of consultations under Article V.[355] The Claimant disagrees with the Respondent's assertion that consultation about "matters" and "disputes" are two distinct mechanisms that operate in isolation of one another, and asserts that international law holds negotiation and adjudication to be complementary forms of dispute settlement.[356] According to the Claimant, the use of the words "matter" and "dispute" merely reflects that, at the initial stage of consultations, the Parties have not yet determined whether a dispute exists.[357] The Claimant avers that the fear that bringing an arbitration following the failure of negotiations would "chill" dialogue with its treaty partner would apply to all instances of State-

[350] Claimant's Counter-Memorial on Jurisdiction, para. 127.

[351] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 386:6–20.

[352] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 383:12–384:1.

[353] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 384:2–6, citing *Lucchetti*, *supra* note 180.

[354] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 385:24–386:5.

[355] Claimant's Counter-Memorial on Jurisdiction, paras. 128–130.

[356] Claimant's Counter-Memorial on Jurisdiction, paras. 131–132, citing *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Jurisdiction, Judgment (19 December 1978), 1978 I.C.J. Reports 3, para. 29 [C-114]; *Alps Finance and Trade AG* v. *Slovakia*, UNCITRAL, Award (5 March 2011), para. 204 [C-115].

[357] Claimant's Counter-Memorial on Jurisdiction, para. 134.

to-State arbitration, but that the inclusion of State-to-State dispute settlement clauses indicates that States intended to provide such recourse.[358]

179. The Claimant also casts some doubts on "the prophecy that [the Tribunal's] assertion of jurisdiction would open the floodgates to State-to-State arbitrations."[359] The Claimant argues, that "differences between States, the States themselves, on the interpretation of the protection provided for in the treaty are rare." Furthermore, it argues that "arbitration between States may be a waste of time. It may be costly, costly money wise and also costly to the relationship between the two States. And for this reason, States are not likely to engage in arbitrations lightly."[360]

180. The Claimant concludes by countering the Respondent's suggestions that exercising jurisdiction would set a dangerous precedent in international law, submitting that the Tribunal cannot decline jurisdiction based on extraneous non-legal considerations. The Claimant cites Orakhelashvili who states that "[i]f interpretation is meant to clarify the content of law that has crossed the threshold of legal regulation, it naturally follows that the process of interpretation has to be independent of non-legal considerations" and that "interpretation is a purely legal, not political, task".[361]

i) The Claimant has fulfilled its obligation to consult

181. The Claimant refutes the Respondent's assertion that it had not fulfilled the preconditions set forth in Article VII. The Claimant notes that the UNCITRAL Rules do not allow a party to raise a new jurisdictional objection for the first time at the oral hearings. In addition, it contends that it "unquestionably pursued a resolution through diplomatic channels" and it observes that it was Mr. Koh who put an end to the diplomatic process on behalf of the Respondent, when he "unilaterally cut off dialogue with [the Claimant] in October 2010, advising [the Claimant] at the time that [the Respondent] had made a decision not to share with [the Claimant] its interpretation of Arti-

[358] Claimant's Counter-Memorial on Jurisdiction, para. 135.

[359] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 386:21–23.

[360] *Id.*, p. 387:9–18.

[361] Claimant's Counter-Memorial on Jurisdiction, paras. 136–137, citing A. Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (2008), p. 293 [C-113]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 356:9–23 ("[I]t is said that your assertion of jurisdiction may bring in the future to politicizing investment disputes. One may have very serious doubts about this. These agreements on the interpretation of the investment BITs. At the year between investors and on the States because they have conflicting interests, but between the two States that are the signatories of the Bilateral Investment Treaty, as such, differences are likely not to occur often. The State of the investor as a State is likely to have concerns similar as the State hosting the investments to keep the Undertakings made by the two States within the reasonable boundaries they agreed. So I think that the fear of politicization—of making more politic—political the settlement of disputes in the field of investment is very grossly overstated.").

cle II(7)."[362] The Claimant further avers that it "did, indeed, seek and engage in consultations and other diplomatic means in this matter until the State Department, the United States Government chose to close the door on further discussions and to refuse to respond to Ecuador's Note and its concerns and its apprehensions."[363] It further explains that "it is absolutely wrong to characterize [the Diplomatic Note] as an ultimatum," which mischaracterization is in its view also demonstrated by the Parties' subsequent conduct.[364]

182. Finally, the Claimant contends that invoking Article V cannot be a prerequisite for the Tribunal's jurisdiction, since it is not mentioned in Article VII whatsoever.[365]

j) The applicability and effects of the decision is not a matter for the Tribunal

183. The Claimant notes that it does not seek a decision that is binding *erga omnes*. It is only asking for a decision which would be binding between the two Parties to the Treaty. The Claimant is of the view that the applicability of such a decision is not a matter for the Tribunal, who does not have "to decide anything about the effects of [its] decision except that is binding upon the two Parties, and it is binding in the relations between them."[366]

184. The Claimant concedes that both Parties have obligations under Article VI to comply with awards of Article VI Tribunals, "and that would not change, even though a decision has emanated from an Article VII Tribunal." Moreover, it claims that if either Party refused to pay an award, the other State would be able to provide diplomatic protection, "not espousing a claim under the interpreted provision, Article II(7), but a claim for nonperformance of the obligation to pay the award."[367]

185. As mentioned above, the Claimant insists that the decision would have no effect on the *Chevron* award. The Claimant asserts that awards made by Article VI tribunals are safe, since they have their "own authority and an erroneous interpretation of the law in regard to what [the Tribunal] would decide, that would have been made in the past by an Article VI Arbitral Tribunal would certainly not be a ground to seeking to setting aside of this arbitral award."[368] The Claimant also notes that a misinterpretation of the law is not

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[362] *Id.,* pp. 271:25–273:7. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 53:22–56:10.

[363] *Id.*, pp. 358:12–359:10.

[364] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 50:5–53:21.

[365] *Id.,* p. 359:6–10.

[366] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 69:6–17.

[367] *Id.*, pp. 353:14–354:22.

[368] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 383:2–6.

a ground for refusal of enforcement of the award under any relevant international instrument.[369]

186. Finally, the Claimant contends that in the end the authority of any eventual decision by the Tribunal will have to be determined by those called upon to consider that question. In particular, it observes:

> The last question, one they have is what will be the authority of the decision you will make on the interpretation if you proceed to the merits? One may make guesstimates, but in the end it will be incumbent on the arbitration community to organize itself. No doubt, arbitrators in investment disputes would recognize the role, the leading role, that an Article VII interpretation should have. It will be incumbent on these arbitrators to determine the exact views they make of your determination, but this should be no way be a reason for you to decline the jurisdiction that is conferred upon you by the Treaty.[370]

VII. Tribunal's Reasoning

1. Preliminary considerations

187. While not being made express elsewhere in this decision, two broad considerations guide the Tribunal's reasoning in this decision and deserve preliminary comment.

188. First, an arbitral tribunal, even though not bound by any strict doctrine of *stare decisis*, should try as far as possible to decide in a manner consistent with other applicable judicial decisions. However, when evaluating the authorities cited by the Parties in these proceedings—parsing through the *obiter dictae* and restricting oneself to the conclusions actually employed to reach a resolution of the case—the Tribunal has concluded that the case at hand is truly a novel one. While the jurisprudence guides and informs the Tribunal's decision, the Tribunal has not found any decision that truly qualifies as precedent on the fundamental questions posed by the Parties' arguments.

189. Secondly, the Tribunal notes that the two main jurisdictional issues— "concreteness" and "positive opposition"—are intertwined. As elaborated below, the Tribunal's principal concern in deciding both jurisdictional questions in this State-to-State arbitration is whether the claim on the merits has some implications or consequences for the relations between Parties at the State-to-State level. The issue of the existence of a sufficiently "concrete" State-to-State claim is therefore intimately connected to the existence or not of a State-to-State "dispute". The two objections may in fact be considered different

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[369] *Id*., p. 383:7–11. *See also* p. 364:3–10 ("And as we have already seen in the case of Ecuador in Article II(7), two different tribunals can to two very different conclusions already. And because Article VI Tribunals and Investor-State Tribunals in general do not enjoy stare decisis and their decisions are not binding on anybody but the Parties relating to that dispute, it would be no ground for a Third Party to insist that it relied upon a particular decision of an arbitral tribunal.").

[370] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 388:7–18.

prongs of the *Mavrommatis* formula for determining what constitutes a proper "dispute" for adjudication. The Tribunal's conclusions on these issues, while stated separately, must be read together and both depend on the unique factual matrix presented by this case.

2. The so-called "concreteness" requirement

a) The legal framework

190. The Tribunal need not repeat here the extensive arguments put forth by the Parties already summarized above. In essence, the Respondent relies on a passage from the *Northern Cameroons* case, where the ICJ states that "it may pronounce judgment only in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties."[371] On the basis of this case and a number of further authorities on the inherent limitations of the international judicial function, the Respondent concludes that a case is not justiciable before an international tribunal in the absence of an allegation of breach.

191. By contrast, the Claimant emphasizes the immediately following sentence of the ICJ's judgment, requiring only that "[t]he Court's judgment must have *some practical consequence*" and not be entirely academic.[372] The Claimant then points to various pronouncements by international tribunals of their duty to decide important questions put before them, whether abstract or not, as long as they are capable of resolution according to law.

192. At the hearing, the Claimant put forward what it considered to be examples of rulings on abstract questions of interpretation,[373] and the Respondent sought to distinguish each case produced.[374] The Claimant eventually appeared to accept a slightly higher threshold of "practical consequences"[375] and the Respondent appeared to acknowledge that the spectre of an allegation of breach might be enough.[376] Despite softening their positions, the Parties nonetheless continued to draw diametrically opposite conclusions from the same cases and facts.

193. With due respect for the skilled advocacy observed, both sides seem to focus on specific excerpts to the exclusion of considering the meaning of the passage and decision as a whole. To recall, the full passage from *Northern Cameroons* which both Parties regard as authoritative reads as follows:

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[371] See *supra*, section VI(1), paras. 57, 71. *Northern Cameroons*, supra note 71, pp. 33–34 (emphasis added).

[372] See *supra*, section VI(2), paras. 148–149. *Northern Cameroons*, supra note 71, p. 34 (emphasis added).

[373] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 230:14–255:17.

[374] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 125:22–160:20.

[375] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 350:15–351:8.

[376] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 329:11–334:4.

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.[377]

194. The present case is, however, very different from *Northern Cameroons*, which was primarily concerned with the efficacy of a decision in that case:

> If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application.[378]

195. At issue in *Northern Cameroons* was not whether—in the parties' respective views on the application of various UN decisions, the management of the Trust, and the treaties that instituted the mandates—there was a sufficient "conflict of legal interests between the parties," but whether its decision would "affect *existing* legal rights or obligations of the parties." The ICJ concluded that it could not give a decision from which any practical consequence could result in light of the situation created by the end of the Trust. The case had been rendered entirely moot:

> The Court finds that the proper limits of its judicial function do not permit it to entertain the claims submitted to it in the Application of which it has been seised, with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom. Any judgment which the Court might pronounce would be without object.[379]

196. *Northern Cameroons* is nonetheless instructive in certain respects. Much of the argument between the Parties in the instant case revolved around whether the tribunal could answer an abstract question of interpretation. But that is a false issue: a tribunal can answer such an issue if properly put before it. The ICJ in *Northern Cameroons* deemed it "undisputable" that "the Court may, in an appropriate case, make a declaratory judgment…[that] expounds a rule of customary law or interprets a treaty which remains in force, [which] judgment has a continuing applicability." The issue is whether the context of such a decision grants it the necessary practical consequence, beyond the mere elucidation of the meaning of the treaty itself, for the parties before the tribunal.

197. The relevant question does not thus merely concern the practical effect arising from a decision on the merits writ large, but requires that the decision affect the "legal rights or obligations of the parties, thus removing uncertainty from their legal relations." The use of the plural "parties" is sig-

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[377] *Northern Cameroons*, supra note 71, pp. 33–34 (emphasis added).

[378] *Northern Cameroons*, supra note 71, p. 33.

[379] *Northern Cameroons*, supra note 71, p. 38.

nificant, as is the phrase "their legal relations." They clarify that the "practical consequences" must affect and relate to both Parties who are the object of the decision to be rendered in the present case. In other words, they must relate to rights or obligations owed by Ecuador to the United States and vice-versa.

b) The existence of practical consequences in the present case

198. This case has seen discussion of the Parties' respective duties to consult or respond to each other. However, the fundamental interpretative questions put before the Tribunal—the issues of practical consequence—focus on Ecuador's obligations with respect to US investors such as Chevron, and not on obligations that are in contention with the United States. In fact, the Parties agree:

> (*a*) that Ecuador makes no claim that the US is in violation of its obligations under Article II(7) of the Treaty;
>
> (*b*) that no claim has been advanced by the US that Ecuador is in violation of its obligations under Article II(7) of the Treaty; and
>
> (*c*) that the US does not take issue with Ecuador's actual or proposed implementation of Article II(7) of the Treaty.

199. However, the Parties strongly disagree over whether Ecuador is entitled to an authoritative interpretation of Article II(7) of the Treaty in order to protect itself from liability to US investors on the basis of what it claims to be an erroneous construction of that provision.

200. Concretely, in the light of the *Chevron* award, Ecuador claims that it must know whether and how it is to adapt its legal system to comply with the *Chevron* interpretation or have confirmation that it does not have to do so. Ecuador admits, however, that this Tribunal's ruling will have no impact on the *Chevron* award itself. Indeed, Ecuador has explicitly committed itself to complying with the *Chevron* award, subject to the exhaustion of the recourses and defenses available to it in accordance with the *lex arbitri* and international instruments governing the recognition and enforcement of arbitral awards. So, Ecuador's expressed concern is prospective: it wants a decision of this Tribunal in order to better predict the outcome of future disputes regarding the interpretation of Article II(7) before future Article VI tribunals and if necessary to reform its judicial system to avoid adverse outcomes in investor-State arbitrations.

201. The US objects to resort to an Article VII arbitration for this purpose, claiming that it would undermine a principal object of BITs:

> Compelling States to reach an agreed interpretation in the context of an investor-State dispute whenever demanded by another State, at pain of arbitration if they fail, would eviscerate a principal rationale for investor-State dispute mechanisms, which is to depoliticize investment disputes and permit neutral and binding arbitration between the State and the investor.[380]

[380] US Statement of defense pp. 12–13.

202. Even if the questions advanced in this case could be considered to have clear practical consequences for Ecuador, how is this a matter that affects Ecuador's relationship with the US? Following the reasoning developed by the Parties on this point, the crucial question is how the Tribunal's decision on the merits stands to remove any legal uncertainty in that bilateral relationship.

203. Even in the cases dealing with those treaties most akin to modern BITs, the "abstract question" was of clear consequence for both parties to the treaty. For example, in the *Rights of US Nationals in Morocco*, the case concerned the disputed question of whether U.S. nationals were entitled to certain economic and consular rights as a result of a MFN clause in a commercial treaty. The same is true for the Iran–U.S. Claims Tribunal cases *A2* and *A17*, where the question concerned whether nationals of either State could bring claims before the tribunal. In essence, in all the cases cited, there were practical consequences for both parties in the resolution of the matter of interpretation placed before the tribunal. Such consequences do not arise in the instant case as it has been pleaded before this Tribunal.

204. There exists the possibility that the United States could directly allege a breach of the "effective means" obligation in Article II(7) against Ecuador, in which case there would be clear "practical consequences" for both Parties.[381] Such a case could arise in the context of either a direct claim for breach or a claim by way of diplomatic protection by the U.S. of one of its investors against Ecuador.[382] Contrary to the view expressed in Prof. Reisman's opinion submitted by the Respondent,[383] some commentators consider that recourse to State-to-State dispute resolution for breaches of a BIT may be possible, in particular where the investment dispute in question has not already been submitted to investor-State arbitration under Article VI.[384] The Tribunal makes no finding on this point, but is not persuaded to exclude this possibility outright.

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[381] The question of to whom the obligations in BITs are owed revolves around the interpretation of the primary obligation. See James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" 96 Am. J. Int'l Law 874, pp. 887–888 (2002). Even Professor Douglas, an advocate of the "direct" theory, argues that the substantive obligations in BITs may exist purely on the State-to-State plane while procedural obligations are owed directly to the investor. Zachary Douglas "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British Yearbook of International Law 151 p. 168.

[382] See e.g. *Italy* v. *Cuba*, where Italy alleged a breach of its rights under the Italy–Cuba BIT and brought a claim of diplomatic protection on behalf of its nationals under a comparable State-to-State compromissory clause, despite the availability of investor-State arbitration under the same Italy–Cuba BIT.

[383] Reisman Opinion, para. 23. ("[T]he central jurisdictional feature of the BIT's dual-track jurisdictional regime is its assignment of a different range of disputes exclusively to each of the tracks.").

[384] Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* (1992), p. 191. ("The [State-to-State disputes] article [of the 1983 US Model BIT] expressly excludes two categories of disputes to which it would be otherwise applicable. […T]he omission of this language [in later Model BITs] leaves open the possibility that a dispute submitted to the [ICSID] Additional Facility could be resubmitted for resolution under the state-to-state disputes provision."); Juliane Kokott "Interim Report on 'The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment'" in International Law Association, New Delhi Conference (2002), Committee on Diplomatic Protection of Persons and Property, Second Report, p. 24;

205. This prospect remains theoretical, however, and was in any event not pleaded by the Claimant here. Moreover, as further discussed below in relation to the existence of a dispute, it is impossible to exclude the possibility that the U.S., when approached by an aggrieved U.S. investor, might agree with the interpretation of Article II(7) that Ecuador has put forward.

206. Returning to *Northern Cameroons*, the present situation is not unlike the failure by Cameroon to claim any reparation for the breaches it alleged, a fact on which Judge Fitzmaurice focuses in his Separate Opinion. Had Cameroon claimed any compensation or other appropriate relief for the breaches it alleged, the result might have been different. Alternatively, had the Trusteeship Agreement remained in force, or had the possibility of a future allegation of breach remained, the judgment would have obtained the necessary "practical consequences":

> for in that case, any finding in favour of the plaintiff State functions as a prohibition on the continuance or repetition of the breach of treaty, and this may be all that is required, and in any event makes the judgment effective. Moreover, the latter necessarily operates as a finding about the correct interpretation or application of the treaty, and therefore serves a useful and effective legal purpose during the life-time of the treaty.[385]

207. The outcome might well have been different here as well if the Respondent had put forward an opinion that differed from that of Ecuador on the proper interpretation of Article II(7), expressed approval for the *Chevron* award's conclusions, or taken issue with Ecuador's actual or proposed implementation of its obligations under Article II(7). However, under the circumstances, and particularly in light of the Tribunal's conclusion below that no dispute exists regarding the interpretation of Article II(7), the Tribunal cannot conclude that a proper case for adjudication has been presented by the Claimant.

3. The existence of a dispute

a) The legal framework

208. In order to determine whether it has jurisdiction, the Tribunal must interpret Article VII in accordance with the general rules of treaty interpretation contained in Article 31 and following of the VCLT. Article VII confers jurisdiction over "[a]ny dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels." In construing the meaning of this grant of jurisdiction to State-to-State arbitral tribunals, the Tribunal must determine whether a "dispute" exists between the Parties. However, there is a qualification regarding

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Antonio R. Parra "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment" (1997) 12 ICSID Review 287, p. 335.

[385] *Northern Cameroons*, Separate Opinion, p. 98.

which disputes the Tribunal may assert jurisdiction over—it must be a dispute "concerning the interpretation or application of the Treaty." More precisely, the issue to be addressed is whether there is a dispute between the Parties over the interpretation or application of Article II(7) of the Treaty.

209. As with the question of "concreteness", the Parties have put forward diametrically opposed positions regarding the existence of a dispute. For the Claimant, the dispute arises out of the situation described by Ambassador Luis Benigno Gallegos in his witness statement:

> A diplomatic note was therefore prepared that set out Ecuador's views on what it understood to be the Contracting Parties' common intentions with respect to Article II(7), and asked the United States to confirm that, in fact, it shared Ecuador's interpretation of that provision. The diplomatic note further observed that, if the United States had a different understanding of Article II(7) than was described in the note, or if the United States did not respond, Ecuador would consider itself to be in dispute with the United States over the interpretation of the Treaty.

210. This was part of a broader "strategy outlined by the President of the Republic" whereby Ecuador sought to discredit the interpretation made by the *Chevron* tribunal and to validate its own views on Article II(7) of the Treaty.[386]

211. The United States initially acknowledged Ecuador's Diplomatic Note and "look[ed] forward to remaining in contact about this," but then chose not to respond further. The Respondent has also abstained from addressing the substance of the June 8 Note throughout these proceedings.

212. The Parties both acknowledge that the term "dispute" has a specific meaning in international law and practice and are largely in agreement on the legal framework to be applied, aptly and succinctly summarized by the ICJ in its judgment in *Georgia* v. *Russia*:

> The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on

[386] Memo C.E. No. 1–718/2010 to Ricardo Patiño from Luis Gallegos Chiriboga (Oct. 4, 2010) (attached to Gallegos Statement).

> an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.[387]

213. In respect of the existence of disagreement between the Parties, the Respondent claims that it has never expressed an opinion on—and therefore never opposed—the position of Claimant on the meaning of Article II(7). It has simply refused to express any opinion about the interpretation and remained silent on this subject. Thus, according to the Respondent, there is no disagreement or conflict between the Parties; there is no "positive opposition" between them.

214. The Claimant argues, however, that the facts and circumstances surrounding the Respondent's silence support the inference that it opposes the Claimant's position regarding the proper interpretation of Article II(7). The Claimant emphasizes that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." The Claimant acknowledges that the Respondent had no strict obligation under the Treaty to respond to the June 8 Note and was entitled to remain silent. However, it considers that the progression, from the issuance of the *Chevron* award, to the Claimant's June 8 Note to the Respondent, and then the Respondent's sudden decision not to respond to the note or engage in discussions on the subject, create a situation where "a response is called for."[388]

215. The specific issue facing the Tribunal is thus whether the facts of this case allow for the inference that the Respondent disagrees with the position of the Claimant regarding the interpretation of Article II(7).

b) The inference of positive opposition

216. Three facts directly support the inference that the Claimant asks the Tribunal to draw. First, the Treaty was negotiated on the basis of the 1992 US Model BIT and the "effective means" provision was adopted verbatim from this model—which itself was the product of the inter-agency discussions that the Respondent purports to be necessary to form a view on the proper interpretation of Article II(7). The US cannot therefore plead ignorance of the intended meaning of Article II(7) of the Treaty, at least not for such fundamental questions as whether the provision is reflective of customary law or constitutes *lex specialis*. The Claimant argues therefore that the Respondent could only "either agree or disagree" with the Claimant's interpretation and, if it agreed, it would have said so, leaving the Tribunal to deduce that it must not agree.[389]

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[387] *Georgia* v. *Russia*, *supra* note 122, para. 30.

[388] See *supra* section VI(2), paras. 154–166.

[389] Transcript (Hearing on Jurisdiction), 26 June 2012, pp. 266–272.

217. Second, as the Respondent has itself acknowledged, its decision not to respond to the June 8 Note was a departure from its regular practice with its treaty partners. Indeed, this was an about-face after having courteously acknowledged receipt of the June 8 Note and stated that "the U.S. government is currently reviewing the views expressed in your letter and…look[s] forward to remaining in contact about this and other important issues that affect our two nations." This behavior confers greater significance on the Respondent's silence, from which the Claimant invites the Tribunal to infer that the Respondent disagrees with the Claimant and is trying to protect the *Chevron* interpretation from scrutiny by a State-to-State tribunal.

218. Third, the Respondent has repeatedly insisted on remaining silent on the interpretation of Article II(7) even in situations where the Respondent would be expected to address the substance of Ecuador's views on Article II(7), including in the various pleadings on the merits in these proceedings. This suggests that the Respondent's position has not been solely motivated by its objection to being presented with an "ultimatum" in the June 8 Note. Indeed the implication of such a motivation is in any event belied by the Respondent's initial response, which expressed no objection to the form or content of the June 8 Note.

219. However, the Tribunal does not regard any of these arguments—individually or collectively—as establishing an inference that the Respondent in fact disagreed with the Claimant's position. One cannot exclude other reasonable explanations for the Respondent's behavior that do not depend on the Respondent's disagreement with the Claimant's interpretation of Article II(7). In particular, the Respondent's behavior is consistent with a principled stance of not wanting to interfere with the decisions of Article VI investor-State tribunals, be they right or wrong. Given the existence of such a plausible explanation for the United States' silence, the circumstances of this case do not warrant the inference of "positive opposition".

220. The jurisprudence cited by the Parties supports this conclusion. For example, in *Georgia* v. *Russia*, Russian representatives made somewhat ambiguous statements in response to the claims leveled against the Russian Federation regarding both the unlawful use of force and ethnic cleansing. The oblique rejection by Russia of the accusatory statements made by Georgian representatives could not tenably be construed as rejecting only the claims regarding the unlawful use of force, as that would imply an admission that the Russian Federation was engaging in ethnic cleansing.

221. The situation is similar to that in the *UN Headquarters Agreement* case. The UN Secretary-General claimed that the U.S. was violating its international obligations by forcing the closing of the office of the PLO Mission to the United Nations in New York. Although the U.S. never expressly opposed

the UN Secretary-General's views, its course of conduct could only reasonably be interpreted as indicating that it believed that its actions were justified.[390]

222. The same is true for *Cameroon* v. *Nigeria*. Nigeria's silence on where certain sections of the boundary should lay between the two countries could not, given clear disputes regarding other portions of the boundary, reasonably be interpreted as indicating that it had no opinion on the boundary or that it agreed with Cameroon's position. The only reasonable interpretation was that Nigeria disagreed, even if it had not explicitly expressed its disagreement.

223. These cases demonstrate that the inference of "positive opposition" is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded. Such may be the case when a State remains silent when faced a serious allegation of breach of its international obligations or when the situation presents mutually-exclusive binary alternatives, one of which may be discarded as unreasonable.

224. But that is not the case here. The Claimant asserts that, if the Respondent agreed with its position, a response to its June 8 Note would be required by virtue of the Respondent's good faith obligations. Even if this were so, the Tribunal finds—*as a factual matter*—that the Respondent has put forward a reasonable alternative explanation for its decision not to respond that precludes the inference that the Respondent opposes the Claimant's views on the interpretation of Article II(7) of the Treaty.

c) The scope of the dispute: the obligation to respond or consult

225. The above reasoning does not mean that there may not be a dispute between the Parties. However, the dispute, if one exists, concerns the Respondent's refusal to respond to the June 8 Note as encapsulated in the Respondent's statement at the hearing that "the most Ecuador can do is to say that the failure of the United States to answer Ecuador's either/or demand […] created the dispute […] But that alleged dispute is over whether Ecuador had a right to issue such an ultimatum or demand and whether the Respondent had an obligation to answer. It's not over the interpretation or application of Article II(7)."[391]

226. Seen from another point of view, the question concerns the obligation to agree to a joint interpretation or engage in consultations regarding the proper interpretation of Article II(7) of the Treaty when faced with a demand such as Ecuador's. In essence, the Parties disagree about the validity of the United States' justification for not responding: that it does not want to interfere with the proper functioning of the investor-State arbitration system and thus matters subject to investor-State arbitration should be left to investor-State tribunals.

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[390] Claimant's Counter-Memorial on Jurisdiction, para. 82, citing *UN Headquarters Agreement*, *supra* note 123, para. 36.

[391] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 108–109.

227. Such a dispute might have been brought within the ambit of Article VII if the Claimant had alleged a violation of the duty to consult under Article V in light of the Respondent's subsequent refusal to discuss the matter despite its initial indication that it "look[ed] forward to" doing so. However, Ecuador neither invoked Article V nor argued a breach thereof. Moreover, since Ecuador agrees that there is no obligation under the Treaty to respond to a request to give an interpretation and bases it arguments on general obligations of good faith in the performance of treaties and the principle of *pacta sunt servanda* such a dispute could not concern the "interpretation or application of the Treaty."

228. The Tribunal is thus left with no dispute over which it can assert jurisdiction.

4. The prerequisite obligation to consult

229. Given it conclusions leading to an absence of jurisdiction due to the absence of a dispute, the Tribunal need not consider the Respondent's further objection that the precondition of negotiation in good faith prior to resort to arbitration were not fulfilled by the Claimant, including the question of whether this allegedly late-arising objection is admissible.

5. Costs

230. The Respondent has claimed costs, including its costs for legal representation and assistance, in accordance with Article 40 of the UNCITRAL Rules, which establishes a presumption that "the costs of arbitration shall in principle be borne by the unsuccessful party." However, Article VII(4) of the Treaty—while preserving the Tribunal's discretion to "direct that a higher proportion of the costs be paid by one of the Parties"—appears to abrogate that presumption and even suggest a presumption that the "costs of the proceedings shall be paid for equally by the Parties." It is also not clear whether the Treaty permits the Tribunal to order apportionment of the Parties' costs of legal representation and assistance.

231. In any event, the Tribunal finds no reason to depart from an even division of the costs of the proceedings. Not only would this comport with the Treaty and customary practice in State-to-State arbitration, but in a novel case such as this, where substantial and reasonable arguments are made by each party, each party should bear its own costs and divide the costs of the proceedings equally.

232. The PCA shall render a final accounting of the costs of arbitration to the Parties following the issuance of this award.

6. Conclusion

233. In light of its conclusions, the Tribunal must therefore dismiss the case as a whole and put an end to the arbitration. The Tribunal nonetheless takes this final opportunity to praise the Parties and counsel on both sides for their exemplary advocacy and collaboration in what has been novel and challenging case—both procedurally and substantively. The Tribunal also wishes to thank the PCA and in particular the Registrar, Martin Doe Rodríguez, for their support to the Tribunal in meeting these challenges.

VIII. Decision

For the foregoing reasons, the Tribunal decides, by majority, as follows:

(1) The Tribunal has no jurisdiction, and the case must consequently be dismissed in its entirety, due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty; and

(2) The fees and expenses of the Tribunal and the Registry, and other costs of the proceedings shall be paid for equally by the Parties in accordance with Article VII(4) of the Treaty.

Done this 29th day of September 2012.

[*Signed*]
Professor Raúl Emilio Vinuesa
[Subject to dissenting opinion]

[*Signed*]
Professor Donald M. McRae

[*Signed*]
Professor Luiz Olavo Baptista
[Chairman]

[*Signed*]
Martin Doe Rodríguez
[Registrar]

Dissenting Opinion of Professor Raúl Emilio Vinuesa

Preliminary Issues

1. On 2 August 2012, the President of the Tribunal circulated a draft Decision on Jurisdiction, which was upheld by the majority of the Tribunal that very day, absent any prior deliberation. By means of the Registrar of the Tribunal, I informed the Parties that not only did I dissent from such a decision and the reasoning in support thereof, but I also reserved the right to agree to or dissent from any other argument that may not have been included in the adopted Decision. After the Decision had been adopted, the President of the Tribunal circulated a new draft with reasoning that differs significantly from the former draft Decision. In view of this situation, this Dissenting Opinion presents my position in regard to the main arguments put forward by both Parties in the course of the proceedings in order to express my disagreement with the arguments of the majority which were eventually included in this Award.

I. Introduction

2. On 28 June 2011, the Republic of Ecuador (hereinafter, "*Ecuador*" or the "*Claimant*") filed a Request for Arbitration against the United States of America (hereinafter, the "*United States*" or the "*Respondent*") on the interpretation of Article II(7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of 1993 (hereinafter, the "*Treaty*" or the "*BIT*").

3. Article II(7) of the Treaty provides that:

> Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

4. The Request for Arbitration filed by Ecuador was based on Article VII of the Treaty.[1]

5. Article VII(1) of the Treaty provides that:

> Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

[1] Claimant's Request, pp. 2–3.

6. According to Ecuador, the dispute arises from the erroneous interpretation and application of Article II(7) of the Treaty in the Partial Award issued in the *Chevron*[2] case.[3]

7. Ecuador maintained that the dispute arose from the United States' refusal to engage in discussions on the timely requests made by Ecuador, which called for an answer. Ecuador claimed that its efforts to reach a solution through consultations or other diplomatic channels proved to be unsuccessful and, therefore, the issue remains unresolved: "This Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the 'Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded."[4]

8. On 29 March 2012, the United States submitted its Statement of Defence pursuant to Article 19 of the UNCITRAL Rules and Procedural Order No. 1.

9. The Respondent asserted that there was no dispute whatsoever but rather a unilateral attempt by Ecuador to secure a new interpretation of Article II(7) of the Treaty, alleging that no provision of either the BIT nor international law supported Ecuador's request to obligate a Contracting State to interpret the Treaty.[5]

10. On 25 April 2012, the United States submitted its Memorial on Objections to Jurisdiction of the Tribunal.

11. On 23 May 2012, Ecuador submitted its Counter-Memorial on Jurisdiction.

12. The objections to the jurisdiction of the Tribunal as raised by the Respondent may be summarised as follows: Article VII of the BIT does not authorise State Parties to resort to arbitration in order to secure an abstract interpretation of a treaty clause, which means that, in the absence of a concrete case, there is no jurisdiction. Nor is there jurisdiction in the absence of a dispute or in the event of failure to infer positive opposition giving rise to such dispute from the United States' silence. There follows below a separate analysis of these objections.

II. The Compromissory Clause: Article VII of the BIT

13. Ecuador based its Request for Arbitration on Article VII of the BIT. The United States objected to the jurisdiction of the Tribunal by alleging that the Parties had failed to consent under Article VII to arbitrate issues removed

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[2] *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*, PCA Case No. 2007–2, Partial Award of 30 March 2010.

[3] Claimant's Request, pp. 4 *et seq.*

[4] *Ibid.*, p. 7.

[5] Respondent's Statement of Defense, pp. 1–2.

from actual disputes in relation to the performance of their obligations pursuant to the Treaty. The Respondent maintained that, even if the facts show that a dispute does exist, Ecuador failed to resort to the suitable mechanism in order to engage in consultations before commencing the arbitration.[6]

14. The Respondent stated that, were a dispute to exist, such a dispute was between Ecuador and Chevron, not the United States. Rather than a request, the demand made by Ecuador to the United States by means of its Diplomatic Note was an ultimatum whereby Ecuador threatened to submit the United States to arbitration if it refused to accept the interpretation it proposed.[7]

15. According to the Respondent, since there was no violation of the Treaty, there was no concrete dispute on the interpretation of the Treaty which may be submitted to the jurisdiction of this Tribunal pursuant to Article VII.

16. The Respondent maintained that the points at issue in the Request for Arbitration posed merely abstract questions and demonstrated the lack of a concrete dispute between the Parties. The United States found Ecuador's demand to be political in nature, and thus, it could not be settled through arbitration.

17. According to the United States, the requirement of allegation of a breach is firmly enshrined in Article VII. I cite Judge Fitzmaurice in his separate opinion in the ICJ case *Northern Cameroons*, where he stated that: "This minimum, is that one party should be making or should have made a complaint, claim or protest about an act, omission, or course of conduct, present or past, of the other party".[8]

18. In my opinion, it is clear that Judge Fitzmaurice was making reference to a dispute on the application of a treaty which was claimed to have been breached, not only its interpretation. It is worth recalling that this separate opinion penned by Judge Fitzmaurice was not followed by the majority, who, on the contrary, acknowledged the Court's power to issue a declaratory judgment.[9]

19. For its part, Ecuador argued that Article VII empowers the Tribunal to issue a binding decision on a dispute between the parties concerning the interpretation and application of a Treaty and in particular on the meaning or application of a specific provision.[10]

20. Ecuador maintained that Article VII confers jurisdiction over "*any dispute*" concerning the interpretation or application of the Treaty. The Claimant based its position on the ordinary meaning of the terms of Article VII and the precedents of international jurisprudence that confirm that an Article VII

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[6] Respondent's Memorial on Jurisdiction, p. 3; Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 110:9–111:17; Transcript (Hearing on Jurisdiction) Day 2, 26 June 2012, p. 311:7–16.

[7] *Ibid.*, p. 3, Transcript (Hearing on Jurisdiction), Day 1, p. 14:11–20.

[8] *Case Concerning the Northern Cameroons* (Cameroon *v.* United Kingdom) (hereinafter "*Northern Cameroons*"), Separate Opinion of Judge Fitzmaurice, ICJ Reports 1963, p. 109.

[9] *Ibid.,* Judgment of 2 December 1963, ICJ Reports 1963, p. 37.

[10] Claimant's Counter-Memorial on Jurisdiction, p. 9.

tribunal can exercise jurisdiction over abstract disputes, insofar as such disputes concern the interpretation and application of the Treaty.[11]

21. Ecuador alleged that, in principle, international law does not demand as a prerequisite to the finding of a dispute that it involve a breach of the Treaty or that it be a concrete dispute, more than what is provided by Article VII.[12]

22. As to the terms of Article VII, Ecuador maintained that its ordinary meaning confers jurisdiction upon this Tribunal regarding any dispute concerning the interpretation or application of Article II(7). In support of its position, the Claimant cited the Permanent Court of International Justice (the "*PCIJ*") which, in interpreting a similar compromissory clause, asserted that a tribunal may exercise jurisdiction over any dispute, because the clause's jurisdictional reach was as comprehensive as possible.[13]

23. I agree with Ecuador that the fact that the phrase "interpretation or application" of Article VII of the BIT was stated in a disjunctive manner evidences the Parties' agreement that a dispute concerning the interpretation of the Treaty may be submitted to arbitration without also requiring that a dispute regarding the application of the Treaty be submitted at the same time, and *vice versa*.[14]

24. Under international law, there is no doubt that the terms "interpretation" and "application" are distinct concepts. From the viewpoint of legal doctrine, a convincing clarification was offered by the *Harvard Law School's Draft Convention on the Law of Treaties*, which defined the term "interpretation" as "the process of determining the meaning of a text", as opposed to "application", which is defined as "the process of determining the consequences which, according to the text, should follow in a given situation".[15]

25. By citing the position adopted by the United States in the case *United States Diplomatic and Consular Staff in Tehran*,[16] Ecuador argued that a dispute on the interpretation of a treaty may arise irrespective of whether there is a dispute regarding the treaty's application, provided that the parties have different viewpoints as to the meaning and scope of a treaty clause.

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, p. 10, citing *Mavrommatis Palestine Concessions* (Greece *v.* U.K.), Judgment of 30 August 1924, 1924 P.C.I.J., Series A, No. 2, p. 11.

[14] Claimant's Counter-Memorial on Jurisdiction, p. 11.

[15] *Ibid.*, citing *Harvard Law School's Draft Convention on the Law Treaties*. In addition, there is ample precedent to support the meaning of these concepts, see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*; *Case concerning a boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, *RIAA*, Vol. XXII. In the same vein, the opinion of Judge Higgins in the case *Oil Platforms* regarding the distinctive elements of "interpretation" and "application" cited by Ecuador is also relevant (Claimant's Counter-Memorial on Jurisdiction, pp. 11–12 citing *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment of 12 December 1996, *ICJ Reports 1996*.

[16] Claimant's Counter-Memorial on Jurisdiction, p. 13, note 18.

A. Disputes between an Investor and a State Party (Article VI) and Disputes between States (Article VII)

26. The United States alleged that Article VII of the Treaty should be construed within the framework of Article VI whereby the investors of a Party may commence an arbitration proceeding against the other Party with respect to investment disputes and secure a final and binding award.[17] The Respondent maintains that this provision is vital for the operation of the BIT and constitutes a separate and essential mechanism whereby the Parties have authorised arbitral tribunals to settle actual disputes that investors may submit to arbitration directly against the host State.[18] Due to Article VI, the United States concludes that a State-to-State tribunal constituted under Article VII lacks appellate jurisdiction over such awards. As Professor M. Reisman notes, the United States alleges that Articles VI and VII create two distinct tracks of arbitration that "*assign[] a different range of disputes exclusively to each of the tracks*".[19]

27. According to the United States, the limited scope of Article VII is confirmed by the basic object and purpose of the Treaty, *i.e.*, the promotion and reciprocal protection of investment. Article VI provides the main mechanism for the settlement of disputes concerning breach by either Party of the obligations undertaken under the Treaty. On the other hand, Article VII creates a residual mechanism intended to ensure that the Parties abide by the treaty in certain circumstances.

28. According to Ecuador, the dispute resolution systems provided for Article VI and Article VII of the Treaty are distinct and independent from one another. Article VI refers to disputes between investors and a State Party regarding alleged breaches of the Treaty. Article VI does not concern all disputes, but rather only certain concrete disputes submitted by an investor against the host State. Article VI does not authorise the abstract interpretation of the Treaty in the absence of a claim for breach of the Treaty. By contrast, the mechanism of Article VII, being independent from the mechanism of Article VI, makes reference to any dispute between States concerning the interpretation or application of the Treaty. The parties to the disputes under Article VI and Article VII differ as do the scope and content of the disputes submitted under one mechanism or the other.

29. Ecuador argued that the Article VII system is not an appellate mechanism for awards issued under the dispute settlement provision of Article VI. The Claimant also submitted that Article VII did not entail a referral system or a mechanism aimed at issuing advisory opinions.

30. The United States relied on no precedent whatsoever in support of the residual nature of the dispute settlement mechanism set forth in Arti-

[17] Respondent's Memorial on Objections to Jurisdiction, p. 19.

[18] *Ibid*., pp. 19–20.

[19] *Ibid*., p. 20.

cle VII or the limited scope thereof, arguing that Article VII of the Treaty is there "[…]for example, to resolve a dispute over a Party's non-payment of an investor-State arbitration award in violation of Article VI(6) of the Treaty".[20]

31. In my view, neither the text nor the context of the Treaty allow a restrictive and partial interpretation of Article VII, let alone the dependence or subordination thereof to the mechanism provided for by Article VI of the Treaty. The mechanisms set forth in Article VI and Article VII are independent from one another. Thus, the awards issued within the framework of each system are fully independent. Consequently, the awards issued in accordance with Article VI are binding upon the Parties to the dispute only, *i.e.*, the investor of one Party and the other State Party, whereas the awards issued under Article VII are binding upon State Parties only.

B. Consultations (Article V) and Recourse to Inter-State Arbitration (Article VII)

32. According to the United States, the context of the Treaty confirms the absence of a dispute, since, for a dispute to exist, there must be a claim for breach of a treaty provision. In the Respondent's opinion, Article VII should be interpreted within the framework of the text of Article V of the Treaty.[21]

33. Article V provides that:

> The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

34. The United States considered that Ecuador's request concerned a "matter" or issue, *i.e.*, a situation covered by Article V, not a dispute involving the existence of a claim for breach of a Treaty provision, as enshrined in Article VII. Hence, the Respondent argued that, as long as Ecuador claimed that the United States refused to engage in consultations in order to agree upon the meaning of Article II(7), the mechanism applicable to refer such claims for resolution is set forth in Article V, not Article VII. However, Ecuador has never relied upon Article V.[22]

35. From my point of view, having read the relevant Articles of the Treaty, it cannot be concluded that Article V is a prerequisite or a condition precedent for recourse to Article VII. Therefore, Ecuador was not obligated to follow such a course of action.

36. The United States argued that if the Parties wish to clarify the meaning of the Treaty, they must reach agreement, for instance, through the consul-

[20] *Ibid*., p. 20.

[21] *Ibid*., p. 18.

[22] *Ibid*., p. 19.

tation procedure set forth in Article V.[23] In this regard, I believe that a problem arises where either party deliberately does not wish to clarify the meaning of a treaty. This situation allows the other State to resort to the mechanism agreed upon in Article VII of the Treaty, *i.e.*, arbitration.

37. Even though Article V is not a prerequisite or condition precedent to trigger recourse to Article VII, in the event of frustrated consultations and negotiations, the only alternative in order to settle a dispute is the possibility of resorting to arbitration as a method to ensure a neutral and suitable solution.

38. The myth of judicializing diplomacy in resorting to arbitration in order to settle a dispute underestimates the dispute settlement system which, in this case, is activated by the reluctance of one of the Parties to acknowledge a dispute and the frustration of prospective negotiations as the primary method to reach an agreement acceptable to both Parties. Therefore, the interpretation made by an arbitral tribunal constituted under Article VII will neither jeopardise nor undermine the arbitration mechanism between investors and States set forth in Article VI. On the other hand, it is difficult to understand how recourse to arbitration will politicise investment disputes between investors and States, where the purpose of arbitration is to interpret a treaty rule according to what the parties regarded is its content and scope, thus ensuring the necessary credibility of the system by clarifying the law in force, as the Parties stated at the time of expressing their consent to be bound.

39. According to the United States, the purpose of Article V is to foster talks, not arbitration, on a wide variety of issues concerning the interpretation or application of the Treaty, including abstract matters in relation to the meaning of Article II(7).[24] In this regard, it strikes me that recourse to arbitration may not be seriously considered a threat to the continuity of diplomatic talks, especially in the face of the specific situation where a State refuses to adopt a position, so that its unilateral attitude be understood as constituting the absence of a dispute. The position of remaining silent and not responding adopted by the United States, coupled with its expectation that its attitude should not be deemed to create a dispute by inference, will be analysed *infra*, taking into consideration such facts as may be relevant and the arguments of both Parties.

C. The Obligation to Respond and the Obligation to Agree on an Interpretation

40. The Respondent asserted that the content of neither Article VII of the BIT nor general international law support the Claimant's position of resorting to an arbitral tribunal so that it can interpret a clause of the Treaty. Ecuador's argument is opposed by the very meaning of Article VII, read in

[23] *Ibid*., p. 38.

[24] *Ibid*., pp. 64–65.

context and in light of the object and purpose of the Treaty, as well as by a century of unbroken international jurisprudence.[25]

41. According to the United States, it has no obligation to respond to Ecuador, let alone confirm its unilateral interpretation of the Treaty, *i.e.*, under both the Treaty and international law, Ecuador is not entitled to demand that the United States confirm its own interpretation of Article II(7) or submit to arbitration.

42. The United States argued that it exercised its own discretion in failing to respond to Ecuador's demand. The Respondent alleged that it retains the discretion to mutually agree on a joint interpretation or "subsequent agreement", only if it so desires in order to clarify the Parties' understanding of a particular provision. Likewise, it retains the discretion not to go into detail as to the meaning of a specific treaty provision.[26] According to the United States, no provision of the Treaty compels the Respondent to respond to Ecuador's demand to confirm its interpretation.[27]

43. The United States stated that the only provision of the Treaty where it has undertaken to engage in consultations as to the meaning of its provisions was Article V. As Professor Tomuschat has opined, this would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement.[28]

44. The United States argued that general international law does not require a State to respond to an interpretative statement.[29] Accordingly, I believe that Ecuador did not object to this argument by Respondent. Undoubtedly, under general international law, there is no generic obligation whereby a State is compelled to negotiate or agree upon a new interpretation of a treaty. Nevertheless, Ecuador's demand focuses on a claim for interpretation of a treaty clause as agreed upon by the parties at the time of expressing their consent to be bound. It is evident that Ecuador may not "impose" its unilateral interpretation on either the United States or the Tribunal, but it simply submitted the dispute on interpretation to the decision of this *ad hoc* Tribunal pursuant to Article VII of the Treaty. Ecuador requests that the Tribunal acknowledge its interpretation, although it is for the Tribunal, not the Parties, to make such a determination.

45. In this context, it is relevant to highlight the United States' citation in its Memorial on Objections to Jurisdiction, of the statement made by the President of this Tribunal, whereby "[t]he role of the treaty interpreter is not to look for the will of one of the parties or the intended will of one of the parties, but the consensual will of all of the parties, which stems from the text they agreed

[25] *Ibid*., pp. 15–16.

[26] *Ibid*., pp. 36–37.

[27] *Ibid*., p. 38.

[28] *Ibid*., p. 39.

[29] *Ibid*., p. 41.

to and upon which the agreement was built".[30] The United States reiterated its view that there is no dispute because there is no concrete case, since Ecuador made no allegation of a breach of the Treaty. In addition, the Respondent noted that Ecuador confirmed that it accused the United States of no misbehaviour, of no breach of its international obligations, it has required no compensation from the United States, and it has requested no order against it.[31] Ecuador has not denied this allegation made by Respondent. Thus, it may be asserted that there was no dispute whatsoever between the Parties on the existence of an obligation to agree on the interpretation of a clause of the Treaty.

46. In my opinion, Ecuador's demand contains no requirement to "agree upon" or "impose" a given course of action, but requires that Article II(7) be interpreted in accordance with the common intention of the Parties at the time of the Treaty's negotiation and later in their expressed consent to be bound by the Treaty. Ecuador's demand is based on the compromissory clause agreed upon by the Parties in Article VII of the BIT. It makes reference to a dispute concerning the interpretation of the Treaty, not a dispute on the obligation of the United States to respond to Ecuador's demand that it confirm its own interpretation.

D. The Interpreting Function and the Lawmaking Function

47. According to the United States, were the Tribunal to issue an interpretation of Article II(7) as required by Ecuador, it would be exceeding its judicial powers and creating international law, to the detriment of the right of both Parties to interpret the Treaty.[32]

48. The Respondent maintained that Ecuador's position entailed judicializing the relationships of State Parties under the Treaty[33] by purporting to extend the scope of Article VII to situations not arising from the breach of a Treaty provision.

49. According to the United States, in view of the complete lack of any alleged breach or other wrongdoing by the United States, this Tribunal should decline Ecuador's invitation to engage in judicial lawmaking, and dismiss Ecuador's request.[34]

50. The United States alleges that the Tribunal's assertion of jurisdiction to interpret Article II(7) of the BIT would entail assuming a legislative power that the Tribunal does not have.[35] The Respondent maintained that an abstract interpretation of Article II(7) exceeds the judicial functions granted by Article VII.

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[30] *Ibid*., pp. 48–49.

[31] Transcript (Preliminary Hearing), 21 March 2012, p. 18:17–25 (Statement by Ecuador's counsel).

[32] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:3–6.

[33] *Ibid*., p. 133:4–10.

[34] Respondent's Memorial on Objections to Jurisdiction, p. 29.

[35] *Ibid*., p. 55.

51. According to the United States, Ecuador requests that this Tribunal be "*the author of new rules*" in order to find jurisdiction under Article VII and ultimately to issue "*interpretations*" of Article II(7) that go beyond the text of the Treaty.[36]

52. On the basis of the foregoing assertion, I believe, firstly, that the Respondent clearly stated that it resists, and thus, opposes, the interpretation of Article II(7) proposed by Ecuador. Secondly, it shows an incomprehensible confusion between the interpreting function and the lawmaking function under international law, especially where, in its Memorial on Objections to Jurisdiction, the Respondent cited *verbatim* the statement made by the President of this Tribunal: "*An interpreter of law is someone who tries to explain what other people have drafted. He does not and should not create new rules. The interpreter does not have the right to say more or less than what is said in the text he is interpreting, and which is not his will but that of the author of the rules*".[37]

53. It is evident that if the interpretation alleged by Ecuador exceeds what the Parties agreed on in the Treaty, it is the Tribunal who shall determine that in addressing the merits of the case concerning the interpretation of Article II(7). The content and scope of Ecuador's interpretation does not concern the jurisdiction of the Tribunal, but rather go to the merits of the issue.

54. According to the United States, Ecuador's demand concerning the general and abstract interpretation of a Treaty clause deprives the Parties from the right to interpret the Treaty.[38] However, in this regard, I believe that it is the Treaty in particular that, by means of the compromissory clause of Article VII, gives States the possibility of resorting to arbitration in order to settle a dispute concerning the interpretation of one of its provisions.

E. Abstract Interpretation and the Existence of a Concrete Case

55. The United States claimed that Article VII of the BIT does not authorise State Parties to resort to arbitration in order to settle disputes concerning the interpretation of the Treaty in the absence of a concrete case. According to the Respondent, the concrete case requirement entails one party alleging the breach by the other party of a treaty clause.

56. The position of the United States is based on the ICJ precedent in *Northern Cameroons*.[39]

57. In turn, Ecuador stated that the ICJ's reference in *Northern Cameroons* to the notion of a concrete case is restricted to the practical consequences that

[36] *Ibid*.

[37] *Ibid*., see note 189.

[38] *Ibid*., p. 59.

[39] *Northern Cameroons* (Cameroon *v.* United Kingdom), Judgment of 2 December 1963, *ICJ Reports 1963*.

a judgment might have on the parties to the dispute, not to the existence of an allegation of breach of a rule of international law. As a result, the Claimant argued that Article VII of the BIT allows State Parties to resort to arbitration in order to settle a dispute on the abstract interpretation of a treaty in force and effect.

58. In the *Northern Cameroons* case, the ICJ held:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases *where there exists at the time of the adjudication an actual controversy* involving a conflict of legal interests between the parties. The Court's judgment must have practical consequences in the sense that *it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function*.[40]

59. In my understanding, one cannot but read that paragraph in its own context: for the first time the Court referred to a "concrete case" with regard to the impossibility of delivering a judgment without legal effect due to the fact that there was no actual case. The inexistence of a case was a direct consequence of the Trusteeship Agreement's termination and the recognition of Nigeria as a new independent State. For the Court, these situations made the case moot.

60. As mentioned, the Court found that the object of the dispute disappeared due to the fact that the Trusteeship Agreement was terminated a few days after the Claimant;s application was filed. The Court further stated,

> [W]ithin two days after the filing of the Application the substantive interest which the procedural right would have protected, disappeared with the termination of the Trusteeship Agreement with respect to the Northern Cameroons. After I June 1961 there was no "trust territory" and no inhabitants for whose protection the trust functions could be exercised. […][41]

61. It follows that the "practical consequences" requirement mentioned by the ICJ in the *Northern Cameroons* case was related to the actual existence of a dispute in the sense that it must affect "existing" legal rights and obligations of the parties.

62. In the present case, Ecuador's claimed purpose is to obtain an authentic interpretation of a treaty clause through the application of international law by an impartial tribunal constituted under article VII of the BIT. The natural effect of the decision of an arbitral award concerning the interpretation of a treaty clause will be binding on both parties in relation to the proper meaning and scope of that particular clause. All other effects that a binding award may have in relation to the parties to the dispute should not be dealt with during the jurisdictional phase. It should be sufficient for the Tribunal to

[40] *Ibid*., pp. 33–34 (emphasis added).

[41] *Ibid*., p. 36.

understand that, whatever the final outcome of its decision, it surely will bring a measure of juridical certainty on the applicable law between the parties.

F. Declaratory judgments and practical consequences in international law

63. It is illustrative to refer to certain passages in the *Northern Cameroons* case that clarifies the Court's position regarding what it meant when referring to "practical consequences" precisely in relation to its power to produce a declaratory judgment and its practical effects.

64. In that context, the *Northern Cameroons* case is also a relevant precedent concerning treaty interpretation. In reference to the declaratory effect pursued by Cameroon in its Application, the Court stated that:

> Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom has breached the provisions of the Agreement, and that, if its application were admissible and the Court has jurisdiction to proceed to the merits, *such a declaratory judgment is not only one the Court could make but one that it should make* […].[42]

65. The Court added,

> *That the Court may, in an appropriate case, make a declaratory judgment is indisputable…* If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so. *Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty, which remains in force, its judgment has a continuing applicability.* But in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.[43]

66. The Court then cited the PCIJ on the *Interpretation of Judgment No. 7 and 8*,[44] where it stated that

> The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation of law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.[45]

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[42] *Ibid*. (emphasis added).

[43] *Ibid*., p. 37 (emphasis added).

[44] *Case Concerning the Factory at Chorzów*, 1927, *PCIJ Series A*, No. 13, p. 20.

[45] *Northern Cameroons*, ICJ *Reports 1963*, p. 37.

67. The Court also observed that,

> It may also be agreed, as Counsel for the Applicant has suggested, *that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not in the judicial plane*. But it is not the function of a Court merely to provide a basis for political action if no question of actual legal rights is involved. Whatever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or defiance thereof. That is not the situation here.[46]

68. The Court finally concluded that

> Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.[47]

69. Under those circumstances, the Court stressed that, "[a]ny judgment which the Court might pronounce would be without object".[48]

70. In conclusion, the existence of a "concrete case" depends upon the existence of a dispute of legal interests with respect to a rule of law, which is, at the time of adjudication, in force between the parties. If not, "[…] the Court is relegated to an issue remote from reality".[49]

71. Thus, the practical consequences of an award under article VII of the BIT should be understood in the sense that "*it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations*".[50]

72. Our present case concerns a treaty that is in force and binding upon Ecuador and United States. It is not for this Tribunal to decide at the jurisdictional phase on the legal consequences of its award without going into the merits. In deciding on its jurisdiction, it suffices for the Tribunal to confirm that the Treaty is in force and that the settlement of the dispute concerning interpretation is intended to provoke juridical certainty on the proper meaning and scope of a treaty clause, thus removing uncertainty from their legal obligations, with binding effects for both Parties.

73. In my understanding, the Respondent's arguments based on the *Northern Cameroons* case concerning the requirement of a concrete case and the requirement of practical consequences are misleading.

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[46] *Ibid*., pp. 37–38 (emphasis added).

[47] *Ibid*., p. 38.

[48] *Ibid*.

[49] *Ibid*., p. 33.

[50] *Ibid*., p. 34 (emphasis added).

G. Precedents Concerning the Abstract Interpretation of Treaties and their Interpretation in the Face of Concrete Cases (Allegation of Breach)

74. International courts and tribunals have repeatedly applied compromissory clauses similar to that of Article VII in order to determine whether to exercise jurisdiction over disputes concerning the interpretation of treaties in which there is no allegation of a breach of the treaty.

75. During the jurisdictional phase, both the United States and Ecuador engaged in broad arguments and discussions on the precedents relied upon by one or both Parties.

Precedents Relied Upon by the United States

76. The only case that the United States invoked in its Memorial on Objections to Jurisdiction to support its position on the inability of an international tribunal to exercise jurisdiction over a demand for interpretation of a treaty clause without allegation of breach is *Cases of Dual Nationality* settled by the Anglo-Italian Conciliation Commission, created by the compromissory clause of Article 83 of the Peace Treaty entered into with Italy in 1947.[51] The Conciliation Commission found that an authoritative abstract interpretation may create rules of law, which is not a jurisdictional function, but rather, a legislative function.[52]

77. The Commission made a distinction between the power of interpretation and the lawmaking power, based on the fact that the United Kingdom's request sought more than just the interpretation of the text, which might lead the tribunal to exceed its jurisdiction, thus performing a lawmaking function. Nonetheless, in the case at hand, Ecuador demands that Article II(7) be interpreted within the meaning and scope assigned to the clause in the course of negotiations and at the time where both Parties expressed their consent to be bound by the Treaty.

78. Ecuador did not request that a new rule be created, but that a treaty clause be construed within the meaning assigned by the Parties at the time of expressing their consent to be bound. For this reason, whether the proposed interpretation exceeds what the Parties expressly agreed upon at the time of drafting the text of the relevant clause shall be determined by the Tribunal when analysing the merits.

79. The Conciliation Commission declined jurisdiction as it was to act under a compromissory clause which expressly required a breach of treaty. The Commission asserted that it had to limit its activities to determining the dis-

[51] Respondent's Memorial on Jurisdiction, pp. 57–58; Claimant's Counter-Memorial on Jurisdiction, pp. 21–22.

[52] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:7–25.

putes arising from claims presented according to the terms of Article 78 of the Peace Treaty.[53] However, the compromissory clauses of Article 83 of the Peace Treaty differs fundamentally from Article VII of the BIT relied upon in this case.

80. According to Ecuador, in the *Cases of Dual Nationality,* Italy first was required to fail to satisfy a claim in the face of the alleged breach as enshrined in the Peace Treaty. A bi-national Commission would then intervene, whereupon, in the event that the dispute was not settled, the arbitration mechanism was set in motion. Furthermore, Ecuador alleged that the Commission was especially mindful not to exceed the limits of its jurisdiction and make an abstract interpretation of future application that would be binding on all parties without their express consent.[54]

81. On my reading, the text of the Award makes clear that the Commission expressed that, in the exercise of its jurisdictional functions, it "[…] can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty". Consequently, it understood that it had not been granted the power "to exceed the limits which the Peace Treaty assigns formally to its jurisdiction […] One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission […]".[55]

82. In this regard, we may conclude that it is clear that the Anglo-Italian Commission had no jurisdiction as its jurisdiction was conditional upon the text and spirit of the compromissory clause of the treaty which limited it to the existence of a dispute concerning breach of the relief scheme. Within such a framework, the compromissory clause differs fundamentally from that agreed upon by the Parties in the instant case through Article VII of the BIT. Therefore, in my opinion, the only precedent relied upon by the United States is irrelevant.

83. What is highly revealing about the *Cases of Double Nationality* is that the Anglo-Italian Commission assumed that it had features inherent in any conciliation commission, and thus, such functions as were not inherent therein had to be expressly acknowledged in the treaty that created them.[56]

84. Moreover, the United States alleged that the existence of a concrete case concerning the breach of a rule of international law is evidenced by precedents from tribunals settling disputes between investors and States, such as ICSID tribunals. Regarding this argument, it should be borne in mind that for an ICSID tribunal to have jurisdiction, there must be an alleged breach of an investment protection treaty. ICSID arbitration tribunals only have jurisdiction over disputes between investors and States in which the breach of a treaty clause relied upon as a basis for the jurisdiction of the tribunal must be alleged.

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[53] Transcript (Hearing on Jurisdiction), 26 June 2012, p. 240:4–10.

[54] Claimant's Counter-Memorial on Jurisdiction, pp. 24–25.

[55] *Cases of Dual Nationality*, Anglo-Italian Conciliation Commission, Decision No. 22 of 8 May 1954, *RIAA*, Vol. XIV, p. 34.

[56] *Ibid*., p. 35.

Precedents Relied Upon by Ecuador

85. In turn, Ecuador made reference to a series of international precedents in which it found consistent and repeated application of compromissory clauses, similar to that of Article VII of the BIT, admitting the exercise of the judicial function for the purpose of interpreting clauses, without a specific allegation of a breach of treaty.

86. A brief reference to such precedents sets in context the importance of the scope that international tribunals attach to clauses similar to that of Article VII of the BIT so as to determine their own jurisdiction.

87. In the case *Certain German Interests in Polish Upper Silesia*,[57] the PCIJ dismissed a jurisdictional objection based on the allegedly abstract character of the question at issue because a State is not precluded from seizing a tribunal's jurisdiction in relation to an abstract issue of treaty interpretation.[58]

88. The Court held:

> There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil. It has, in fact, already had occasion to do so in the Judgment No. [Treaty of Neuilly].[59]

89. In this case, the United States alleged[60] that the compromissory clause at issue in *Certain German Interests* covered "differences of opinion" and not a "dispute". Therefore, the United States argued that a lower standard was established in order to secure jurisdiction. However, the text of the compromissory clause that gave rise to the precedent mentioned *supra* clearly evidenced that the parties understood that they were referring to "international disputes". The simple reading of the relevant portions of the ruling indicates that the Court made no distinction whatsoever between a "difference of opinion" and a "dispute" concerning interpretation.

90. The United States maintained that in *Judgment No. 3* of the PCIJ, Bulgaria and Greece had expressly consented to the Court's interpretation of the Treaty of Neuilly. By applying such reasoning to the case at hand, I understand that Article VII of the BIT also evidences an agreement, although in this general case it is an agreement to arbitrate "any dispute", including those on abstract interpretations of the Treaty.

91. The case concerning the *Rights of Nationals of the United States of America in Morocco* is another example of acknowledgement by the ICJ of its ability to interpret a treaty for the purpose of clarifying the parties' rights and

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[57] *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJI Series A*, No. 7.

[58] Claimant's Counter-Memorial on Jurisdiction, p. 14.

[59] *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJI Series A*, No. 7, pp. 18–19.

[60] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 147:14–24.

obligations, thus removing the absence of certainty as to the law in force.[61] According to the United States, even though it was the accused party France brought the case to the ICJ. Thus, not surprisingly, France did not frame the issues in terms of alleged treaty breaches, but rather sought a declaration of its rights and obligations under the treaty.[62] Nevertheless, the simple reading of the case demonstrates that the Court eventually issued a decision regardless of the breach of any obligation under the agreements invoked.

92. In the case concerning the *Interpretation of the Statute of the Memel Territory*, the PCIJ claimed to have jurisdiction over the interpretation of Article 17 of the Statute irrespective of the existence of a breach. The Permanent Court asserted:

> The actual text of Article 17 shows that the two procedures relate to different objects. The object of *the* procedure before the Council is the examination of an 'infraction of the provisions of the Convention', which presupposes an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regards to questions of law or fact.' Such difference of opinion may arise without any infraction having been noted".[63]

93. Article 17 of the Statute stated that "*any difference of opinion*" constituted "*a dispute of an international character*" pursuant to Article 14 of the Covenant of the League of Nations.[64]

94. In addition, the Court held that the purpose of proceedings before the Council involved breach of treaty clauses, which assumes an act that has already occurred, whereas proceedings before the Court concerned any difference of opinion on questions of fact or of law.

95. In the case of *Pensions of Officials of the Saar Territory*,[65] the arbitral tribunal found that it had jurisdiction over a request for the interpretation of Article 10 of the Baden-Baden Agreement even though no breach of the treaty had been alleged.

96. Such a criterion was also adopted by the Tribunal in the case of *The Re-Valuation of the German Mark*, in deciding on the interpretation of the 1953 Agreement on German External Debts, regardless of the existence of an allegation of breach of the relevant agreement. The Tribunal held:

> The Applicant's right to an authoritative interpretation of the clause in dispute […] is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in Exchange for

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[61] *Rights of Nationals of the United States of America in Morocco* (France *v.* United States of America), Judgment of 27 August 1952, *ICJ Reports 1952*.

[62] Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 145:18–146:1.

[63] *Interpretation of the Statute of the Memel Territory*, Judgment (Preliminary Objections) (1932), *PCIJ Series A/B*, No. 49, p. 248.

[64] See text of Art. 17 in Claimant's Counter-Memorial on Jurisdiction, p. 20, note 41.

[65] *Pensions of officials of the Saar Territory*, Germany—Government Commission of the Saar Territory, *RIAA*, Vol. III (1934).

> the disputed clause. They have the right to know what is the legal effect of the language used. The Tribunal in the exercise of its judicial functions is obliged to inform them.[66]

97. Apart from such precedents, it is worth analysing conclusive precedents from the Iran–United States Claims Tribunal, whereby the Tribunal exercised jurisdiction over matters concerning abstract interpretation.

98. Within the framework of Case No. A/2, the Iran–United States Claims Tribunal maintained that:

> According to article VI paragraph 4 of the Claims Settlement Declaration, "any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon request of either Iran or the United States", and according to paragraph 17 of the General Declaration, and Article II, paragraph 3 of the Claims Settlement Declaration, any dispute arising between the Parties as to the interpretation of any provision of the General Declaration may be submitted by either Party to binding arbitration by the Tribunal. On that dual basis, the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran.[67]

99. Case No. A/17 is another example of a precedent of the Iran–United States Claims Tribunal in which the Tribunal acknowledged that its decision concerned solely interpretative guidance.[68] Thus, it did not involve a decision concerning the breach of an applicable rule of international law.

100. The United States tried to mitigate the weakness of its position in the face of the cases determined by the Iran–United States Claims Tribunal by claiming that in those cases, the parties had expressly consented to the extension of the tribunal's jurisdiction.[69] Contrary to the position of the United States, the simple reading of both awards indicates that none of those decisions made reference to a special consent of the parties in order to empower the tribunal to hear interpretation disputes irrespective of treaty breaches.

101. The United States also argued that, in the context of cases A/2 and A/17, the parties had never objected to the jurisdiction of the Tribunal. In support of its position, the Respondent cited the concurring opinion of two of the judges who stated that it was the Parties' practice to modify the Tribunal's jurisdiction when necessary by mutual consent.[70] Ecuador considers the United States' argument regarding the fact that neither party had objected to the

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[66] *The Question whether the re-valuation of the German Mark in 1961 and 1969 constitutes a case for the application of the clause in article 2(e) of the Annex I A of the 1953 Agreement on German External Debts*, *RIAA*, Vol. XIX (1980) p. 89.

[67] *Islamic Republic of Iran* v. *United States of America*, Iran–United States Claims Tribunal, Case No. A/2, Decision No. DEC 1-A2-FT, 26 January 1982, Part II.

[68] *United States of America* v. *Islamic Republic of Iran*, Iran–United States Claims Tribunal, DEC. 37-A17-FT, 18 June 1985.

[69] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 140:7–12.

[70] *Ibid*., pp. 159:19–160:12.

jurisdiction of the Tribunal in the foregoing cases irrelevant since neither of these awards was based on the absence of such objections.[71]

102. In sum, I believe that both those cases indicate that tribunals operating under compromissory clauses similar to that of Article VII of the Treaty are empowered to settle disputes regarding the interpretation of a treaty, even absent allegations of breach.

103. According to the United States, all cases cited by Ecuador arose initially out of claims of treaty breach, thus easily satisfying the concreteness requirement.[72] The Respondent maintained that sometimes issues of interpretation were dominant because the dispute turned primarily on resolving opposing positions as to the meaning of treaty provisions, while sometimes issues of application were dominant.

104. During the oral hearings, the United States asserted that all cases argued by Ecuador either support its own position on the need of a concrete case in full—which means that they arose from allegations of treaty breaches—, or else they may be distinguished since the disputing parties agreed to extend the tribunal's jurisdiction.[73]

105. In my view, that the originality of these arguments exceeds the bounds of legal imagination is evident from a simple comparison of the plain text of the decisions cited, and their reasoning and logic, with the compromissory clauses that empowered the tribunals to settle disputes concerning the interpretation of a treaty.

H. Conclusion on the Scope of the Compromissory Clause of Article VII

106. International jurisprudence is consistent regarding the exercise of jurisdiction over disputes concerning the interpretation of a treaty absent an allegation of treaty breach. Such jurisprudence applied the specific agreements which conferred jurisdiction upon every tribunal to hear interpretation disputes absent an allegation of violation of law.

107. The most conclusive acknowledgement by conventional international law distinguishing interpretative disputes from those regarding the application of a treaty is found in the wording of Article 36(2) of the Statute of the International Court of Justice, which recognises the possibility of exercising jurisdiction over treaty interpretation disputes regardless of jurisdiction over other matters.

108. Article 36(2) of the Statute of the International Court of Justice provides that:

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[71] Transcript (Hearing on Jurisdiction), 26 June 2012, p. 237:3–7.

[72] Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 136:22–137:1.

[73] *Ibid*., p. 126:11–22.

> […] in all legal disputes concerning:
>
> *a*. the interpretation of a treaty;
>
> *b*. any question of international law;
>
> *c*. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> *d*. the nature or extent of the reparation to be made for the breach of an international obligation.

109. The precedents cited *supra* simply confirm that the only possible interpretation of the text and context of Article VII of the BIT is that the Tribunal has jurisdiction to interpret Article II(7) and inform the Parties regarding its content and scope, thus creating legal certainty on the law in force between the Parties.

110. The references made by the United States to precedents on dispute resolution between investors and States[74] are inapposite to the case at hand, since the jurisdiction of such tribunals is limited to disputes concerning the breach or violation of a provision of an investment protection treaty, and not to hear interpretation disputes outside the framework of an alleged treaty breach.

111. The formula of Article VII was not invented by the parties to the BIT, but repeats a traditional compromissory clause of general international law which has been applied since the turn of the 20th century. Treaty interpretation may be neither wide nor narrow. It should abide by the terms and conditions agreed upon by the parties. The text and context of Article VII give rise to no confusion, obscurity, ambiguity or absurd or unreasonable results. The express text, as construed in good faith according to its ordinary meaning, determines without ambiguity or confusion that any dispute concerning treaty interpretation may trigger the dispute settlement mechanism which was agreed upon by the Parties. Such an interpretation confirms the need to preserve the requisite legal certainty on the content and scope of the law in force of each provision of the Treaty.

112. The compromissory clause contained in Article VII was freely agreed upon by the Parties, and, according to the United States, it is the clear expression of their will to submit to arbitration.[75] Article VII does not require or condition the parties to exhaust diplomatic channels prior to arbitration. It requires the existence of a dispute, but is not conditional upon an allegation of breach of a rule of international law.

113. In this context, a decision of this Tribunal on the content and scope of Article II(7) of the BIT would have practical consequences for both Parties through an authoritative interpretation clarifying the Parties' rights and obligations and thus removing the uncertainty derived from contrasting or opposed interpretations between them. Accordingly, the practical conse-

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[74] Respondent's Memorial Jurisdiction, pp. 24 *et seq*.

[75] In accordance with the Memorandum of the President of the United States of America to the U.S. Congress in connection with the Ecuador–U.S. BIT.

quences of any judgment or award are established with regard to both Parties to the dispute insofar as the legal rule subject to interpretation or application by the Tribunal is in force and effect.

114. For the purpose of determining whether the Tribunal has jurisdiction or not, it suffices to look at Ecuador's claim for interpretation of Article II(7) of the BIT in accordance with the common will of the Parties at the time of expressing their consent to be bound by the Treaty. Ecuador's prospective claims as to the scope of the clause subject to interpretation concern the merits of the case, and therefore, a decision in favour of the jurisdiction of the Tribunal does not entail a pre-judgment on the correctness of the interpretation alleged by Claimant.

115. Article VII constitutes the legal framework applicable in order to submit a dispute on the interpretation of a treaty clause to the jurisdiction of an arbitral tribunal. Ecuador's demand concerns an interpretation dispute, not a dispute on the obligation of the United States to negotiate or agree upon a new interpretation of the Treaty.

III. Existence of a Dispute

116. The Respondent objects to the jurisdiction of the Tribunal on the grounds that there is not dispute on the interpretation of Article II(7) of the BIT as alleged by Ecuador. This objection focuses on the content and scope of the definition of "dispute".

117. The United States argues once again that, for a dispute to exist, there must be a concrete case—an allegation of treaty breach—as well as express positive opposition. Ecuador maintains that the definition of "dispute" is not limited to the existence of a concrete case and that the Respondent has demonstrated its positive opposition, both expressly and in an implied manner.

118. International jurisprudence is consistent in referring to the definition of a "dispute" and the conditions for its existence under international law.

119. In this context, in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter, *Georgia* v. *Russia*), the ICJ held:

> The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Judgement No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objec-*

> *tions, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Ruanda), Jurisdiction and Admissibility, I.C.J. Reports 2006,* p. 40, para. 90). The Court's determination must turn on a determination of the facts. The matter is one of substance not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject matter.[76]

120. In the case of *Questions relating to the Obligation to Prosecute or Extradite* between Belgium and Senegal, the Court confirmed the content of the definition of a "dispute" between States.[77]

121. Returning to the *Mavrommatis* case, the PCIJ found that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[78] Accordingly, an interpretation dispute may arise from the opposing attitudes of two States as to the interpretation of a treaty clause.

122. The definition of "dispute" should not be at issue for the Parties. However, at the time of its expounding on its objection to jurisdiction, the United States invoked a requirement—the existence of a concrete case—which is not part of the traditional definition or its expression in the most recent precedents of international tribunals.

123. As demonstrated above, under international law, for a dispute to exist, it is not necessary for either party to have alleged the breach of a rule of international law attributable to the other party. Nevertheless, the Respondent summarizes the argument for the purpose of denying that the scope of Article VII of the BIT covers interpretative disputes—alleging the inexistence of a concrete case—in order to maintain that the positive opposition requirement depends inextricably on the existence of a concrete case.

Positive Opposition

124. According to the United States, the notion of a "dispute" does not encompass Ecuador's claims. The Respondent cites its expert, Professor Tomuschat, in order to assert that the word "dispute" has "obtained a specific

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[76] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30, p 16.

[77] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 45–46.

[78] *The Mavrommatis Palestine Concessions*, Judgment No. 2 (1924), *PCIJ Series A*, No. 2, p. 11.

meaning in international practice," requiring that the parties to a treaty have put themselves in positive opposition with one another over a concrete case involving a claim of breach under the treaty.[79]

125. In short, the United States reiterated its arguments on the need for a breach allegation in order to apply Article VII of the BIT, as well as to establish the requirement that a "dispute" exists. According to Respondent, there is no "dispute" between the parties since there is no positive opposition in relation to any allegation of treaty breach.[80]

126. According to Ecuador, a dispute on the interpretation of a BIT clause exists, since the United States is in positive opposition to the content of such an interpretation. This positive opposition was both expressed, by means of the positions adopted by the United States in the course of the arbitration proceeding, and implied, by inference from the attitudes assumed prior to the commencement of this proceeding.

a) Express Positive Opposition

127. Ecuador alleged that the United States has manifested its positive opposition to Ecuador's interpretation through its express statements showing that it considers Ecuador's position to be "unilateral". Its express opposition is also manifest in its taking the position that the interpretation given by the *Chevron* tribunal was "*res judicata*" not only for purposes of that dispute but also for Ecuador's relationships with other parties (including the United States).[81]

128. In this regard, it can also be stated that the position adopted by the United States is that Ecuador's interpretation of Article II(7) entails the exercise of a lawmaking power that this Tribunal does not enjoy. Such a position inextricably leads to the express acknowledgement of the United States' positive opposition to the meaning of Article II(7) purported by Ecuador.

129. Accordingly, the United States maintained that the jurisdiction of the Tribunal must be determined at the time of the filing of the Request for Arbitration: "In order for this Tribunal to have jurisdiction, therefore, it must determine that the United States had put itself in positive opposition with Ecuador over the meaning of Article II.7 as of June 28, 2011, the date of the Request for Arbitration and Statement of Claim".[82]

130. According to Ecuador, the position adopted by the United States in the course of this proceeding confirms the existence of a dispute arising prior to 28 June 2011, the date when Ecuador learned about the end of the diplomatic exchanges which followed the Note of 8 June 2010. In Ecuador's opinion, the

[79] Respondent's Memorial on Jurisdiction, p. 17.

[80] *Ibid.*, p. 29.

[81] Claimant's Counter-Memorial on Jurisdiction, para. 66.

[82] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 169:2–6.

critical date of the dispute is the date on which the United States served notice of its refusal to respond to Ecuador's claims.

131. Ecuador maintains that the documents filed during this arbitration demonstrate that the Respondent has manifested its opposition to Ecuador's interpretation of Article II(7) on several occasions.[83]

132. In this regard, I consider that the Respondent's allegations during the proceeding may not give rise to a dispute over which this Tribunal may exercise jurisdiction on account of the fact that such a dispute must have arisen upon the commencement of the arbitration proceeding.[84] However, were it to be shown that such dispute arose prior to the commencement of the actual proceeding, the position adopted by the United States throughout the proceeding would be conclusive evidence that the dispute alleged by Ecuador already existed.

133. Consequently, only if the attitudes assumed by the United States prior to the commencement of this proceeding allow an inference of positive opposition to Ecuador's interpretation of Article II(7) would it be possible to determine the existence of a dispute, which could then be confirmed by the positions adopted by the Respondent in the course of this arbitration proceeding.

134. Therefore, it is essential to analyse the basic rules of international law on the establishment of a positive opposition by inference from the attitudes of a State in order to determine whether a dispute exists in the instant case.

b) Positive opposition by inference

135. In Ecuador's view, the positive opposition of the United States may be established by inference from its behavior and its attitude in refusing to respond to Ecuador's request when a response was unquestionably called for and by stating that there was no dispute.[85]

136. Ecuador held that international jurisprudence allows inferring the existence of a dispute in the case at hand.[86] Its argument was mainly based on the precedents set by the ICJ in *Georgia* v. *Russia Federation* and *Cameroon* v. *Nigeria*.

137. According to Ecuador, due to the specific circumstances in which this case arose, the attitude and the acquiescence of the United States are inconsistent with its fundamental duty to perform the Treaty in good faith.[87] Ecuador affirmed that the *bone fide* principle within a treaty relationship serves

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[83] Claimant's Counter-Memorial on Jurisdiction, pp. 34 *et seq*.

[84] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 46, 48; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports 2011*, para. 30.

[85] Claimant's Counter-Memorial on Jurisdiction, para. 67.

[86] *Ibid*., para. 75.

[87] *Ibid*., para. 92.

to ensure trust and create legitimate expectations concerning the development of legal relationships between the parties.[88]

138. Ecuador, acknowledging that in absence of a specific obligation of a treaty, a State may not justifiably base itself on the *bona fide* principle to ground its claim,[89] argued breach of good faith by the United States in relation to the application of the Treaty.[90] Ecuador concluded that while the United Stated retained the ability not to give an interpretation, it could not in good faith seek to avoid the implications of such a choice, namely, the inference that a dispute exists.[91]

139. On the other hand, according to the United States, silence alone cannot establish positive opposition. It is only when a party's actions make it obvious that its views are positively opposed to another party's views that silence could allow an objective determination of positive opposition.[92]

140. The argument of the United States can be reduced to the view that absent a claim for any Treaty breach, there is no duty to respond to Ecuador's demand.[93]

141. As regards the precedents relied on by Ecuador regarding the possibility to infer the existence of a dispute through positive opposition, the United States held that in each of those cases and even in the absence an explicit statement by the parties denying the claim, the actions of the parties constituted clear evidence that they opposed the allegation of breach, thus creating a dispute.[94]

142. From the standpoint of both Parties it may be concluded that, in the case at hand, the interpretation of a treaty clause was requested, which only requires the existence of opposing viewpoints or interests between the parties. This dispute regards the interpretation of a treaty provision that, in accordance with the wording of article VII, does not require one of the parties to be charged with the violation of one Treaty provision by the other party. It is clear that the United Stated has adopted specific behavior that permits, in the particular circumstances of this case, the inference of its stance regarding the interpretation of Article II(7) of the Treaty.

143. The cited jurisprudence confirmed that failure by one of the parties to provide a response to the other party's demand may be construed as positive opposition for the purposes of giving rise to a dispute between States. Silence by one of the parties, within the framework of particular circumstances in a specific case, accounts for the positive opposition to the explicit request of the other party. The simple invocation by a State of its intention to refrain from

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[88] *Ibid.*, para. 98.

[89] Conf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, Decision on 11 June 1998, *ICJ Reports 1998*.

[90] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[91] *Ibid.*, para. 101.

[92] Respondent's Memorial on Objections to Jurisdiction, pp. 29–30.

[93] *Ibid.*, p. 32.

[94] *Ibid.*, pp. 32 *et seq.*

responding to a request grounded on the inexistence of a dispute, is sufficient evidence of the very existence of said dispute.

144. The fact that Ecuador does not allege a breach of a Treaty provision does not limits its right to request the interpretation of a Treaty provision subject to the compromissory clause of Article VII, nor does it inhibit inferring from the other party's behavior the existence of a positive opposition to its request, which gives rise to a dispute on interpretation.

145. The requirement of positive opposition does not necessarily imply of the expression of different interests, and evidencing simple opposition by one State to the request by the other State will suffice. In the *South West Africa* case, the ICJ held that:

> […] a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proves its non existence. *Nor is it adequate to show that the interests of the two Parties to such a case are in conflict*. It must be shown that the claim of one Party is positively opposed by the other.[95]

146. Taking into consideration the above criteria, I believe that, under international law, there can exist a dispute between States which stems from the attitude of one of the parties regarding the claim brought by the party on the interpretation of a treaty clause.

147. In short, the requirement of a positive opposition does not necessarily imply an *expressis verbis* opposition.[96] To infer positive opposition from the attitude of a State requires that the claim brought by the other State must be express and clear. In addition, it is necessary that the State against which a claim is brought was given the opportunity to apprehend the content and the scope of the claim, and that positive opposition is grounded on an objective determination of the circumstances in the particular case.

148. In my opinion, in the event that the conditions above were met in this case, they would support the existence of a dispute inferred from the positive opposition of the United States by its actions and omissions *vis-á-vis* Ecuador's claims.

c) Inference of positive opposition in international law

149. General international law, as applied by the International Court of Justice, has recognized the possibility to infer from a State's attitude the existence of a dispute, even when that State has alleged that there is no such dispute. The most relevant cases discussed by both Parties are *Georgia* v. *Russia* and *Cameroon* v. *Nigeria*.

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[95] *South West Africa* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Decision of 21 December 1962, *ICJ Reports 1962*, p. 328 (emphasis added).

[96] *Cameroon* v. *Nigeria*, *ICJ Reports 1998*, p. 315.

150. The possibility to infer the existence of a dispute from a State's attitude has also been recognized by Respondent's expert Professor Tomuschat.

151. On that point, Professor Tomuschat expressed that "[i]n the recent case of Georgia *v.* Russian Federation the ICJ emphasized that the existence of a dispute may be 'inferred from the failure of a State to respond to a claim in circumstances where a response is called for'". But even if for Professor Tomuschat, no legal obligation existed for the United States Government to take a stance as to the request contained in the letter of 8 June 2010. He concedes that: "[i]t may well be that in exceptional circumstances one of the contracting parties may be compelled to respond to a question put to it, even where a specific legal obligation cannot be identified. However, just the will of one of the parties does not give rise to such an exceptional situation. In any event, the requested government would have had to contribute to the situation that requires clarification."[97]

152. The United States has also admitted that proposition when Counsel for the United States during the Hearing on Jurisdiction expressed that "[…] in most cases this opposition is evidenced by public statements of the Respondent. *In a few cases, however, the ICJ has found that the actions of the Respondent manifest its opposition so clearly that an oral or written statement of its opposition is not necessary*".[98]

153. It is appropriate now to refer to the ICJ cases discussed by the Parties in the present case in relation to the inference of a dispute from State's actions or omissions.

154. In the *Georgia* v. *Russia* case, the Court

> […] observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect to the elimination of racial discrimination, in an exchange between them, *but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim* (see paragraph 30) Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level […].[99]

Paragraph 30 provides that "[…] the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for […]".[100]

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[97] Respondent's Memorial on Jurisdiction, Expert Opinion of Professor Tomuschat, pp. 8–9.

[98] Hearing on Jurisdiction, June 25, 2012, Transcripts p. 170: 18–22 (emphasis added).

[99] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Decision of 1 April 2011, *ICJ Reports 2011*, para. 37 (emphasis added).

[100] *Ibid.*, para. 30.

155. For the Court, the failure of a State "to respond" does not depend on the existence of a prior legal obligation but rather is based on the circumstances where a response is called for. In that context, the Court has inferred the existence of a dispute from the simple acknowledgment by a State of the subject matter of a claim against it and from the mere rejection of such claim.

156. It is relevant to take note that the rejection by the Russian Federation of the Georgian claims was inferred by the Court from two official Russian statements: the first one, was made by the representative of the Russian Federation at the Security Council meeting on 10 August 2008, and the second was made by the Russian Minister of Foreign Affairs in a Joint press conference with the Minister of Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE on the 12 of August 2008.[101]

157. Those exchanges and the above-mentioned press conference did not contain any express statement by the Russian Federation which accepted or recognized the existence of a dispute. That is why the ICJ objectively determined the existence of the dispute by inference from the Russian Federation's rejection of the very existence of a dispute.[102]

158. The case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) is another relevant ICJ precedent on the determination of the existence of a dispute by inference from the attitude of one of the parties.[103] In that case, Nigeria alleged as its fifth preliminary objection that there is no dispute concerning *"boundary delimitation as such"* throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and subject within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula.[104]

159. The Court stated that "there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the peninsula of Bakassi".[105] However, given the great length of the boundary, the Court concluded that "it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary".[106] It added that

> Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. *However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated expressis verbis. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be estab-*

[101] *Ibid*., paras. 109–112.

[102] *Ibid*., para. 113.

[103] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *ICJ Reports 1998*.

[104] *Ibid*., p. 313.

[105] *Ibid*. para. 87.

[106] *Ibid*., para. 88.

> *lished by inference, whatever the profess view of that party*. In this respect the Court does not found persuasive the argument of Cameroon that the challenges by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the see is based, and therefore proves the existence of a dispute concerning the whole of the boundary.[107]

160. The Court clearly stated that positive opposition to a claim from one party by the other need not be express. Therefore, in determining the existence of a dispute, the stance taken by a party may be established by inference, regardless of the viewpoints it expresses.

161. In reference to the border incidents the Court observed

> Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.[108]
>
> However the Court notes that Nigeria has constantly reserved in a manner in which it has presented its own position on the matter. *Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no dispute concerning boundary delimitation as such. Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the Oral Proceedings* (see paragraph 85 above).[109]

162. Regarding the answer provided by Nigeria to a question formulated by one of the judges, the Court stated

> The Court notes that, in this reply, Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or its legal basis, though clearly it does differ with Cameroon about Darak, and adjacent islands, Tipsan and Bakassi.[110]
>
> Nigeria maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length from the tripoint in Lake Chad to the sea […] and that Cameroon's request definitively to determine the boundary is not admissible in the absence of such a dispute. *However Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis … and it has not informed the Court of the position which it will take in the future on Cameroon's claims*. Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that

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[107] *Ibid.*, para. 89 (emphasis added).

[108] *Ibid.*, para. 90.

[109] *Ibid.*, para. 91 (emphasis added).

[110] *Ibid.*, para. 92.

> there is no dispute between the two States. Because of Nigeria's position, the exact scope of the dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal basis of the boundary. It is for the Court to pass upon this dispute.[111]

163. The Court, in assessing Nigeria's denial of the existence of a dispute on the entire border with Cameroon, believed that it was placed in a situation where it could not decline its jurisdiction on the basis that there was no dispute between those two States. Lack of acknowledgement by one State of the existence of a dispute faced with the claims brought by another State, does not inhibit the tribunal from exercising its jurisdiction.

164. Likewise, the Court acknowledged that the Party which denies the existence of the dispute can express its arguments during the merits stage of the proceedings for the matters at issue. Thus, the Court confirmed that in order to determine if it had jurisdiction to decide on a case where a party denied the existence of a dispute, it could infer from the attitudes of the party in question that such dispute existed *prima facie* in order to analyze the merits of the claims brought by the other party.

165. Given the principles applied by the ICJ in the precedents cited above to determine the existence of a dispute by inference from the denial of a dispute by a State, it may be concluded that these cases are relevant for the assessment of the legal effects of the silence alleged by the United States and the legal consequences of its statement that there is no dispute.

d) Relevant Facts for the Determination of a Positive Opposition by Inference

166. It is clear that in the case at hand there is a factual scenario that predetermines the context in which the dispute on the interpretation of a Treaty clause could have arisen between the Parties. Thus, it is necessary to refer to the facts that allegedly generated a dispute on the interpretation of Article II(7) of the BIT.

167. First, it should be noted that the facts alleged by Ecuador were not challenged by the United States.[112] These relevant facts refer to certain diplomatic exchanges including official letters exchanged by the Parties and a meeting held between representatives of the Parties, followed by telephone conversations.

168. Regarding the exchange of official letters, we shall first refer to the letter sent by the Ecuadorian Minister of Foreign Affairs, Mr. Patiño Aroca, to the Secretary of State, Ms. H. Clinton, on 8 June 2010. In this letter, Ecuador stated:

> On behalf of the Government of the Republic of Ecuador, I meet to submit to the Illustrious Government of the United States, through your Excellency, various delicate matters that have arisen around the proper interpretation and application to be given to the terms of the Treaty

[111] *Ibid*., para. 93 (emphasis added).

[112] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 97:1–11.

> between the Republic of Ecuador and the United States of America concerning the Encouragement and Reciprocal Protection of Investments which was signed on August 27, 1993 and which entered into force on May 11, 1997 […]. These issues put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investments of nationals or companies of the other Party. They also threaten to undermine the proper administration of the procedures for resolving disputes between investors of one State and the other State.[113]

169. After describing its concern for the Arbitral Award rendered in *Chevron* v. *Ecuador,* "[…] the Government of the Republic of Ecuador respectfully request[ed] that the Illustrious Government of the United States of America confirm, by a note of reply, the agreed […]" interpretation that the Government of Ecuador has outlined above. According to Ecuador, the dispute is preceded by the incorrect interpretation and application of Article II(7) of the Treaty[114] in the partial Award rendered in *Chevron*.[115]

170. At the end of the letter, Ecuador concludes that:

> If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Art. II.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.[116]

171. Ecuador's letter led to a meeting held in the Department of State on 17 June 2010, between the Ecuadorian Ambassador to the United States, Mr. Gallegos, and the Legal Advisor of the Department of State, Mr. Koh.[117] The meeting evidenced a mutual intention to remain in contact in relation to the matters outlined in the letter dated 8 June 2010.[118]

172. The formal reply of the United States to Ecuador's letter mentioned above was signed by the Assistant Secretary of the Bureau of Western Hemisphere Affairs on 23 August 2010.

173. The letter of the Assistant Secretary read as follows:

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[113] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, non-official translation provided by the Republic of Ecuador.

[114] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, pp. 4 *et seq.*

[115] Chevron Corporation and Texaco Petroleum Company *v.* Republic of Ecuador, PCA case No. 2007–2, Partial Award, 30 March 2010.

[116] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, p.4, non-official translated provided by the Republic of Ecuador.

[117] Claimant's Counter-Memorial on Jurisdiction, para. 15.

[118] Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

> Thank you for your letter of June 8 addressed to Secretary Clinton regarding the interpretation of Article II (7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment. Secretary Clinton asks me to reply on her behalf.
>
> The Department of State wishes to convey to the Government of Ecuador that the U.S. Government is currently reviewing the views expressed in your letter and considering the concerns that they have raised. We look forward to remaining in contact about this and other important issues that affect our nations.[119]

174. This letter acknowledges the content and scope of the request put forth by Ecuador in its letter dated 8 June 2010. By means of such letter, the United States informed that it was duly considering the concerns raised by Ecuador.

175. The letter of the Assistant Secretary does not express any kind of unease or animosity in relation to Ecuador's proposal. Furthermore, the letter expressed the interest of the Department of State in keeping in touch regarding the matters outlined and some other important matters of common interest to both States.

176. From that date onwards, Ecuador alleged that it attempted to contact the Legal Advisor, Mr. Koh, through several telephone calls. Eventually, Mr. Koh and Mr. Gallegos had a telephone conversation on 8 October 2010. According to Ecuador, during that conversation, Mr. Koh stated that the United Stated would not reply to the request made by Ecuador in its letter dated 8 June[120] since, according to the United States, it was difficult to consider a request for the interpretation of a treaty while Ecuador was in the process of terminating that agreement.[121]

177. Ecuador held that the dispute arose from the United States' refusal to discuss Ecuador's request which should have been answered. Ecuador contended that its efforts to reach a solution by consultations or by other diplomatic channels proved unsuccessful and, thus, the matter remained unresolved. Ecuador stated that "[the] Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the 'Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded".[122]

178. During the Hearing on Jurisdiction, the Respondent's counsel affirmed that the United States had decided not to reply to the request submitted

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[119] Letter by the Assistant Secretary of the Bureau of Western Hemisphere Affairs, dated 23 August 2010.

[120] Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

[121] Respondent's Statement of Defense, p. 7.

[122] Claimant's Request, p. 7.

by Ecuador. Accordingly, they stated: "To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador's interpretation".[123]

179. Thus, confirmation was given of Ecuador's allegations regarding the content of the telephone conversation between Ecuador's Ambassador and the Legal Advisor of the United States Department of State.

180. According to the United States, Ecuador has invented a dispute by means of an ultimatum based on the formula "to agree or to dispute". From a strictly objective standpoint, in order to justify the above statement, the United States must demonstrate Ecuador's bad faith when faced with the United States own actions, having failed to respond to Ecuador and having denied the existence of the dispute.

181. The United States attempted to justify its alleged silence by reference to certain facts and actions by Ecuador. The United States stressed the fact that Ecuador threatened to denounce the Treaty whose interpretation was being pursued, apart from having denounced the Washington Convention (ICSID Convention). In addition, the United States affirmed that the Constitutional Court of Ecuador found that the provisions of the BITs between investors and a State Party is unconstitutional, which Ecuador now relies on as the sole grounds for this Tribunal's jurisdiction, are unconstitutional.[124] Similarly, the United States noted that on 7 July 2011, Ecuador submitted a claim before The Hague's District Court seeking to annul the awards rendered in *Chevron,* although it had already presented its Request for Arbitration on 28 June 2011.

182. Ecuador stated that the United States' failure to respond cannot be based on or justified by its denunciation of other BITs or other internal measures, since such measures cannot modify the international obligations of Ecuador.[125]

183. According to Ecuador, it is important to consider that the Treaty whose interpretation is pursued was and is in force, and that pursuant to Article XII, even if denounced, it continues to protect investors who made investments before the date of denunciation for ten more years.[126]

184. Concerning these facts, I consider that the letter sent by Ecuador of 8 June 2010, was not initially regarded by the United States as an ultimatum, but rather as an invitation to make future diplomatic exchanges. In any event, Ecuador's decision to commence an arbitration proceeding cannot be considered inamicable. Ecuador alleged that the Request for Arbitration was based on the impossibility to continue negotiating, in view of the response it received to its questions.

185. In this regard, it is difficult to understand to what extent the decision to trigger a dispute settlement mechanism that had been previously agreed by the

[123] Transcript (Hearing on Jurisdiction), June 25 2012, p. 186:4–6.

[124] Respondent's Memorial on Objections to Jurisdiction, pp. 13–14.

[125] Claimant's Counter-Memorial, para. 100.

[126] *Ibid.*

Parties can compromise the good faith of the State resorting to this mechanism faced with the alleged absence of an openness to negotiate by the other party.

186. Accordingly, it should be recalled that Article VII of the BIT does not require reference to diplomatic channels or consultations before having recourse to arbitration. Furthermore, the negotiations provided for in Article V are not a condition precedent to trigger the arbitration mechanism established in Article VII of the BIT. Therefore, in this case the uncontested facts suggest that the somewhat precarious diplomatic endeavors by Ecuador were thwarted by the notice that the United Stated had decided not to respond, followed by Ecuador's lack of insistence to resume conversations.

187. In any case, the commencement of arbitration proceedings is independent from negotiations or the continuation of previously undertaken negotiations or diplomatic overtures. Therefore, to verify the required positive opposition of the United States to the request submitted by Ecuador, the critical date of the dispute would be the time in which the United States decided to inform Ecuador of its intention not to respond and in which, based on such failure to respond, its silence confirmed the existence of a dispute on the interpretation of Article II(7) of the BIT.

188. In sum, the sequence of relevant facts in the relations maintained between both Parties evidences a closed door towards future diplomatic relations concerning the request submitted by Ecuador in the letter of 8 June 2010, and the discussions held by the representatives of the Parties of 17 June 2010.

189. Ecuador finally presented its Request for Arbitration on 28 June 2011, relying upon Article VII of the BIT.

190. The relevance or irrelevance of negotiations undertaken before the commencement of an arbitration in case at hand can be determined by following the principles applied in international case law.

191. Thus, it is helpful to note that in *Mavrommatis,* even considering that Article 26 of the Palestine Mandate[127] established that only those cases in which the dispute could not be settled by negotiations could have recourse to the Permanent Court—unlike the BIT between Ecuador and the United States—, the PCIJ affirmed:

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or it finally a point is reached at which one of the parties definitely declares himself unable, or

[127] Article 26 provides: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such despite, if it can not be settle by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations".

> refuses, to give way, and then can therefore be no doubt that the dispute can not be settled by diplomatic negotiations.[128]

192. The Court then expressed:

> […] on January 26th 1924, the Greek Legation in London wrote to the Foreign Office in order to ascertain whether in the opinion of the British Government, "M. Mavrommatis claims could not satisfactory met" or submitted to arbitration…; and the note of His British Majesty's Secretary of State for Foreign Affairs, dated April 1st, 1924 *was regarded by Greece as a definitely negative reply.*[129]

193. On this point, the Court concluded that:

> The matter had reached this stage when the Greek Government, *considering that there was no hope of effecting a settlement by further negotiation* […] sent to the Foreign Office a dispatch dated May 12, 1924, informing its Britannic Majesty's government of its decision to refer the dispute to the Court […] a decision which […] it proceeded to carry out on the following day […].[130]

194. Although *Mavrommatis* is a case concerning diplomatic protection and the alleged breach of the Palestine Mandate, it is a valid precedent for the purposes of defining the role of diplomatic exchanges in relation to the inference of a dispute from the positive opposition of a State. It is also a relevant precedent that evidences that the claiming State must determine whether there are any possibilities left to continue negotiating or whether the attitude of the other State implies a refusal that thwarts any attempt to negotiate.

195. In the understanding that the wording of Article VII does not require previous negotiations, the relevance of diplomatic exchanges between Ecuador and the United States provides a clear benchmark to assess the context in which it is possible to objectively infer the positive opposition of one of the Parties towards the claim of the other.

e) The Respondent's positive opposition to Ecuador's interpretation of Article II(7)—Silence in International Law

196. The main disagreement between the Parties relates to whether the Respondent's silence and its refusal to respond leads, in the particular circumstances of the case, to the inference that United States is opposed to Ecuador's interpretation of article II(7) of the BIT.

197. State silence as such cannot be thought to have any meaning unless connected with a legal or factual situation particularly the act or claim of

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[128] The Mavrommatis Palestine Concessions, PCIJ, Series A, No 2, p. 13.

[129] *Ibid*., p. 14 (emphasis added).

[130] *Ibid*., p. 15 (emphasis added).

another State. The ICJ has determined that silence may also speak, but only if the conduct of the other State calls for a response.[131]

198. In that context is relevant to note that the International Law Commission Special *Rapporteur* on Unilateral Acts of States has expressed that silence, as a State behaviour having legal effects, is reactive. It acquires juridical value when a State is faced with a situation, normally an act performed or a claim raised by another State, which calls for its reaction.[132]

199. International tribunals have managed to take into account objective criteria in order to evaluate a State's silence as an issue separate from the actual intent of the silent State. Political motivations behind a State's silence have been rejected by the ICJ as relevant.[133] Reference to objective criteria guarantees legal certainty and credibility.

200. In several occasions the ICJ has determined the legal effects of a State's silence, interpreting the context in which a reaction was expected or "called for". [134]

201. The circumstances under which silence has to be interpreted is a matter of substance not of form.[135] The intention behind the State's refusal to respond is irrelevant under international law.[136]

202. It is relevant therefore to take note of the United States position as expressed by Counsel during the Hearing on Jurisdiction: "To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador's interpretation".[137]

203. This means that there is a response by the United States: to maintain silence. But the legal effects of silence do not depend from the intention or will of the silent State. The effects of silence depend upon the objective determination of the circumstances in which silence has been manifested.[138]

204. The United States has not referred to a single precedent to support its position in relation to the legal effects of silence. It could not even demonstrate its own pretended effects derived from silence. International precedents have confirmed that the State's intention regarding its silence is not relevant to

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[131] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, ICJ Reports 2008, para. 121.

[132] Conf. S. Kopela, "The legal value of silence in the jurisprudence of the International Court", p. 91 (quoting (2001) I *Yearbook of the ILC*, 197 [27] [meeting of the 26 July 2001]).

[133] *Minquiers and Ecrehos* (France/United Kingdom), Judgment of 17 November 1953, *ICJ Reports 1953*.

[134] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia *v.* Russian Federation), Judgment of 1 April 2011, ICJ Reports, 2011.

[135] *Ibid.,* para. 30, p. 16.

[136] Conf. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria; Equatorial Guinea intervening), Judgment of 11 June 1998, ICJ Reports 1998.

[137] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 186: 4–6.

[138] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950, ICJ Reports 1950.

determine the legal effects of its behaviour. Moreover, in the present case there is a clear intent by the Respondent "not to respond".

205. In the present case, positive opposition can be inferred from the United States' attitude. International law, as applied by the ICJ, has established the possibility of inferring the existence of a dispute from different attitudes assumed by States; even from the circumstances in which a State's denial of the existence of a dispute would imply the very existence of such dispute.

206. The United States argued that the only way to evidence positive opposition is by opposing the other State's claim through a State's words or actions.[139] This argument by the United States is in contradiction with the ICJ's reiterated recognition of the ability to infer positive opposition that arises from a State's owns actions or omissions. As stated by the ICJ, positive opposition is not reduced to express opposition.[140]

207. Silence is a clear manifestation of the will and intention of the United States not to reveal its own interpretation. Silence cannot benefit the State that wantonly decides not to respond to a treaty partner's request or claim. The United States has not denied that it has its own interpretation and it has also confirmed during the First Hearing that a treaty interpretation by the United States Government could vary from one administration to another.[141]

208. The United States allegation that the case concerns a "dispute" created by one party giving an ultimatum to the other, to "either agree with our interpretation or there is a dispute", is unfounded on the facts. The United States' note dated August 23, 2010, in answering the so-called Ecuador's ultimatum, recognised the initiation of an informal consultation process. That process was later on deadlocked by United States' attitude of not responding and further by assuming that there was no dispute.

209. The United States' notification to Ecuador of its intention not to respond, constituted within the factual circumstances of the informal diplomatic intercourse between the Parties a relevant unilateral act from which positive opposition *vis a vis* the requesting State can be directly inferred.

210. Under these circumstances the calling for a response was directly related to the need to promote assurances of fair juridical certainty attached to the interpretation of treaties, as well as transparency and good faith in their interpretation and application.

211. There are no multiple possibilities as to the interpretation of the United States' determination not to respond. At the Hearing on Jurisdiction, the United States counsel confirmed that there are only two possibilities: to agree or to disagree.

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[139] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 162:9–15.

[140] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *ICJ Reports 1998,* para. 89.

[141] Transcript (Preparatory Meeting), 21 March 2010, Mr. Koh, pp. 100:23–101:6.

212. Counsel for the United States has maintained, "*[s]ilence can express either agreement or disagreement with the proposed interpretation*. States may consider it unnecessary to respond to an interpretative declaration because they share the views expressed therein, or they may feel that the interpretation is erroneous, but there is no point in saying so since, in any event, the interpretation would not, in their view be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct".[142]

213. The United States assumed, from its decision not to respond, that there was no dispute. The United States' decision not to respond produced legal effects independently from its own will or intention. If there is no dispute there is an agreement, there is not a third possibility. There are no legal precedents on limbo situations generated by the wanton silence of a party to a treaty when confronted with a claim made by other party.

214. In my understanding, the United States has confirmed that there are only two substantive ways in which Ecuador's request could be answered: to agree or to disagree. The discretional power of a State to maintain silence does not alter the number of options from which it will be possible to infer an agreement or a disagreement. Under those circumstances, the State's intention to maintain silence is an expression of its interest, for whatever reason, not to reveal its position.

215. From the United States' attitude denying the existence of a dispute it is illogical to imply its agreement with Ecuador. Thus, the only alternative left under the present factual circumstances is to infer the United States'positive opposition to Ecuador request.

216. The inference of positive opposition on the part of the United States from its attitude towards the present case was equally confirmed by the positions taken by the United States during the present arbitration proceedings, repeatedly and impliedly expressing doubts regarding Ecuador's claim.

e) Conclusion and Consequences on the Existence of a Dispute

217. By virtue of the foregoing and considering that, according to the judicial precedents cited by the Parties, this is a substantive rather than a procedural issue, I hereby conclude that there is a dispute between Ecuador and the United States on the interpretation of Article II(7) of the BIT, since the United States' positive opposition to Ecuador's claim was determined by inference from the objective determination of the facts and circumstances relevant to the case at issue.

218. As already stated in several passages of this Dissent, under article VII consultations or negotiations are not a pre-requisite for recourse to arbitration. Thus a State party is entitled to activate the compromisory clause of article VII by which both States agreed on a binding State to State arbitration

[142] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 193:1–9 (emphasis added).

system for the settlement of their disputes concerning the interpretation or the application of the treaty. Thus, in a State-to-State arbitration under article VII the parties to the treaty have already committed themselves to settle their disputes (any dispute) concerning the interpretation or application of the treaty.

219. The United States' affirmation that "[…] the practice of States in their Treaty relations recognizes that the way the Parties to a treaty control or clarify its meaning is through negotiation and agreement … The avenues for the management and interpretation of treaties are to be pursued at the discretion and mutual interest of States that are Parties to the treaties"[143] may be considered as a valid presumption pending on the agreement of the Parties. But such a presumption could not derogate from a previously agreed compromissory clause for the settlement of any dispute concerning the interpretation of a treaty, such as article VII of the BIT.

220. The above conclusion is in accordance with the message of the President of the United States to the United States Congress in connection with the ratification of the Ecuador–United States BIT expressing that: "Article VII provides for binding arbitration of disputes between the United States and Ecuador that are not resolved through consultations or other diplomatic channels. *The article constitutes each Party's prior consent to arbitration*".[144]

221. The United States' allegation that under article VII of the BIT one party cannot be forced to do something that it had not agreed in the BIT to do[145] contradicts the express wording of that treaty clause. Article VII speaks for itself.

222. I understand that the legal precedents discussed by the Parties support, *prima facie* and in the factual circumstances of the case, the existence of a dispute over which this Tribunal can exercise its jurisdiction in accordance with Article VII of the BIT.

IV. Conclusions on the Opinion of the Majority

223. By virtue of all the foregoing reasons, I dissent from the arguments of the majority, and therefore, from the conclusion arrived at thereby.

224. First, I consider that the magnitude of the case and the efforts made by the Parties in the preparation and presentation of their relevant positions deserve a proper legal analysis of all the subjects put forward, to the exclusion of mere speculation, as utilized by the majority on the alleged intention of the Parties.

225. Accordingly, I disagree with the fact that the majority analyses in depth, neither the content of the compromissory clause of Article VII of the BIT, nor the positions of the Parties as to the scope thereof. The majority does

[143] *Ibid.*, p. 196:1–11.

[144] In accordance with the Memorandum addressed by the President of the United States of America to the United States Congress in relation to the BIT between Ecuador and the United States. (emphasis added).

[145] Respondent's Memorial on Objections to Jurisdiction, pp. 62 *et seq.*

nothing but assume that there must be a concrete case for a dispute to exist between States insofar as the claim on the merits has implications or consequences between the Parties.

226. I disagree with the reasoning of the majority on these issues, as it limits itself to an erroneous interpretation of the finding of the ICJ contained in a single paragraph of the judgment issued in the case concerning *Northern Cameroons* and in the Separate Opinion of Judge Fitzmaurice.

227. In this Award, the majority overlooks the fact that, in *Northern Cameroons*, the Court admitted that a dispute existed and that, given that the treaty relied upon was no longer in force and effect, the Court held that issuing a judgment would have no legal consequences or effects. In *Northern Cameroons*, according to the Court, the existence of practical consequences of a judgment was not related to the existence of a dispute, but to the force and effect of the legal rule which was the subject-matter of the dispute. It is worth recalling that, in its Separate Opinion, Judge Fitzmaurice expressed his dissent from the majority of the Court as to the existence of a dispute between Cameroon and the United Kingdom as well as the power to issue a declaratory judgment asserted by the Court.

228. I disagree with the statement whereby a concrete case as defined by the majority is required under international law for a dispute on treaty interpretation to exist. The precedents from international courts and tribunals analysed above fail to support the position adopted by the majority.

229. With regard to the practical consequences of the Award, the majority errs when holding that the principal issue of interpretation before the Tribunal focuses on Ecuador's obligations *vis-á-vis* such investors as Chevron, not on obligations concerning the United States.[146] On the basis of this assumption, the majority erroneously finds that a decision by the Tribunal would only have consequences for Ecuador, not the United States, as the majority presumes—on no further grounds—that the United States would not claim an interpretation different from that determined by a tribunal under Article VI of the Treaty.

230. With reference to the cases cited by Ecuador in order to show that a breach of a rule of international law need not be established for a tribunal to exercise jurisdiction, the majority believes that there were practical consequences for both Parties in the settlement of an interpretive dispute in all cases. According to the majority, such practical consequences do not arise in the instant case.[147] The majority speculates that such consequences could only arise for one of the Parties within the framework of a direct claim of breach or a claim for diplomatic protection by the United States in favour of one of its investors against Ecuador.[148] The majority adds to the confusion by stating that

[146] Award, para. 198.

[147] Award, para. 204.

[148] *Ibid.*

"[t]he Tribunal makes no finding on this point, but is not persuaded to exclude this possibility outright",[149] to go on to assert that it is impossible to exclude the possibility that the United States, when approached by an aggrieved investor, might agree with the interpretation that Ecuador has put forward.[150]

231. I disagree with this conclusion of the majority, since, in my view, the legal consequences of an award do not depend on the future acts or omissions of one of the Parties, let alone on the speculative inferences that the Tribunal may make on such prospective future attitudes of one of the Parties.

232. Further, I disagree with the conclusion of the majority on the existence of practical consequences in the case at hand hailing from the fact that the majority's assertion that it cannot conclude that a proper case for adjudication has been presented by the Claimant was grounded on its own conclusion on the inexistence of a dispute on the interpretation of Article II(7), to which it expressly admits that it would only make reference thereafter.[151] Not only do I disagree with the conclusion, which, I opine, features speculative grounds unsupported in law on the position that one of the Parties would purportedly assume, but I also disagree with the elliptical and misleading manner in which the majority presents its reasoning on grounds which have not yet been addressed thereby.

233. In regard to the issue concerning the existence of a dispute, the majority, upon citing the ICJ in the case of *Georgia* v. *Russia* regarding the definition of dispute, decides to disregard the content of such definition to then put forward reasons as to the practical consequences of a judgment, thereby mistaking the precise scope attached thereto by the Court in *Nothern Cameroons*.

234. The majority acknowledges that the specific issue facing the Tribunal is thus whether "the facts of this case" allow for the inference that the Respondent disagrees with the position of the Claimant regarding the interpretation of Article II(7).[152] Nonetheless, rather than analyzing the facts and circumstances surrounding the case, the majority decides on the basis of arguments-rather than on the basis of "the facts of this case"—that it cannot infer "from any of these arguments" that the Respondent disagrees with the position of the Claimant.

235. The reasoning of the majority is grounded on the fact that it cannot exclude other reasonable explanations regarding the behavior of the Respondent that are not dependent upon its disagreement with Ecuador's interpretation of Article II(7). The majority goes on and holds that the behavior of the Respondent is consistent with its desire not to interfere with decisions issued by Tribunals constituted under Article VI. Given the existence of such a plausible explanation for the United States' silence, the majority concludes that the circumstances of the case warrant no inference of positive opposition.

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[149] *Ibid.*

[150] Award, para. 205.

[151] Award, para.207.

[152] Award, para. 215.

236. I disagree with the above conclusion and I dissent from its rationale as it merely focuses on a simplistic subjective speculation that lacks any legal support

237. The majority disregards its obligation under international law to determine whether a dispute exists through an objective determination, and not from a merely subjective determination that depends on the purported intention of one of the Parties, which the majority affords itself the luxury of presuming. It should be recalled that, on several occasions, the ICJ recognized the obligation to make an objective determination: "*Whether there is a dispute in a given case is a matter for objective determination by the Court…The Court's determination must turn on a determination of the facts*".[153]

238. I also disagree, on the basis that it is not impossible to understand the critical path of reasoning taken by the majority, who then admit in paragraph 215 of the Award that the issue facing the Tribunal is "whether the facts of this case allow for the inference" only to then reach the conclusion in paragraph 219 that it cannot infer opposition since it "cannot exclude other reasonable explanations for the Respondent's behaviour", which must, after all, refer to its intention, and therefore, to its full discretion.

239. I disagree with the conclusion of the majority that regards as a relevant factual matter that the Respondent has given a reasonable alternative explanation for its decision not to respond as a factual matter[154], thereby precluding any chance of inferring its opposition from an objective determination as required under the applicable law.

240. My dissent on this point is grounded on the fact that, should an alternative explanation exist, a situation which the majority fails to prove this conclusion would contradict other arguments put forward by the Respondent regarding its decision not to respond, *e.g.* the admission on the part of the United States of having failed to take a stance; or holding that the Treaty's interpretation could change from one government administration of the United States to the next.[155]

241. I disagree with the majority in that the Award ignores the significance attached by international law to unilateral acts of States and in that it minimizes the legal consequences that international law attaches to the silence of a State faced with a situation where claims are being made by another State.

242. I disagree with the statement of the majority that the jurisprudence cited by the Parties endorses its conclusion that an inference of "positive

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[153] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*.

[154] Award, para. 224.

[155] Transcript (Preparatory Hearing), 21 March 2012, "[…] as you know, some times those determinations [on treaty interpretation] can change from one administration to next, and that makes even more important that we not prematurely make such decisions because we are in the middle of an election season and other issues are at stake […]": Mr. Koh, p. 101:1–6.

opposition" is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded.[156] My dissent is grounded on the fact that the above statement departs from the text and context of the very precedents cited. It is worth noting that such a strong statement finds support in no part of any authority.

243. Lastly, I disagree with the exclusively speculative statements of the majority concerning the existence of a possible dispute over the duty to respond or engage in consultations,[157] given that the Parties neither understood that such a dispute existed, nor put forward arguments on its purported existence.

244. In case of doubt, the Spanish original version prevails.

The Hague, 29 September 2012.

[*Signed*]
Professor Raúl Emilio Vinuesa
[Arbitrator]

[156] Award, para. 223.

[157] Award, paras. 225 *et seq.*

PART II

Award in the Railway Land Arbitration (Malaysia/Singapore)

Award of 30 October 2014

PARTIE II

Sentence dans l'arbitrage relatif au domaine ferroviaire (Malaisie/Singapour)

Sentence du 30 octobre 2014

Railway Land Arbitration (Malaysia/Singapore), Award of 30 October 2014

Arbitrage relatif au domaine ferroviaire (Malaisie/Singapour), Sentence du 30 octobre 2014

Whether Malaysia would have been obliged to pay a development charge, under the municipal law of Singapore, for parcels of land exchanged for railway lands held by Malaysia in Singapore—As a party to the Agreement with Malaysia, Singapore was in position to negotiate terms that balanced the benefit it obtained from the return of the railway lands against benefit Malaysia would receive—Evidence of a common intention or understanding of the Parties to a treaty can assist in its interpretation—Evidence of practice that demonstrates a common understanding of the Parties to a treaty contrasts with evidence of conflicting understanding or intention of those involved in its negotiation, which does not assist in the interpretation of the treaty—Actions and reactions of the Malaysian participants carried no inferences as to intention—Subsequent conduct of Parties in and after 2008 of no assistance in relation to the interpretation of the Agreement as at the time that it was concluded in 1990.

Applying ordinary meaning of the Agreement, in its context and having regard to its object and purpose, Malaysia would not have been liable to pay development charge—Nature of transaction was analogous in principle to a sale by Singapore of land for a specified development—Estoppel involves a representation that is relied upon to the detriment of the party relying upon it—Subsequent amendments to the Agreement did not include the imposition of an obligation to pay development charge.

La Malaisie était-elle tenue de payer des droits d'aménagement, imposés en application du droit municipal de Singapour, relativement à des parcelles de terre échangées contre des terrains destinés à un usage ferroviaire détenus par la Malaisie à Singapour ?—En tant que partie à l'Accord avec la Malaisie, Singapour était en mesure de négocier des clauses créant un équilibre entre les avantages qu'elle tirait du retour de terrains destinés à un usage ferroviaire et les avantages qu'en tirerait la Malaisie—La preuve de l'intention commune des Parties à un Traité ou de la compréhension commune qu'elles en ont peut aider à interpréter celui-ci—À la preuve d'une pratique démontrant que les Parties comprenaient le traité de la même manière, s'oppose la preuve que les personnes qui ont participé à sa négociation ne s'entendaient pas sur son intention ou son interprétation, ce qui n'aide pas à l'interpréter—On ne pouvait tirer des actes et des réactions des participants malaysiens aucune conclusion sur leur intention—La conduite ultérieure des parties à compter de 2008 n'est d'aucune aide dans l'interprétation de l'Accord au moment de sa conclusion, en 1990.

En application de l'Accord, interprété selon son sens ordinaire, compte tenu de son contexte, de son objet et de son but, la Malaisie n'aurait pas été tenue de payer les droits d'aménagement—La nature de la transaction était analogue en principe à la vente par Singapour d'un terrain à des fins d'aménagement déterminées—Pour qu'il y

ait estoppel, une partie doit s'être fiée, à son détriment, à une représentation faite par l'autre—Les amendements apportés à l'Accord par la suite n'incluaient pas d'obligation de payer des droits d'aménagement.

* * * * *

PCA CASE Nº 2012-01

In the matter of
the Railway Land Arbitration

-before-

a Tribunal Constituted in Accordance with a
Submission Agreement between Singapore and Malaysia
Dated 9 January 2012

-between-

Malaysia

-and-

The Republic of Singapore

-under-

the Permanent Court of Arbitration Optional Rules
for Arbitrating Disputes between Two States

Award

Arbitral Tribunal:

Lord Phillips of Worth Matravers KG, PC (President)
The Honourable Murray Gleeson AC, QC
Judge Bruno Simma

Registry:
Permanent Court of Arbitration

30 October 2014

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Glossary of Defined Terms

24 May Joint Statement	Joint Statement on Singapore—Malaysia Leaders' Retreat between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak, 24 May 2010, Singapore (Exhibit S65)
CIQ	Customs, immigration and quarantine
DC	Development charge, a tax provided for in Singapore's municipal law for written permission to develop land in a manner departing from the zoning or plot ratio set out in Singapore's Master Plan
Differential Premium	Premium amounting to 100% of the enhancement in the value of the land attributable to the lifting, upon application, of restrictive covenants in a lease of State land
IM	Iskandar Malaysia, a special economic zone in South Johor, Malaysia
Jurong Spur	Spur line of the railway in Singapore, running between Bukit Timah and Jurong
Khazanah	Khazanah Nasional Berhad
KTMB	Keretapi Tanah Melayu Berhad
Minister Anifah	Dato' Sri Anifah Aman, Foreign Minister of Malaysia as from April 2009
Minister Daim	Tun Daim Zainuddin, Finance Minister of Malaysia between July 1984 and March 1991
Minister Dhanabalan	Mr. Suppiah Dhanabalan, Minister for National Development of Singapore from January 1987 to August 1992
Minister Mah	Mr. Mah Bow Tan, Minister for National Development of Singapore from June 1999 to May 2011
Minister Nor	Tan Sri Nor Mohamed Yakcop, Minister in the Prime Minister's Department and Head of the Economic Planning Unit in the Office of the Prime Minister of Malaysia from 10 April 2009 to 5 May 2013
Minister Rais	Datuk Seri Utama Dr. Rais Yatim, Foreign Minister of Malaysia between March 2008 and April 2009
Minister Yeo	Mr. George Yeo, Foreign Minister of Singapore between August 2004 and May 2011
MOU	Draft Memorandum of Understanding prepared by Singapore in advance of the 12 November 1992 meeting between KTMB and the Ministry of National Development of Singapore (Exhibit S-25)
MRA	Malayan Railway Administration

M-S	M-S Pte Ltd, a private company limited by shares, incorporated in Singapore and owned 60% by Kazanah and 40% by Temasek
Parties	Malaysia and the Republic of Singapore
PCA Optional Rules	The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States
PCA	The Permanent Court of Arbitration
POA	*Points of Agreement on Malayan Railway Land in Singapore* dated 27 November 1990
Prime Minister Abdullah	Tun Abdullah Ahmad Badawi, Prime Minister of Malaysia from October 2003 to April 2009
Prime Minister Najib	Dato' Sri Mohd Najib bin Tun Abdul Razak, Prime Minister of Malaysia as from April 2009
railway lands	Land in Singapore used for the operation of a railway, first by the MRA and later by KTMB
Rule 4	Rule 4 of the Singapore Planning (Development Charges—Exemption) Rules 1996 (Exhibit M-39)
Singapore	The Republic of Singapore
SRTO	Singapore Railway Transfer Ordinance
Submission Question	Question set out in Article 1 of the *Submission Agreement between Singapore and Malaysia* dated 9 January 2012
Temasek	Temasek Holdings (Private) Limited
three Bukit Timah parcels	Three parcels of land at Bukit Timah offered by Singapore in the Letter dated 2 June 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-52)
three POA parcels	Three parcels of land at Keppel, Kranji and Woodlands identified in the annexes to the POA
TPN	Third Party Notes, a form of diplomatic correspondence
URA	Urban Redevelopment Authority of Singapore
valuation footnote	Footnote referencing the need for M-S Pte Ltd to pay "development charges and other applicable charges and levies", included in the valuation attached to the Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S54) and in the valuation attached to the Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-55)

Vienna Convention	Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332
Woodlands Checkpoint proposal	Written proposals, headed "Woodlands Checkpoint" sent by Malaysia to Singapore in advance of the Prime Ministers' meeting on 18 August 1990 (Exhibit S-13)

A. The Parties and Their Representatives

1. The Parties to this arbitration are Malaysia and the Republic of Singapore ("*Singapore*") (together, the "*Parties*").

2. The Parties are represented in these proceedings as follows:

Malaysia

Agent

— Tan Sri Abdul Gani Patail, Attorney General of Malaysia

Deputy Agent

— Datuk Azailiza Mohd Ahad, Deputy Solicitor General I, Attorney General's Chambers

— Ms. Amelia Emran, Senior Federal Counsel,

— Ms. Intan Diyana Ahamad, Senior Federal Counsel

Legal Representatives

— Professor James Crawford AC, SC

— Professor Robert Volterra, Volterra Fietta

— Mr. Justin D'Agostino, Herbert Smith Freehills

— Mr. Matthew Weiniger QC, Herbert Smith Freehills LLP

— Mr. Simon Chapman, Herbert Smith Freehills

— Mr. Simon Olleson, 13 Old Square Chambers

— Mr. Iain Maxwell, Herbert Smith Freehills LLP

— Ms. Gitta Satryani, Herbert Smith Freehills LLP

— Mr. Timothy Hughes, Herbert Smith Freehills

— Ms. Claire Nicholas, Herbert Smith Freehills LLP

— Ms. Laura Rees-Evans, Volterra Fietta

— Dr. James Upcher, Volterra Fietta

Other Representatives

— Sir Malcolm Grant

— Mr. Mohd Nasri Sallehuddin, Khazanah Nasional Berhad

— Ms. Zaida Khalida Shaari, Khazanah Nasional Berhad

— Ms. Lisa Ong, Khazanah Nasional Berhad

Singapore

Agent

— Justice Steven Chong, Former Attorney-General of Singapore

Deputy Agent

— Mr. Pang Khang Chau, Director-General, International Affairs Division, Attorney-General's Chambers

Counsel

— Lord Goldsmith QC, PC, Debevoise & Plimpton LLP
— Professor Vaughan Lowe QC, Essex Court Chambers
— Mr. Toby Landau QC, Essex Court Chambers
— Ms. Jessica Gladstone, Debevoise & Plimpton LLP

Members of the Singapore Delegation

— Mr. K Shanmugam, Minister for Foreign Affairs and Minister for Law
— Mr. Jules Sher QC, Special Advisor to the Attorney-General
— Mr. Leong Kwang Ian, Senior State Counsel, Attorney-General's Chambers
— Ms. Melanie Chng, Deputy Director, Ministry of Law
— Mr. David Low, Deputy Senior State Counsel, Attorney-General's Chambers
— Mr. Louis Ng, Deputy Senior State Counsel, Attorney-General's Chambers
— Mr. Kenneth Wong, Deputy Senior State Counsel, Attorney-General's Chambers
— Mr. Wong Kai Jiun, Special Assistant to the Minister for Foreign Affairs
— Mr. Justin Yeo, Special Assistant to Justice Steven Chong
— Ms. Shirin Chua, State Counsel, Attorney-General's Chambers
— Ms. Sarah Shi, State Counsel, Attorney-General's Chambers

B. The Dispute

3. The Parties have agreed to refer to this arbitration for resolution in a "very cordial and friendly manner, and not in any way acrimonious"[1] an issue (the "Submission Question") that has arisen in relation to the effect of an agreement concluded between the Parties on 27 November 1990 (the "Points

[1] Letter dated 17 September 2010 from Malaysian Prime Minister Najib Razak to Singapore Prime Minister Lee Hsien Loong (*Exhibit S-88/Tab C-118*).

of Agreement on Malayan Railway Land in Singapore", or "POA")[2] as subsequently varied. Under the POA Malaysia agreed to return to Singapore lands that it held in Singapore under titles that, for the most part, restricted the use that Malaysia could make of them to the operation of a railway that ran through Singapore (the "railway lands"). In exchange, the POA conferred options on Malaysia. One option made provision for the vesting of three parcels of the railway lands by Singapore in a company to be jointly owned by the Parties to be called M-S Pte Ltd ("M-S") for the purpose of commercial development. Malaysia did not exercise that option. Instead it opted for the joint company to receive for development some parcels of land reclaimed from the sea by Singapore. The Submission Question is whether, had Malaysia exercised the option for the joint company to receive the railway lands and had the joint company proceeded to develop those lands, the joint company would have been obliged to pay a development charge ("DC") in relation to each of these three parcels of land. DC is a tax levied in respect of the increase in value of land consequent upon the grant of planning permission to change the use of the land. Singapore contends that under the terms of the POA M-S would have had to pay DC in the sum of S$1.47 billion as one of the costs of developing the lands imposed under Singapore's municipal law. Malaysia contends that under the terms of the POA no DC fell to be paid by M-S. If Singapore is correct, the Parties are agreed that M-S will be under a liability to pay to Singapore S$1.47 billion, together with interest.

4. The most relevant parts of the Submission Agreement[3] provide as follows:

> *The Government of Malaysia and the Government of the Republic of Singapore* (the "Parties")
>
> *Recalling* the Points of Agreement on Malayan Railway Land in Singapore entered into between the Parties on 27 November 1990 (the "POA");
>
> *Considering* the subsequent events as outlined in the Annex;
>
> *Recognising* that both Parties have different views relating to the development charges payable on the three POA land in Tanjong Pagar, Kranji and Woodlands;
>
> *Desiring* to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration;
>
> *Have agreed as follows:*

[2] *Points of Agreement on Malayan Railway Land in Singapore between Government of Malaysia and Government of Singapore* dated 27 November 1990 (Exhibit S-19/Tab C-25).

[3] Submission Agreement between Singapore and Malaysia dated 9 January 2012 (Exhibit S-1/Tab B-1).

Article 1
Submission of dispute

1. The Parties hereby submit the following question to final and binding arbitration under the auspices of the Permanent Court of Arbitration in accordance with this Agreement:

> "Whether in all the circumstances, including the agreed matters set out in the Annex, M-S Pte Ltd would have been liable to pay development charges on the three land parcels referred to below (the amount of which had been determined as S$1.47 billion) if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes of the POA as particularized below:
>
> (i) the land at Keppel, the details of which are contained in Annex 1 of the POA;
>
> (ii) the land at Kranji, the details of which are contained in Annex 2 of the POA; and
>
> (iii) the land at Woodlands, the details of which are contained in Annex 3 of the POA."

2. If the Arbitral Tribunal answers the question in the affirmative, it shall make a declaration to that effect and issue an award that the said amount of S$1.47 billion is payable and the Parties agree that M-S Pte Ltd shall pay such sum within ninety days of the date of the award or by 1 January 2013 which ever shall be later (in addition to the development charge of S$362 million on the three additional pieces of land in Bukit Timah, which is not in dispute and which shall be payable in any event by 1 January 2013), such payment to be without prejudice to the consideration by the Singapore authorities of any application for remission which M-S Pte Ltd may make under and in accordance with Singapore law.

Article 2
Applicable law

The Arbitral Tribunal shall decide the dispute in accordance with international treaties, including in particular the POA, and the other sources of international law as set out in Article 38 of the Statute of the International Court of Justice. In deciding the dispute, the Arbitral Tribunal shall also apply municipal law, if and to the extent it is determined by the Arbitral Tribunal to be applicable.

[…]

Article 8
Lex Arbitri

[…]

2. The Parties agree that the *lex arbitri* shall be public international law and not the domestic laws of the Netherlands or any other country, and nothing in this Agreement shall be construed as a waiver of sovereign immunity from, or a submission to, the jurisdiction of the courts of the Netherlands or any other country on any issue whatsoever, whether substantive or procedural.

5. The Annex referred to in Article 1 reads as follows:

1. On 27 November 1990 the Government of Malaysia and the Government of Singapore (hereinafter "the Parties") entered into an agreement known as the "Points of Agreement on Malayan Railway Land in Singapore between the Government of Malaysia and Government of Singapore" (hereinafter "the POA");

2. The POA provides as follows:

> "(1) The station at Keppel will be vacated and moved from Keppel, in the first instance to Lot 76–2 which is next to the Bukit Timah Fire Station along Upper Bukit Timah Road near the junction with Jurong Road. (Please refer to Appendix) This place is shown on a map attached as Plan l. The Government of Singapore will help in the alienation of such lands as may be reasonably necessary for the development of the station, provided that it is not necessary to acquire land which in the opinion of MRA and the Government of Singapore has major permanent structures on it. (When MRA wants to acquire despite Government of Singapore's view that there are major permanent structures then the acquisition will be at market price)
>
> (2) The land at Keppel will be vested in a limited company, (M-S Pte Ltd) to be developed as residential and commercial land in accordance with the plans attached as Annex 1.
>
> (3) When the MRT reaches Woodlands New Town, the MRA may within 5 years, move its station from Lot 76–2 to a site in Woodlands adjacent or close to the MRT station. Then the two pieces of land, one in Kranji and in Woodlands, attached as Annex 2 and 3 respectively will be vested in the limited company M-S Pte Ltd and developed in accordance with plans given.
>
> (4) Singapore's Land Office shall issue freehold land titles to M-S Pte Ltd in respect of lands at Keppel, Kranji and Woodlands.
>
> (5) 60% of shares of the limited company, M-S Pte Ltd, will be owned by a company to be designated by the Government of Malaysia and 40% of shares by a company to be designated by the Government of Singapore. Payment for the development costs of these properties will be similarly shared in the ratio 60:40.
>
> (6) There will be no compensation for the MRA land, instead the three big pieces will be realienated to M-S Pte Ltd at no costs. Whoever takes the land should clear the tracks and also pay for

costs of resettlement of squatters. Therefore, the cost of clearing tracks and squatters for the three pieces of land will be on M-S Pte Ltd. For the balance of the MRA lands, the costs of clearance of tracks and squatters will be on the Singapore Government.

(7) In exchange for the MRA land at Keppel, a plot of land of equivalent value in Marina South will be offered to M-S Pte Ltd so that a prestigious building can be developed on this Marina site. M-S Pte Ltd intends to develop and retain a prestigious building as a long term investment. If the land offered to M-S Pte Ltd. is, in the opinion of M-S Pte Ltd. not suitable, then alternative sites in Marina South of equivalent value shall be offered to M-S Pte Ltd. Examples of the kind of prestigious sites of equivalent value to MRA Keppel land are attached in Plan 2 and Plan 3.

3. The implementation of the POA was held in abeyance due to certain differences between the Parties. The Parties resumed discussions on the implementation of the POA in 2008, during which Singapore offered to vest an additional three parcels of land at Bukit Timah in M-S Pte Ltd if Malaysia were to move the railway terminus to Woodlands. Malaysia responded by requesting that, instead of swapping only the Keppel parcel for land in Marina South, M-S Pte Ltd be allowed to swap all six plots of land (i.e., the three POA parcels in Tanjong Pagar, Woodlands and Kranji and the three additional Bukit Timah parcels) for land in Marina South.

4. These discussions culminated in an agreement reached on 24 May 2010 at the Singapore-Malaysia Leaders Retreat in the form of a Joint Statement which provides at paragraph 4 as follows:

"Both Leaders also discussed issues arising from the Points of Agreement (*POA*) on Malayan Railway Lands in Singapore and reached an understanding to move the issues forward. In this regard, the POA shall be supplemented by new terms and conditions to maximise the full potentials of the MRA Lands in Singapore. To that effect, both Leaders agreed to undertake the following steps:

- The Keretapi Tanah Melayu Berhad (KTMB) station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (WTCP) by 1 July 2011. Malaysia would co-locate its railway CIQ facilities at WTCP. Singapore would facilitate the relocation to the WTCP and ensure bus service connectivity from the KTMB Station at WTCP to a nearby MRT Station for the convenience of train passengers.

- A company known as M-S Pte Ltd will be established as soon as practicable but not later than 31 December 2010 with Malaysia's 60% held by Khazanah Nasional Berhad and Singapore's 40% held by Temasek Holdings Limited.

- The three parcels of land in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah

(Lot 76–2 Mk 16, Lot 249 Mk 4 and Lot 32–10 Mk 16) will be vested in M-S Pte Ltd for joint development, which in turn, could be swapped, on the basis of equivalent value for pieces of land in Marina South and/or Ophir-Rochor. Both sides will conduct their respective valuations and Prime Minister Lee will visit Kuala Lumpur within a month with a proposal for the land swap for Malaysia's consideration.

- The transfer of the said land parcels to M-S Pte Ltd will take effect at the time when KTMB vacates Tanjong Pagar Railway Station (TPRS).

- A rapid transit system link between Tanjung Puteri, Johor Bahru and Singapore aimed at enhancing connectivity between the two countries will be jointly developed. The rapid transit system link will be integrated with public transport services in both Johor Bahru and Singapore. For the convenience of commuters, the rapid transit system link will have a single co-located CIQ facility in Singapore with the exact location to be determined later. It is targeted that the proposed rapid transit system link will be operational by 2018. Thereafter Malaysia may consider to relocate the KTMB Station from Woodlands to Johor."

5. Pursuant to the Joint Statement of 24 May 2010, the Prime Minister of Singapore made an offer dated 17 June 2010 which sets out three options. The first two options set out two different ways of swapping the three POA parcels in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah ("the 3+3 parcels") for land in Marina South and Ophir-Rochor, while the third option provides for M-S Pte Ltd to retain the 3+3 parcels for development, without further swapping them. The offer provides that "All proposed developments will be subject to the usual planning approval and development control process applicable under Singapore law. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels.". For the two options involving land swap, the offer provides that:

> "The Singapore Government will vest the relevant Marina South/Ophir-Rocher parcels directly in M-S Pte Ltd once KTMB vacates Tanjong Pagar Railway Station. There is no need for a two-step process of first vesting the 3+3 parcels in M-S Pre Ltd and then having M-S Pte Ltd surrender them in exchange for the Marina South/Ophir-Rochor parcels."

6. Following a meeting on 22 June 2010 between the Prime Minister of Singapore and the Prime Minister of Malaysia, the Prime Minister of Singapore issued a revised offer dated 28 June 2010 which sets out two options—one option involving land swap (Option A) and one option without land swap (Option B). Under Option A, the revised offer provides that:

"M-S Pte Ltd shall pay the following amounts to the Singapore Government:

> (*a*) S$1.832 billion, being the development charge amount payable on the 3+3 parcels under Singapore law (fixed at current valuation) to realise their full value based on their potential permissible uses. in order to use this full value to effect the land swap. This amount shall be paid within 18 months after the vesting of the 4+2 parcels in M-S Pte Ltd; and
>
> (*b*) S$556 million, being an amount to make up the difference in gross value between the 3+3 parcels and the 4+2 parcels so as to effect the land swap on an equivalent value basis. This amount shall be paid upon the vesting of the 4+2 parcels in M-S Pte Ltd."

7. The Prime Minister of Malaysia replied on 17 September 2010 accepting the revised offer in the following terms:

> "I positively accept your offer to swap the 3+3 land parcels for the 4+2 land parcels as per your revised offer in Option A. Secondly, on the payment on the development charge … I sought your concurrence for us to arbitrate on the DC for the original POA parcels in Tanjong Pagar, Kranji and Woodlands. Malaysia is, however, prepared for M-S Pte Ltd to pay the DC for the three additional pieces of lands in Bukit Timah (Lot 76–2 Mk 16, Lot 249 Mk 4 and Lot 32–10 Mk 16) as these pieces of land are not subject to the POA."

The Prime Minister of Singapore replied with his agreement on 19 September 2010 in the following terms:

> "I confirm our agreement with your letter of 17 September 2010. I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands."

On 20 September 2010, the Parties issued a Joint Statement providing, among other things, that:

> "Both countries have different views relating to the development charges payable on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands. Both Leaders have agreed to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration. They have further agreed to accept the arbitration award as final and binding."

8. Copies of the documents referred to above are appended to this Annex.

6. The Annex discloses a most unusual feature of this case. Approximately 20 years elapsed between the conclusion of the POA and its implementation in its amended form. At the end of the day, Malaysia elected for a swap option under which M-S received a total of six parcels of land at Marina South and Ophir-Rochor in substitution for the three parcels of land at Keppel, Kranji and Woodlands that were the subject of the original POA (the "three POA

parcels") plus three additional parcels at Bukit Timah (the "three Bukit Timah parcels"). No DC was payable on the Marina South and Ophir-Rochor parcels. The exchange was on the basis that these parcels should be of equivalent value to the value that the three POA parcels and the three Bukit Timah parcels would have had with planning permission for development. It was Singapore's case that, under the terms of the amended POA, if Malaysia had opted for the exchange, M-S would have had to pay DC on the enhanced value that all six parcels would have enjoyed with the benefit of planning permission. Malaysia agreed that M-S should pay DC in relation to the enhanced value that the three Bukit Timah parcels would have had, but challenged its obligation to pay DC in relation to the enhanced value of the three POA parcels. The Parties have agreed that this challenge falls to be resolved by answering the Submission Question. The Parties are also agreed that in answering that question the Tribunal is entitled to have regard to all relevant facts, whether or not they are included in the Annex. Singapore submits that the negotiations between the Parties leading up to the land swap, 20 years after the POA was initially agreed, are important and possibly critical in producing an affirmative answer to the Submission Question.

C. The Joint Company

7. Pursuant to the POA, as amended, a private company limited by shares, was incorporated under the Singapore Companies Act on 27 June 2011. Sixty percent of the shares of this company are held by a Malaysian Company, Khazanah Nasional Berhad ("Khazanah"), which in turn is wholly owned by Malaysia. Forty percent of the shares are held by a Singapore Company, Temasek Holdings (Private) Limited ("Temasek"), which, in turn is wholly owned by Singapore. M-S has been referred to throughout by the Parties as "M-S Pte Ltd", although it was incorporated under the name M+S Pte Ltd. We shall describe both the proposed company and the company subsequently incorporated as "M-S".

D. Relief Requested

(i) Singapore's Request

8. In its Memorial and Reply, Singapore requested that the Tribunal adjudge and declare that:

> (*a*) M-S Pte Ltd would have been liable to pay DC on the Keppel, Kranji and Woodlands parcels (the amount of which had been determined as S$1.47 billion) if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the land in accordance with the proposed land uses set out in the Annexes of the POA;
>
> (*b*) M-S Pte Ltd shall pay the said amount of S$1.47 billion to the Government of Singapore within ninety days of the date of the Tribunal's

award (in addition to the DC of S$362 million on the 3 Bukit Timah parcels, which had already been paid on 31 December 2012);

(*c*) M-S Pte Ltd shall pay to the Government of Singapore interest on the said amount of S$1.47 billion, calculated from 1 April 2013, at a rate to be determined by the Tribunal; and

(*d*) Each Party is to bear its own costs, as agreed in Article 10 of the Submission Agreement.

(ii) Malaysia's Request

9. In its Counter-Memorial and Rejoinder, Malaysia requested that the Tribunal adjudge and declare that:

(*a*) M-S Pte Ltd would not have been liable to pay DC on the Keppel, Kranji and Woodlands parcels if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes of the POA; and

(*b*) Each Party is to bear its own costs, as stated in Article 10 of the Submission Agreement.

E. Procedural History

10. On 9 January 2012, the Governments of Malaysia and Singapore signed the Submission Agreement to submit the present matter to arbitration. Article 3 of the Submission Agreement provides:

Article 3. Rules and Administrative Assistance

(1) The Parties agree that the arbitration shall be conducted in accordance with this Agreement and to the extent that they are not inconsistent with the provisions of this Agreement, the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States as in effect on the date of this Agreement (the "PCA Optional Rules").

(2) The Parties agree that the International Bureau of the Permanent Court of Arbitration shall act as the registry and shall provide administrative support in accordance with this Agreement and the PCA Optional Rules.

11. Pursuant to Article 5 of the Submission Agreement, the Parties established a timeline for these proceedings:

Article 5. Commencement of arbitration and period of the arbitration proceedings

(1) The arbitration proceedings shall commence on the date on which this Agreement is signed or, if later, the date the Arbitral Tribunal is constituted.

(2) The Parties and the Arbitral Tribunal shall endeavour to complete the arbitration proceedings in all respects, including the making of an award, on or before 31 December 2012, without prejudice to the Arbitral

> Tribunal's jurisdiction, and its ability to extend or abridge time periods for good cause.

12. On 23 April 2012, the Parties notified the Permanent Court of Arbitration (the "PCA") of their Submission Agreement and their respective appointments of The Honourable Murray Gleeson AC, QC (by Singapore) and Dr. Gavan Griffith QC (by Malaysia) to the Tribunal. Paragraph 5 of this letter provides:

> The parties are currently discussing the appointment of a Chairman of the Tribunal. In the first instance, and in accordance with Article 6 of the Submission Agreement, it has been agreed that a shortlist of up to three candidates for Chairman shall be submitted to the co-arbitrators for a final decision. The parties have agreed that the co-arbitrators shall have a period of 28 days from the receipt of this shortlist to decide upon a preferred candidate for Chairman, failing which the Secretary-General of the Permanent Court of Arbitration shall be invited to appoint a Chairman from the said shortlist. The dates set out in Article 6 of the Submission Agreement have been amended by consent to reflect this agreement.

13. On 25 April 2012, the Parties notified the PCA that the co-arbitrators had reached an impasse concerning the selection of the President of the Tribunal. Pursuant to Article 6(3) of the Submission Agreement, the Parties requested the Secretary-General of the PCA to appoint a President from between the Parties' respective candidates, on the basis of written observations to be submitted by each Party.

14. Following consultation with the Parties, the PCA on 10 May 2012 requested the Parties to submit written observations as to their respective candidates by 17 May 2012.

15. On 17 May 2012, the Parties notified the PCA of their agreement to postpone the appointment of the President of the Tribunal pending ongoing negotiations.

16. On 8 June 2012, Malaysia notified the PCA that, with the agreement of Singapore, it intended to appoint a replacement arbitrator.

17. On 6 July 2012, Malaysia notified the PCA that it had appointed Judge Bruno Simma as a replacement arbitrator.

18. On 13 June 2013, Lord Nicholas Phillips of Worth Matravers, KG, PC accepted his appointment as President of the Tribunal, following his selection by the co-arbitrators. Pursuant to Article 5 of the Submission Agreement, the arbitration proceedings therefore commenced on 13 June 2013.

19. On 3 July 2013, the Parties notified the PCA of the constitution of the Tribunal and the commencement of the arbitration proceedings.

20. Pursuant to Article 7(3)(i) of the Submission Agreement, Singapore submitted its Memorial on 12 August 2013.

21. On 4 September 2013, the Tribunal circulated draft Terms of Appointment for the Tribunal and a draft Procedural Order N° 1 to supplement in certain respects the PCA Optional Rules, and invited the Parties' comments.

22. On 8 October 2013, following consultations with the Parties, the Tribunal confirmed that the dates of the hearing would be 14 through 18 July 2014.

23. On 11 October 2013, Malaysia submitted its Counter-Memorial pursuant to Article 7(3)(ii) of the Submission Agreement.

24. On 16 October 2013, the Parties provided the Tribunal with their joint comments on the draft Terms of Appointment and draft Procedural Order N° 1.

25. On 11 November 2013, Singapore submitted its Reply pursuant to Article 7(3)(iii) of the Submission Agreement.

26. On 12 November 2013, the Tribunal issued Procedural Order N° 1, which recorded the Parties' agreement that the award of the Tribunal be made public and addressed, *inter alia*, the timetable for the Parties' remaining written pleadings and submissions concerning the production of documents. On the same day, the Tribunal circulated the final Terms of Appointment for signature. The Terms of Appointment were thereafter executed on 8 January 2014.

27. On 11 December 2013, Malaysia submitted its Rejoinder pursuant to Article 7(3)(iv) of the Submission Agreement

28. On 9 January 2014, the Parties jointly requested the postponement by 28 days of the timeline for the production of documents set out in paragraph 1.3 of Procedural Order N° 1.

29. On 21 January 2014, the Tribunal issued Procedural Order N° 2, postponing the procedure for the production of documents as requested by the Parties on 9 January 2014.

30. On 6 February 2014, the Parties jointly requested the Tribunal to "dispense with the document production procedure set out in Article 7(7) of the Submission Agreement and referred to in section 1.3 of the Tribunal's Procedural Order No. 1 and section 1 of the Tribunal's Procedural Order No. 2". The Parties proposed that the deadline for the exchange of further evidence under Article 7(8) of the Submission Agreement be fixed for 10 March 2014. On 7 February 2014, the Tribunal granted this joint request and accepted the Parties' proposal.

31. On 20 February 2014, the Parties jointly requested the Tribunal to postpone the July 2014 hearing by one day. On 21 February 2014, the Tribunal granted this joint request, reserving the dates of 15 through 19 July 2014 for the hearing.

32. On 10 March 2014, the Parties filed their evidentiary submissions pursuant to Article 7(8) of the Submission Agreement. Singapore filed its submissions electronically, while Malaysia remitted its submissions by courier, which the Tribunal received on 11 March 2014. Pursuant to paragraph 2.2.6 of Procedural Order N° 1, the PCA on 12 March 2014 administered the exchange of evidence between the Parties by courier, which the Parties received on 14 March 2014.

33. On 25 March 2014, the Parties informed the Tribunal of their shared understanding of 14 April 2014 as the date for the Parties to exchange reply

evidence, pursuant to Article 7(9) of the Submission Agreement. On 14 April 2014, the Parties exchanged this evidence electronically.

34. On 13 May 2014, the Tribunal provided the Parties with an agenda of procedural issues in relation to the organization of the hearing and invited them to confer and seek agreement to the extent possible.

35. On 14 May 2014, the Parties jointly requested that the Tribunal consider the Annex to the Submission Agreement to "take the place of and be treated as the agreed statement of facts contemplated under Article 7(10) of the Submission Agreement". On 22 May 2014, the Tribunal granted this joint request.

36. On 31 May 2014, the Parties informed the Tribunal of their agreement on a number of organizational matters relating to the hearing and "request[ed] the Tribunal to promulgate a further Procedural Order, in consultation with the Parties, setting out the agreed procedural matters."

37. On 1 June 2014, the Tribunal provided the Parties with a draft Procedural Order N° 3 in respect of the hearing and invited comments.

38. On 5 July 2014, the Parties provided their joint comments on draft Procedural Order N° 3. On 6 July 2014, the Tribunal informed the Parties that it approved certain agreed changes and that the order would soon be formally issued.

39. On 10 July 2014, the Tribunal issued Procedural Order N° 3, reflecting the Parties' agreed agenda of procedural items in respect of the hearing.

40. From 15 through 18 July 2014, the Tribunal held a hearing in London, United Kingdom for the examination of witnesses and the presentation of oral argument by the Parties. During the course of the hearing, the following witnesses were presented by the Parties and examined:

(i) Mr. George Yeo; and

(ii) Tan Sri Nor Mohamed Yakcop.

F. Principles of Interpretation

41. It is common ground that we are concerned with the interpretation of an international treaty between States, the POA as amended, and that this task is governed by rules of international law. However the POA made provision for the establishment of a joint company that would be subject to Singapore municipal law. Article 2 of the Submission Agreement requires us to apply municipal law if and to the extent that we find it to be applicable. It is also common ground that if there is a conflict between the obligations of the Parties under the POA and the requirements of municipal law, the former prevails.

42. Article 38(1) of the Statute of the International Court of Justice, which Article 2 of the Submission Agreement requires us to observe, enumerates the sources of international law to be applied in this case. These include:

(*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(*b*) international custom, as evidence of a general practice accepted as law;

[…]

As to (*a*), the 1969 Vienna Convention on the Law of Treaties[4] (the "Vienna Convention" is not directly applicable as Singapore is not a party to it, but it is common ground that Articles 31 and 32 of that Convention state rules of customary international law[5]. These are applicable in the present case. Articles 31 and 32 provide as follows:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

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[4] Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332.

[5] Malaysia's Counter-Memorial, para. 167; Transcript, p. 212.

43. In applying these principles it is important not to lose sight of the object of the exercise. This is to identify the common intention of the Parties at the time that the treaty was concluded as to its meaning and effect. We are in this case concerned with a treaty that dealt in part with a commercial activity—the development of land—by a private company, and with the implications of the treaty on tax liability under the municipal law of Singapore. In the course of argument Lord Goldsmith observed that there was no particular difference between the principles governing the interpretation of a treaty and what would be the principles for commercial interpretation, with the possibility that treaty interpretation would actually be more generous about the extraneous materials that can be brought into account. In the context of this case we are inclined to agree, subject to the additional comment that the principle of good faith is an important aspect of the interpretation of a treaty, as recognised by Article 31 of the Vienna Convention.

G. A Summary of the Issues

44. Singapore submits that the meaning and effect of the POA are clear. The Parties agreed to the creation of a jointly owned Singapore company, M-S, to develop three POA parcels. That company would be subject to the normal incidents of Singapore municipal law when carrying out the developments. These included the need to obtain planning permission. As a precondition to obtaining planning permission, Singapore's municipal law required M-S to pay DC. Nothing in the POA absolved M-S from this obligation. Were there any doubt, this would be resolved in favour of Singapore by the negotiations that preceded the conclusion of the POA and the subsequent conduct of the Parties.

45. As an alternative to this submission, Singapore submits that, in and after 2008, during the negotiations that led to the variation of the POA, Malaysia agreed with, or appeared to agree with, Singapore's assertion that DC would be payable and the variation was agreed on this basis. In these circumstances Malaysia is "estopped or otherwise precluded" from asserting that DC would not be payable[6].

46. Malaysia submits that on true interpretation of the POA no DC would have been payable by MS. The POA specified in detail the nature of the development that M-S was to undertake once the three parcels of land had been transferred. Singapore agreed that M-S would be entitled to use the land for the purpose of the specified development. Although it would be necessary for M-S to obtain planning permission to carry out the proposed development of the three POA parcels, it was not the grant of planning permission that enhanced the value of the parcels. That enhancement was produced by the obligation that Singapore undertook under the POA to permit the three parcels to be used for the purposes of the developments specified in the POA. Malaysia further sub-

[6] Singapore's Reply, paras. 172–174.

mits that, had M-S proceeded to develop the three parcels in accordance with the POA, the company would not have been liable to pay DC under Singapore municipal law. As to the events that led up to the variation of the POA, Malaysia submits that it never agreed that DC would be payable, nor acted in a way that now precludes it from challenging the obligation to pay DC.

H. The Structure of this Award

47. We propose first to deal with the nature of DC under the municipal law of Singapore. Then we shall set out the relevant facts, supplementing, where appropriate, those set out in the Annex to the Submission Agreement. Then we shall give our interpretation of the POA as at the time of its conclusion in 1990, having regard, insofar as relevant, to events both before and after that time. Finally we shall consider whether the conduct of Malaysia in and after 2008 has estopped or otherwise precluded Malaysia from denying that M-S would have been liable to pay DC on the three POA parcels.

I. Development Charge

(i) The general principles

48. The Tribunal has been provided with a substantial body of documentation dealing with DC in the form of both the relevant Singapore laws and regulations and commentaries on these. These date back to 1964 when DC was first introduced. This summary is based on that material. Provisions for the assessment of DC have varied over the years and can be quite complex, but the principle is simple. Land is scarce in Singapore and the manner in which it may be used has been governed, since before 1964, by a series of Master Plans which prescribe the use to be made of different areas and, *inter alia*, the average residential density. Any land development requires planning permission, whether or not it involves a departure from the relevant Master Plan. This is because planning permission addresses a number of different matters, including building regulations. Where a proposed development involves a departure from the relevant Master Plan, permission for the development may nonetheless be granted. In that event the grant of permission to depart from the Master Plan is likely to result in a rise in the market value of the land. DC is designed to ensure that the State shares in this "wind-fall" appreciation in value. It is a tax on the appreciation in value, the amount of which has varied from time to time between 50% and 70%.

49. DC was introduced by the Planning (Amendment) Act 1964. The following sections of the 1990 version of the Planning Act[7] demonstrate the manner in which the system for the recovery of DC operated:

[7] Singapore Planning Act (Rev. Ed. 1990) (Exhibit M-37/Tab F-10).

10. (1) No person shall, without the written permission of the competent authority, develop any land.

(2) Notwithstanding the provisions of any other written law, the permission of the competent authority under this section is a condition precedent to the consideration by a licensing authority of any application for the issue of a licence for any purpose involving development of land.

[…]

32. (1) There shall be paid to the competent authority a tax (referred to in this Act as a development charge) for written permission, including amendments to the written permission, granted under section 10 (1) which permits development of land in an area—

(*a*) not in accordance with the purposes for which the area has been zoned in the Master Plan;

(*b*) in excess of the plot ratio specified in the Master Plan in relation to that area;

(*c*) in excess of the equivalent plot ratio of that area; or

(*d*) of such a nature involving any change in the use of the land or any building as may be prescribed, except that a development charge for amendments to a written permission shall not be payable with respect to any floor area for which the development charge has already been paid.

(2) The development charge may, in the discretion of the competent authority, be levied on—

(*a*) the owner of the land with respect to which written permission is granted; or

(*b*) the person making the application for the grant of written permission.

(3) Notwithstanding section 10 (11) the competent authority shall not grant written permission until the development charge, if any, has been determined, under section 34 (2), and has been paid or secured to his satisfaction.

[…]

33. (1) Subject to this section, any development charge payable under section 32 (1) for any written permission to develop any land shall be determined in accordance with a prescribed rate and method of calculation.

(2) Where any person is dissatisfied with the amount of any development charge determined in accordance with subsection (1), the person may, within 14 days of the service of any order under section 34 (2) in respect of the development charge, in writing request the competent authority to determine the development charge in accordance with subsection (3).

(3) Where any person makes a request under subsection (2) in relation to any development charge in respect of any land, the development charge payable for any written permission to develop the land shall be a

prescribed percentage of any appreciation in the value of the land arising from the grant of the written permission to develop the land.

(4) The Minister may limit the application of subsections (2) and (3) to cases where the amount of development charge determined in accordance with subsection (1) exceeds a prescribed sum.

(5) For the purposes of this section, the Chief Valuer or such other person as the Minister may appoint shall determine the amount of appreciation, if any, in the value of the land.

34. (1) The competent authority shall, by an order, determine whether a development charge is payable in respect of any development and, if payable, the amount thereof.

(2) The competent authority shall serve a copy of the order on the person liable for the payment of the development charge.

[…]

35. If any development is commenced or carried out without payment of the development charge, the development charge shall be, subject to the rights of the Government, a first charge on the land of any person from whom any money is due under the provisions of this Act.

[…]

40. The Minister may, from time to time by notification in the Gazette, exempt any land or lands either generally or for a specified period from the operation of all or any of the provisions of this Act.

50. While the method of calculating DC has changed from time to time, the overall nature of the scheme has not. Under the revised Planning Act 1998[8], recovery of DC was fully integrated into the application for what had become described as "planning permission". Section 12(1) provided that no person should carry out any development of any land without planning permission. Section 35(1) imposed, subject to the provisions of the Act, an obligation to pay DC in respect of every development of land authorised by any planning permission. Section 37 provided:

> 37. (1) Subject to subsection (4), the development charge (whether under an interim or final order) may, in the discretion of the competent authority, be levied on—
>
> (*a*) the owner of the land with respect to which the planning permission or conservation permission is granted; or
>
> (*b*) the person who applied for the relevant planning permission or conservation permission.
>
> (2) That liability of the person on whom the development charge is levied shall continue notwithstanding any change in ownership of the land.
>
> (3) Notwithstanding section 13(2), the competent authority shall not grant any planning permission or conservation permission until the

[8] Singapore Planning Act 1998 (including all amendments up to 2010) (Exhibit S-35/Tab F-12).

> estimated amount of development charge payable under an interim order under section 38(2) is either paid or secured to the satisfaction of the competent authority.
>
> (4) Any outstanding amount of development charge shall be secured as a first charge against the land to which the relevant permission relates, and shall, subject to any other rights of the Government, prevail over all other estates and interests whenever created notwithstanding the provisions of any other written law relating to the registration of any interest or encumbrance over land.

51. From 1980 to 1985, DC was charged at 70% of the increase in value of the land consequent upon the grant of permission to develop. In 1985 this was reduced to 50%. In 2007 it was increased again to 70%.

(ii) Sales of land by the Government

52. The legislation set out above applies where a landowner obtains planning permission for the development of land that he owns. Where, however, the landowner has obtained the land under a sale by the Government that specifies that the land is sold for the development in question, DC is not payable. This arbitration concerns liability to pay DC to the Government after a transfer of title to land by the Government under a transaction that is accepted by both Parties to have been unique in character. A critical issue in this case is whether the principles applicable in the case of a Government sale of land apply equally to the POA. In this part of our award we consider the rule that applied in 1990 to sales of land by the Government, as to which there is some dispute between the Parties, and, more importantly, the principles underlying the rule that applies to Government land sales.

53. In 1996 the Minister for National Development introduced the Planning (Development Charge—Exemption) Rules[9]. These included the following provision in relation to land sold by the Government:

> *Exemption in respect of land sold by Government or statutory board.*
>
> 4. (1) In respect of written permission or any amendment to such written permission granted under section 10 of the Act, whether before or after 15th July 1996, a person shall be exempted from liability under section 32 of the Act to pay any development charge for any development of land sold—
>
> (*a*) Whether before or after that date by the Government or by a statutory body on behalf of the Government; or
>
> (*b*) before 1st January 1983, by the Urban Redevelopment Authority whether on its own behalf or as agent for the Housing and Development Board,

[9] Singapore Planning (Development Charges—Exemption) Rules 1996 (Exhibit M-39/Tab F-16).

> to such extent and in so far as the development is in accordance with the terms and conditions of the sale.

We shall refer to the Rule as "Rule 4".

54. It was common ground that Rule 4 gave formal effect to a long standing practice that had been operative in 1990. Mr. Suppiah Dhanabalan, who was Singapore's Minister for National Development from 1987 to 1992, described this practice as follows at paragraph 10 of his witness statement:

> It is true that at the time of the POA there was a practice under which no DC would be payable where the State sells land by tender to a developer under the Government Land Sales ("GLS") programme. This was a programme under which the Government cleared land, and then sold it by public tender on terms which exempted DC. As a result, developers would submit bids reflecting the full development potential of the land. The Government would therefore receive the full enhancement value in selling the land in this way, including in effect the DC which would otherwise be payable.

55. This policy of securing for itself the full value of the development potential of its own land was reflected in the Government's practice when dealing with applications by lessees of State land for the lifting of restrictive covenants in their leases. The Government would only agree to this if the lessee agreed to pay a premium amounting to 100% of the enhancement of the value of the land attributable to the lifting of the covenants ("Differential Premium")[10].

56. Mr. Dhanabalan stated that the exemption from liability to pay DC in respect of Government land sales did not apply to the POA because the land in question was MRA land rather than Singapore Government land, the transaction was not a sale by tender and it was not carried out under the GLS programme. Lord Goldsmith submitted that there was little evidence that rebutted these assertions by Mr. Dhanabalan. Professor Crawford did not agree. Nor do we. We accept that the exemption had only been applied in the case of sales of land. We accept that those sales were usually sales under the GLS programme and that they were sales by tender. We do not accept that the exemption from DC was only applicable if the sales were GLS sales or sales by tender. At the end of the day, we do not believe that it matters whether or not Mr. Dhanabalan is correct about these issues, save that his evidence tends to obfuscate the principle behind the exemption. However we shall explain why we have not accepted this part of his evidence.

(i) There is no principled justification for restricting the exemption to GLS sales or sales by tender.

(ii) Rule 4, which had retroactive effect, was subject to no such limitations.

(iii) On 16 July 1990 the *Business Times* published a letter from

[10] *See* Witness Statement by Mr. Suppiah Dhanabalan at para. 7.

Mr. Chang of the State Land Office[11], explaining Differential Premium. This stated:

> State land is always alienated at a value assessed by the Chief Valuer based on the intended use—for example recreational, educational, industrial or commercial. The applicant pays the "appropriate price" for the land on the basis of its intended use.
>
> The inference is that there was no obligation on the purchaser to pay DC in such circumstances.

57. We have the following observations to make about Rule 4:

(i) Rule 4 did not purport to bring about a change in the law but simply to codify the existing legal position.

(ii) Rule 4 recognised that the Government could, by the terms on which it concluded a contract for the sale of land, exempt the land from liability in respect of DC.

(iii) Rule 4 recognised that stipulations in the contract of a Government sale as to the manner in which the land should be developed including, where appropriate, maximum density or plot ratio, resulted in exemption from the liability to pay DC. No DC had to be paid on an application for planning permission for development that had been expressly specified in the sale contract.

(iv) The commercial principle that explains why DC is not payable in such circumstances is obvious. DC is designed to make the owner of land share with the State any windfall profit that flows from the grant by the State of permission to develop the land. If, however, the State sells the land for the purpose of a specified development, it is in a position to exact a price that reflects the full development value of the land having regard to the specified use. Where it does so there is no need, or indeed room, for the imposition of DC. Were the land to be sold on the basis that DC would have to be paid in order to carry out the development stipulated in the sale contract, the sale price would have to be reduced to reflect that liability. Such a two-stage process would involve unnecessary bureaucracy, complexity and expense for both parties.

(v) Rule 4 is not an exception to the principles that underlie DC. It is the result of the application of those principles. DC is imposed where the grant of planning permission to develop land results in the increase in the value of land. Where the Government sells land for the purpose of a specified development it thereby approves the development. The planning decision is taken by the Government when it decides to sell the land for the specified purpose. Thereafter planning permission for the development will follow automatically. It is thus the sale for the specified purpose that gives the land its enhanced value, not the

[11] "Land office explains differential premium", *The Business Times*, Singapore, 16 July 1990 (Exhibit M48/Tab C-15).

subsequent grant of planning permission. That is why the sale price reflects the development value of the land.

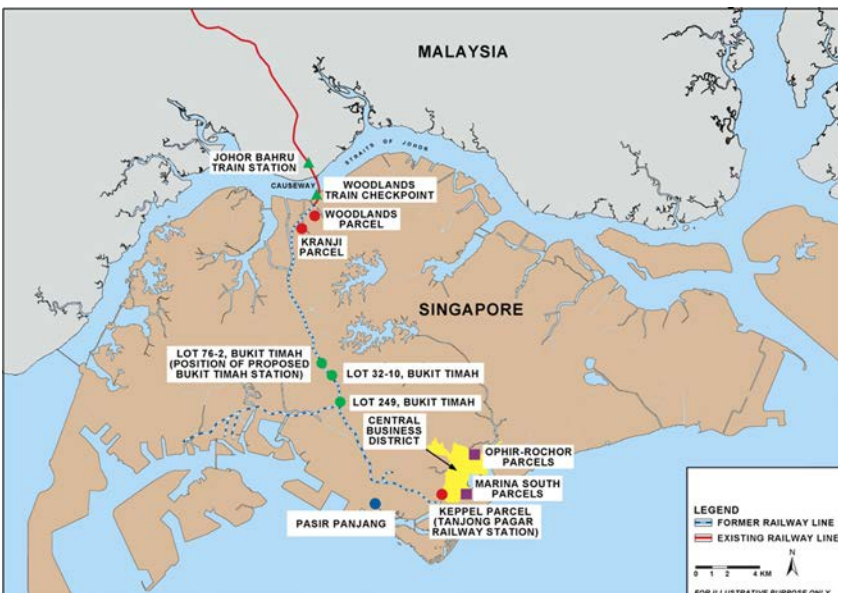
(vi) Applying these principles, no DC should be payable where the State transfers land for the purpose of a specified development in exchange for consideration that reflects that specified development. A critical issue in this case is whether that was the position under the POA. We consider that issue under the heading "The Nature of the Transaction" below.

J. Background to the POA

58. This section of the award is based in large part on those statements in the Memorial and the Counter-Memorial which have not been challenged.

59. Singapore and Malaysia are neighbouring sovereign States, located in South East Asia. The juxtaposition of the two is depicted in the following sketch map taken from Singapore's Memorial:

60. Singapore is an island that lies to the south of Malaysia. The two are linked by a causeway which carries road and rail traffic between the Malaysian State of Johor and Singapore. From 1913 to 1990 Singapore, or its predecessors in title (to whom for simplicity we shall refer simply as "Singapore") provided to Malaysia, or Malaysia's predecessors in title (to whom for simplicity we shall refer simply as "Malaysia"), lands to enable the operation of a railway from Woodlands, an area in the north of Singapore, to the terminus which, by 1932, had been established in an area known as Keppel, or Tanjong Pagar, in the south of Singapore. This was the final section of a railway that ran throughout the length of the Malayan peninsula. The plan that follows, taken from Singapore's Memorial, shows the railway, crossing into Singapore from Johor Bahru and running southwards to the terminus at Keppel. A spur of the railway runs from Bukit Timah to Jurong (the "Jurong Spur"). The various named parcels of land feature prominently in the story.



61. Malaysia had a bewildering and changing variety of titles to the land on which were situated the tracks and facilities of the railway that it operated across Singapore. We shall summarise these for we do not believe that anything turns on the detail.

62. In 1913 Singapore agreed to sell the Singapore railway to Malaysia for a total of Straits dollars 4,136,000 on terms that were subsequently set out in the Singapore Railway Transfer Ordinance ("SRTO")[12]. This made provision for Singapore to transfer to Malaysia without charge any additional lands that might be required for the operation of the railway. The SRTO further made

[12] Singapore Railway Transfer Ordinance 1918 (Exhibit S-2/Tab C-1).

provision for railway land that was no longer required for railway purposes to be recovered by Singapore in exchange for compensation consisting of the payment (if any) made by Malaysia for the land and the value of any buildings erected on the land.

63. By 1935 titles to the railway lands had become confused. In an attempt to simplify the position, all railway lands were returned to Singapore. The lands that were still required by Malaysia for railway purposes were then re-transferred to Malaysia, for the purposes of the Malayan Railway Administration ("MRA"), on 999-year leases. Some of the lands not so required were retained by Singapore. Parcels of land that Singapore did not need were returned to Malaysia with freehold titles.

64. By 1980 about 70% of the land was held on 999-year leases from Singapore. A number of parcels were held on 99-year leases from Singapore. The remainder were parcels of freehold land.

65. The 999-year leases were on identical terms. The lands could only be used for the purpose of running the railway. Any lands no longer required for this purpose could be recovered by Singapore on payment of compensation on the bases specified in the leases[13]. Thus if Malaysia had paid for the land, Singapore would pay by way of compensation the value of the land, and of the buildings constructed on the land, as at the date of resumption[14]. If Malaysia had not paid for the land, then compensation would be limited to the value of the buildings erected on the land[15]. So far as the balance of the lands is concerned, these were not subject to title restrictions or to an obligation to return the lands to Singapore if not required for railway use.

66. Correspondence internal to Singapore records that in 1984 an informal approach was made to Singapore by Malaysia[16] under which Malaysia stated that it was considering moving the terminus of its railway from Tanjong Pagar to Woodlands and selling or developing the land thus vacated at Tanjong Pagar. Singapore's equally informal response[17] to this was that Singapore would prefer Malaysia to continue to use the land for railway purposes, but that if Malaysia did not wish to do so, Singapore would take the land back in accordance with the terms of the leases of the various parcels.

67. On 21 August 1989 the MRA wrote to the Singapore Government stating its intention to develop for commercial purposes, in partnership with

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[13] Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 1(2) (Exhibit S-3/Tab C2).

[14] Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 2(1)(*a*) (Exhibit S-3/Tab C2).

[15] Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 2(1)(*b*) (Exhibit S-3/Tab C2).

[16] *See* Letter dated 14 May 1984 from Singapore High Commissioner to Malaysia Maurice Baker to the Singapore 2nd Permanent Secretary for Foreign Affairs Peter Chan (Exhibit S-6/TabC-7).

[17] *See* Letter dated 29 June 1984 from the 2nd Permanent Secretary for Foreign Affairs Peter Chan to Singapore High Commissioner to Malaysia Maurice Baker (Exhibit S-7/Tab C-8).

other companies, four specified parcels of railway land. The MRA suggested that this would enhance the physical environment and deal with the problem of squatters[18]. Singapore replied on 23 January 1990 that it was not its current policy to allow any development on disused MRA land[19].

68. Within the year, however, Singapore had cause to reconsider its stance. Those entering Singapore from Malaysia by rail did not carry out customs, immigration and quarantine ("CIQ") formalities until the train reached the terminus at Tanjong Pagar. Some passengers managed to leave the train illegally, or to throw parcels of drugs from the train, while in transit from Woodlands to Tanjong Pagar. It was appreciated that these problems would be avoided if passengers were required to perform CIQ formalities on entry to Singapore at Woodlands. This would be facilitated if Malaysia moved the terminus of the railway from Tanjong Pagar to Woodlands, as it had suggested in 1984, or even to Johor.

K. The Negotiation of the POA

69. On 27 June 1990 Mr. Lee Kuan Yew, Singapore's Prime Minister, entertained to dinner Malaysia's Finance Minister, Tun Daim Zainuddin ("Minister Daim"). The following day Prime Minister Lee Kuan Yew made a note of this meeting[20], which covered a number of topics discussed. These included a suggestion made by Prime Minister Lee Kuan Yew under which Singapore would "rip up" the railway between Tanjong Pagar and Woodlands and Malaysia would be permitted to develop the station at Tanjong Pagar "as a shopping complex or an office block *with special low development charges*".[21] The Parties are not agreed as to the implications of this proposal and we deal with that question below.

70. On 18 August 1990 a meeting took place at Pulau Langkawi, an island off the Malaysian coast, between Prime Minister Lee Kuan Yew and the Malaysian Prime Minister, Dr. Mahathir, to discuss the following written proposals, headed "Woodlands Checkpoint" (the "Woodlands Checkpoint proposal") that were sent to Malaysia by Singapore in advance of the meeting[22]:

(i) Singapore would create a new Checkpoint Complex at Woodlands where CIQ formalities would take place for those entering the country from Malaysia. This would be operational in 4 to 5 years.

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[18] Letter dated 21 August 1989 from the Malayan Railway Administration to the Singapore Ministry of National Development (Exhibit S-9/Tab C-11).

[19] Letter dated 23 January 1990 from the Singapore Ministry of National Development to the Malayan Railway Administration (Exhibit S-10/Tab C-12).

[20] Note dated 28 June 1990 from Singapore Prime Minister Lee Kuan Yew (with redactions) (Exhibit S12/Tab C-14).

[21] Emphasis added.

[22] Document titled '*Woodlands Checkpoint*' provided to Malaysia in August 1990 (Exhibit S-13/Tab C17).

(ii) There would be a new MRT line linking the Woodlands MRT station with the Checkpoint Complex.
(iii) The MRA railway would have a new terminus, either at Johor Bahru, the capital of Johor, or at the Woodlands Checkpoint.
(iv) The railway lands in Singapore that were no longer being used for railway purposes would be returned to Singapore.
(v) Compensation for the land returned ("resumption cost") would be paid to Malaysia in accordance with the terms of the SRTO or the leases, whichever were applicable.
(vi) Three large parcels of the land returned to Singapore, being suitable for development, would become the subject of a joint commercial venture between Singapore and Malaysia. These were at Keppel (Tanjong Pagar), Kranji and Woodlands[23] (i.e. the three POA parcels). These would be "realianated" at resumption cost to a joint venture company owned 50:50 by Singapore and Malaysia, for the purpose of development.

71. Three Annexes, one for each parcel, showed the existing use of the parcel, the current market value at present zoning and the proposed uses of the parcel upon realienation. As to the value of each parcel for the proposed use each Annex commented that this could be determined by independent valuation. The Annexes were illustrated by a number of plans, prepared by the Singapore Urban Redevelopment Authority ("URA"). These showed the then current zoning of the parcels and, by way of an overlay, the proposed use and intensity upon realienation. The overlay for the Keppel parcel had hatched areas of open land, in respect of which a note stated: "The land area can be used for density calculations in the residential developments but the land is to be vested to state as open space".

72. After the meeting on 18 August 1990 between Prime Minister Lee Kuan Yew and Prime Minister Mahathir, the latter responded to Singapore's proposals in a letter sent by Minister Daim dated 28 August 1990[24]. His response indicated that the Parties had agreed that the new MRA terminus would be, not at Woodlands, but at Bukit Timah, somewhat farther to the South[25]. He went on to contend that Malaysia should have a larger share in the equity of the joint company as Malaysia would be relinquishing rights to land held on 999-year leases in exchange for new leases which would probably only be for 99 years. He further suggested that some of the portions of the railway track might also be suitable for development.

73. Prime Minister Lee Kuan Yew responded on 22 September 1990 asking what share in the equity Prime Minister Mahathir was seeking and stating that, other than the three parcels that had been identified, there were no railway lands that were suitable for independent development.

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[23] See the plan that follows paragraph 60 above for the siting of the three parcels.

[24] Letter dated 28 August 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (Exhibit S-14/Tab C-20).

[25] See the plan that follows paragraph 60 above.

74. There was then a dormant period during the Malaysian general elections. Then on 23 November, Prime Minister Lee Kuan Yew discussed the joint venture agreement with Minister Daim and on the following day he sent to Minister Daim the agreed terms, as he understood them, in a letter[26], stating that he had prepared them himself. Prime Minister Lee Kuan Yew's draft provided as follows:

> **Points of Agreement on Malayan Railway Land in Singapore Between Government of Malaysia and Government of Singapore**
>
> (1) The station at Keppel will be vacated and moved from Keppel, in the first instance to Lot 76–2 which is next to the Bukit Timah Fire station along Upper Bukit Timah Road near the junction with Jurong Road. (Please refer to Appendix) This place is shown on a map attached as Plan 1. The Government of Singapore will help in the alienation of such lands as may be reasonably necessary for the development of the station, provided that it is not necessary to acquire land with major permanent structures on it.
>
> (2) The land at Keppel will be vested in a limited company, (M-S Pte Ltd) to be developed as residential and commercial land in accordance with the plans attached as Annex 1. The MRA will remove all railway tracks south of this new station at Lot 76–2.
>
> (3) Compensation will be paid to Malayan Railways in accordance with the Singapore Railway Transfer Ordinance (Chapter 380) or land titles issued by Singapore's Land Office to MRA, whichever is applicable for each particular lot of land.
>
> (4) Within 5 years, when the MRT reaches Woodlands New Town, the MRA may remove its station from Lot 76–2 to a site in Woodlands adjacent or close to the MRT station. Then the MRA tracks south of the new Woodlands MRA station will be removed by the MRA. Then the two pieces of land, one in Kranji and in Woodlands, attached as Annex 2 and 3 respectively will be vested in the limited company M-S Pte Ltd and developed in accordance with plans given.
>
> (5) 60% of shares of the limited company, M-S Pte Ltd, will be owned by a company to be designated by the Prime Minister of Malaysia and 40% of shares by a company to be designated by the Prime Minister of Singapore. (Payment for the vesting of the three pieces of land) and development costs of these properties will be similarly shared in the ratio 60:40.
>
> (6) In exchange for the MRA land at Keppel, a plot of land of equivalent value in Marina south will be offered to M-S Pte Ltd so that a prestigous building can be developed on this Marina site. This is if M-S Pte Ltd intends to develop and retain a prestigous building as a long term investment. Examples of the kind of prestigous sites of equivalent value to MRA Keppel land are attached in Plan 2 and Plan 3.

[26] Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (Exhibit S-16/Tab C-22).

Signed for the
Government of Malaysia
by Dato' Paduka Daim Zainuddin
on behalf of Dr. Mahathir Mohamed,
Prime Minister of Malaysia

Signed for the
Government of Singapore
by Lee Kuan Yew
Prime Minister, Singapore

Appendix

Proposed MRA Station at Upper Bukit Timah Road at Lot 76–2

The station to be built at Upper Bukit Timah Road at Lot 76–2 should be economically built until, in MRA's judgement, Upper Bukit Timah Road is the best long term location for the station. In Singapore's judgement the better long term location of the station for most economic benefits is either in Woodlands or in Johore Bahru. Hence, the proposed MRA station in Upper Bukit Timah Road should be economically built.

2. MRA may conclude that it is better to move the station in the first instance to Woodlands. When the MRT extends from Woodlands to Johore Bahru, the MRA station can obtain economic benefits by moving to Johore Bahru.

It is common ground that the "payment for the vesting of the three pieces of land" would have been at the resumption cost of those pieces. The Annexes referred to were those that had accompanied the Woodlands Checkpoint proposal—see paragraph 70 above. In addition there were two plans showing plots at Marina South, where significant development on land reclaimed from the sea was taking place.

75. Minister Daim responded by letter on 26 November 1990[27]. He suggested a number of amendments to the POA, which he discussed with Prime Minister Lee Kuan Yew by telephone on the following day. Of those amendments that were accepted the following are significant:

(i) The provision in point 3 for payment of compensation to the MRA for the railway lands that would revert to Singapore was removed.
(ii) The provision in point 5 for M-S to pay for the 3 parcels of land that would vest in them was removed.
(iii) Provision was made for the Singapore Land Office to issue freehold titles to M-S in respect of the three parcels of land.

76. Minister Daim explained these amendments by stating:

[27] Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (Exhibit S-17/Tab C-23).

there is no need to raise the issue of the compensation to the MRA as we are talking about the exchange of land.

77. These amendments were duly incorporated in the POA dated 27 November 1990, which we have set out as part of the Annex to the Submission to Arbitration at paragraph 5 above. The POA included the three Annexes that set out the current zoning and proposed land use for each of the three parcels, which had remained unchanged since first sent to Malaysia with the Woodlands Checkpoint proposal.

L. Initial Steps Towards the Implementation of the POA

78. Between 1990 and 1993 officials from Singapore and Malaysia held a series of meetings to discuss the implementation of the POA. In the course of these, Malaysia transferred its railway operations from the MRA to Keretapi Tanah Melayu Berhad ("KTMB"), a limited liability company wholly owned by Malaysia, and nominated this company to hold Malaysia's 60% shareholding in M-S. In the course of the meetings a number of issues were identified[28]. Malaysia wanted to incorporate a commercial complex into the terminus that it was to build at Bukit Timah and Singapore would not agree to this. And Malaysia contended that it would retain ownership of the Jurong Spur after the terminus was built at Bukit Timah whereas Singapore contended that, under the terms of the POA, this would revert to Singapore at that point.

79. On 12 November 1992 a meeting took place in Singapore between representatives of the newly formed KTMB and of the Ministry of National Development of Singapore. In preparation for this the Ministry prepared a draft Memorandum of Understanding ("MOU") between KTMB and a company to be incorporated by Singapore to hold Singapore's 40% interest[29]. This set out the manner in which M-S would receive and develop the three initial parcels of land covered by the POA. In relation to each parcel the MOU provided that it would be surrendered by MRA to the Singapore Government in exchange for the Singapore Government alienating it to M-S without cost. It further provided that M-S would pay any cost "including stamp duties and survey fees" incurred in the transfer to M-S. The MOU provided that Singapore should take the lead in the development of the three initial parcels and that "all construction and development costs and professional fees" should be born by M-S.

80. The MOU made the following provision in relation to the option to exchange the Keppel parcel for land at Marina South[30]:

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[28] Singapore's Memorial, paras. 43, 44.

[29] Memorandum of Understanding, enclosed with Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (Exhibit S-25/Tab C-34).

[30] Memorandum of Understanding at s. 5, enclosed with Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (Exhibit S-25/Tab C-34).

> 5. Option to exchange Keppel Parcel for Marina South land
>
> 5.1 M-S Pte Ltd may wish to exchange the Keppel Parcel for a plot of land in Marina South of equivalent land value to be offered by the Government of Singapore so that a prestigious building can be developed and retained as a long term investment.
>
> 5.2 If the land offered to M-S Pte Ltd is, in the opinion of M-S Pte Ltd, not suitable then alternative sites in Marina South of equivalent land value shall be offered to M-S Pte Ltd by the Singapore Government in accordance with the Points of Agreement. Examples of the kind of prestigious sites of equivalent value to Keppel Parcel are attached in Plan 2 and Plan 3 of the Points of Agreement.
>
> 5.3 In view of the rising costs of construction, the potential loss of opportunity in terms of holding cost of vacant land and the loss of lead time required to carry out the development on the Keppel Parcel or the alternative Marina South plot, if any, the parties recognise that it is in their best interest to achieve an early decision on which of the Keppel Parcel or the alternative Marina South plot will be developed.
>
> 5.4 The parties will meet at least once a month, if necessary, in reaching this decision and if parties could not come to any conclusive decision within six months from the signing of this Memorandum, then the original plan to develop the Keppel Parcel shall be adopted by the parties. In that event, the parties shall procure M-S Pte Ltd to adopt and ratify such development plans agreed to.

81. On 21 December 1993 Minister Daim wrote to Senior Minister Lee Kuan Yew[31], passing on a proposal from Prime Minister Mahathir. Malaysia would move its terminus directly to Woodlands if Singapore would agree that the land thus liberated at Bukit Timah be shared on a 60:40 basis between the two countries. This invitation was declined. In responding on 8 January 1994[32], Senior Minister Lee Kuan Yew commented in relation to the terms of the POA:

> … we had agreed on strong incentives for the station to move to Woodlands. At the time of the agreement in November 2009, I knew that KTM would sooner or later have to move to Woodlands. The old Bukit Timah trunk road was being replaced by a new island-wide network of expressways. The Bukit Timah area has no MRT and is becoming a low rise residential area.

[31] Letter dated 21 December 1993 from Daim Zainuddin to Singapore Senior Minister Lee Kuan Yew (Exhibit S-28/Tab C-37).

[32] Letter dated 8 January 1994 from Prime Minister Lee Kuan Yew to Finance Minister Daim, 8 January 1994 (Exhibit M-13/Tab C-38).

M. Impasse

82. There followed a period of inertia. On 10 February 1996 the MRT reached Woodlands[33] so that the option given by the POA for Malaysia to move its terminus to Woodlands began to run. Malaysia then advanced the contention that the POA would only come into effect "if and when KTM should decide to vacate Tanjong Pagar station"—see the assertion made by the Malaysian Minister for Foreign Affairs to his opposite number on 11 June 1997[34]. The latter replied on 2 July 1997[35], asserting that the POA became operative on 27 November 1990, the day that it was signed. He suggested that, ideally, the difference of view should be resolved within the framework of wider cooperation between the two countries. Failing this, the dispute should be referred to arbitration or to the International Court of Justice.

83. Between 1999 and 2002 package negotiations took place between Malaysia and Singapore of which, while the status of the POA was one element, greater significance was attached to the terms on which Malaysia should supply water to Singapore. These negotiations ended in failure. On 10 February 2001 the option under the POA to move the terminus to Woodlands expired. This meant that the only course open to Malaysia under the POA was to move the terminus to Bukit Timah, a location that would be convenient neither for Malaysia nor Singapore.

84. At the end of 2003 Prime Minister Mahathir was replaced as Prime Minister of Malaysia by Tun Abdullah Ahmad Badawi ("Prime Minister Abdullah"). Prime Minister Abdullah set about attempting to repair relations between his country and Singapore, but no progress was made towards implementing the POA until 2008.

N. The POA Revived and Revised as Set Out in the Joint Statement of 24 May 2010

85. On 17 April 2008 the newly appointed Malaysian Foreign Minister, Dr. Rais Yatim ("Minister Rais"), called on Prime Minister Lee Hsien Loong, who had succeeded Prime Minister Lee Kuan Yew as Prime Minister of Singapore. In the course of this meeting he acknowledged that the POA was valid and binding. After the meeting, Singapore's Foreign Minister, Mr. George Yeo ("Minister Yeo"), wrote to Minister Rais[36] offering "without prejudice" to rein-

[33] Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-55/Tab C-74).

[34] Letter dated 11 June 1997 from Malaysian Minister of Foreign Affairs Abdullah Badawi to Singapore Minister for Foreign Affairs S Jayakumar (Exhibit S-33/Tab C-48).

[35] Letter dated 2 July 1997 from Singapore Minister for Foreign Affairs S Jayakumar to Malaysian Minister of Foreign Affairs Abdullah Badawi (Exhibit S-34/Tab C-49).

[36] Letter dated 5 May 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-50/Tab C-66).

state the option in the POA that had lapsed in 2001, namely that KTMB could move the terminus to Woodlands, instead of Bukit Timah, in which case Singapore would make available the parcels of land at Kranji and Woodlands, in addition to the Keppel parcel, for joint development. All three parcels of land were "now much more valuable than before".

86. In 2006 Malaysia had set up a special economic zone in South Johor, initially named Iskandar Development Region but renamed Iskandar Malaysia ("IM"). In 2008 Malaysia sought Singapore's cooperation in encouraging investment in IM. On 8 May 2008 Prime Minister Lee Hsien Loong wrote to Prime Minister Abdullah[37], pledging support for IM, but stating that for cooperation to be credible it was essential that they should clear the implementation of the POA, which was 17 years old and an item that "you and I inherited from our predecessors". He added that the delay in implementing the POA was holding up development projects in Singapore. He proposed that the two Foreign Ministers should work together to bring the matter to a speedy conclusion.

87. On 2 June 2008 Minister Yeo wrote a letter to Minister Rais[38] in which he repeated the "without prejudice" offer to let KTMB move the terminus to Woodlands. He added that the Prime Minister had asked him to be generous in negotiations and instructed him to include some pieces of land at Bukit Timah occupied by KTMB for joint development by M-S if the terminus was relocated to Woodlands. This offer was repeated in a letter from Prime Minister Lee Hsien Loong to Prime Minister Abdullah on 3 October 2008. In this letter he emphasised that the POA had "dealt comprehensively with the issue of the railway lands in Singapore" and stated Singapore's intention, pursuant to the POA, to resume possession of the Jurong Spur by 1 July 2009 and of the remaining railway lands by 1 July 2011.

88. At the request of Minister Rais, Minister Yeo wrote on 20 November 2008[39] attaching an updated valuation of the three initial parcels of land as follows:

Keppel	$2,311m
Kranji	$166m
Woodlands	$269m
Total	$2,764m

These figures were followed by a note (the "valuation footnote") which stated:

> Based on May 2008 valuation. This is the estimated value of the land parcels based on their full development potential. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies before the land parcels can be developed to their full development potential.

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[37] Letter dated 8 May 2008 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Abdullah Badawi (Exhibit S-51/Tab C-67).

[38] Letter dated 2 June 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-52/Tab C-68).

[39] Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-54/Tab C-73).

89. Mr. Yeo was called to give oral evidence on behalf of Singapore. He stated that his letters were written on the advice of lawyers[40]. He had discussed with his lawyers whether the original POA excluded the obligation to pay DC, and they had no doubt that it did not[41]. This was the settled Cabinet position. The matter was raised on one occasion in 2008 or 2009 and Minister Mentor Lee Kuan Yew said "[o]f course it is payable and Tun Daim knows it."[42] Mr. Yeo said that he wrote the valuation footnote himself because he wanted his opposite number to be very clear as to the basis of the valuation[43].

90. On 19 December 2008, following a meeting in Bali, Minister Yeo wrote to Minister Rais[44]. He suggested a relocation of the terminus at Woodlands to the site of the Woodlands Checkpoint, thereby freeing up a larger parcel for development by MS. He repeated the without prejudice offer, emphasising that it was contingent on the KTMB Terminus being moved to Woodlands by 1 July 2011. A valuation was provided of the three additional parcels of land at Bukit Timah that were offered "without prejudice", totalling S$562 million. This included a "valuation footnote" in essentially identical terms to that set out at paragraph 88 above.

91. In 2009 there was an exchange of formal diplomatic "Third Party Notes" ("TPN"). The first[45] sent by Singapore on 5 January 2009 emphasised the urgency of Malaysia returning the Jurong spur, and some other railway lands the subject of the POA, because of Singapore's development plans. Once again the "without-prejudice" offer was repeated. The second TPN[46] sent by Malaysia on 19 March 2009 sought further information about the valuation of the six parcels of land. The third TPN[47] sent by Singapore on 18 May 2009 provided this information but urged Malaysia to carry out its own valuation. A guide to DC published by the URA accompanied the note. This guide dealt with DC in general in terms that were not very easy to understand. It did not state that a special rule applied in relation to sales of land by the Government. The TPN included the following information in relation to land at Marina South:

> As the Government of Malaysia is aware, development works at Marina South are ongoing and land parcels in Marina South are regularly sold and allocated by the Government of Singapore. If and when the Government of Malaysia indicates a firm intention to exchange the railway land at Tanjong Pagar (Keppel) for a plot of land in Marina South, the

[40] Transcript, p. 312.

[41] Transcript, p. 342.

[42] Transcript, p. 343.

[43] Transcript, p. 345.

[44] Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-55/Tab C-74).

[45] Note dated 5 January 2009 from the Singapore Ministry of Foreign Affairs to the High Commission of Malaysia in Singapore (Exhibit M-20/Tab C-76).

[46] Third Person Note dated 19 March 2009 from Malaysia to Singapore (Exhibit S-57/Tab C-77).

[47] Third Person Note dated 18 May 2009 from Singapore to Malaysia (Exhibit S-58/Tab C-78).

> Government of Singapore will propose, from such land stock as are still available in Marina South at that time, a plot of land of equivalent value to the railway land at Tanjong Pagar (Keppel) for exchange.

92. Meanwhile in April 2009 there had been a cabinet reshuffle in Malaysia. Dato' Sri Mohd Najib bin Tun Abdul Razak ("Prime Minister Najib") took over as Malaysia's Prime Minister while Dato' Sri Anifah Aman ("Minister Anifah") took over as Malaysia's Foreign Minister.

93. On 23 June 2009 Minister Yeo met with Minister Anifah in Singapore. Singapore kept a note of the meeting[48]. This records that Minister Anifah said that Malaysia knew and accepted "the legalities of the issue". He was anxious, however that the people of Malaysia should not feel that their government had sold out their interests. He was looking for a "political win-win outcome". Minister Yeo replied that the "without prejudice" offer was still on the table, at which Minister Anifah seemed relieved. Minister Yeo stated that the three additional pieces of land at Bukit Timah were worth S$562 million—more than the Kranji and Woodlands POA parcels, which were worth about S$400 million. Minister Anifah then asked about the possibility of swapping all the POA lands for land at Marina South and Minister Yeo said that this was a good idea. M-S could then be involved in two joint development projects, one at IM and one at Marina South.

94. On 29 June 2009 the URA briefed a Malaysian delegation on various plots of land that might be available for such an exchange. On 20 July 2009 Singapore sent Malaysia a TPN[49] providing information designed to assist Malaysia to decide whether to accept the "without prejudice" offer. There were two Annexes to this. Annex A gave details of the three initial parcels and plans and details of the three Bukit Timah parcels (collectively "the 3+3 parcels"). Annex B gave plans and details of four parcels of land at Marina South and one at Ophir-Rochor that might be available for exchange "at equivalent value". In each Annex the details were qualified by a "valuation footnote" in the same terms as those set out in paragraph 88 above.

95. There was then a further period of inertia, broken by a letter from Minister Yeo dated 22 January 2010[50] suggesting a meeting of the two Foreign Ministers, to be followed by a meeting of the two Prime Ministers. The former meeting took place in Kuala Lumpur on 15 May 2010. What there transpired was summarised by Minister Anifah to Minister Yeo in a letter written five days later[51]. Minister Anifah referred to Singapore's "without prejudice" offer

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[48] Notes of Restricted Meeting between Malaysia Foreign Minister Dato' Anifah Aman and Minister for Foreign Affairs George Yeo on 23 June 2009, 0900 hrs at Wisma Putra, Putrajaya' (Exhibit SR-04/Tab C-79).

[49] Third Person Note dated 20 July 2009 from Singapore to Malaysia (Exhibit S-60/Tab C-82).

[50] Letter dated 22 January 2010 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Anifah Aman (Exhibit S-61/Tab C-84).

[51] Letter dated 20 May 2010 from Malaysian Minister of Foreign Affairs Anifah Aman to Singapore Minister for Foreign Affairs George Yeo (Exhibit S-63/Tab C-86).

as POA+ and countered with a "without prejudice offer" that he described as POA++. This was as follows:

(i) The KTMB station would be relocated from Tanjong Pagar to Woodlands Train Checkpoint by 2011.

(ii) The 3+3 parcels would be vested in M-S for joint development, but could be swapped for the four parcels at Marina South and the parcel in Ophir-Rochor.

(iii) When the MRT link between Johor Bahru and Singapore was completed by 2018 Malaysia could consider moving the terminus from Woodlands to Kempas, Johor.

96. On 21 May 2010 Minister Yeo wrote to Minister Anifah[52] agreeing to POA++. His letter included the following paragraph:

> 3. For the land swap, as mentioned in our offer of 20 July 2009, "M-S Pte Ltd could consider exchanging the six plots (3 POA parcels and 3 Bukit Timah lots) entirely for land in Marina South or exchanging the six plots partly for land in Marina South and partly for land in Ophir-Rochor. As the land swap is to be undertaken on an equivalent value basis, the exact amount of land which would be offered under each option in exchange for the six plots would depend on the relative land valuation at the time when M-S Pte Ltd seeks to effect the exchange." Both my earlier letter of November 2008 to Dato' Seri Rais Yatim and Singapore's TPN to Wisma Putra in July 2009 had stated that "M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels." In May 2009, in response to a specific question by Wisma Putra on development charges, we provided a "guide for the computation of development charges in Singapore" and suggested that "the Government of Malaysia should engage a qualified professional to advise on the actual computation of development charges, if necessary".

97. The two Prime Ministers met at the Singapore–Malaysia Leaders' Retreat in Singapore on 23 and 24 May 2010. In a letter[53] to Minister Tan Sri Nor Mohamed Yakcop ("Minister Nor"), who led the Economic Planning Unit of the Malaysian Prime Minister's office, Mr. Mah Bow Tan, the Singapore Minister for National Development, ("Minister Mah") recorded that Prime Minister Lee Hsieng Loong had briefed him that at the Retreat he had personally explained the DC requirement to Prime Minister Najib. The result of the meeting was set out in a formal written Joint Statement dated 24 May 2010[54] (the "24 May Joint Statement"). Paragraph 3 of this set out an agreement about increased cross-border connectivity. Paragraph 9 dealt with "bilateral coop-

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[52] Letter dated 21 May 2010 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Anifah Aman (Exhibit S-64/Tab C-87).

[53] Letter dated 18 June 2010 from Singapore Minister for National Development Mah Bow Tan to Malaysian Minister in the Prime Minister's Department Nor Mohamed Yakcop (Exhibit S-81/Tab C-106).

[54] Joint Statement on Singapore-Malaysia Leaders' Retreat between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak, 24 May 2010, Singapore (Exhibit S-65/Tab C-88).

eration in the joint iconic project in Iskandar Malaysia". The following paragraphs dealt with issues arising from the POA as follows:

> 4. Both Leaders also discussed issues arising from the Points of Agreement (POA) on Malayan Railway Lands in Singapore and reached an understanding to move the issues forward. In this regard, the POA shall be supplemented by new terms and conditions to maximise the full potentials of the MRA Lands in Singapore. To that effect, both Leaders agreed to undertake the following steps:
>
> - The Keretapi Tanah Melayu Berhad (KTMB) station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (WTCP) by 1 July 2011. Malaysia would co-locate its railway CIQ facilities at WTCP. Singapore would facilitate the relocation to the WTCP and ensure bus service connectivity from the KTMB Station at WTCP to a nearby MRT Station for the convenience of train passengers.
>
> - A company known as M-S Pte Ltd will be established as soon as practicable but not later than 31 December 2010 with Malaysia's 60% held by Khazanah Nasional Berhad and Singapore's 40% held by Temasek Holdings Limited.
>
> - The three parcels of land in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah (Lot 76–2 Mk 16, Lot 249 Mk 4 and Lot 32–10 Mk 16) will be vested in M-S Pte Ltd for joint development, which in turn, could be swapped, on the basis of equivalent value for pieces of land in Marina South and/or Ophir-Rochor. Both sides will conduct their respective valuations and Prime Minister Lee will visit Kuala Lumpur within a month with a proposal for the land swap for Malaysia's consideration.
>
> - The transfer of the said land parcels to M-S Pte Ltd will take effect at the time when KTMB vacates Tanjong Pagar Railway Station (TPRS).
>
> - A rapid transit system link between Tanjung Puteri, Johor Bahru and Singapore aimed at enhancing connectivity between the two countries will be jointly developed. The rapid transit system link will be integrated with public transport services in both Johor Bahru and Singapore. For the convenience of commuters, the rapid transit system link will have a single co-located CIQ facility in Singapore with the exact location to be determined later. It is targeted that the proposed rapid transit system link will be operational by 2018. Thereafter Malaysia may consider to relocate the KTMB Station from Woodlands to Johor.
>
> 5. Both Leaders agreed to task a joint implementation team, to be led by the Secretary General of the Ministry of Foreign Affairs, Malaysia and the Permanent Secretary of the Ministry of Foreign Affairs, Singa-

pore to further discuss the implementation details, which among others, would include as follows:

- establishment and the framework governing the M-S Pte Ltd;
- rapid transit system connectivity between Johor Bahru and Singapore; and
- co-located CIQ in Woodlands Train Checkpoint.

6. The joint implementation team will complete its works by 31 December 2010.

7. The outcome reached by the joint implementation team on the matters discussed should be reflected in a written instrument to be signed by both countries upon approval from their respective Governments.

[…]

11. Prime Minister Lee and Prime Minister Najib Razak expressed satisfaction that the arrangements relating to the POA would facilitate resolution of the issue which has been outstanding for more than 19 years. Both Prime Ministers reaffirmed their commitment towards further strengthening bilateral relations and mutual collaboration in various areas.

O. Events After 24 May 2010

98. It was only after 24 May 2010 that the issue in relation to DC emerged. For this period, and this period alone, Malaysia has disclosed a series of internal notes prepared by Minister Nor.

99. On 17 June 2010 Prime Minister Lee Hsien Loong wrote to Prime Minister Najib stating that, as set out in the 24 May Joint Statement, Singapore and Malaysia had agreed on all aspects of the implementation of the POA with the exception of the land swap[55]. As to this he set out in an Annex three options. The first two involved exchanging the 3+3 parcels for different parcels of land at Marina South and Ophir-Rochor. The third provided for M-S to retain the 3+3 parcels without any exchange. Paragraph 2 of the Annex stated:

> As previously indicated, a development charge is payable to realise the potential permissible uses of the 3+3 parcels

Paragraph 4 of the Annex stated:

> All proposed developments will be subject to the usual planning approval and development control process applicable under Singapore law. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels. The mechanism for vesting of the land parcels and payment of the development charge is set out in Appendix 3.

[55] Letter dated 17 June 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysia Prime Minister Najib Razak (Original Land Swap Offer) (Exhibit S-78/Tab C-102).

Appendix 1(*a*) to the Annex tabled the values of the 3+3 parcels "based on Potential Permissible Use" and the DC payable in respect of each parcel. Appendix 1(*a*) also set out the values of the Marina South and Ophir-Rochor parcels. For these, no DC was mentioned. Appendix 3 provided:

> 1. Under Option 1 and Option 2:
>
> *a*. The Singapore Government will vest the relevant Marina South/Ophir-Rochor parcels directly in M-S Pte Ltd once KTMB vacates Tanjong Pagar Railway Station. There is no need for a two-step process of first vesting the 3+3 parcels in MS Pte Ltd and then having M-S Pte Ltd surrender them in exchange for the Marina South/Ophir-Rochor parcels.
>
> *b*. The development charge amount will be locked down at the present amount of S$1.832 billion. This will provide certainty and finality to both sides as to what the swap deal comprises, and make the deal independent of future changes in development charge or property values. The amount of S$1.832 billion is payable on the vesting of the Marina South/Ophir-Rochor parcels in M-S Pte Ltd.
>
> 2. Under Option 3:
>
> *a*. Singapore will not require upfront payment of the development charge at the time of vesting of the 3+3 parcels, nor will the development charge be locked down at the present amount.
>
> *b*. Instead, M-S Pte Ltd will pay the development charge, based on the prevailing rates at the time of the provisional permission, when the written permission is granted for the development of the land.
>
> […]

100. The letter of 17 June 2010 was delivered personally by Minister Mah to Minister Nor at a meeting between delegations from the two countries in Malaysia on 17 June, in anticipation of a meeting between the two Prime Ministers on 22 June. Those present included Tan Sri Abdul Gani Patail, Malaysia's Attorney General and Tan Sri Dato' Azman Mokhtar, the Managing Director of Khazanah. Singapore's note of this meeting[56] records the following discussion under the heading "Development Charge":

> 9. Gani Patail asked if the development charge was mandatory and if there was any room to vary the charges. He took the line that the land swap was not a land sale but in the context of a "sovereign agreement". In this context, he asked if there were any leeway, if the parcels were seen as a "granting", that discretion could be given to exempt the parcels from certain charges or taxes. Minister explained that development charge was a tax on the enhancement in land value which was the difference between the baseline land use value and the permissible use value. This tax was currently set at 70%. This was a gazetted requirement, and it was

[56] Delegation Report for Minister (ND)'s Meeting with Tan Sri Nor Mohamed Yakcop on Singapore's Land Swap Offer, 17 June 2010, Shangri-La Hotel, Putrajaya (with redactions) (Exhibit S-79/Tab C-103).

> calculated based on a clear formula that was transparent. The development charge was also stated and explained in our past TPNs.
>
> 10. Azman commented that the development charge was a well established and transparent requirement in Singapore. However the question was whether the land parcels to be vested were seen as a "granting" or a "sale" and we had to view this within the context of the POA. He highlighted that the POA mentioned "development costs" related to development but not the development charge.
>
> 11. Yakcop summarized the view that the land swap was not like a sale of land because it started on the basis of Malaysia giving up 500 acres of land and exchanging it for 3+3. Including the development charge made things "hazy" and was like "double counting". However he agreed with Minister that it was stated in past correspondences that the development charge was payable. The Malaysian side just had to study the development charge as it was "very big".
>
> 12. Gani Patail recognised that DC was a statutory requirement; but questioned whether the amount of DC was fixed, citing that in some jurisdictions, the percentage varied depending on the land use. He wanted to know if the charges could be varied and asked for information on the relevant laws to be provided after the meeting.

101. Minister Nor wrote an internal note on 18 June making recommendations in relation to the forthcoming meeting between Prime Ministers. The note argued, *inter alia*, that as neither the POA nor the 24 May Joint Statement mentioned DC, this should be construed as a new term. The note continued:

> We challenge the basis of the various without prejudice letters. Further, there is clearly discretion on the part of the Singapore Government whether to impose development charges and encumbrances. It is not mandatory. As is the case for Marina South lands, the Singapore Government itself converted the land use, not triggering development charge, before putting such lots up for sale to third parties.

The note recommended that Malaysia should not commit itself in relation to DC at the meeting on 22 June.

102. Minister Nor mentioned Malaysia's reservations about DC in a telephone conversation with Minister Mah on 18 June[57]. This provoked a letter from Minister Mah[58] written the same evening emphasising that the obligation to pay DC had been made clear in prior correspondence and in discussion between the two Prime Ministers. The letter continued:

> As I explained to you yesterday, and during our conversation today, DC is a tax payable on all lands whose value is enhanced as a result of government

[57] Filenote of Call from YB Tan Sri Nor Mohd Yakcop, Minister of Prime Minister's Department, Malaysia to Minister Mah Bow Tan on Friday, 18 June 2010 at 6P.M. (Exhibit S-80/Tab C-105).

[58] Letter dated 18 June 2010 from Singapore Minister for National Development Mah Bow Tan to Malaysian Minister in the Prime Minister's Department Nor Mohamed Yakcop (Exhibit S-81/Tab C-106).

> approving a higher value development proposal. The quantum of the DC is determined by law, as is the process for such determination. As Sri Azman Mokhtar said yesterday, this is a well known and transparent process.
>
> As such, I am afraid the payment of DC is not a matter which can be subject to negotiation.

103. Minister Nor's two internal notes of 21 June[59] record that Malaysia did not believe that the POA imposed an obligation to pay DC and that the best negotiating tactics were to attempt to keep that issue on ice while focusing on other aspects of the implementation of the POA. In the latter note he complained that Singapore was clearly aware of the quantum of DC during the meeting of 24 May 2010 but had chosen not to disclose it. The note summarised the position as follows:

> • Singapore takes the position that when the 3+3 land is vested into M-S Pte Ltd, it is still for railway use. Hence, the act of converting it to commercial and residential use attracts the development charge (tax),
>
> • Malaysia's reading of the PoA is that it clearly sets out that the PoA related lands are vested into M-S Pte Ltd based on a specified use (commercial and residential) at no costs, as consideration for Malaysia surrendering KTM's lease.

104. This was repeated in a lengthy note dated 22 June[60] by way of a position paper ahead of the Prime Ministers' meeting. The note added:

> … Malaysia would concede that the additional 3 Bukit Timah land offered by Singapore is not explicitly mentioned in the POA and thus can compromise if Singapore imposes development charges on these parcels.

In setting out Malaysia's position Minister Nor compared the allocation of lands to M-S under the POA with the allocation by Singapore of lands at Marina South:

> When Singapore sells lands, such as Marina South, its use is converted by Government and thus, purchasers are not imposed a development charge. Under the POA Singapore was to vest the land to M-S Pte approved for use, as specified in the POA.

Singapore's note of the Prime Ministers' meeting[61] recorded:

> 6. On DC, Najib had claimed that Malaysia's understanding was that there was no development charge (DC) payable on the three POA parcels based on the original POA document. Najib had offered to pay DC for the plus 3 Bukit Timah land parcels. PM replied that the DC has been there all along. It has been our practice since 1965. Although the POA

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[59] Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*Meeting with Minister Mah*', dated 21 June 2010 (Exhibit NMY-2/Tab C-107); Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*Points of Agreement*', dated 21 June 2010 (Exhibit NMY-3/Tab C-108) (emphasis in original).

[60] Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*PoA Meeting 22 June 2010*', dated 22 June 2010 (Exhibit NMY-4/Tab C-110).

[61] Notes of PM's Debrief of PM's Four-Eye Meeting with Malaysian Prime Minister Najib Razak at Putrajaya, Malaysia on 22 June 2010 at 5.30pm (with redactions) (Exhibit S-83/Tab C-111).

had not explicitly referred to DC, the POA had referred to "development costs" which included many things, one of which was the DC. This was what MM had clearly conveyed to Daim Zainuddin when they had negotiated the POA. However, Najib had remarked to PM that both Daim and then-PM Mahathir would not have signed off on the POA if they had known how large the DC would have been. PM replied to Najib that Daim was a lawyer, and knew what he was doing. PM had also noted to Najib that the DC was also something that most commercial developers would know about. Thus far the DC has never been waived. PM had also told Najib that both sides did not need to take cognisance of this matter at the political level. It would be a commercial matter for M-S Pte Ltd and there need not be any political signature. However, if Malaysia had any doubt about whether the DC was payable on the POA lands, the issue could be settled in the courts, or by international arbitration at the Permanent Court of Arbitration. Najib immediately declined, saying that that was the last thing he wanted to do. PM concurred with Najib, pointing out that that would focus great public attention on the DC issue.

7. PM pointed out that we had referred to the DC more than once in the letters and notes we had sent Malaysia before the 24 May retreat. He himself had been concerned that the Malaysians should be conscious of this requirement, and had made a point of highlighting it, including to Najib when they had met. Najib acknowledged this but said that they had not reacted at the time as they did not realise the amount involved. PM had also reiterated to Najib that where we could exercise discretion we would. For example, we were calculating the DC based on spot valuations, and not on the published DC tables, which would have been higher. However, we could not waive the DC. PM now suggested an additional concession to be flexible: we would allow the DC amount to be paid 12 to 18 months after the lands had been vested in M-S Pte Ltd if it would help to manage the visibility of the DC issue, or the cash flow of the company. Najib said he took note of PM's offer, and would study it. PM said that the project was "completely bankable". He explained to Najib in that the company could borrow against the land to pay the DC, and borrow against the future proceeds from the development to pay for the construction costs. There was no need for the shareholders to put in any more money to pay the DC.

Prime Minister Lee Hsien Loong repeated Singapore's position in a letter[62] to Prime Minister Najib on 28 June.

105. These discussions about DC were conducted in parallel with discussions about the land swap options. At the meeting on 22 June Prime Minister Najib asked whether it would be possible to swap the 3+3 parcels for four parcels at Marina South and two at Ophir-Rochor (4+2 parcels). Prime

[62] Letter dated 28 June 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (Revised Land Swap Offer) (Exhibit S-84/Tab C-114).

Minister Lee Hsien Loong offered to agree to this provided that M-S paid the difference in value between the 3+3 and the 4+2 parcels. Prime Minister Najib agreed to consider this. In his letter of 28 June Prime Minister Lee Hsieng Loong remarked that this was a significant concession as:

> … the Government's standard practice is to sell land by public tender, which often results in higher bids than the Chief Valuer's valuation. If M-S Pte had to bid for the extra land it might well cost them more.

106. In a telephone conversation on 15 September 2010[63] the Prime Ministers agreed a way ahead. Prime Minister Najib accepted the proposal set out above in relation to an exchange of the 3+3 parcels for the 4+2 parcels. He said, however, that Malaysia would have difficulty in accepting this offer if DC applied. Malaysia had sought "legal opinion from rather eminent lawyers" and it appeared that there was some basis to seek legal clarification on the DC. He suggested that the issue of whether DC was payable on the initial three parcels under the POA should be submitted to arbitration which would "be conducted in a cordial and friendly manner and would not be acrimonious". He accepted that it would be fair for Malaysia to pay DC on the three additional Bukit Timah parcels. Prime Minister Lee Hsieng Loong agreed to these proposals.

107. This agreement was confirmed in an exchange of letters on 17[64] and 19[65] September 2010. In the latter Prime Minister Lee Hsieng Loong wrote:

> 2. I confirm our agreement with your letter of 17 September 2010. I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the three parcels of POA lands in Tanjong Pagar, Kranji and Woodlands. I share fully your wish to resolve this issue in a cordial and friendly manner, which will help to set the tone for our bilateral cooperation in many other fields.

108. The agreement was the subject of a Joint Statement[66] made on 20 September 2010. It was subsequently incorporated in a formal Agreement between the two Governments dated 27 June 2011. On the same day Khazanah and Temasek executed a Shareholders' Agreement relating to M-S and incorporated M-S as a private company limited by shares under the Singapore Companies Act[67].

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[63] See Filenote of Telephone Conversation between Prime Minister Lee Hsien Loong and Malaysian Prime Minister Dato' Seri Najib Tun Razak, 1220 hrs, 15 September 2010, PM's Office, Istana (with redactions) (Exhibit S-87/Tab C-117).

[64] Letter dated 17 September 2010 from Malaysian Prime Minister Najib Razak to Singapore Prime Minister Lee Hsien Loong (Exhibit S-88/Tab C-118).

[65] Letter dated 19 September 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (Exhibit S-89/Tab C-119).

[66] Joint Statement on Meeting between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak on the Implementation of the Points of Agreement on Malayan Railway Land in Singapore (POA), 20 September 2010, Singapore (Exhibit S-90/Tab C-120).

[67] Extracts from the Memorandum and Articles of Association of M+S Pte Ltd dated 27 June 2011 (Exhibit S-94/Tab C-124).

109. On 1 July 2011 Malaysia moved the KTMB railway terminus to Woodlands and ceased operations at Keppel. On the same day Singapore vested the 4+2 parcels in M-S and all other railway lands south of Woodlands were vested in Singapore. The Submission Agreement[68] was entered into on 9 January 2012.

P. The Correct Interpretation of the POA at the Time of its Conclusion

110. After this summary of the factual evidence we turn to consider the correct interpretation of the POA at the time of its conclusion in 1990, applying the principles set out in Section F above. As Article 31 of the Vienna Convention records, the ordinary meaning of the terms of the POA, in their context and in the light of the object and purpose of the POA, is of primary importance. Account is to be taken of any subsequent agreement, or practice establishing such agreement, regarding the interpretation of the POA. Where an interpretation would leave the meaning ambiguous or obscure, or lead to a manifestly absurd or unreasonable result, recourse may be had to the preparatory work of the treaty as a supplementary means of interpretation. We propose to approach this section of the award under the following headings:

(i) Singapore's submissions in outline;
(ii) Malaysia's submissions in outline;
(iii) The value to the Parties of the railway lands;
(iv) Prime Minister Lee Kuan Yew's dinner;
(v) The nature of the transaction;
(vi) Singapore municipal law;
(vii) The natural meaning of the terms of the POA;
(viii) The subjective belief of the parties;
(ix) The subsequent conduct of the parties;
(x) Conclusions.

(i) Singapore's submissions in outline

111. The railway lands had little value to Malaysia. The lands were held by Malaysia on terms that restricted their use to the operation of the MRA railway. That railway was, however, operating at a loss in Singapore. It made economic sense to close down the railway and restore the railway lands to Singapore. Singapore for its part had shown itself quite content that Malaysia should continue to operate the railway if that was Malaysia's wish. Singapore had no urgent need to recover the railway lands. It had, however, become necessary for the purposes of regulation of those entering Singapore from Malaysia that the checkpoint for CIQ formalities should be moved to the entry point into

[68] Submission Agreement between Singapore and Malaysia dated 9 January 2012 (Exhibit S-1/Tab B-1).

Singapore and this made it convenient for the terminus of the MRA railway to be moved to the north.

112. To encourage Malaysia to agree to moving the MRA terminus to the north, Prime Minister Lee Kuan Yew, at the dinner on 27 June 1990, offered Malaysia the chance of developing the railway lands at Keppel that would be vacated. He made it plain at that meeting that this would involve Malaysia paying DC.

113. Prime Minister Lee Kuan Yew's proposal was developed in the Woodlands Checkpoint proposal and his letter of 24 November 1990[69]. The essence of the POA was not changed thereafter. The amendments made at the suggestion of Minister Daim[70] were merely by way of simplification and did not alter the nature of the transaction. The object and purpose of the POA was to jointly develop the three parcels in exchange for the surrender of the MRA lands by Malaysia, so as to strengthen bilateral relationships and give Malaysia a long term stake in Singapore. The essence of the agreement was as follows.

114. MRA would move its terminus to the north, vacating the lands to the south. These would revert to Malaysia, subject to a transaction in relation to three parcels of land that would be governed by Singapore municipal law. Under that transaction Singapore would transfer the three parcels to a joint venture company, M-S. The use of the lands so transferred would, initially, be restricted by the Master Plan zoning to railway use. Singapore would, however, be obliged under the POA to make sure that M-S received the necessary planning permission to use the lands for the purposes detailed in the annexes to the POA. In order to obtain that planning permission M-S would, in accordance with Singapore municipal law, have to pay DC. Were there any doubt about this obligation such doubt was resolved by the express term that Malaysia and Singapore would share the "development costs". The obligation to pay DC thus accorded with the ordinary meaning of the POA. Furthermore, at all times Malaysia shared Singapore's belief that DC would be payable in respect of the three parcels of land.

(ii) Malaysia's submissions in outline

115. The railway lands were of considerable political, economic and practical importance to Malaysia. At the same time they were a source of controversy and inconvenience to Singapore. The railway cut Singapore in half and was an impediment to development. The object and purpose of the POA was to resolve this situation by providing an inducement to Malaysia to give up the MRA lands. Had M-S been required to pay DC the inducement would have been inadequate.

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[69] Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (Exhibit S-16/Tab C-22).

[70] Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (Exhibit S-17/Tab C-23).

116. Prime Minister Lee Kuan Yew's reference to development charges at the dinner on 27 June 1990 had no relevance to the very different agreement that was subsequently embodied in the POA.

117. The POA specified in detail the use that was to be made of the three parcels of land once they had been realienated by Singapore. Singapore's obligation under the POA was to enable the parcels to be used for those purposes. It was thus the POA itself which conferred permission on M-S to use the parcels for the purposes set out in the annexes to the POA. It would have been contrary to Singapore's obligations under the POA to impose a municipal law obligation on MS to pay DC as a precondition to obtaining permission to use the parcels in this way. However, no such obligation would have arisen at municipal law. The value of the three parcels would have been enhanced by the agreement of Singapore that they could be developed in accordance with the annexes to the POA, not by the subsequent grant of planning permission, so there would have been no basis for imposing DC. Alternatively M-S would have been exempt from the obligation to pay DC under the practice that applied to land sales by the Singapore Government on terms that the land would be used for a specified purpose.

(iii) The value to the Parties of the railway lands

118. The value to the Parties of the railway lands is an important aspect of the context of the POA. This is because, as we explain below, the return of the railway lands to Singapore without charge was the consideration provided by Malaysia for the obligations undertaken by Singapore under the POA.

119. Malaysia did not persuade us that the operation of that part of the MRA railway that ran through Singapore had significant economic benefit to Malaysia. It is common ground that the railway as a whole, including the greater section that ran the length of Malaysia, was running at a loss. Malaysia sought to deal with this at paragraphs 69 to 72 of its Counter-Memorial. It relied on a press statement by the Malaysian Transport Minister on 23 April 1991 that the railway was "invaluable" because it "facilitated the transport of goods and passengers", contributing "much-needed revenue". But the Counter-Memorial went on to concede the overall unprofitability of the railway, commenting that Singapore had adduced no evidence on the operation of the Singapore line, considered separately. It went on to state, however, that financial performance was not necessarily the primary rationale for "the construction and maintenance of national railway systems". Passenger and freight railway networks were "strategic assets" that had "inherent economic, social and political value, independent of the commercial performance of the railway operators".

120. We can understand a State operating a railway at a loss within its own borders for social reasons, but not on the territory of another State. There were, however, clearly political considerations in play. Evidence was adduced of the public reaction to the POA that made it clear that the Malaysian public considered the railway lands Malaysian property, not to be lightly handed over

to Singapore, notwithstanding the restricted use that Malaysia was permitted to make of most of the lands.

121. Thus, in the eyes of Malaysia the railway lands had a much greater value than the amount of the payments to which Malaysia would be entitled if it relinquished the lands to Singapore. As to this, Malaysia devoted paragraphs 56 to 68 of its Counter-Memorial to an analysis of the different titles and restrictions on the railway lands in support of the submission that it was not right to suggest that all the lands held by the MRA in Singapore were held under titles that restricted their use to railway purposes. Malaysia's counsel were, however, unable to provide us with even a "ballpark" figure of the compensation to which Malaysia would have been entitled had it handed back all the railway lands to Singapore—sometimes described as "resumption cost". Lord Goldsmith for Singapore submitted that it would have been less than the then current land value on the basis of railway usage and this was not challenged. That is not to say that the resumption cost can be treated as having been insignificant.

122. So far as the value to Singapore of the railway lands that were to be returned under the POA is concerned, Malaysia regaled us with a slide show that seemed designed to show us just how attractive some of the lands appeared. Singapore asserted at the time of the negotiation of the POA that the only parcels of railway land that would be capable of independent development were the three parcels that were to be realienated to M-S, although Malaysia challenged this. And Singapore submitted that it was quite wrong to speak of the railway "cutting Singapore in half" as Malaysia had described it. Nonetheless, we have no doubt that recovery of the railway lands had an attraction to Singapore that went beyond facilitating the move of the CIQ checkpoint to Woodlands. If the railway lands were only to be used for amenity purposes, their recovery would have been an attractive prospect. In the event, by the time that the POA was ultimately implemented, Singapore had urgent need of at least the land of the Jurong Spur "in order to proceed with critical business park and residential development projects"[71] and other railway lands were required to facilitate road development.

123. Malaysia and Singapore were seeking to reach an agreement that could be described as a "win-win" situation, that is one that would leave each party better off than before. The evidence of the value that the railway lands had for each party does not enable us to conclude that the achievement of a win-win situation depended on whether or not DC had to be paid by M-S. On either footing the POA had attractions for both parties. As Tan Sri Nor conceded to Lord Goldsmith, even if DC was payable the POA was "a sweet deal" for Malaysia[72]. Equally we believe that the deal will have proved advantageous for Singapore even if we conclude that DC is not payable.

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[71] Note dated 5 January 2009 from the Singapore Ministry of Foreign Affairs to the High Commission of Malaysia in Singapore (Exhibit M-20/Tab C-76).

[72] Transcript p. 352.

(iv) Prime Minister Lee Kuan Yew's dinner

124. Prime Minister Lee Kuan Yew's dinner with Minister Daim on 27 June 1990 is relevant inasmuch as it was the starting point of the negotiations that led up to the POA. His note of this dinner[73] begins by recording that the meeting lasted from 7.05 to 8.15. The note records that a lot of different matters were discussed in this period, including some that have been redacted from the note. Paragraph 8 relates to the railway lands. It reads as follows:

> 8. I then made him an attractive proposition which I said was thinking aloud. The Sultan of Johor had suggested during the Asian Aerospace show in February that our MRT should go into Johor Bahru. The Sultan probably had a piece of land in mind and was not thinking of Johor Bahru Railway Station. But this could be adjusted and a deal beneficial for all could be arranged. The station at Tanjong Pagar, we could allow them to redevelop as a shopping complex or an office block with special low development charges. This would give them a long term stake in Singapore which yields returns every month. Then we can rip up the railway line but we use the line from Woodlands to Johor Bahru for the MRT. This meant that Johor will become even more of an extension of Singapore and vice versa. It would be convenient for Singapore people here to buy second homes in Johor and commute to Singapore. Johoreans can come to Singapore easily and cheaply. The two will become even more closely linked. Was he prepared for that? He said there was no trouble allowing Johor to work closely together with us, but he would have to think it over this proposition about railway land.

125. Singapore placed in evidence a witness statement of Mr. Lee Kuan Yew dated 24 June 2013. In this he gave the following explanation of his use of the phrase "special low development charges":

> 8. When I used the phrase "special low" to describe the development charges, I had in mind that development charges (calculated at 50% of enhancement in land value resulting from a proposed development) would be much lower than differential land premium (which would be calculated at 100% of the value enhancement). Differential land premium is a premium which the State is entitled to charge as a condition for waiving or varying restrictive covenants contained in State leases. I saw the offer to levy development charges instead of differential land premium as a concession which the Singapore Government could be prepared to grant to MRA.

126. This account accords with the evidence of Mr. Suppiah Dhanabalan, who was then the Minister for National Development ("Minister Dhanabalan"), in the following paragraphs from his statement:

> 11. I recall that one of the issues we had to consider was whether to impose Differential Premium or DC on the POA land parcels. A con-

[73] Note dated 28 June 1990 from Singapore Prime Minister Lee Kuan Yew (with redactions) (Exhibit S-12/Tab C-14).

> scious decision was made that DC rather than Differential Premium would be imposed as this would be an attractive incentive to Malaysia given the more favourable rate that was applicable to the former than the latter (see above at [7]). But at no stage was it ever suggested or considered that DC would not be payable in respect of the POA land parcels which would be redeveloped.
>
> […]
>
> 14. I have reviewed the witness statement affirmed by Mr. Lee on 24 June 2013, and his explanation of the phrase "special low" being a reference to DC rather than Differential Premium accords with my recollection of how I understood it at the time. The imposition of DC (calculated at 50% of the land value enhancement) was a "special low" concession when compared to the imposition of Differential Premium (calculated at 100% of the land value enhancement), which would otherwise have been imposed for the removal of the restrictive covenants in the leases for these railway lands. As I have noted above, this was something that we discussed at that time and decided that we would accord Malaysia the concession of imposing DC rather than Differential Premium. I can also confirm that at no time throughout these discussions was any other concessionary rate ever discussed by Singapore.

A month after the dinner Minister Dhanabalan sent Prime Minister Lee Kuan Yew a note which detailed the various parcels proposed for redevelopment with, in each case, a) the market value in 1989 based on its present zoning and use, b) its potential value based on its proposed development use and c) the DC payable on its enhancement in value, i.e. the difference between a) and b).

127. Malaysia put in evidence a witness statement from Tun Daim Zainuddin. Not surprisingly this states at paragraph 4 that Tun Daim did not remember very much about this discussion, which took place nearly 25 years ago. Prime Minister Lee Kuan Yew made a number of different proposals. According to Tun Daim: "We may have talked about the railway land, but we also discussed a wide range of other topics". Tun Daim's statement goes on to make the point that Prime Minister Lee Kuan Yew was discussing a very different proposal from the deal that was finally concluded under the POA.

128. It is Singapore's case that Prime Minister Lee Kuan Yew's reference to "special low development charges" was the first indication to Malaysia that DC would be payable. Singapore's Memorial states, however, that "the phrase '*special low development charges*' requires some clarification" and proceeds to give the explanation proffered by Mr. Lee Kuan Yew[74]. Malaysia in its Counter-Memorial at paragraph 77 suggest that this "clarification" does not make sense and that, *inter alia*, it is unclear how Singapore could have collected DC from Malaysia in place of Differential Premium.

[74] Singapore's Memorial, para. 31.

129. The following questions arise in relation to the statements of Mr. Lee Kuan Yew and Mr. Dhanabalan as to what the former intended to convey by his use of the phrase "special low development charges":

(i) Is this evidence admissible as to the meaning of those words?
(ii) If so, should those words have led Malaysia to understand that M-S would have to pay DC under the terms of the POA?

130. As to admissibility, Professor Lowe submitted[75]:

> If I may in passing respond briefly to the question about subjective intentions, I'm afraid international law is not terribly refined as far as rules of evidence come, and it generally tends to admit practically everything. Our position in international law in the absence of a rule excluding it—and there is no evidence of a rule excluding it—it is admissible. And it is then for the Tribunal to attach to it what weight they see fit.

131. We accept this submission as to admissibility. It is, however, far from clear that the words used by Prime Minister Lee Kuan Yew would have conveyed the meaning he intended them to bear.

132. Assume, however, that Prime Minister Lee Kuan Yew's words bore the meaning that he intended. We agree with Tun Daim's comment that the scheme of the POA was very different from that which Prime Minister Lee Kuan Yew intended to propose at the dinner. This proposal was that Malaysia should be permitted to develop for its own benefit the railway land at Keppel but that, instead of having to pay Differential Premium in the amount of 100% of the land's enhancement in value, Malaysia would only have to pay DC in the amount of 50% of this sum. Mr. Dhanabalan confirms that the intention was to allow Malaysia to pay DC at 50% rather than Differential Premium at 100%[76]. Subsequently Prime Minister Lee Kuan Yew made a very different proposal. This was a joint venture under which, through their equal shareholdings in M-S, Malaysia and Singapore would share the benefit of the enhancement in value of the land. It would not have been compatible with Prime Minister Lee Kuan Yew's stated intention that Malaysia should enjoy 50% of the increase in value of the railway land at Keppel (i) to make Malaysia share that benefit with Singapore under the joint venture on a 50/50 basis but (ii) also to impose a 50% tax on the joint venture in respect of the increase in value. The natural inference to draw was that Prime Minister Lee Kuan Yew had decided that Singapore and Malaysia should share 50/50 the benefit of the increase in value of the railway land at Keppel through the medium of a joint venture company.

133. For these reasons we do not consider that Prime Minister Lee Kuan Yew's reference to "special low development charges" in the very different context in which it was made should have led Malaysia to understand that M-S would have to pay DC under the terms of the POA.

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[75] Transcript, p. 749.

[76] *See* Witness Statement by Mr. Suppiah Dhanabalan at para. 14.

(v) The nature of the transaction

134. The Parties are fundamentally, and in our view critically, at odds as to the true nature of the transaction that was the subject of the POA. It is Singapore's case that the POA, as originating in the Woodlands Checkpoint proposal and refined in the draft POA sent to Minister Daim on 24 November 1990, embraced two separate transactions. Under the first, the MRA was to return to Singapore all the railway lands for which Singapore was to pay full compensation "on the terms stipulated in the law and titles". This meant that the return of the railway lands would be "financially neutral" for Malaysia. It would receive the compensation to which it was entitled under the law. Lord Goldsmith described as Singapore's "key proposition" that Malaysia would be fully compensated by payment of the resumption costs for the return of the railway lands[77]. The second transaction was one in which M-S would purchase from Singapore the three parcels of land "at resumption cost", i.e. for the same amount as the compensation paid for those land parcels by the Singapore Government[78]. "This would at most be existing-use value of the land parcels … a consistent feature of the deal was that payment by the recipient company for the vesting of the Keppel, Kranji and Woodland parcels would be at existing-use value and not the full development value"[79]. The surrender of the remainder of the railway lands was not part of the consideration given for the vesting of the three parcels, because that had been paid for in full under the first transaction. Thus Singapore submits that the very modest consideration to be paid by M-S was only consistent with M-S receiving land whose value was restricted because it could only be used for railway purposes.

135. Singapore then asserts "[Finance] Minister Daim's merging of the two parts of the deal on 26 November into an exchange of land had nothing to do with DC and did not affect the requirement to pay DC"[80].

136. Malaysia's case has always been that the governing obligations lay in the terms of the POA, which was a treaty, the interpretation of which was governed by international law. The treaty obliged Singapore to transfer the three parcels to M-S to be developed in accordance with the Annexes to the POA. The consideration given by Malaysia for this obligation was the return to Singapore of all the other railway lands. There was only one transaction, which was an exchange of land.

137. We are in no doubt that Malaysia's interpretation of the nature of the transaction is to be preferred to that of Singapore. There are two linked fallacies in Singapore's submissions. The first is that the compensation that Malaysia would have received had the POA proceeded in accordance with the draft sent by Prime Minister Lee Kuan Yew under cover of his letter of 24 November

[77] Transcript, p. 156.

[78] Transcript, pp. 76–78.

[79] Singapore's Memorial, paras. 153, 154; transcript, pp. 76–79.

[80] Singapore's Memorial, para. 154.

1990[81] would have been adequate compensation for the surrender of the railway lands. As Professor Crawford put it in his closing submissions[82]:

> … Malaysia would not have been prepared simply to terminate the railway, surrender the lands held under leases, and take the compensation available. It would have been free to do so at any time and Singapore would have rejoiced.

138. The second fallacy is that the "resumption cost" to be paid by M-S for the three parcels equated with the value of the lands in question for the pre-existing railway use, thus demonstrating that M-S received the lands subject to that restriction. In fact, as Lord Goldsmith accepted in discussion with the Tribunal, the resumption cost did not represent the value of the land for railway use[83]. Singapore's proposal that M-S would pay the resumption costs for the three parcels would appear to have been designed simply to ensure that the transfer of these lands first to Singapore and then on to M-S would not involve any cost to Singapore.

139. It was Singapore's case that the amendment proposed by Minister Daim[84] and accepted by Prime Minister Lee Kuan Yew "did not alter the nature of the deal"[85]. We agree, but this was only because neither the compensation payable to Malaysia by way of resumption cost nor the payment by M-S to Singapore of that part of the resumption cost that related to the three parcels of land realienated to M-S was treated by the Parties as significant. As Minister Daim stated, the transaction was "an exchange of lands". Lord Goldsmith's submission that the consideration to be given for the transfer of the three POA parcels to M-S reflected no more than their value as railway lands is not tenable.

(vi) Singapore's municipal law

140. Before turning to the interpretation of the POA, it is convenient to address the issue between the Parties as to the requirements of Singapore's municipal law.

141. It is Singapore's case that, had M-S opted to receive from Singapore the initial three parcels of land and proceeded to develop these, M-S would have had to pay DC as a condition of obtaining planning permission. This was what the provisions of Singapore municipal law specifically required. M-S would have received the lands from Singapore subject to the restriction that they could only be used for railway purposes. Under municipal law, planning

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[81] Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (Exhibit S-16/Tab C-22).

[82] Transcript, p. 532.

[83] Transcript, pp. 77, 650.

[84] Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (Exhibit S-17/Tab C-23).

[85] Singapore's Reply, para. 113; Singapore's Skeleton Opening, para. 34.

permission was required in order to lift this restriction, and DC was payable in respect of the enhancement in value of the land that would result from the grant of planning permission.

142. It is Malaysia's case that M-S would have been under no obligation under municipal law to pay DC had it opted to receive and develop the three POA parcels. This was because the POA satisfied the conditions for exemption from the obligation to pay DC recognised by Rule 4 or alternatively because Rule 4 applied by analogy.

143. The express exemption conferred by Rule 4 of the 1996 Planning (Development Charge—Exemption) Rules applied in respect of: "any development land … *sold* … by the Government." The Woodlands Checkpoint proposal initially made by Prime Minister Lee Kuan Yew would have involved a sale by Singapore to M-S of the relevant lands. Thus it would have brought the transactions within the letter of the exemption provisions. However, as we have found above, the true nature of the transaction proposed was not a simple sale by Singapore to M-S. It was not even a simple land swap. It was a transfer of land to M-S pursuant to an inter-State treaty, and the consideration for the transfer was not provided by M-S but by Malaysia. It has always been common ground that the POA was a unique transaction. For this reason the *alienation* by Singapore of the three POA parcels to M-S would not have brought them fairly and squarely within the exemption for which Rule 4 of the 1996 Rules provided nor within the pre-existing practice to which Rule 4 gave effect. Indeed Mr. Chapman for Malaysia accepted that the transaction "falls outside the usual structures of municipal law"[86].

144. Malaysia's submission that the Rule 4 exemption would have applied by analogy merits more detailed examination. The argument underlying that submission is, as we see it, as follows. Rule 4 recognises that DC will not fall to be paid when land has been transferred by the Singapore Government pursuant to a contract under which the development for which the land is sold is specified and the price paid represents the full development value of the land. In such circumstances it is an implicit term of the contract that DC will not be payable. The POA was not a contract but a treaty. Under that treaty the three POA parcels were to be transferred to M-S for the purpose of specified developments. Under that treaty Malaysia was to provide full consideration for the development values of those parcels. In these circumstances it was an implicit term of the treaty that DC would not be payable. Under municipal law effect should be given to the treaty and DC should not be charged.

145. This argument presupposes that Malaysia's interpretation of the treaty is correct. In that event the position under domestic law will become irrelevant. This is because the Parties are agreed that if, on true interpretation of the POA, DC would not fall to be paid, the Submission Question falls to be answered in the negative regardless of the position under Singapore municipal

[86] Transcript, p. 579.

law. We are inclined to think, however, that the "competent authority" should give effect to Singapore's obligations under international law when ruling whether or not DC falls to be paid on an application for planning permission. Whether we are correct about this is, however, academic. The crucial question remains whether, under the terms of the POA, DC would have fallen to be paid by M-S, had the company received the three POA parcels and proceeded to develop these. We turn to consider that question.

(vii) The ordinary meaning of the terms of the POA

146. Neither the context nor the object and purpose of the POA afford assistance in resolving the issue that has arisen between the Parties as to its interpretation. The Parties have identified the object of the POA in different terms, but both recognise that it involved the grant to Malaysia of an interest in a joint venture with Singapore in exchange for the release by Malaysia to Singapore of the remaining railway lands. The value of the joint venture depends upon whether or not DC was payable by the joint venture company, M-S. The object of the POA affords no assistance in resolving that issue. The issue falls to be resolved by giving the terms of the POA the interpretation that both accords with the ordinary meaning of the words used and produces a result that is commercially sensible.

147. Dealing first with the words used, Singapore submits that the POA dealt specifically with the obligation to pay DC. Both in its original draft and in its amended form, the POA provided that "payment for the development costs" of the properties would be shared in the ratio 60:40. It is Singapore's case that this phrase could not have been referring simply to the costs of construction. It would have gone without saying that the Parties would have been obliged to share these. "Development costs" must have encompassed something broader. DC was one of the significant costs associated with the development of the land and had been raised in the negotiations[87]. It was one of the "development costs" to which clause 5 of the POA referred.

148. The reference to "the negotiations" is a reference to Prime Minister Lee Kuan Yew's dinner. We have already explained why his reference at this dinner to "low development charges" lends no support to Singapore's case on the interpretation of the POA. Nor does the phrase "development costs" in clause 5 of the POA throw any light on whether or not M-S would have to pay DC. As we see it, clause 5 imposed an express duty on the Parties to provide M-S with the capital necessary to pay whatever costs were involved in the development of the initial three parcels. The phrase "development costs" in clause 5 was capable of embracing DC but it did not necessarily do so.

149. For these reasons, we reject Singapore's submission that the wording of the POA made express provision for the payment by M-S of DC. The

[87] Singapore's Memorial, para. 162.

issue is whether it was implicit from the provisions of the POA that M-S would have to pay DC, or implicit that M-S would not.

150. Singapore's case is that it followed inexorably from the terms of the POA that M-S would have to pay DC. This was because the POA made provision for M-S to carry out the developments specified in the Annexes to the POA and, in order to carry out those developments, M-S would have to obtain planning permission. Under municipal law, M-S would have to pay DC as a precondition to obtaining planning permission. In its Memorial[88] Singapore set out a long list of costs that M-S in fact bore in relation to the development of the lands ultimately received at Marina South and Ophir-Rochor. These included Goods and Services Tax, stamp duty and monthly property taxes, all imposed under Singapore's municipal law. These exemplified, in Singapore's submission, the principle that M-S was subject to all the normal incidents of municipal law, including the obligation to pay DC.

151. Malaysia's case is that the express provision for carrying out the developments specified in the POA was inconsistent with a requirement that M-S should pay DC. The provision in the treaty between Singapore and Malaysia obliged Singapore to permit M-S to carry out the specified developments. This was not a right that M-S could be required to pay for. It was a right to which it was entitled by the terms of the POA. If M-S exercised the option to receive and develop the initial three parcels it would receive lands that had the benefit of Singapore's obligations under the POA. The lands that it received would already have the value attributable to the right to carry out the specified developments. The formal grant of planning permission would not enhance the value of the lands. Hence, there could be no obligation to pay DC as a condition of obtaining planning permission.

152. We have concluded that Malaysia's submissions are to be preferred to those of Singapore. DC is not to be compared to the other taxes and charges that M-S had to pay to develop the lands ultimately received at Marina South and Ophir-Rochor. DC is not a tax simply designed to raise revenue. It is a special tax designed to ensure that the State shares in the increase in value that flows from the grant of planning permission when the grant releases land from prior restraints. DC is not payable when the State sells land for the purpose of development specified in the contract of sale. The State receives the benefit of the increase in value at the point of sale and not as a result of the subsequent grant of planning permission.

153. The reasons that underlie the exemption from liability to DC recognised by Rule 4 apply equally in our view to the unique transaction that was the subject of the POA. There is a close analogy between the POA and a sale by Singapore of land for a specified development. Under a sale of land by Singapore for a specified development the price reflects the value of the land with permission to develop it for that purpose. Under the POA Singapore agreed to

[88] Singapore's Memorial, para. 147 and Annex B.

alienate lands to M-S for specified developments. Under the POA Singapore agreed that Malaysia should have a 60% interest in M-S. The consideration that Malaysia provided for this interest was the release to Singapore of the remaining railway lands. Just as in a sale of land for a specified development, under the POA Singapore agreed with Malaysia that the lands could be used for the specified developments. Indeed, under the POA the Parties agreed not merely that the lands *could* be used for the specified developments. They agreed that they *should* be used for them. Clause 5 of the POA required the Parties jointly to fund the developments. The natural meaning of the POA, together with its Annexes, was that Malaysia by releasing the balance of the railway lands to Singapore was providing consideration both for the receipt by M-S of the lands and for the permission to develop them. The terms of the POA unlocked the development value of the lands.

154. Before the POA was agreed, Malaysia held the railway lands on terms that prohibited their use for other than railway purposes. Furthermore, as noted in paragraph 67 above, Singapore informed Malaysia in January 1990 that it was not its current policy to allow any development on disused MRA land. Lord Goldsmith[89] said in argument that by entering into the POA Singapore agreed to abandon that policy which, so long as it subsisted, blocked development of the railway lands. So far as it goes, that proposition is correct. The corollary is that for planning permission to have been withheld on the basis of that policy would have been inconsistent with Singapore's obligations under the POA. However, in the POA Singapore agreed to more than that. It agreed to undertake, in joint venture with Malaysia, through a corporate vehicle, development of the lands for certain purposes and in accordance with certain plans attached to the POA. The corollary is that for permission for development for such purposes and in accordance with such plans to have been withheld would also have been inconsistent with Singapore's obligations under the POA.

155. Under the POA Malaysia was to return all the railway lands, including the initial three parcels, to Singapore. Singapore was then to transfer freehold title in the initial parcels to M-S for the purpose of the specified developments, which Singapore and Malaysia had agreed to fund. Singapore was not agreeing to lift an embargo on the development of lands held by Malaysia. It was agreeing to transfer lands that it would own to M-S for the purpose of specified developments. On Singapore's case the Government would have vested the lands in M-S for the purpose of the specified developments but on terms that they could only be used for railway purposes unless and until M-S obtained the Government's permission to carry out the specified developments. This makes no sense. Had Singapore sold the three initial parcels to a company unconnected with Malaysia and Singapore for the purpose of specified development, that company would have obtained planning permission without being required to pay DC. The practice recognised by Rule 4 would have applied. It seems to us that the principles underlying Rule 4 would have

[89] Transcript, pp. 633–636.

applied *a fortiori* when the lands were being transferred to a company jointly owned by Malaysia and Singapore for the purpose of a joint venture that Malaysia and Singapore had agreed to underwrite.

156. One reason why DC does not apply where Singapore sells land for a specified development is because, as vendor, Singapore is in a position to ensure that the purchaser pays for the value that the specified development gives to the land. As a party to the POA Singapore was equally in a position to negotiate terms that balanced the benefit that Singapore would obtain from the return of the majority of the railway lands against the benefit that Malaysia would receive, through MS, in the value that the specified developments would give to the parcels that were to be vested in M-S. This could be done by adjusting the size or numbers of the parcels, of by adjusting the relative shareholdings of the two Parties in M-S. The natural inference was that the POA did just this.

157. Ultimately the natural meaning of the POA turns upon the nature of the transaction, which we have analysed above. The transaction was a single exchange of lands in which the release of the railway lands by Malaysia was full consideration for the right of M-S to receive and develop the three POA parcels. The POA required the Parties to fund the developments that it provided that M-S should carry out. In these circumstances it went without saying that M-S would not have to pay DC in order to obtain permission to carry out these very developments.

158. Professor Crawford reinforced Malaysia's case by two further arguments, raised for the first time on the third day of the hearing[90], but none the worse for that. Under Singapore's interpretation of the POA, had M-S opted to receive the initial three parcels, their value would have been relatively modest. That is because the use of the lands would have been restricted to use for railway purposes. Before the land could be developed DC would have had to be paid[91]. Under Malaysia's interpretation of the POA if M-S had opted to receive the three POA parcels their value would have reflected the fact that they could be developed without payment of DC. Article 7 of the POA provided:

> in exchange for the MRA land at Keppel, a plot of land of equivalent value in Marina South will be offered to M-S Pte Ltd so that a prestigious building can be developed on the Marina site… . If the land offered to M-S Pte Ltd is, in the opinion of M-S Pte Ltd not suitable, then alternative sites in Marina South of equivalent value shall be offered to M-S Pte Ltd. Examples of the kind of prestigious site of equivalent value to MRA Keppel land are attached in Plan 2 and Plan 3 (our emphasis).

159. It is common ground that the examples of land "of equivalent value" at Marina South in Plans 2 and 3 were lands of equivalent value to the Keppel parcel with full development rights for the use proposed in Annex 1.

[90] Transcript, pp. 538–543.

[91] Transcript, p. 167.

Professor Crawford submitted[92] that this clearly indicated that under the POA the Keppel land would have vested in M-S with full development rights. Lord Goldsmith's answer to this was that in order to be able to exercise the swap option M-S would first have had to obtain planning permission to develop the Keppel parcel, paying DC in order to do so, or to agree contractually to pay the equivalent of DC in order to exercise the swap option[93].

160. Lord Goldsmith's interpretation requires the implication of a significant proviso to the swap option in the POA. We can see no warrant for this. The swap option was clearly based on the premise that the Keppel land would have full development value. We consider that Professor Crawford was correct to submit that the swap option was "flatly inconsistent with Singapore's argument that the POA lands were to be vested in M-S at their existing use so that DC would have to be paid".

161. Professor Crawford's second submission also related to a swap option. Ultimately Malaysia opted for M-S to receive lands in Marina South and Ophir-Rochor rather than the railway lands. It obtained planning permission for the lands it received without payment of DC. Lord Goldsmith submitted, on instructions, that this was because those lands were reclaimed from the sea, so that they were not subject to any zoning restriction[94]. Professor Crawford submitted[95] that this should have resulted in DC being payable on the full value of the lands. He suggested that the reason why no DC had been payable was because the policy underlying Rule 4 had been treated as applicable to a swap transaction. We think that there is force in this submission. The Singapore Government was selling off plots of land at Marina South that had been reclaimed from the sea in the same way that it had sold off plots of land cleared of vegetation under the GLS programme. The purchasers in each case paid the full development value of the land and for this reason were not required to pay DC. M-S was treated in the same way.

162. For these reasons, we have reached the conclusion that, on the ordinary meaning of the POA, if M-S had opted to receive the three initial parcels, it would have been entitled to carry out the developments specified in the Annexes to the POA without payment of DC.

(viii) The subjective intention of the Parties

163. There is no doubt that under international law evidence of a common intention or understanding of the Parties to a treaty can assist in its interpretation. Malaysia in its Counter-Memorial at paragraph 194 cited the

[92] Transcript, p. 542.

[93] Transcript, pp. 80, 81, 607.

[94] Transcript, p. 624.

[95] Transcript, p. 544.

following statement of the International Law Commission on the draft Articles on the Law of Treaties[96]:

> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.

Evidence of practice that demonstrates a common understanding of the Parties to a treaty contrasts with evidence of conflicting understanding or intention of those involved in its negotiation. The latter does not assist in the interpretation of the treaty. For this reason we have derived no assistance from the evidence of Mr. Lee Kuan Yew and Tun Daim as to their understandings when negotiating the POA. The former stated[97]:

> I never doubted that development charge would be payable for the development of the land parcels under the agreement. The parcels were in Singapore and their development would necessarily be subject to Singapore law.

The latter stated[98]:

> The question of DC did not arise on this arrangement. The whole point of the POA was to transfer land to M-S Pte Ltd which could be developed for commercial purposes. Provided that M-S Pte Ltd did not exceed the prescribed use and plot ratios set out in the POA, it would not pay DC.

This conflict of evidence underlines, rather than assists, the issue of interpretation that we have to resolve.

(ix) The subsequent conduct of the Parties

164. In Appendix 1 to its Counter-Memorial[99] Malaysia submitted that it was revealing that no mention was made of DC in the negotiations that took place after the conclusion of the POA between representatives of Singapore and Malaysia with a view to the implementation of the POA. These included the drawing up by Singapore of a draft MOU[100] setting out the steps to be taken to implement the POA, including financing requirements. Neither in the draft MOU nor in any other document was there any reference to the need to fund the payment of DC, or indeed any reference to DC at all. We agree with Malaysia that if it was the common understanding that the POA imposed an obligation on M-S to pay DC in order to proceed with the proposed developments it is surprising that no reference was made to DC by those responsible for implementing the POA.

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[96] Draft Articles on the Law of Treaties, Introductory Commentary to draft Articles 27 and 28, paragraph 15; in International Law Commission's 1966 Commentary to the Draft Articles on the law of Treaties "Report of the ILC on the second part of its seventeenth session and on its eighteenth session", reproduced in *Yearbook of the ILC 1966*, vol. II(1), p. 169, at p. 221.

[97] Witness Statement by Mr. Lee Kuan Yew, para. 5.

[98] Witness Statement of Tun Daim Zainuddin, para. 5(*b*).

[99] Malaysia's Counter-Memorial, Appendix 1, paras. 14–16.

[100] Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (Exhibit S-25/Tab C-34).

165. Singapore contended that, in accordance with the principles of treaty interpretation, the conduct of the Parties in and after 2008 provides "valuable evidence of the Parties' intention and understanding"[101] in relation to the POA. In support of this submission Singapore invoked the decision of the Court of Arbitration in the *Beagle Channel* Arbitration[102].

166. Malaysia denies that the subsequent conduct of the Parties constituted "any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions" or "practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation"[103].

167. It is important to recognise that this part of the debate is about drawing inferences from the conduct of the Parties as to the interpretation of an earlier treaty. Thus Article 31 of the Vienna Convention states that there shall be "taken into account" when interpreting a treaty "any subsequent agreement between the parties" regarding its interpretation. The agreement referred to is consensus, not a formal agreement that itself has the status of a treaty. Such an agreement would plainly be conclusive.

168. The *Beagle Channel* arbitration involved a territorial dispute in relation to which there were relevant acts exercising jurisdiction over 150 years. Those acts bore little relation to the conduct relied upon by Singapore in the present case, which we are about to consider in detail. However, in the course of its lengthy award the Court of Arbitration made some comments about "the temporal or chronological factor" in relation to the significance of maps illustrating a territorial settlement or disputed boundary that are of relevance in the present case[104]:

> Where there is controversy, the implications of any given map can be correctly assessed only if account is taken of the date of its publication,—and also of the circumstances of the time. Thus, maps appearing contemporaneously with the territorial settlement or within a relatively short period after it will, other things being equal, have greater probative value than those produced later when the mists of time have obscured the landscape and the original participants have left it.

Those involved on both sides in the negotiations in and after 2008 were dealing with the implementation of a treaty of a commercial nature, concluded nearly 20 years earlier, in which they had had no involvement. True it is that Singapore's stance on the meaning of the POA was informed by a comment made by Minister Mentor Lee Kuan Yew as to the effect of the POA. But having considered the evidence of the conduct of the Malaysian representatives in and after 2008 we do not find that this carries any probative inference as to the intentions

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[101] Singapore's Reply, para. 159.

[102] *Beagle Channel Arbitration (Argentina* v. *Chile)* (1977) 52 ILR 93 (Authority ML-19/Tab G-5).

[103] Malaysia's Rejoinder, paras. 126–149.

[104] *Beagle Channel Arbitration (Argentina* v. *Chile)* (1977) 52 ILR 93 at 206, para. 142(3) (Authority ML19/Tab G-5).

of those representing Malaysia when the POA was concluded in 1990. They had not been involved in the conclusion of the POA. The original participants had "left the landscape". For the reasons that we shall give when analysing events in and after 2008, the actions and reactions of the Malaysian participants carried no inferences as to the intention of those who concluded the POA in 1990.

169. It is for these reasons that we have found the subsequent conduct of the Parties in and after 2008 of no assistance in relation to the interpretation of the POA as at the time that it was concluded in 1990.

(x) Conclusions

170. Applying the ordinary meaning of the POA, as originally agreed, in its context and having regard to its object and purpose, M-S would not have been liable to pay DC had it obtained and developed the three POA parcels. The nature of the transaction was analogous in principle to a sale by Singapore of land for a specified development. Consideration would have been provided for the full development values of the parcels as specified in the Annexes to the POA. The POA anticipated and required that these developments should be carried out by M-S. It would have been contrary to the POA for M-S to have been required to pay DC for permission to carry out those developments. It is significant that in the negotiations that followed Prime Minister Lee Kuan Yew's dinner and led to the conclusion of the POA, and in the steps taken to implement it after its conclusion, the requirement to pay DC was never once mentioned. This is in marked contrast to the negotiations that led to the amendment of the POA, to which we now turn.

Q. The Effect of the Conduct of Malaysia in and after 2008

171. In the course of the negotiations leading up to the 24 May Joint Statement, correspondence from Singapore asserted repeatedly that M-S would have to pay DC if it opted to develop the three POA parcels. Malaysia did not challenge these assertions. It is Singapore's case that Malaysia's failure to do so now precludes Malaysia from successfully challenging the obligation on the part of M-S to pay DC had M-S opted to develop the three initial parcels. This part of Singapore's case is not presaged by the terms of the Submission Agreement and its Annex nor by Singapore's Memorial, though the seeds of it are to be found in the latter's paragraphs 178 and 184:

> 178. Although M-S Pte Ltd's liability to pay DC is not dependent on the state of Malaysia's knowledge, it is clear from the chronology recited in Chapter II above that Malaysia was, in any event, aware of M-S Pte Ltd's liability to pay DC throughout the entire span of time from 1990 to the point when the issue was agreed to be referred to arbitration.
>
> […]

184. Finally, the fact that DC would have to be paid was also specifically highlighted to Malaysia, and acknowledged by it, on various occasions prior to the conclusion of the 24 May 2010 Agreement and even beyond that. Malaysia even made specific enquires to Singapore concerning DC. These occasions include meetings between the officials of both countries, meetings between the Ministers and Prime Ministers of both countries, and even the sending of official Third Person Notes between the two Governments—as detailed at paragraphs 77 to 113 of this Memorial. Malaysia was thus, in all the circumstances, fully aware that DC would have to be paid for the development of the Keppel, Kranji and Woodlands parcels, as part of the agreement struck between the two countries.

172. This part of Singapore's case was first advanced in little over a page of Singapore's Reply, in the following terms:

(II) The 24 May 2010 Agreement was similarly concluded on the basis that DC was payable

172. From the above paragraphs, it is clear that in the lead-up to the 24 May 2010 Agreement, there were numerous opportunities for Malaysia to object to the payment of DC. However, Malaysia did not at any time before 24 May 2010 object to any of these letters and Third Person Notes sent by Singapore (even though it had clearly studied them, and therefore knew that DC was payable). During that period, Malaysia had been careful to object to the assertions of Singapore with which it did not agree. It also knew, or would reasonably have known, of the quantum of DC involved.

173. Instead of objecting, Malaysia relied on the proposals contained in these letters and Third Person Notes (which included the statements that DC was payable) and built on them to advance its own interests in the negotiations leading up to the 24 May 2010 Agreement. In particular, it should be noted that Singapore had expressly stated in November 2008 that DC was payable for the Keppel, Kranji and Woodlands parcels, which Malaysia did not dispute.

174. Three conclusions are apposite. First, this chain of correspondence clearly indicates that both the Parties believed that DC was payable under the terms of the POA. Secondly, the chain of correspondence above constitutes a clear basis on which the 24 May 2010 Agreement was concluded (as stated in the Memorial of Singapore at paragraph 166, which Malaysia has not denied). In other words, this confirms the understanding that DC was payable under the POA deal, and in any case constituted an agreement to do so in 2010. Thirdly, this chain of correspondence reflects an unambiguous, agreed basis upon which the 24 May 2010 Agreement was concluded, and upon which Malaysia secured from Singapore significant additional benefits. To this end, Malaysia is now estopped and/or otherwise precluded from asserting that no DC is payable.

173. In its Rejoinder[105] Malaysia asserted that its silence in the period up to the 24 May Joint Statement did not amount to agreement that DC was payable. Malaysia went on[106] to describe Singapore's plea of estoppel as "inchoate" and "half-hearted".

174. It was not until Singapore's oral submissions[107] in reply, after some discussion with the Tribunal, that Singapore clarified its case on estoppel:

> the representation, whether expressly or by their conduct, was that Malaysia honestly believed that M-S Pte Ltd would pay DC for the 3+3 plots and that that would be the condition for calibrating equivalent value in the event of a swap.

175. By this stage of the hearing the issues between the Parties in relation to Malaysia's conduct in the period up to the 24 May Joint Statement had become clearer. Singapore's case was as follows:

(i) Singapore at all times believed that DC would be payable under the POA[108].
(ii) Malaysia at all times up to the 24 May Joint Statement also believed that DC would be payable under the POA. Tan Sri Nor's evidence to the contrary was not to be accepted[109].
(iii) Alternatively, Malaysia is estopped from denying that it believed that DC would be payable under the POA.
(iv) The agreement of both Parties that DC would be payable, manifested in the course of negotiations, was evidence of the intention of the Parties at the time that the POA was originally agreed.
(v) The 24 May Joint Statement constituted a binding agreement between Malaysia and Singapore a term of which was that DC would be payable on the three POA parcels.
(vi) That agreement requires the Submission Question to be answered in the affirmative.

176. Malaysia's answer to this case is as follows:

(i) Singapore had reservations as to whether DC was payable under the POA[110].
(ii) At no time did Malaysia believe that DC would be payable under the POA.
(iii) No estoppel arises from Malaysia's conduct in the course of the negotiations.
(iv) The manner in which the Parties negotiated in 2008 did not evidence the common intention of the Parties at the time that the POA was originally negotiated.

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[105] Malaysia's Rejoinder, paras. 138–149.
[106] Malaysia's Rejoinder, paras. 150–154.
[107] Transcript, p. 739–740.
[108] Transcript, pp. 675–676.
[109] Transcript, pp. 435, 684–697.
[110] Transcript, p. 462.

(v) The 24 May Joint Statement constituted an agreement between the parties, but not an agreement that DC would be payable. It was one of a series of agreements made in the course of implementing the POA.

(vi) The true interpretation of the POA, both in its original and amended form, requires the Submission Question to be answered in the negative.

We shall deal first of all with the issues of fact in relation to the beliefs of the Parties as to whether POA would be payable under the POA.

177. While a significant part of this award has been devoted to an analysis of the POA in its original form, we have reached a firm conclusion that on its true interpretation it did not require M-S to pay DC if it opted to receive the three POA parcels of land. In these circumstances the evidence that Singapore's representatives, with the benefit of legal advice, had formed a firm contrary view is perhaps surprising. However, Mr. Yeo's evidence to this effect was not challenged and it accords with the stance taken by Singapore. We accept that in the negotiations that led to the 24 May Joint Statement Singapore's representatives at all times believed that the POA, in its original form, required M-S to pay DC if it opted to develop the three POA parcels.

178. At paragraph 7 of his witness statement, Tan Sri Nor said:

> … until Singapore first raised the issue in the negotiations [i.e., the negotiations in relation to the land swap], we had not considered that this tax would be payable on POA lands. During the course of our discussions, therefore, we were simply trying to find out more information from Singapore as to why they considered the tax to be applicable and how it was calculated.

In his oral evidence he went further than this. He said that during the period up to the 24 May Joint Statement he, and other representatives of Malaysia, had considered that DC was not payable under the terms of the POA[111]. The reason that he did not communicate this view to Singapore was that things were moving fast and that Malaysia was concerned with "the big picture" and thought that DC was a lesser matter that could be dealt with later. Because Singapore did not say that liability to DC should be part of the Joint Statement they thought that the matter had been resolved[112].

179. We consider that Singapore was justified in challenging this evidence. It is not compatible with the contemporary documents, which paint a clear picture that we find more reliable. Our analysis of events up to and after the 24 May Joint Statement is as follows:

180. At about the time that negotiations in relation to the implementation of the POA were reopened by the "without prejudice" offer of 2 June 2008, the Singapore Cabinet considered, in the presence of Minister Mentor

[111] Transcript, pp. 367–374.

[112] Transcript, p. 385.

Lee Kuan Yew, whether under the POA M-S would be liable to pay DC. The Cabinet formed the firm view that M-S would be so liable.

181. We have no reason to think that before the matter was raised by Singapore, the Malaysian representatives had given any thought to DC. In 1990, negotiations on behalf of Malaysia had been conducted by Minister Daim. He was an experienced property developer who knew all about DC and Differential Premium but, quite reasonably, it had not occurred to him that DC would be payable under the POA[113]. The evidence shows a lack of understanding about DC on the part of Prime Minister Abdullah, Minister Anifah and Minister Nor in the latter part of the negotiations that led up to the 24 May Joint Statement and there is no reason to think that Prime Minister Najib and Minister Rais knew any more about it before they were replaced.

182. On 20 November 2008 Minister Yeo appended to the valuations of the three initial parcels the valuation footnote. This stated that M-S would need to bear the DC in respect of the three POA parcels. This assertion was made in good faith and represented the understanding of the Singapore Cabinet, but unfortunately, as we have found, it was wrong in law. The valuation footnote led Malaysia, in the TPN of 19 March to seek information about, *inter alia*, the determination of DC. Singapore sent a "Quick Guide" to DC under cover of a TPN dated 18 May 2009. This was not an easy document to follow and the TPN advised Malaysia to "engage a qualified professional to advise on the actual computation of development charges, if necessary."

183. On 22 December 2008 Prime Minister Lee Hsieng Loong wrote to Prime Minister Abdullah[114] referring to the "without-prejudice offers". He commented that Singapore had made these offers to make the implementation of the POA "politically easier for Malaysia" and that they gave Malaysia "substantially more than it would receive under the POA". There is no reason to believe that either Prime Minister doubted the accuracy of this comment.

184. It is not clear from the evidence what advice Malaysia took in relation to DC or when, but we are satisfied that at this stage Malaysia accepted the accuracy of Singapore's assertion that DC would fall to be paid under the POA. Equally, it is plain that, by the meetings that preceded the 24 May Joint Statement, Malaysia had not appreciated the fact that DC would account for 70% of the value that the development potential added to the three POA parcels. It was the discovery of this that first caused Malaysia to question Singapore's assertion that the POA required M-S to pay DC on these parcels. Up to that point Singapore was justified in concluding that Malaysia accepted that DC would be payable under the terms of the POA.

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[113] Witness Statement of Tun Daim Zainuddin, paras. 5–6.

[114] Letter dated 22 December 2008 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Abdullah Badawi (Exhibit S-56/Tab C-75).

185. Singapore's note of the meeting between delegations from the two countries on 17 June 2010[115] records that a degree of ignorance as to the nature of the obligation to pay DC remained on the Malaysian side. As we read that note, Tan Sri Dato' Azman Mokhtar, the Managing Director of Khazanah, was himself questioning whether DC fell to be paid under the terms of the POA.

186. Minister Nor's internal notes of 21 and 22 June 2010 are the first record of Malaysia beginning to focus on the issues in relation to DC that have been canvased before us. In particular Minister Nor was asking why, if purchasers of land for development at Marina South did not have to pay DC, M-S should be under a liability to pay DC under the POA. There is no suggestion at this point, however, that Malaysia had taken legal advice. This was to come in the telephone conversation between the Prime Ministers on 15 September 2010.

187. In the light of these findings of fact, we turn to the issues of law.

(i) Did the 24 May Joint Statement, and the negotiations leading up to it, constitute an agreement that evidenced the intention of the Parties at the time the POA was negotiated in 1990?

188. We have already explained why we have not found the negotiations leading up to the 24 May Joint Statement of any assistance in interpreting the POA, as agreed in 1990.

(ii) What was the nature of the agreement contained in the 24 May Joint Statement?

189. The Parties were agreed that the 24 May Joint Statement constituted an agreement between Singapore and Malaysia. In the course of his final submissions[116] Lord Goldsmith developed an interesting argument that Mr. Landau had advanced in opening[117]. The 24 May Joint Statement could be treated as a separate free-standing agreement. It was possible to base the answer to the Submission Question on the 24 May Joint Statement without considering the meaning of the POA at all. The Submission Question did not mention the POA, save through the Annex. The POA had to be referred to in order to identify the parcels of land and the proposed land uses to which the Submission Question referred, but not otherwise. We understood this submission to mean that we should interpret the 24 May Joint Statement on the basis of the negotiations that led up to it and ignore any findings that we might make as to the meaning of the original POA.

190. We reject this submission. The 24 May Joint Statement was not a separate free-standing agreement. Clause 4 makes it plain that the agree-

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[115] Delegation Report for Minister (ND)'s Meeting with Tan Sri Nor Mohamed Yakcop on Singapore's Land Swap Offer, 17 June 2010, Shangri-La Hotel, Putrajaya (with redactions) (Exhibit S-79/Tab C-103).

[116] Transcript, pp. 609–612.

[117] Transcript, p. 93.

ment (i) set out new terms and conditions that supplemented the POA in order to maximise the potential of the MRA lands in Singapore and (ii) set out the steps that would be taken to move the POA, as supplemented, forward. The agreement set out in the 24 May Joint Statement was an amendment of the 1990 POA. In interpreting the terms of the 24 May Joint Statement the starting point must be the 1990 POA itself.

(iii) What is the true interpretation of the 24 May Joint Statement?

191. The task of interpreting the 24 May Joint Statement involves the same principles of interpretation that we have identified at F. above. Both the purpose and an important part of the context of the 24 May Joint Statement are summarised in paragraph 190 above.

192. The relevant terms of the 24 May Joint Statement echoed those of the 1990 POA. The 1990 POA provided in paragraphs 1, 2 and 3 for the vesting of the three POA parcels in M-S if the railway terminus were moved to Woodlands. The 24 May Joint Statement provided for the railway terminus to be moved to Woodlands and the three POA parcels, together with three additional parcels at Bukit Timah to vest in M-S. The POA provided in paragraph 7 that M-S would have the option to exchange the Keppel parcel for a parcel "of equivalent value". The 24 May Joint Statement gave a similar swap option. In neither agreement is any mention made of liability to pay DC. We have held that, on true interpretation of the 1990 POA, M-S would have been under no obligation to pay DC had it developed the three POA parcels. Singapore's case must be that the 24 May Joint Statement amended the 1990 POA so as to make DC payable on the three POA parcels.

193. We have found that in the negotiations leading up to the 24 May Joint Statement Singapore repeatedly stated that under the proposed agreement M-S would have to pay DC on the three POA parcels and that Malaysia accepted that M-S would have to do so. The critical issue is whether this consensus constituted a binding agreement that amended the POA, so as to make DC payable on the three POA parcels.

194. The starting point is that when Minister Yeo added the valuation footnote to the valuations attached to his letter of 20 November 2008 he was not purporting, nor intending, to propose an amendment to the POA, or indeed to propose a contractual condition at all. He was simply stating what he believed to be the effect of the POA. The subsequent repetitions of the valuation footnote, and the other occasions on which it was stated to Malaysian representatives that DC would be payable on the three POA parcels, were all on the basis that this was the position under the 1990 POA. Were this not the case it could not have been represented to the Malaysian representatives that the proposed amendments to the POA would result in a substantially better deal for Malaysia.

195. Unhappily Minister Yeo and other representatives of Singapore unwittingly misrepresented the effect of the POA. When Malaysia sought

details of the liability to pay DC it was not, so far as we are aware, informed that a special regime prevailed in respect of Government sales of land under which, if the land was sold for a specified development, DC was not payable. No doubt this was because the Singapore representatives did not appreciate that this was relevant.

196. The Malaysian representatives made no comment prior to the 24 May Joint Statement in relation to Singapore's repeated statements that DC would be payable. They did not *agree* that these statements were correct but they did not challenge them. This would reasonably have led the Singapore representatives to believe that Malaysia accepted that Singapore had correctly stated the position, as indeed we have found was the case.

197. In these circumstances it cannot be said that there was any *agreement* between Singapore and Malaysia, either before the conclusion of the 24 May Joint Statement or in the 24 May Joint Statement that DC would be payable under the terms of the POA, as amended by the Joint Statement. The POA had been amended under a common mistake as to its effect both in its original form and in its amended form. That mistake had been induced by an inaccurate statement by Singapore that DC would be payable under the POA which Malaysia had not questioned.

198. For these reasons we reject Singapore's submission that the 24 May Joint Statement amended the POA so as to make DC payable when it had not been before. We turn to consider the question of estoppel.

(iv) Estoppel

199. Singapore's pleadings did not spell out the particulars of the alleged estoppel and Singapore's counsel had some difficulty in formulating this plea. Estoppel involves a representation that is relied upon to the detriment of the party relying upon it. We have already set out Mr. Landau's formulation of the representation[118]:

> Malaysia honestly believed that M-S Pte would pay DC for the 3+3 plots and that that would be the condition for calibrating equivalent value in the event of a swap.

Mr. Landau went on to submit that that was a representation of fact as to belief and intention. Professor Lowe in his final submissions[119] added little in relation to estoppel under international law other than to submit that the principle applied and that it involved representation, reliance and detriment.

200. We have a little difficulty in following Mr. Landau's formulation of the representation and it may be that the transcription that we have quoted is not entirely accurate. The essence of the representation is, however, that Malaysia believed that DC would be payable under the POA.

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[118] Transcript, pp. 739–740.

[119] Transcript, pp. 749–50.

201. We turn to the allegations of reliance and detriment. In his statement[120] Mr. Yeo stated:

> In a number of my letters to Malaysia, I pointed out that DC was applicable. This point was not disputed by the Malaysians in my meetings with them. The additional concessions to Malaysia were premised, as with the original POA terms, upon DC being payable. Since Malaysia had made no objections to the payability of DC, and even asked Singapore how DC was to be calculated, Singapore proceeded to grant the additional concessions. Had Malaysia disputed the payability of DC, Singapore would not have made the same concessions.

202. Mr. Yeo's evidence as to what would have happened had Malaysia disputed the "payability" of DC is necessarily conjectural. He was not challenged as to this, but it is right that we should say that we have reservations about his conclusions. The concessions to which he referred were (i) the revival of the option in respect of the Kranji and Woodlands parcels and (ii) the offer of the additional three Bukit Timah parcels. As to the former, these parcels were offered as an incentive to persuade Malaysia to move the terminal to Woodlands, which is what Singapore had always wanted and Prime Minister Lee Kuan Yew had intended would come about. The estimated values of the Kranji and Woodlands parcels were S$166 million and S$269 million respectively[121]. Singapore would receive the benefit of 40% of this value through its shareholding in M-S. It seems unlikely that Singapore would not have been prepared to offer this option regardless of the position in relation to DC.

203. The estimated value of the three Bukit Timah parcels totalled S$562 million. Once again Singapore would benefit to the extent of 40% of this through its shareholding in M-S. Mr. Yeo may well have been correct to conclude that Singapore would not have been prepared to offer this additional concession had Malaysia challenged the obligation to pay DC under the POA. This might have depended upon whether Singapore concluded that this inducement was necessary to persuade Malaysia to proceed with the implementation of the POA. We consider that the most likely outcome had Malaysia challenged the obligation to pay DC would have been that which in fact occurred. The DC issue would have been put aside to be resolved by arbitration and the implementation of the amended POA would have proceeded.

204. We have set out these conclusions by way of completeness, but they are not critical to the resolution of the estoppel issue. The inference from Malaysia's silence in the face of Singapore's assertions that DC would be payable under the POA was that Malaysia accepted this to be the case. But we have found that this was in fact the position. What follows from this? At the time of the delivery of the 24 May Joint Statement the Parties shared a misapprehension that DC would be payable under its terms. Malaysia was not

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[120] Witness Statement by Mr. George Yong-Boon Yeo, para. 34.

[121] Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-54/Tab C-73).

responsible for that misapprehension. Singapore had expressed an erroneous view of the effect of the POA and Malaysia had not challenged that view. It would be inequitable if the consequence of this shared misapprehension was that the POA should be treated as amended so as to impose an obligation on M-S to pay DC in respect of all the parcels. The detriment to M-S of such an amendment to the POA, the sum of S$1.47 billion at stake in this arbitration, would far have outweighed the benefit of the additional concessions made by Singapore. Happily, there is no legal principle that requires the amended POA to be interpreted in this way.

205. At the same time, it would not seem fair that Singapore should not have received DC in respect of the three Bukit Timah parcels, when these had been added to the bargain under Singapore's expressed understanding that DC would be payable under the POA. It might have been possible, on the basis that treaties must be interpreted in good faith, for us to have interpreted the amended POA as requiring DC to be paid in respect of these three parcels. Consistently with the equities of the situation, however, Malaysia conceded that DC should be payable in respect of the three Bukit Timah parcels.

206. For these reasons we find that the amendments made to the POA by the 24 May Joint Statement did not include the imposition of an obligation to pay DC in respect of the three POA parcels. The dominant factor in our analysis has been the true interpretation of the 1990 POA. We believe that our approach accords with what the Parties envisaged when they agreed to this arbitration. At no stage before that agreement did Singapore suggest that the 24 May Joint Statement was the critical agreement. The basic bone of contention had been the interpretation of the original POA. We believe that this is what Prime Minister Lee Hsieng Loong had in mind when, on 19 September 2010, he wrote to Prime Minister Najib[122]:

> I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question of whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the three parcels of POA lands in Tanjong Pagar, Kranji and Woodlands. I share fully your wish to resolve this issue in a cordial and friendly manner, which will help to set the tone for our bilateral cooperation in many other fields.

207. Counsel for Malaysia accepted that the terms of the Submission Question left it open to Singapore to rely on principles of estoppel, or even a free standing agreement if it could establish one. The industry and ingenuity of counsel for Singapore have required us to resolve issues that the respective Prime Ministers are unlikely to have envisaged when they agreed to this arbitration. The arbitration has been conducted in the cordial and friendly manner that the Prime Ministers intended, and we hope that its resolution will be a chapter in the continued fruitful cooperation between the two countries involved.

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[122] Letter dated 19 September 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (Exhibit S-89/Tab C-119).

R. Decision

For the reasons that we have given we adjudge and declare that:

(*a*) M-S Pte Ltd would not have been liable to pay DC on the Keppel, Kranji and Woodland parcels if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes to the POA; and

(*b*) Each party is to bear its own costs, as stated in Article 10 of the Submission Agreement.

PART III

Timor Sea Conciliation (Timor-Leste/Australia)

Decision on competence of 19 September 2016

Report and recommendations of 9 May 2018

PARTIE III

Conciliation relative à la mer de Timor (Timor-Leste/Australie)

Décision sur la compétence du 19 septembre 2016

Rapport et recommandations du 9 mai 2018

Timor Sea Conciliation (Timor-Leste/Australia)

Conciliation relative à la mer de Timor (Timor-Leste/Australie)

Decision on competence of 19 September 2016

Compulsory conciliation, pursuant to Article 298(1)(*a*)(i) and Annex V, section 2, of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS)—Request for interpretation and application of Articles 74 and 83 of UNCLOS for delimitation of exclusive economic zone and continental shelf between Timor-Leste and Australia including establishment of permanent maritime boundaries—Objection to competence of Conciliation Commission.

Article 281 of UNCLOS contemplates legally binding agreement—Exchange of letters do not constitute agreement having legal effect pursuant to Article 281—Treaty on Certain Maritime Arrangements in the Timor Sea, of 2006 (CMATS), not agreement to seek settlement of dispute pursuant to Article 281.

Reference to entry into force in Article 298(1)(*a*)(i) of UNCLOS is to that of Convention as a whole, on 16 November 1994—No agreement reached in negotiations between the Parties within a reasonable period of time—Requirements of Article 298(1)(*a*)(i) of UNCLOS regarding competence of Commission satisfied.

UNCLOS is later treaty between the Parties—No material overlap with Timor Sea Treaty Arbitration tribunal—CMATS not agreement precluding dispute resolution under Part XV of UNCLOS—Clean hands doctrine does not make possible breach of another agreement a bar to dispute resolution proceedings—Twelve month period in Article 7 of Annex V of UNCLOS commences on date of present Decision.

Report and recommendations of 9 May 2018

Dispute regarding delimitation of a permanent boundary between maritime zones in the Timor Sea—Compulsory conciliation proceeding under Annex V United Nations Convention on the Law of the Sea—Description of background and process leading to comprehensive agreement regarding maritime boundaries in the Timor Sea, including role played by Conciliation Commission.

Décision du 19 septembre 2016 sur la compétence

Conciliation obligatoire, en application du sous-alinéa 298(1)a)i) et de la section 2 de l'annexe V de la Convention des Nations Unies sur le droit de la mer de 1982 (la Convention)—Requête aux fins de l'interprétation et de l'application des articles 74 et 83 de la Convention aux fins de la délimitation de la zone économique exclusive et du plateau continental entre le Timor-Leste et l'Australie, y compris l'établissement de limites maritimes permanentes—Objection à la compétence de la Commission de conciliation.

L'article 281 de la Convention vise un accord juridiquement contraignant—Un échange de lettres ne constitue pas un accord emportant des effets juridiques aux fins de l'article 281—Le traité relatif à certains arrangements maritimes dans la mer de

Timor de 2006 ne consigne pas une entente des Parties à chercher à régler leurs différends visé par l'article 281.

L'entrée en vigueur envisagée par l'alinéa 298(1)a)i) est celle de la Convention dans son ensemble, le 16 novembre 1994—Les parties ne sont parvenues à aucun accord par voie de négociations dans un délai raisonnable—Le critère prévu par l'alinéa 298(1)a)i) de la Convention concernant la compétence de la Commission est rempli.

La Convention est traité ultérieur entre les Parties—Il n'y a aucun chevauchement avec le tribunal d'arbitrage prévu dans le Traité sur la mer de Timor—Le traité relatif à certains arrangements maritimes dans la mer de Timor ne constitue pas une entente excluant le règlement d'un différend conformément à la partie XV de la Convention—La théorie des mains propres ne fait pas de la violation possible d'une autre entente un obstacle à une procédure de règlement des différends—Le délai de douze mois prévu par l'article 7 de l'annexe V de la Convention commence à la date de la présente décision.

Rapport et recommandations du 9 mai 2018

Différend portant sur la délimitation permanente des zones maritimes dans la mer de Timor—Procédure de conciliation obligatoire conformément à l'annexe V de la Convention des Nations Unies sur le droit de la mer—Description du contexte et de la procédure qui ont conduit à une entente exhaustive concernant la délimitation des zones maritimes dans la mer de Timor, notamment le rôle joué par la Commission de conciliation.

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PCA CASE Nº 2016-10

IN THE MATTER OF A CONCILIATION

-before-

A CONCILIATION COMMISSION CONSTITUTED UNDER ANNEX V TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

-between-

THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE

-and-

THE COMMONWEALTH OF AUSTRALIA

DECISION ON AUSTRALIA'S OBJECTIONS TO COMPETENCE

Conciliation Commission:

H.E. Ambassador Peter Taksøe-Jensen (Chairman)
Dr. Rosalie Balkin
Judge Abdul G. Koroma
Professor Donald McRae
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

19 September 2016

Representatives of the Parties

Democratic Republic of Timor-Leste

Agent

— H.E. Hermenegildo Pereira, Minister of State and of the Presidency of the Council of Ministers

Deputy Agent

— Ms. Elisabeth Exposto, Chief Executive Officer, Maritime Boundary Office

Representatives

— H.E. Kay Rala Xanana Gusmão, Minister of Planning and Strategic Investment, Chief Negotiator for Maritime Boundaries

— H.E. Joaquim da Fonseca, Ambassador to the Court of St. James

— H.E. Abel Guterres, Ambassador to the Commonwealth of Australia

— H.E. Milena Pires, Ambassador to the United States, Permanent Representative to the United Nations

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— Sir Michael Wood KCMG, 20 Essex Street Chambers

— Mr. Eran Sthoeger

Legal Representatives

DLA Piper:

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— Mr. Stephen Webb

— Ms. Gitanjali Bajaj

Maritime Boundary Office:

— Mr. Simon Fenby

— Ms. Sadhie Abayasekara

Commonwealth of Australia

Agent

— Mr. John Reid, First Assistant Secretary, Office of International Law, Attorney-General's Department

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— Ms. Katrina Cooper, Senior Legal Adviser, Department of Foreign Affairs and Trade

Representatives

— Mr. Gary Quinlan AO, Deputy Secretary, Department of Foreign Affairs and Trade

— H.E. Brett Mason, Ambassador to the Kingdom of the Netherlands

Counsel and Advocates

— Mr. Justin Gleeson SC, Solicitor General of Australia

— Sir Daniel Bethlehem KCMG QC, 20 Essex Street Chambers

— Mr. Bill Campbell QC, General Counsel (International Law), Attorney-General's Department

— Professor Chester Brown, 7 Wentworth Selborne Chambers

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— Amelia Telec

— Benjamin Huntley

— Anna Rangott

Department of Foreign Affairs and Trade:

— Justin Whyatt

— Todd Quinn

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Glossary of Defined Terms

Term	*Definition*
Australia	The Commonwealth of Australia
CMATS	Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, 12 January 2006, 2438 UNTS 359
Commission	The Conciliation Commission constituted in the present matter, composed of H.E. Ambassador Peter Taksøe-Jensen (Chairman), Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum
Convention	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
JPDA	The Joint Petroleum Development Area established pursuant to the Timor Sea Treaty
Parties	Timor-Leste and Australia
PCA	The Permanent Court of Arbitration
Third UN Conference	Third United Nations Conference on the Law of the Sea
Timor Sea Treaty	Timor Sea Treaty between the Government of East Timor and the Government of Australia, 20 May 2002, 2258 UNTS 3
Timor-Leste	The Democratic Republic of Timor-Leste
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
Unitisation Agreement	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, 6 March 2003, 2483 UNTS 317

I. Introduction

1. The Parties to these conciliation proceedings are the Democratic Republic of Timor-Leste ("Timor-Leste") and the Commonwealth of Australia ("Australia") (together, the "Parties"). Both States are parties to the 1982 Unit-

ed Nations Convention on the Law of the Sea (the "Convention") ("UNCLOS"),[1] Australia having ratified the Convention with effect from 16 November 1994, and Timor-Leste having acceded to the Convention with effect from 7 February 2013.

2. Timor-Leste and Australia are neighbouring States, separated by the Timor Sea at a distance of approximately 300 nautical miles. In these proceedings, Timor-Leste seeks compulsory conciliation, pursuant to Article 298(1)(*a*)(i) and Annex V, section 2 of the Convention, of a dispute concerning "the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States".[2]

3. Australia objects to the competence of the Conciliation Commission in this matter on the grounds that, *inter alia*, compulsory conciliation pursuant to the Convention is precluded by other treaties entered into between the Parties. However, Australia has made clear that its objections to competence do not have implications for its participation in any further stage of the proceedings; indeed, Australia has committed that it "will abide by the Commission's finding as to whether it has jurisdiction to hear matters on maritime boundaries"[3] and that "if the decision is against us, [Australia] will engage in the conciliation in good faith."[4]

4. The present Decision sets out the Commission's reasoning on the question of its competence pursuant to the Convention. Nothing herein should be understood to prejudge the substance of the Parties' dispute.

A. Background to the Parties' Dispute

5. For the purpose of giving necessary context to this Decision on Competence, the Commission considers it useful to set out, briefly, its understanding of the history of the Parties' dispute and to recall the various international instruments that, in addition to the Convention, bear on the legal relationship between the Parties.

6. Although inhabited for thousands of years, the eastern half of the island of Timor entered the modern era as a colony of Portugal. During the colonial period, the remaining portion of Timor (*i.e.*, the western half of the island), as well as other neighbouring islands, formed part of the Dutch East Indies and, upon independence, became part of the Republic of Indonesia.

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[1] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

[2] Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS, para. 5.

[3] Joint media release: Minister for Foreign Affairs, The Hon Julie Bishop MP; Leader of the Government in the Senate, Senator the Hon George Brandis QC (29 August 2016).

[4] Procedural Meeting Tr. 125:5–6.

7. In 1975, the people of Timor-Leste declared their independence from Portugal, but promptly came under the control of Indonesia, which administered Timor-Leste as a province of Indonesia until 1999. During the period of Indonesian control, Australia entered into certain arrangements with Indonesia with respect to the allocation of seabed resources in the Timor Sea, but did not establish any permanent maritime boundary adjacent to the coast of what later became Timor-Leste.

8. In 1999, in a referendum supervised by the United Nations, the people of Timor-Leste voted in favour of independence from Indonesia. Following a period of temporary administration by the United Nations Transitional Administration in East Timor (UNTAET), Timor-Leste became an independent State on 20 May 2002.

9. On the same day that Timor-Leste regained its independence, Timor-Leste and Australia concluded the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (the "Timor Sea Treaty").[5] In broad terms, the Timor Sea Treaty provided for the creation and management of a Joint Petroleum Development Area (the "JPDA") in the Timor Sea between Timor-Leste and Australia, pending the ultimate delimitation of a maritime boundary between them. Within the JPDA, 90 percent of the petroleum production belongs to Timor-Leste and 10 percent to Australia.

10. Thereafter, in 2003, Timor-Leste and Australia began negotiations on the establishment of a permanent maritime boundary. The focus of these negotiations changed, however, leading to the conclusion on 12 January 2006 of the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* ("CMATS").[6] In broad terms, CMATS (*a*) extended the life of the Timor Sea Treaty until 50 years after the entry into force of CMATS; (*b*) provided for Timor-Leste to exercise jurisdiction over the water column in the JPDA; and (*c*) provided that revenues derived directly from the production of petroleum from the Greater Sunrise Field, an oil and gas field which straddles the eastern limit of the JPDA, would be shared equally between the two States. CMATS also includes in Article 4 a "moratorium" that addresses the issue of permanent maritime boundaries and the availability of dispute resolution with respect to maritime boundaries.

11. In parallel with the negotiation of CMATS, Timor-Leste and Australia also concluded an 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 (the "Unitisation Agreement"),[7] with respect to the Greater Sunrise Field. The Unitisation Agreement

[5] Timor Sea Treaty between the Government of East Timor and the Government of Australia, 20 May 2002, 2258 UNTS 3.

[6] Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, 12 January 2006, 2438 UNTS 359.

[7] 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,

was signed on 6 March 2003, but entered into force in parallel with CMATS on 23 February 2007. CMATS and the Unitisation Agreement thus predate the entry into force of the Convention as between the Parties, which occurred with Timor-Leste's accession on 7 February 2013.

12. The Commission notes that exploitation of the Greater Sunrise Field has not yet commenced.

B. Australia's Objections to Competence and the Scope of this Decision

13. As noted in paragraph 2 above, Timor-Leste has requested compulsory conciliation of a dispute concerning "the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States".[8]

14. Australia objects to the competence of the Commission on six distinct grounds.

15. First, Australia submits that "Article 4 of the CMATS Treaty precludes either Party … from initiating compulsory conciliation under Article 298 and Annex V of UNCLOS and … from engaging in the substantive matters in dispute in such proceedings."[9]

16. Secondly, Australia argues that "the CMATS Treaty is something specifically envisaged by Articles 74 and 83 of UNCLOS, so it is specifically brought into the UNCLOS regime by Articles 74 and 83."[10] Because CMATS is a provisional arrangement of a practical nature contemplated by the Convention, Australia considers that the moratorium in CMATS was not displaced by the entry into force of the Convention.[11]

17. Thirdly, Australia contends that:

> in 2003, the Parties agreed on a mechanism for resolution of that dispute which was negotiation. Australia's case is then that the CMATS Treaty built upon that agreement of the Parties, confirmed that negotiation was to be the method of dispute resolution, and added a time stipulation which was the negotiation was not to occur until a period in the future … .[12]

Accordingly, Australia considers that the Commission's competence is precluded by Article 281 of the Convention, which "recognises the CMATS agree-

6 March 2003, 2483 UNTS 317.

[8] Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS, para. 5.

[9] Competence Hearing Tr. (Final) 140:21 to 141:1.

[10] Competence Hearing Tr. (Final) 183:8–11.

[11] Competence Hearing Tr. (Final) 203:10 to 210:7.

[12] Competence Hearing Tr. (Final) 244:19 to 245:2.

ment as a relevant choice by the Parties that that is the way their dispute is to be determined."[13]

18. Fourthly, Australia submits that the Parties' dispute over maritime boundaries dates to 2002, prior to the entry into force of the Convention as between the Parties.[14] Australia therefore contends that the first condition of Article 298—that the dispute arise "subsequent to the entry into force of this Convention"—is not met.[15]

19. Fifthly, Australia further contends that "[t]here have not been negotiations on the maritime line, which Article 298 contemplates will be necessary before one can resort to its provisions. The reason for that is that the Parties have observed the CMATS Treaty."[16] Accordingly, Australia considers that the second condition of Article 298 is not met.

20. Finally, Australia submits that the Parties dispute is "inadmissible" because Timor-Leste is seeking to "seize the Commission in breach of its treaty commitments to Australia."[17] Australia further submits that principles of comity compel the Commission to "at the very least stay the conciliation proceedings until the Tribunal constituted to hear [a related arbitration concerning the validity of CMATS] has reached a decision."[18]

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21. For its part, Timor-Leste contests each of Australia's objections and submits that the Commission is competent to proceed with the conciliation. More generally, Timor-Leste rejects the dichotomy Australia presents between dispute resolution under the Convention and CMATS. According to Timor-Leste:

> A conciliation commission is a creature of UNCLOS: its competence is determined by UNCLOS, not by other treaties, unless they are incorporated by reference. Even if the institution of conciliation proceedings was a breach of some other commitment, under a separate treaty, for example, that would not deprive the UNCLOS Commission of its competence.[19]

22. Moreover, Timor-Leste does not "accept that the kind of considerations that constrain the exercise of the judicial function can be transported into conciliation"[20] and "do[es] not think that these proceedings should be

[13] Competence Hearing Tr. (Final) 245:3–6.

[14] Australia's Objection to Competence, para. 153.

[15] Australia's Objection to Competence, para. 148.

[16] Competence Hearing Tr. (Final) 258:5–9.

[17] Competence Hearing Tr. (Final) 264:4–6; Australia's Objection to Competence, para. 173.

[18] Australia's Objection to Competence, para. 184.

[19] Competence Hearing Tr. (Final) 446:16–23.

[20] Competence Hearing Tr. (Final) 348:8–10.

conducted as if they are international litigation at all."[21] In responding to Australia's specific objections, Timor-Leste maintains as follows.

23. First, Timor-Leste disagrees with Australia regarding the scope and content of Article 4 of CMATS. Timor-Leste "does not consider that Article 4(1) was intended to or does oblige the Parties not to discuss, and if that is any different, negotiate with each other, on the issue of permanent maritime boundaries."[22] Furthermore, Timor-Leste does not "accept that Article 4(4) can bar the Parties from resort to the mechanisms to Part XV of UNCLOS" and "does not regard the UNCLOS conciliation procedure as a 'dispute settlement mechanism' within the meaning of Article 4(4) because this Commission cannot settle the dispute."[23]

24. Secondly, Timor-Leste submits that the mere fact that CMATS includes a provisional arrangement of a practical nature does not make it *per se* compatible with the Convention.[24] Timor-Leste considers CMATS, as interpreted by Australia, to be incompatible with the Convention under the terms of Article 311, which concerns the relationship between the Convention and other instruments.[25]

25. Thirdly, with respect to Article 281, Timor-Leste submits that the Convention requires a binding agreement,[26] that the 2003 exchange of letters did not constitute a binding agreement,[27] and that:

> CMATS is not an agreement within the meaning of Article 281. It is not an agreement to settle the maritime boundary dispute by a means that excludes a further procedure. On the contrary, it purports to freeze the maritime dispute for 50 years.[28]

26. Fourthly, relying on the negotiating record of the Convention, Timor-Leste considers that the cut-off date for disputes that can be submitted to conciliation under Article 298(1)(*a*)(i) "is the entry into force of this Convention, which … means 16 November 1994."[29]

27. Fifthly, with respect to the condition of prior negotiation in Article 298(1)(*a*)(i), Timor-Leste submits that "it is well established that a requirement such as this for a reasonable period of time to elapse before proceedings are initiated does not require a party to wait when there is no prospect of negotiations… . If one side refuses to negotiate, that cannot be a bar to the operation of Article 298(1)(*a*)(i)."[30]

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[21] Competence Hearing Tr. (Final) 349:10–12.

[22] Competence Hearing Tr. (Final) 435:14–18.

[23] Competence Hearing Tr. (Final) 436:5–15.

[24] Competence Hearing Tr. (Final) 345:21 to 347:1.

[25] Competence Hearing Tr. (Final) 345:21 to 346:6; 436:1–10.

[26] Competence Hearing Tr. (Final) 354:8–17.

[27] Competence Hearing Tr. (Final) 355:2 to 356:3.

[28] Competence Hearing Tr. (Final) 356:10–15.

[29] Competence Hearing Tr. (Final) 358:8–10.

[30] Competence Hearing Tr. (Final) 370:11 to 371:4.

28. Finally, regarding Australia's objection on "admissibility", Timor-Leste emphasizes the non-binding nature of these conciliation proceedings and submits that the Commission will not therefore trespass onto matters that are properly before other fora, including an arbitration tribunal presently considering the validity of CMATS.[31] Timor-Leste also indicates that, if necessary, it will soon terminate CMATS, such that CMATS would no longer be in place by the time the Commission is asked to render any report.[32]

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29. Article 13 of Annex V to the Convention provides that "[a] disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the commission." The Parties likewise agree that the Commission is competent to evaluate and decide on its own competence.[33] Accordingly, in this Decision, the Commission will set out the issues that it considers to bear on its competence under the Convention, addressing Australia's objections and Timor-Leste's responses.

II. Procedural History

30. On 11 April 2016, Timor-Leste commenced these conciliation proceedings by way of a *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS*. In its Notification, Timor-Leste appointed Judge Abdul G. Koroma and Judge Rüdiger Wolfrum as Timor-Leste's party-appointed conciliators.

31. On 2 May 2016, Australia submitted a *Response to the Notice of Conciliation*. In its Response, Australia appointed Dr. Rosalie Balkin and Professor Donald McRae as Australia's party-appointed conciliators.

32. On 11 May 2016, the Parties wrote jointly to the Permanent Court of Arbitration (the "PCA"), requesting that it act as the Registry for these conciliation proceedings.

33. On 25 June 2016, after consulting with the Parties, the party-appointed conciliators appointed H.E. Ambassador Peter Taksøe-Jensen to serve as Chairman of the Conciliation Commission (the "Commission"). Ambassador Taksøe-Jensen was selected from a shortlist of candidates acceptable to both Parties. The Commission was accordingly constituted with effect from 25 June 2016.

34. On 27 June 2016, Australia submitted an *Application for Bifurcation of the Proceedings*, briefly setting out Australia's challenge to the competence of the Commission and requesting the Commission to "bifurcate the conciliation to enable Australia's challenge to the competence of the Commission to be decided as a separate preliminary matter."

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[31] Competence Hearing Tr. (Final) 349:1–9.

[32] Competence Hearing Tr. (Final) 35:11–18.

[33] Australia's Objection to Competence, para. 52; Timor-Leste's Written Submission in Response to Australia's Objections to Competence, para. 5.

35. On 18 July 2016, Timor-Leste submitted its *Comments on Australia's Application for Bifurcation of the Proceedings*, requesting that the Commission "not accede to Australia's request for bifurcation."

36. On 28 July 2016, the Commission convened a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. During the course of the procedural meeting, the Commission and the Parties concluded terms of appointment, discussed the rules of procedure and the organization of the proceedings, and agreed that, following written submissions on competence from the Parties, the Commission would convene a hearing on competence from 29 to 31 August 2016 at which the Parties would address both the question of the Commission's competence and whether the Commission should decide on its competence as a preliminary matter. The Parties also agreed that there would be a public opening session, prior to the hearing on competence, in which the Parties would address the background to the dispute.

37. On 12 August 2016, Australia submitted its *Objection to Competence*.

38. On 25 August 2016, Timor-Leste submitted its Written Submission in Response to Australia's Objection to Competence.

39. From 29 to 31 August 2016, the Commission convened a hearing on the issue of competence with the Parties at the Peace Palace in The Hague, the Netherlands. As agreed with the Parties, the hearing was preceded by an opening session on the background to the dispute, which was webcast live on the website of the PCA. The following participated in the opening session and the hearing on competence:

Commissioners

— H.E. Mr. Peter Taksøe-Jensen (Chairman)
— Dr. Rosalie Balkin
— Judge Abdul G. Koroma
— Professor Donald McRae
— Judge Rüdiger Wolfrum

Timor-Leste

— H.E. Minister Kay Rala Xanana Gusmão
— H.E. Minister Hermenegildo Pereira
— Ms. Elisabeth Exposto
— H.E. Ambassador Joaquim da Fonseca
— H.E. Ambassador Abel Guterres
— H.E. Ambassador Milena Pires

— Ms. Elizabeth Baptista
— Mr. Simon Fenby
— Ms. Sadhie Abayasekara
— Ms. Helena Araujo
— Ms. Ermelinda Maria Calapes Da Costa
— Professor Vaughan Lowe QC
— Sir Michael Wood KCMG
— Mr. Eran Sthoeger
— Mr. Robin Cleverly
— Ms. Janet Legrand
— Mr. Stephen Webb
— Ms. Gitanjali Bajaj
— Ms. Harriet Foster
— Ms. Amber Day
— Mr. Olavio Mendes Ferreira Lopes

Australia

— Mr. John Reid
— Ms. Katrina Cooper
— Solicitor-General Justin Gleeson SC
— Sir Daniel Bethlehem KCMG QC
— Mr. Bill Campbell QC
— Professor Chester Brown
— Mr. Gary Quinlan AO
— H.E. Ambassador Brett Mason
— Ms. Amelia Telec
— Mr. Benjamin Huntley
— Ms. Anna Rangott
— Mr. Justin Whyatt
— Mr. Todd Quinn
— Mr. Mark Alcock
— Ms. Angela Robinson
— Ms. Indra McCormick
— Ms. Christina Hey-Nguyen

Registry

— Mr. Garth Schofield

— Mr. Martin Doe

— Ms. Pem Chhoden Tshering

Permanent Court of Arbitration

Court Reporter

— Ms. Diana Burden

40. During the opening session and hearing on competence, H.E. Minister Kay Rala Xanana Gusmão; H.E. Minister Hermenegildo Pereira, Agent for Timor-Leste; Ms. Elisabeth Exposto, Deputy Agent for Timor-Leste; Professor Vaughan Lowe QC; and Sir Michael Wood KCMG made oral presentations for Timor-Leste. Mr. John Reid, Agent for Australia; Mr. Justin Gleeson SC, Solicitor General of Australia; Sir Daniel Bethlehem KCMG QC; Mr. Bill Campbell QC; Professor Chester Brown; and Mr. Gary Quinlan AO made oral presentations for Australia.

41. On 31 August and 9 September 2016, the Parties wrote to the Commission, providing supplemental written answers to questions posed by the Commission during the hearing. Additionally, on 13 September 2016, Australia provided a further supplemental answer to a question from the Commission concerning Article 9 of CMATS.

III. The Commission's Analysis

42. In this dispute, the Conciliation Commission was instituted pursuant to Article 298(1)(*a*)(i) of the Convention, which provides for compulsory conciliation where a State elects to exclude sea boundary delimitation from arbitral or judicial settlement. Annex V to the Convention provides the basis for the formation and procedure of the Commission itself.

43. Following the initiation of these conciliation proceedings, Australia has objected to the competence of the Commission, principally on the basis of CMATS, a bilateral agreement that, according to Australia, precludes access to the dispute resolution mechanisms of the Convention.

44. Australia begins its objections stating that Article 4 of CMATS precludes compulsory conciliation under the Convention. The Commission does not share this point of departure. In its view, the starting point for the Commission's analysis is not CMATS, but rather the Convention itself. The conciliation procedure was established pursuant to Article 298 and accordingly the competence of the Commission derives from the Convention and its Annex V. Agreements such

as CMATS are relevant to the question of the Commission's competence, but only within the framework and from the perspective of the Convention itself.

45. Furthermore, the Convention is a later treaty as between the Parties. Thus, CMATS could only affect the Commission's competence to the extent that such effect is provided for in the Convention.

46. Within the Convention, provisions for the resolution of disputes among the States Parties are concentrated in Part XV. Compulsory conciliation in respect of sea boundary delimitation arises from Article 298, which falls within Section 3 of Part XV, entitled "Limitations and Exceptions to Applicability of Section 2." Section 2, in turn, is concerned with "Compulsory Procedures Entailing Binding Decisions" and begins with Article 286, which limits access to a court or tribunal under Section 2 to situations "where no settlement has been reached by recourse to section 1." Thus, under the Convention, and in particular its Part XV, a party seeking to make use of the dispute resolution provisions of the Convention must first meet the requirements of Section 1 of Part XV to enable access to the binding procedures of Section 2 or the compulsory conciliation procedures provided in Section 3.

47. Article 281 in Section 1 of Part XV is relevant to the present proceedings, and it is to that provision that the Commission now turns. Thereafter, the Commission will address the conditions for compulsory conciliation to be invoked, as set out in Article 298.

A. Article 281 of the Convention

48. Article 281 of the Convention provides as follows:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

49. This article forms part of a compromise on dispute settlement that was carefully negotiated at the Third United Nations Conference on the Law of the Sea (the "Third UN Conference"), where some States favoured recourse to the compulsory settlement of disputes while others sought to exclude it entirely from the Convention.[34] As adopted, the Convention provides for the compulso-

[34] "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, paras. 38–45 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 60. *See also* "Summary records of meetings of the Plenary, 112th Plenary Meeting", UN Doc. A/CONF.62/SR.112, paras. 17–51 (25 April 1979), *Official Records of the Third United Nations*

ry settlement of disputes and restricts States Parties from entering reservations beyond those expressly provided for in the Convention. At the same time, the Convention makes its own procedures for dispute settlement subject to other procedures on which the parties may have agreed, providing that such other procedures will prevail over the mechanisms created by the Convention.

50. Article 281 has been considered as a potential bar to the jurisdiction of courts and tribunals acting under Part XV of the Convention.[35] On its own terms, Article 281 provides that "the procedures provided for *in this Part* apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure."[36] Article 281 thus extends to any procedure under Part XV of the Convention and is a precondition to the competence of a conciliation commission established pursuant to Article 298(1)(*a*)(i).

51. Australia has invoked two instruments that it considers together constitute an agreement within the meaning of Article 281. The first is an exchange of letters between the Prime Ministers of Timor-Leste and Australia in 2003, and the second is CMATS itself. The Commission will address each in turn.

1. The 2003 Exchange of Letters

52. On 4 March 2003, the then–Prime Minister of Timor-Leste, Mr. Mari Alkatiri, wrote to the then–Prime Minister of Australia, Mr. John Howard, in the following terms:

> I refer to our correspondence of late last year regarding permanent maritime boundary discussions between our two countries.
>
> As you know, a very large amount of work and effort has been dedicated by our respective Governments to the conclusion and implementation of the Timor Sea Treaty, and the conclusion of an International Unitisation Agreement for the Greater Sunrise field in the Timor Sea (IUA). I am particularly pleased that your Government is now in a position to ratify the Treaty, and I am pleased to report that I am submitting the IUA immediately to my Council of Ministers for its approval.
>
> In your letter of 3 November last year, you indicated your view that Australia is willing to commence discussions on permanent maritime boundaries once the Treaty is in force and the IUA has been completed. Since those days are fast approaching, I would very much welcome your early indication of a date on which those discussions might begin and a

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Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session), pp. 11–14.

[35] *See, e.g.*, *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 294–295, paras. 56–60. The point was also discussed in *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction of 29 October 2015, paras. 193291.

[36] Emphasis added.

date by which you consider those discussions might result in a permanent boundary delimitation.[37]

53. On 25 July 2003, Prime Minister Howard responded as follows:

> Thank you for your letter of 4 March 2003 seeking agreement on the commencement of maritime boundary discussions between our two countries. I apologise for the delay in responding.
>
> Australia's first priorities have been finalising the implementation of the Timor Sea Treaty (TST) and the International Unitisation Agreement (IUA) for the Greater Sunrise field in the Timor Sea, and establishing the Designated Authority of the Joint Petroleum Development Area (JPDA). Australia looks forward to working together with East Timor under the TST and IUA to develop jointly the resources of the JPDA for the benefit of both our countries.
>
> With the TST now in force, Australia is better placed to commence maritime boundary delimitation negotiations with East Timor through the formation of a joint maritime body. While the resources Australia can devote to the establishment of this body will initially be limited by our focus on completing the process of bringing the IUA into force, Australia considers that in time such a body should provide our two countries with a forum to consider not only maritime boundary delimitation, but also the range of other maritime issues facing us.
>
> Given the complexity of the internal processes I imagine both our governments will need to undertake prior to these negotiations, I propose our governments aim to have a first formal meeting to discuss the formation of the joint body before the end of this year.
>
> Australia's experience of concluding delimitation agreements with other countries is that the process can be prolonged. Therefore I do not feel able to nominate a date by which the negotiations should be concluded. However, I confirm Australia's willingness to proceed in good faith towards the objective of delimiting our maritime boundaries.
>
> I would like to take this opportunity to reaffirm Australia's commitment to promoting the peaceful and prosperous development of East Timor.[38]

54. Australia accepts that this exchange of letters did not constitute a binding agreement,[39] but considers that a binding agreement is not required for the purposes of Article 281.[40] In Australia's view, the exchange of letters was nonetheless an "agreement" to pursue the delimitation of the maritime boundary between Timor-Leste and Australia through negotiation. This agreement was, according to Australia, then supplemented by CMATS, which added an

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[37] Letter from Prime Minister Alkatiri to Prime Minister Howard dated 4 March 2003 (Annex AU-006).

[38] Letter from Prime Minister Howard to Prime Minister Alkatiri dated 25 July 2003 (Annex AU-007).

[39] Australia's Response to the Commission's Questions to the Parties, para. A21 (31 August 2016).

[40] Competence Hearing Tr. (Final) 244:19 to 245:2; 412:3–15.

exclusion on further procedures for the duration of that treaty.[41] However, Timor-Leste argues that only a legally binding agreement would be relevant for the purposes of Article 281.[42]

55. Article 281 has been considered on a number of previous occasions by courts and tribunals acting pursuant to Part XV of the Convention. As Timor-Leste noted, the tribunal in the *South China Sea Arbitration* applied Article 281 on the basis that a legally binding agreement was required and analysed various instruments relevant to those proceedings in such terms.[43] As Australia observed, Article 281 was discussed (although that provision was not raised as a jurisdictional objection by either party) by the tribunal in *Barbados* v. *Trinidad and Tobago* in reference to what it described as a "*de facto* agreement" that was "agreed in practice, although not by any formal agreement," to settle the dispute through negotiations, before concluding that the parties' *de facto* agreement did not, in any event, exclude further procedures.[44] It is unclear, however, whether by a "*de facto* agreement", the tribunal in *Barbados* v. *Trinidad and Tobago* contemplated a non-binding agreement. Article 281 was also considered by the International Tribunal for the Law of the Sea in its provisional measures order in *Land Reclamation in and around the Straits of Johor*, when it considered Singapore's contention that "a consensual process of negotiation had commenced and, as a legal consequence, both States had embarked upon a course of negotiation under article 281."[45] The parties had, in any event, agreed that their discussions were without prejudice to the possibility of arbitration under the Convention, such that the International Tribunal for the Law of the Sea found Article 281 not to be applicable under those circumstances.[46] Finally, the tribunal in the *Southern Bluefin Tuna Arbitration* applied Article 281 to the Convention for the Conservation of Southern Bluefin Tuna, which was unequivocally a legally binding agreement.[47]

56. Although Article 281 does not expressly state that an "agreement" must be legally binding for the article to apply, the Commission nevertheless considers that Article 281 requires a legally binding agreement. As a matter of the text of the Convention, Article 281 stands adjacent to Article 282, which contemplates formal, binding agreements when it refers to a "general, regional or bilateral agreement or otherwise, that such dispute shall, at the request

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[41] Competence Hearing Tr. (Final) 244:19 to 245:2; 412:3–15.

[42] Competence Hearing Tr. (Final) 354:8–17.

[43] *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction of 29 October 2015, paras. 193–291.

[44] *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p.147 at pp. 205–206, para. 200(ii).

[45] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10 at p. 20, para. 53.

[46] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10 at p. 21, paras. 55–57.

[47] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan)*, Award of 4 August 2000, RIAA Vol. XXIII p. 1.

of any party to the dispute, be submitted to a procedure that entails a binding decision." The two provisions use the same terminology of "have agreed" and "agreement", and the Commission does not consider that the text of the Convention would support significantly different meanings to the same terms appearing in two parallel articles.

57. Equally importantly, the Commission does not consider that a reading of Article 281 that would permit a non-binding agreement to preclude the application of the compulsory dispute settlement provisions of Part XV would be consistent with the fact that Part XV of the Convention is itself a binding agreement.

58. On the basis of the foregoing considerations, the Commission concludes that the 2003 exchange of letters between Prime Ministers Alkatiri and Howard did not constitute an agreement that would have legal effect pursuant to Article 281 of the Convention. Australia does not contend, of course, that the exchange of letters was intended to "exclude any further procedure." That element of Article 281 arises only with respect to CMATS, to which the Commission now turns.

2. The 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)

59. The second instrument that, Australia submits, forms part of the Parties' agreement for the purposes of Article 281 is CMATS itself, Article 4 of which provides as follows:

> *Article 4*
> *Moratorium*
>
> 1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.
>
> 2. Paragraph 1 of this Article does not prevent a Party from continuing activities (including the regulation and authorisation of existing and new activities) in areas in which its domestic legislation on 19 May 2002 authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil.
>
> 3. Notwithstanding paragraph 2 of this Article, the JPDA will continue to be governed by the terms of the Timor Sea Treaty and associated instruments.
>
> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either

directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.

6. Neither Party shall raise or pursue in any international organisation matters that are, directly or indirectly, relevant to maritime boundaries or delimitation in the Timor Sea.

7. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty.

60. It is Australia's contention that Article 4 of CMATS, when read together with the exchange of letters discussed above, jointly constitute an agreement pursuant to Article 281, displacing the competence of the Commission. In Australia's view, the exchange of letters constitutes an agreement to settle permanent maritime boundaries between the Parties through negotiations. According to Australia, CMATS adds to that an exclusion of further procedures and, although separated in time, the two agreements together fulfil the requirements of Article 281. Timor-Leste, for its part, submits that CMATS is void for reasons being considered in parallel proceedings by the tribunal in the *Timor Sea Treaty Arbitration48* and, in any event, that CMATS does not provide for dispute settlement.[49]

61. Because Australia's Article 281 objections depend on both the exchange of letters and CMATS, the Commission's finding that the exchange of letters does not constitute an agreement within the meaning of Article 281 would be sufficient to dispense with this objection in its entirety. Nevertheless, the Commission considers it appropriate to examine whether CMATS alone would constitute an agreement within the meaning of Article 281.

62. Unlike the exchange of letters, CMATS is a binding treaty between the Parties. Article 4(4) of CMATS also appears to have been intended to exclude recourse to dispute resolution mechanisms, including those of the Convention. In the Commission's view, what CMATS is not—and what Article 281 requires—is an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." CMATS is an agreement *not* to seek settlement of the Parties' dispute over maritime boundaries for the duration of the moratorium.

63. Article 279 of the Convention calls on the Parties to "seek a solution by the means indicated in Article 33, paragraph 1, of the Charter" of the United Nations, which include negotiation, enquiry, mediation, conciliation,

[48] Competence Hearing Tr. (Final) 333:12–14.

[49] Competence Hearing Tr. (Final) 356:10–19.

arbitration, judicial settlement, and resort to regional agencies or arrangements. Article 33 of the Charter and Article 280 of the Convention both make clear that this list is not exhaustive, and that States may settle their disputes through any other "peaceful means of their own choice." There is, in short, a great deal of flexibility in the range of approaches to dispute settlement that the Convention will recognize and respect. Nowhere in CMATS, however, is there any procedure intended to provide for the settlement of maritime boundaries. On the contrary, CMATS forecloses all possible avenues for the resolution of disputes relating to maritime boundaries, negating, in Article 4(7), the Parties' "obligation to negotiate permanent maritime boundaries for the period of this Treaty." Indeed, even if the Parties had concluded a binding agreement in 2003 to settle their maritime boundary through negotiation, CMATS on its own terms would negate, rather than confirm, such an obligation.

64. Nothing in CMATS constitutes an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." Nor does the Commission consider that an agreement *not* to pursue any means of dispute settlement can reasonably be considered a dispute settlement means of the Parties' own choice. Accordingly, the Commission concludes that CMATS is not an agreement pursuant to Article 281 that would preclude recourse to compulsory conciliation pursuant to Article 298 and Annex V.

B. Article 298 of the Convention

65. Article 298 provides in relevant part as follows:

> *Optional exceptions to applicability of section 2*
>
> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (*a*) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

66. As with the provisions of the Convention discussed in paragraph 49 above, Article 298 embodies a compromise on dispute settlement following

extensive negotiations between those States which favoured compulsory and binding dispute settlement procedures and other States which sought to exclude even non-binding dispute settlement procedures. Article 298(1)(*a*)(i) establishes the limits of what a party to the Convention can unilaterally exclude from compulsory settlement of disputes and, in particular, from compulsory conciliation under Annex V, section 2 of the Convention. At the same time, Article 298(1)(*a*)(i) establishes certain preconditions to invoking compulsory conciliation—namely the exclusion of pre-existing disputes and the absence of a negotiated agreement—which limit the competence of a compulsory conciliation commission under Annex V and form the basis of Australia's objections.

67. On 22 March 2002, Australia made the following declaration under Article 298(1)(*a*)(i):

> The Government of Australia further declares, under paragraph 1 (*a*) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (*a*) and (*b*) of this declaration) with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.[50]

68. Australia accepts that, as a logical consequence of this declaration, it has consented to "submission of the matter to conciliation under Annex V, section 2." Australia, however, argues that the conditions attached to such consent have not been fulfilled, namely that it applies only in cases where "a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties."[51] According to Australia, Timor-Leste has submitted to conciliation a pre-existing dispute, which has not previously been submitted to negotiation.[52] In particular, Australia relies upon the 2003 exchange of letters between Prime Minister Mari Alkatiri and Prime Minister John Howard as evidence of a pre-existing dispute that pre-dates the 2013 entry into force of the Convention for Timor-Leste.[53] To the extent that this dispute is not a pre-existing dispute dating back to at least 2003, and has only arisen after 2013, Australia submits that it has yet to be the subject of negotiations between the Parties since the moratorium in Article 4 of CMATS has precluded such negotiations.[54]

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[50] Australia, Declaration under Articles 287 and 298, 22 March 2002, 2177 UNTS 307.

[51] Competence Hearing Tr. (Final) 256:9 to 258:15.

[52] Competence Hearing Tr. (Final) 256:9 to 258:15.

[53] Australia's Objection to Competence, para. 153.

[54] Australia's Objection to Competence, para. 155.

1. Whether the Parties' dispute has arisen "subsequent to the entry into force of this Convention"

69. Before attempting to apply Article 298(1)(*a*)(i), a preliminary question arises, namely, what is the dispute envisaged under Article 298(1)(*a*)(i) to which any requirements set forth in that article would apply? As Timor-Leste has noted, its Notification tracks the language of Australia's declaration and thus purports to cover exactly what Australia's declaration does.[55] Australia, for its part, has made clear that its declaration intended to exclude from dispute resolution under section 2 of Part XV of the Convention exactly the maximum scope of disputes that may be excluded under Article 298, *i.e.*, all "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."

70. Australia's declaration raises the further question of what constitutes a dispute "concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations." The Commission will return to this matter below in connection with certain matters that Australia argues are to be excluded from the scope of the Commission's competence, even if it concludes that it has competence to proceed with the conciliation. For present purposes, however, it suffices to note that an objection under Article 298(1)(*a*)(i) must clearly invoke a dispute which concerns the interpretation or application of the Convention, which is in principle distinct from a dispute which invokes pre-existing rights and obligations from other sources.[56]

71. Thus, as stated by the Chairman at the 28th meeting of Negotiating Group 7 during the Third UN Conference, when considering the text of what would become Article 298:

> As to the question of a distinction between "future" and "past" disputes, it should be borne in mind that the provisions of Part XV of the [Informal Composite Negotiating Text] deal with disputes "relating to the interpretation and application of the … Convention". If it were clear enough that disputes which have arisen before the entry into force of the Convention, never belong to that category and thus are not governed by the provisions of Part XV, including Article 297 [later Article 298], an express distinction between old and new disputes would not appear necessary.[57]

72. The Commission does not deny the possibility that there might be an overlap between rights and obligations under the Convention and rights and obligations under customary international law or other instruments and

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[55] Competence Hearing Tr. (Final) 306:4 to 307:3.

[56] *See MOX Plant Case (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 89 at p. 105–106, paras. 45–52; *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 294, para. 51.

[57] "Statement by the Chairman", Document NG7/26 (26 March 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 435 (1987).

that such overlapping rights and obligations might form the subject matter of a dispute that straddles the entry into force of the Convention. Australia has, for instance, drawn attention to the express reference to Articles 74 and 83 in the preamble to CMATS,[58] which it asserts to be the product of negotiations over disputed maritime boundaries between 2003 and 2006. Yet, this does not necessarily render a pre-existing dispute over maritime boundaries the same as a dispute concerning the interpretation and application of Articles 74 and 83 of the Convention. Therefore, even adopting Australia's characterization of the dispute, there would, at the very least, still remain matters which fall within the scope of these provisions of the Convention, but beyond the scope of the alleged pre-existing dispute between the Parties which was addressed in CMATS.

73. In any event, Australia at most invokes only a dispute dating back to Timor-Leste's independence in 2002,[59] prior to the entry into force of the Convention *as between the Parties in 2013*, but not prior to the entry into force of the Convention *in general in 1994*. The key question is thus whether the unqualified reference to "entry into force of this Convention" within the requirement that "such a dispute arises subsequent to the entry into force of this Convention" refers to the entry into force of the Convention as a whole on 16 November 1994 or to the entry into force of the Convention as between Australia and Timor-Leste on 7 February 2013.

74. For the Commission, the ordinary meaning of the unqualified phrase favours the former interpretation regarding entry into force of the Convention as a whole, especially when taking into account that the Convention contains various provisions where the phrase "entry into force" is expressly qualified to indicate that it refers to the entry into force as between the relevant parties.[60] While the Convention is not always consistent in its use of terminology, it does appear to be so in this respect.

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[58] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Preamble, para. 3, 12 January 2006, 2438 UNTS 359 ("*Taking into account* the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 and, in particular, Articles 74 and 83 which provide that the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution"). *See also Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Article 2(*a*), 20 May 2002, 2258 UNTS 3 ("This Treaty gives effect to international law as reflected in the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 which under Article 83 requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law. This Treaty is intended to adhere to such obligation.").

[59] Australia's Objection to Competence, paras. 153–154.

[60] *See, e.g.*, Annex II, Article 4 of the Convention, which refers to "the entry into force of this Convention for that State", and Annex IV, Article 11(3)(*d*)(i) of the Convention, which refers to actions to be taken "within 60 days after the entry into force of this Convention, or within 30 days after the deposit of its instrument of ratification or accession." *See also* Articles 154, 308(3), 312(1), Annex II, Article 2(2), Annex III, Articles 6(1) and 7(1), and Annex VI, Article 4(3) of the Convention, all of which use the phrase "entry into force of this Convention" without

75. Nevertheless, to the extent that ambiguity remains, the negotiating history is decisive. In the course of the negotiations at the Third UN Conference on the text of what would become Article 298, the delegation of Israel explicitly proposed that Negotiating Group 7 include additional language to specify the exclusion of disputes arising prior to the entry into force of the Convention "as between all the parties to the dispute."[61] This proposal was then repeated in the Second Committee,[62] but was not taken up by either the Negotiating Group or the Second Committee, despite the adoption of various other elements of the Israeli delegation's proposals.[63]

76. Timor-Leste considers it significant that a number of former members of diplomatic delegations at the Third UN Conference[64] simply assume in later works that the phrase refers to the 1994 entry into force of the Convention as a whole.[65] According to Timor-Leste, these works are evidence that past participants in the Conference consider the meaning of the phrase to be plain, whether on its own or in conjunction with the provision's context and negotiating history. In contrast, Australia submits that the phrase refers to the entry into force of the Convention as between the parties to the particular dispute,

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qualification in circumstances which appear to refer necessarily to the entry into force of the Convention as a whole, rather than for specific parties.

[61] "Informal Working Paper by Israel [6 February 1979]", Document NG7/30 (2 April 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 451 (1987). Mexico had also made a proposal incorporating the same additional language. *See* "Mexico Informal Proposal", Document NG7/29 (30 March 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 448 (1987).

[62] "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, paras. 50, 54–55 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 61.

[63] "Summary Records of Meetings of the Second Committee, 57th Meeting", UN Doc. A/CONF.62/C.2/SR.57, para. 41 (24 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 60; "Report of the Chairman on the work of Negotiating Group 7", Document NG7/39 (20 April 1979) *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XI*, p. 462 (1987). *See also* "Summary records of meetings of the Plenary, 112th Plenary Meeting", UN Doc. A/CONF.62/SR.112, paras. 25–26 (25 April 1979), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Eighth Session)*, p. 11.

[64] *See, e.g.*, S. Rosenne, *Essays on International Law and Practice*, p. 507 (2007); J.A. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, p. 152 (1997); P.S. Rao, "The South China Sea Arbitration (The Philippines *v.* China): Assessment of the Award on Jurisdiction and Admissibility" 15 *Chinese Journal of International Law*, para. 17 (2016), *advance access, available at* <chinesejil.oxfordjournals.org/content/early/2016/06/21/chinesejil.jmw019.full.pdf+html>.

[65] Timor-Leste's Written Submission in Response to Australia's Objections to Competence, para. 31.

invoking the presumption of the non-retroactivity of treaties.[66] Ultimately, for the reasons set out in this section, the Commission agrees with the interpretation put forward by Timor-Leste.

2. Whether any "agreement within a reasonable period of time [was] reached in negotiations between the parties"

77. With respect to the second requirement under Article 298(1)(*a*)(i), Australia asserts that the provision requires that the Parties negotiate for a "reasonable period of time" before submitting a dispute to compulsory conciliation, and that this requirement has not been fulfilled since no negotiations have taken place on maritime boundaries due to the moratorium in Article 4 of CMATS.[67]

78. The requirement under Article 298(1)(*a*)(i), however, is that "no agreement within a reasonable period of time is reached in negotiations between the parties." It does not expressly require that prior negotiations between the parties to the dispute actually take place. Such a requirement would effectively grant a party the right to veto any recourse to compulsory conciliation by refusing to negotiate, contrary to the intention of Article 298. According to the text, the provision merely requires that no agreement be reached within a reasonable period of time in any such negotiations. Furthermore, the "agreement" envisaged by the provision is an agreement resolving the "dispute concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" in the sense described above.

79. In fact, negotiations on maritime boundaries did take place between 2003 and 2006 in the lead up to CMATS. While CMATS is an agreement resulting from those negotiations, it does not purport to resolve the dispute over permanent maritime boundaries. It is at most a provisional arrangement of the kind contemplated under Articles 74(3) and 83(3). Thus, to the extent that there was a pre-existing dispute over maritime boundaries dating back to 2002, this dispute has been the subject of prior negotiations between the Parties which did not produce an agreement on sea boundary delimitation.

80. Even if the relevant dispute is taken only to have arisen in 2013, after the entry into force of the Convention for Timor-Leste, it is clear that Timor-Leste has repeatedly sought to engage in negotiations with Australia over permanent maritime boundaries since then. Despite Australia's unwillingness to engage in such negotiations on account of Article 4 of CMATS, this does not preclude the fact that "no agreement within a reasonable period of time [has been] reached in negotiations between the parties." Moreover, negotiations do appear to have taken place between the Parties regarding CMATS between Sep-

[66] Australia's Objection to Competence, paras. 149–151; Competence Hearing Tr. (Final) 400:9–16; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 258 (2005).

[67] Australia's Objection to Competence, para. 162.

tember 2014 and March 2015 in the context of attempts to resolve the matter before the tribunal in the *Timor Sea Treaty Arbitration*, also without success.[68]

81. The Commission does not in any event interpret CMATS Article 4(1) to preclude any and all possible negotiations between the Parties. The paragraph provides that neither Party "shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries." When read in context, that paragraph seems only to proscribe acts by the Parties that attempt to advance or improve their legal positions or prejudice the other Party's legal position in respect of the Parties' respective maritime claims *vis-à-vis* each other. Similarly, whether or not the present conciliation proceedings fall within the scope of Article 4(4) and 4(5) of CMATS, those paragraphs do not exclude bilateral negotiations between the Parties of the kind envisaged under Article 298(1)(*a*)(i) of the Convention. Finally, Article 4(7) suspends the obligation to negotiate permanent maritime boundaries, but does not prohibit such negotiations. Moreover, nothing in CMATS precludes negotiations regarding CMATS itself and the provisional arrangements established thereunder, as is evident from Article 11 of CMATS. Such discussions are in fact expressly foreseen within the context of the Timor-Leste/Australia Maritime Commission under Article 9 of CMATS.[69]

82. The Commission therefore concludes that the present dispute between the Parties concerning the interpretation or application of Articles 74 and 83 of the Convention has arisen after the entry into force of the Convention and that no agreement has been reached in negotiations between the Parties within a reasonable period of time, thereby satisfying the requirements of Article 298(1)(*a*)(i) regarding the competence of the Commission.

C. Article 311 and the Relationship between the Convention and CMATS

83. The Parties also disagree with respect to the effect of CMATS in relation to Article 311 of the Convention. Article 311 addresses generally the relationship between the Convention and other treaty instruments and provides as follows:

> *Relation to other conventions and international agreements*
>
> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Conven-

[68] Australia's Objection to Competence, paras. 165–167.

[69] Competence Hearing Tr. (Final) 228:16 to 232:17, 405:22 to 406:1.

> tion and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
>
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
>
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

84. In the Commission's view, however, it is not necessary to enter into an examination of CMATS in terms of Article 311. CMATS does not derogate from the terms of the Convention. The Convention is the later treaty between the Parties, and the governments of Timor-Leste and Australia have not notified the States Parties to the Convention of any modification or suspension of its terms, as required by Article 311(4). Nor does CMATS describe the moratorium provisions in its Article 4 as modifying or suspending any obligation under the Convention.

85. Where another agreement between States Parties to the Convention bears on dispute resolution, the relationship between that agreement and the dispute resolution provisions of the Convention is addressed in Part XV, and specifically in Articles 281 and 282 of the Convention. Having already concluded that CMATS is not, for the purposes of Article 281, an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice" of which the Convention will take cognizance, the Commission need not engage in any further analysis of whether or not CMATS is more generally compatible with the Convention within the terms of Article 311. Nor does this analysis depend upon whether or not CMATS is properly considered to be a "practical arrangement of a provisional nature" within the meaning of Articles 74 and 83. The application of Article 281 and of Part XV does not depend upon the substantive content of the agreement between the Parties that is alleged to bear on the availability of dispute resolution under the Convention. Rather, Article 281 depends upon the alternative arrangements for the settlement of disputes that such an agreement makes available.

D. Competence and Australia's Objection to the "Admissibility" of the Proceedings

86. The preceding analysis brings the Commission to Australia's final objection, namely that the Commission should decline to exercise its competence because Timor-Leste has commenced these proceedings in breach of CMATS.

87. Competence, according to Australia, "embrace[s] what might otherwise be considered to be both jurisdiction and admissibility, and it intrinsically entails an exercise of discretion, and that it is open to you to consider and determine all of our objections on admissibility, propriety and abuse of right."[70] Because Australia considers Timor-Leste to have breached CMATS, it argues that the Commission must decline to proceed, lest compulsory conciliation become "a mechanism to reopen every treaty commitment merely because one State has changed its mind or reassessed the bargain."[71] For Timor-Leste, "[i]t is not obvious that the notion of admissibility, which seems to relate mainly to judicial propriety, has a role to play in conciliation."[72] Timor-Leste also considers that it has not breached CMATS[73] and that CMATS is void as a treaty between the Parties.[74]

88. Australia's "admissibility" objection takes two forms. First, Australia argues that CMATS is presumptively valid and must be treated as such unless and until the tribunal in the *Timor Sea Treaty Arbitration* finds it null and void as alleged by Timor-Leste.[75] Second, Australia requests that the Commission dismiss the present conciliation proceedings, or at least order a stay until the *Timor Sea Treaty Arbitration* tribunal has rendered its award.[76] This is, in Australia's view, necessary so that the status of CMATS can be clarified prior to the Commission's decision on its competence and in order to avoid the potential for contradictory results as between the two proceedings.[77]

89. Neither a dismissal nor a stay is warranted in the Commission's view, however, since there is no material overlap between the matters on which this Commission is asked to decide and those before the *Timor Sea Treaty Arbitration* tribunal. The Parties are agreed that this Commission should not decide the question of the validity of CMATS.[78] Further, in answer to a question from the Commission at the hearing on competence as to whether the issue of compatibility between CMATS and the Convention arose in the *Timor*

[70] Competence Hearing Tr. (Final) 385:11–17.

[71] Competence Hearing Tr. (Final) 388:18–20.

[72] Competence Hearing Tr. (Final) 318:2–5.

[73] Timor-Leste's Written Responses to the Commission's Questions, Q13.

[74] Competence Hearing Tr. (Final) 333:13–14.

[75] Australia's Objection to Competence, para. 186; Competence Hearing Tr. (Final) 134:21–135:4.

[76] Australia's Objection to Competence, paras. 183–184.

[77] Competence Hearing Tr. (Final) 136:17–25.

[78] Australia's Objection to Competence, para. 184; Timor-Leste's Comments on Bifurcation, para. 22.

Sea Treaty Arbitration, Timor-Leste confirmed that it does not "seek[] a determination from the [*Timor Sea Treaty Arbitration*] Tribunal on the compatibility of CMATS with the Convention."[79] Consequently, there is no question on which the two proceedings could come to contradictory results. Moreover, the Commission has ultimately decided to uphold its competence for reasons that do not require any inquiry into the compatibility of CMATS and the Convention. Even if CMATS were presumed to be valid, it would not affect the Commission's competence or the "admissibility" of the dispute.

90. A subsidiary objection remains: that it would be improper for the Commission to proceed with the conciliation when that would allegedly allow Timor-Leste to benefit from its breach of CMATS. This raises the question of the significance for dispute resolution under the Convention of the alleged breach of another treaty, the existence of which breach is contested as between the Parties. This amounts to a variation of the clean hands doctrine enunciated by the Permanent Court of International Justice in its decision in *Diversion of Water from the Meuse*, where it declined to support a contention by the Netherlands that Belgium had acted in contravention of a treaty regulating the taking of water from the Meuse River where the Netherlands had engaged in the same conduct.[80] Here however, Australia asks the Commission to find a breach of another instrument (CMATS) in the overall legal relationship between the Parties and to give that breach decisive effect with respect to the Commission's competence under the Convention.

91. The alleged breach of CMATS, however, is not something that properly falls to the Commission to consider or decide. Timor-Leste contests Australia's allegation and argues in any event that CMATS is invalid and without legal effect. The Parties agree that the validity of CMATS is presently before the tribunal in the *Timor Sea Treaty Arbitration* and therefore not a matter that the Commission is competent to address.[81] In any event, the Commission could not address one aspect of CMATS (its alleged breach) without also addressing Timor-Leste's defence regarding the validity of the treaty.

92. For the purposes of these proceedings, it suffices that CMATS is not an agreement that meets the requirements of the Convention to preclude dispute resolution under Part XV. The alleged breach of CMATS is not an established fact, and the clean hand doctrine does not extend so far as to make the possible breach of some other agreement, such as CMATS, a bar to dispute resolution proceedings. The effect of these proceedings on CMATS, like the question of the validity of CMATS, is a matter for the Parties to consider in another forum.

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[79] Timor-Leste's Written Responses to the Commission's Questions, Q11.

[80] *Case Concerning the Diversion of Water from the River Meuse (Netherlands* v. *Belgium), Judgment of 28 June 1937, PCIJ Series A/B, No. 70*, p. 4 at p. 25.

[81] Timor-Leste's Written Responses to the Commission's Questions, Q10; Competence Hearing Tr. (Final) 394:515.

E. The Scope of the Matters submitted to Conciliation

93. During the course of the hearing on competence, a further disagreement concerning the competence of the Commission emerged between the Parties. In its opening statement, Timor-Leste set out the matters with which it hoped the Commission would assist the Parties as follows:

> First, we hope that the Commission can assist the Parties to reach an agreement on the delimitation of permanent maritime boundaries … .
>
> …
>
> In addition to the issue of permanent maritime boundaries, a second task for the Commission is to assist Australia and Timor-Leste to agree on appropriate transitional arrangements in the disputed maritime areas, to bring the Parties from their current temporary arrangements to the full implementation of their newly agreed permanent maritime boundary.
>
> Finally, a third task for the Commission, and one related to the issue of transitional arrangements, concerns the post-CMATS arrangements. With the expected termination of CMATS, and with it the Timor Sea Treaty, the Parties will benefit from the assistance of the Commission in finding the optimal way to come to a mutual position on dissolving the joint institutions and arrangements found in those provisional arrangements, and moving on.[82]

94. Australia objected that this amounted to an attempt to expand the competence of the Commission to include issues that are, in Australia's view, "outside the notification by Timor-Leste which commenced the proceedings" and "outside Article 298 of UNCLOS, because they do not concern the matters in that article."[83] Although not couched as a formal objection to the Commission's competence generally, the Commission considers it appropriate at this juncture also to address this aspect of the Parties' disagreement over its competence.

95. Article 298, on its own terms, requires Australia to accept submission of "the matter" to conciliation under Annex V. The matter in question, again in the terms of Article 298 itself, is a "dispute[] concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations." Turning to those articles, the Commission recalls that Article 74 provides with respect to the exclusive economic zone as follows:

> *Delimitation of the exclusive economic zone between States with opposite or adjacent coasts*
>
> 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

[82] Competence Hearing Tr. (Final) 48:3 to 49:18.

[83] Competence Hearing Tr. (Final) 70:10–13.

> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

96. Article 83 is the near mirror image of Article 74 with respect to the continental shelf:

> *Delimitation of the continental shelf between States with opposite or adjacent coasts*
>
> 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

97. It is apparent from an examination of these articles of the Convention that they address not only the actual delimitation of the sea boundary between States with opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the Parties are called on to apply pending delimitation. The Commission does not, therefore, see that Timor-Leste's request that the Commission also consider transitional arrangements, or the arrangements that the Parties may enter into following the termination of CMATS, lies outside the scope of Articles 74 and 83 or, correspondingly, of Article 298(1)(*a*)(i).

98. The Commission likewise notes that paragraph 5 of Timor-Leste's notification initiating these proceedings calls for the Commission to address

"the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States."[84] Even if the notification were considered to strictly define the matters that could be discussed in the course of conciliation—a position that the Commission doubts—Timor-Leste's notification was plainly not limited to the establishment of permanent maritime boundaries.

99. The Commission thus does not consider that the matters raised by Timor-Leste during the hearing fall beyond the scope of either its notification or of Article 298.

F. Article 7 of Annex V and the Application of the 12-Month Period

100. Having concluded that it has competence to conciliate the matters raised in Timor-Leste's notification of 11 April 2016, the Commission now turns to one final issue that, although not a part of Australia's objections, bears on the Commission's competence. This issue concerns the duration of the proceedings and the effect of the time limit for conciliation in Annex V to the Convention.

101. Article 7(1) of Annex V provides in mandatory terms that "[t]he commission shall report within 12 months of its constitution." The Parties are, of course, free to modify or extend this deadline, a power expressly noted in Article 10 of Annex V, but they must do so by agreement.

102. In the course of the procedural meeting on 28 July 2016, the Commission questioned the Parties concerning the interpretation of this provision and the relevant date on which the 12-month period would begin to run in the case of a compulsory conciliation.

103. Timor-Leste takes the view that the 12-month period in Article 7 runs from 25 June 2016 (the date on which the formation of the Commission was completed) and that it is "not expecting to extend the time scheme." According to Timor-Leste, "[t]he Government took the decision to initiate a 12-month process under UNCLOS and a 12-month process it is."[85]

104. Australia, in contrast, emphasizes that Annex V is divided into two sections, the first—including the 12-month deadline—devoted to voluntary conciliation and the second to compulsory conciliation. According to Australia:

> Section II … deals with initiation of proceedings and competence and then some reconciliation provisions. It deals with a challenge in Article 13. Section II does not address modalities/rules/scope of the conciliation. Article 13, which is in Section II, contemplates a competence challenge.

[84] Notification, para. 5.

[85] Procedural Meeting Tr. 100:16–21.

> Article 14, which is in Section II, makes Section I subject to Section II. Articles 2–10 of Section I of this Annex apply subject to this Section [II].[86]

Therefore, Australia concludes, "a decision on competence is required under Section II before we get into the Section I conciliation phase, and therefore the 12 months which is addressed in Article 7 of Section I only begins to run from the point that we get into the conciliation phase."[87]

105. Article 13 of Annex V provides that the Commission shall decide any disagreement with respect to its competence. If follows that it is for the Commission to resolve this disagreement also and, as necessary, to interpret the terms of Annex V. This point was, indeed, put to both Parties in the course of the procedural meeting on 28 July 2016[88] and not disputed by either side.

106. Although these proceedings arise by way of a compulsory conciliation, Annex V itself is not principally concerned with compulsory proceedings. Article 284 of the Convention makes available voluntary conciliation within the general provisions described in Section 1 of Part XV. Section 1 of Annex V, which makes up the majority of the Annex, falls under the heading "Conciliation Procedure Pursuant to Section 1 of Part XV," and it is in this Section of Annex V that Article 7 and its 12-month deadline are to be found. Compulsory conciliation, in contrast, is structurally separated into the brief Section 2 of the Annex that provides for the resolution of disagreements over competence and further that procedures of Section 1 apply to a compulsory conciliation "subject to this section."

107. A strict application of the 12-month deadline to the conciliation process as a whole may come into conflict with the need to give appropriate consideration to disagreements concerning competence in the case of compulsory conciliation. The deadline in Article 7 is unquestionably important to the conciliation process. It serves to fix an end to the procedure and ensure that a party is not compelled to continue endlessly a conciliation process that, in its view, has no hope of success. This is particularly significant given that Article 284 of the Convention and Article 8 of Annex V permit the termination of even a voluntary conciliation only by agreement, by settlement, or following a report from the conciliation commission. In other words, once conciliation has begun, the Parties are required continue the process for 12 months and may extend it thereafter, but only by agreement.

108. On the other hand, the resolution of disagreements over competence can be a central aspect of compulsory conciliation. Indeed, Article 13 is one of only four Articles that make up Section 2 of Annex V, the only portion of the Annex devoted to compulsory conciliation. While the results of such a proceeding are non-binding, it remains the case that an Article 298 procedure is a compulsory process, and one of the parties may be participating against

[86] Procedural Meeting Tr. 118:4–14.

[87] Procedural Meeting Tr. 118:18–23.

[88] Procedural Meeting Tr. 129:8–13.

its will. It is neither appropriate that a State be subjected to compulsory conciliation before a commission that lacks competence over the matter, nor is such a conciliation process likely to be effective. As a method for the resolution of disputes, conciliation depends ultimately on the parties' acceptance of the process and willingness to seek agreement and give serious consideration to the recommendations of the commission.

109. Article 13 thus calls for serious attention to any disagreements regarding competence. Article 7 is fixed at the minimum period of time in which a conciliation process could realistically be expected to bear fruit, ensuring that only a productive process will be continued, by agreement, beyond that point. In the Commission's view, the tension between these provisions is resolved by Article 14 of Annex V, which provides that Section 1 of the Annex applies subject to Section 2. The deadline in Article 7 must therefore give way to the time needed to consider and decide objections to competence and is thus properly understood to run only after a Commission has addressed any objections that may be made. Any other approach would run the risk of a commission failing to give proper consideration to a justified objection to competence or, alternatively, of giving such objections appropriate attention only to find that too much time had elapsed for the parties to fairly evaluate whether the conciliation process was likely to prove effective and worthy of extension by agreement.

110. Accordingly, the Commission concludes that, in this compulsory conciliation process, the 12month period in Article 7 of Annex will begin to run as of the date of this Decision.

* * *

IV. Decision

111. For the reasons set out in this Decision, the Commission unanimously decides as follows:

A. The Commission is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS* of 11 April 2016.

B. There are no issues of admissibility or comity that preclude the Commission from continuing these proceedings.

C. The 12-month period in Article 7 of Annex V of the Convention shall run from the date of this Decision.

* * *

Done this 19th day of September 2016,

[*Signed*]
Dr. Rosalie Balkin

[*Signed*]
Judge Abdul G. Koroma

[*Signed*]
Professor Donald McRae

[*Signed*]
Judge Rüdiger Wolfrum

[*Signed*]
H.E. Ambassador Peter Taksøe-Jensen
[Chairman]

[*Signed*]
Mr. Garth Schofield
[Registrar]

PCA CASE Nº 2016-10

In the matter of the Maritime Boundary Between Timor-Leste and Australia (The "Timor Sea Conciliation")

-before-

a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea

-between-

The Democratic Republic of Timor-Leste

-and-

The Commonwealth of Australia

Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea

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Conciliation Commission:

H.E. Ambassador Peter Taksøe-Jensen (Chairman)
Dr. Rosalie Balkin
Judge Abdul G. Koroma
Professor Donald McRae
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

9 May 2018

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Glossary of Defined Terms

Term	*Definition*
1958 Continental Shelf Convention	Convention on the Continental Shelf, 29 April 1958, 499 U.N.T.S. 311
1972 Seabed Treaty	Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, 9 October 1972, 974 U.N.T.S. 319
30 August Agreement	The Comprehensive Package Agreement reached between the Parties in Copenhagen on 30 August 2017
ANPM	Autoridade Nacional do Petróleo e Minerais: Timor-Leste's National Authority for Petroleum and Minerals
Area A	The area of the Timor Sea established by the Timor Gap Treaty in which Australia and Indonesia exercised joint control over petroleum operations through a joint authority
Article 8(*b*) Arbitration	The arbitration proceedings initiated by Timor-Leste with Australia pursuant to the Timor Sea Treaty on 15 September 2015
Australia	The Commonwealth of Australia
CMATS	Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, 12 January 2006, 2438 U.N.T.S. 359
Commission	The Conciliation Commission constituted in the present matter, composed of H.E. Ambassador Peter Taksøe-Jensen (Chairman), Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum
Consolidated Draft Treaty	The Parties' consolidated draft treaty, circulated on 25 September 2017
Convention	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3
Darwin LNG	The concept of developing Greater Sunrise by way of a pipeline to the LNG plant located at Wickham Point in Darwin, Australia
Final Draft Treaty	The Parties' agreed draft treaty, initialled by the Agents of the Parties at the Peace Palace in The Hague, the Netherlands on 13 October 2017

Term	*Definition*
Greater Sunrise	The Sunrise and Troubadour gas fields, located in the Timor Sea
INTERFET	International Force for East Timor
Joint Venture	The Greater Sunrise Joint Venture
JPDA	The Joint Petroleum Development Area established pursuant to the Timor Sea Treaty
LNG	Liquefied natural gas
Parties	Timor-Leste and Australia
PCA	The Permanent Court of Arbitration
PCA Conciliation Rules	The *Optional Conciliation Rules* adopted by the Permanent Court of Arbitration on 1 July 1996
Perth Treaty	Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, [1997] Australian Treaties (not in force) 4, *reproduced in* 36 I.L.M. 1053.
Petroleum Fund	The Petroleum Fund for Timor-Leste
PSCs	Production Sharing Contracts
Third UN Conference	Third United Nations Conference on the Law of the Sea
Timor Gap Treaty	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, 11 December 1989, 1654 U.N.T.S. 105
Timor LNG	The concept of developing Greater Sunrise by way of a pipeline to the south coast of Timor-Leste and the construction of a new LNG plant at Beaço
Timor Sea Arrangement	The "Memorandum of Understanding of Timor Sea Arrangement" concluded between Australia and UNTAET on 5 July 2001
Timor Sea Treaty	Timor Sea Treaty between the Government of East Timor and the Government of Australia, 20 May 2002, 2258 U.N.T.S. 3
Timor Sea Treaty Arbitration	The arbitration proceedings initiated by Timor-Leste with Australia pursuant to the Timor Sea Treaty on 23 April 2013
Timor-Leste	The Democratic Republic of Timor-Leste

Term	*Definition*
Treaty	The Treaty Between the Democratic Republic of Timor-Leste and Australia establishing their Maritime Boundaries in the Timor Sea, signed on 6 March 2018
UN Conciliation Rules	United Nations Model Rules for the Conciliation of Disputes between States of 29 January 1996
Unitisation Agreement	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, 6 March 2003, 2483 U.N.T.S. 317
UNTAET	United Nations Transitional Administration in East Timor

I. Introduction

1. This Report is issued in completion of the compulsory conciliation proceedings initiated by the Democratic Republic of Timor-Leste ("Timor-Leste") with the Commonwealth of Australia ("Australia") (together, the "Parties") pursuant to Article 298(1)(*a*)(i) and Annex V of the United Nations Convention on the Law of the Sea (the "Convention"). These proceedings concern a dispute between the Parties regarding the delimitation of a permanent boundary between their respective maritime zones in the Timor Sea. This is the first occasion on which the compulsory conciliation provisions of the Convention have been invoked.

2. On 11 April 2016, Timor-Leste decided to invoke the compulsory conciliation provisions of the Convention with the objective of achieving a permanent maritime boundary, following several unsuccessful attempts by the Parties to reach agreement on a permanent maritime boundary through negotiations since Timor-Leste's re-emergence as an independent State on 20 May 2002. Annex V of the Convention provides for the establishment of a five-member conciliation commission to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement." Such a conciliation commission is entitled to "determine its own procedure", decide on any "disagreement as to whether a conciliation commission acting under [Section 2 of Annex V] has competence", and "draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute."

3. Between July 2016 and February 2018, the present conciliation commission (the "Commission") met regularly with the Parties: initially to resolve the objection by Australia to the Commission's competence and, thereafter, for extensive discussions regarding the delimitation of a maritime boundary and related matters. On 30 August 2017, on the basis of a proposal made by

the Commission, the Parties reached agreement on a comprehensive package of measures (the "30 August Agreement", see paragraphs 254 to 267 below), including (*a*) a maritime boundary; (*b*) a mechanism that would enable the possible adjustment of certain segments of that boundary, following the establishment by Timor-Leste and Indonesia of a boundary between their respective maritime zones; (*c*) a special regime for the joint development, exploitation, and management of the largest known resource, the Sunrise and Troubadour gas fields (collectively, "Greater Sunrise"), and the sharing of the resulting revenue; (*d*) a process to formalize the Parties' agreement in the form of a treaty; and (*e*) a process of intensive engagement between the Parties and the Greater Sunrise Joint Venture, the private holder of the commercial licence to Greater Sunrise (the "Joint Venture"), with the objective of reaching agreement on the overall approach, or development concept, to be taken for the development of the resource.

4. In order to assist the Parties in reaching a complete settlement and in light of the progress made in the proceedings, the Parties agreed that the mandate of the Commission should be extended beyond the one-year period envisaged in Annex V. In October 2017, with the assistance of the Commission, the Parties reached agreement on the text of a draft treaty formalizing the 30 August Agreement. A copy of this draft treaty was initialled at the Peace Palace in The Hague by the Agent of each Party and deposited with the Permanent Court of Arbitration, which serves as the Registry to the Commission. Between September and December 2017, the Parties met regularly with the Joint Venture regarding the development of Greater Sunrise. In December 2017, the Commission noted the Parties' conclusion that the two governments had been unable, on the basis of the information before them, to take a decision on the development concept for Greater Sunrise by 15 December 2017. Accordingly, between December 2017 and February 2018, the Commission proceeded to engage directly with the Parties and with the Joint Venture to ensure that the necessary information to permit an appropriate comparison and evaluation of the competing development concepts would be available to the Parties and to assist the Parties in taking a decision.

5. Pursuant to Annex V to the Convention, at the close of conciliation proceedings, the Commission is mandated to prepare a report, deposited with the Secretary-General of the United Nations, to record any agreements reached between the Parties or, in the absence of agreement, to communicate the Commission's "conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement."

6. In the present matter, the Commission's Report comes at the conclusion of a conciliation process in which the Parties have already reached a comprehensive agreement regarding their maritime boundaries in the Timor Sea. Under these circumstances, the Commission considers that its mandate no longer requires that it provide the Parties with recommendations concerning the resolution of their dispute. The Parties have, themselves, achieved a resolution of that dispute. Rather, the Commission considers that the purpose of this Report is to provide background

and context to the process through which the Parties' agreement was reached. While the Parties' Treaty stands on its own as the legal resolution of the dispute over their maritime boundaries, the Commission considers that both governments, as well as the peoples of Timor-Leste and Australia, will benefit from a neutral elaboration by the Commission of the manner in which this agreement was reached.

7. Accordingly, in the sections that follow, the Commission has set out the background to the dispute submitted to conciliation, the purpose of conciliation, the Commission's understanding of its mandate, the steps taken in the course of these proceedings, the positions held by each Party at the outset, and the Commission's engagement with the Parties regarding their positions. In this context, the Commission has set out the Comprehensive Package Agreement reached in Copenhagen on 30 August 2017 and the details of the Parties' further engagement on the development of Greater Sunrise. Finally, and conscious that this is the first occasion on which the conciliation provisions of the Convention have been invoked, the Commission has set out what, in its view, constituted the key elements of its engagement with the Parties that made possible the achievement of an agreement on maritime boundaries.

* * *

II. Geography of the Area to be Delimited

8. Timor-Leste and Australia are neighbouring States, separated from one another by the Timor Sea at the nearest distance of approximately 243 nautical miles.

9. Timor-Leste consists of the eastern portion of the island of Timor, as well as the island of Atauro, to the north of Timor, the island of Jaco less than 1km off the eastern tip of the main island of Timor, and the enclave of Oe-Cusse Ambeno in the western portion of the island of Timor. The island of Timor is one of the easternmost of the Sunda Islands and was formed from the collision of the Australian and Eurasian continental plates. The land territory of Timor-Leste covers an area of approximately 15 thousand square kilometres.

10. Australia consists principally of the continent of Australia and surrounding islands. The land territory of Australia covers an area of approximately 7.7 million square kilometres.

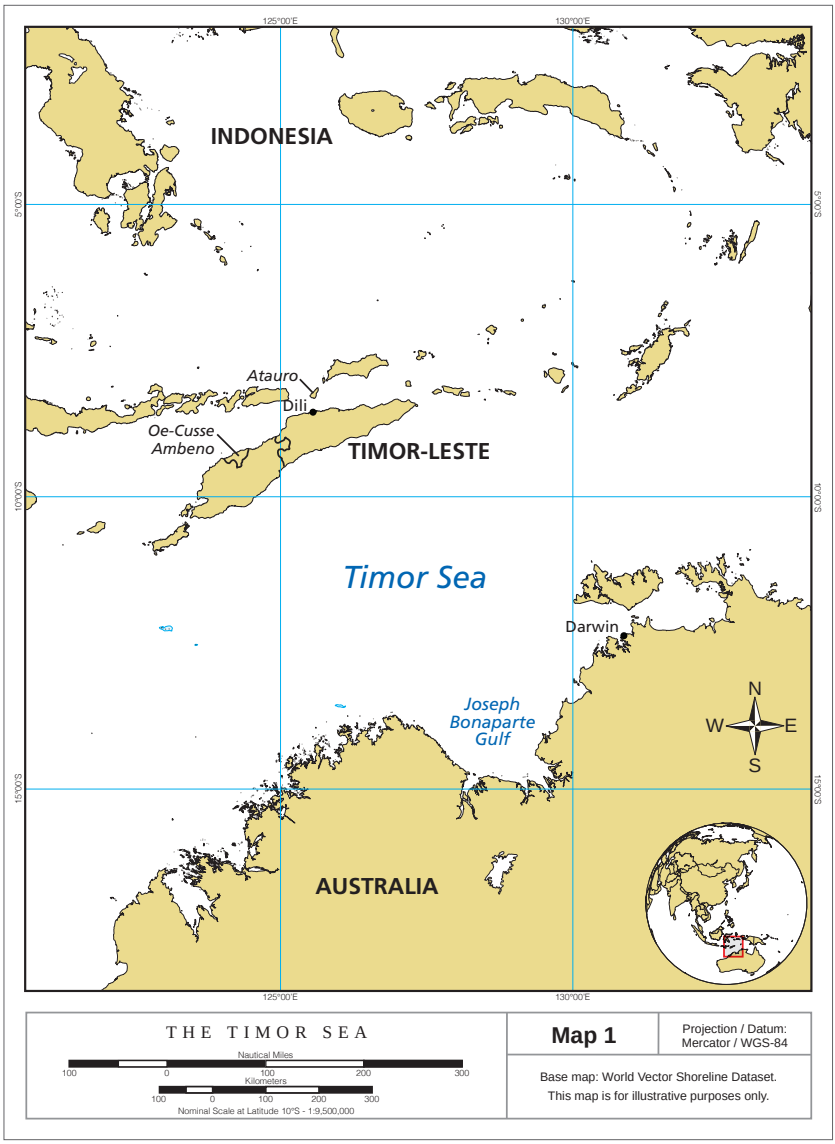
11. The western portion of the island of Timor is part of Indonesia, where it forms the province of East Nusa Tenggara. Other islands of the Indonesian archipelago lie to the north and east of Timor, with the islands of Leti, Moa, and Lakor lying immediately to the east of Timor-Leste.

12. The Timor Sea lies between the Arafura sea to the east and the Indian Ocean to the west, and covers a relevant area of approximately 250 thousand square kilometres. The Timor Sea is generally quite shallow, with the exception of the Timor Trough, a topographical depression in which the ocean

floor descends abruptly to an average depth of 2,840 metres. The seabed of the Timor Sea is known to contain significant deposits of oil and gas.

13. The general geographic configuration of the two States and the region is set out in Map 1 [reproduced below].

* * *



III. Background to the Parties' Dispute Concerning Maritime Boundaries

14. In the following paragraphs, the Commission has set out the history of maritime boundaries in the Timor Sea and the background to the dispute at issue in these proceedings. In the Commission's view, an understanding of this background is essential to appreciating the Parties' dispute and the eventual agreement reached by the Parties. This is due both to the continuing relevance of existing treaties in the Timor Sea and to the prominence of history in the Parties' understanding of their dispute. Timor-Leste has made clear to the Commission that it considers the achievement of permanent maritime boundaries as part of the completion of its sovereignty as an independent State and essential to enable the resources of its territory to be developed for the benefit of the Timorese people.

* *

15. Although inhabited for thousands of years, the eastern half of the island of Timor entered the modern era as a colony of Portugal. During the colonial period, the remaining portion of Timor (*i.e.*, the western half of the island), as well as other neighbouring islands, formed part of the Dutch East Indies and, upon independence, became part of the Republic of Indonesia.[1]

16. As neighbours, the peoples of Timor-Leste and Australia have a long history of close relations, in particular with the Timorese fighting side-by-side with Australian and Dutch forces on the island of Timor during the Second World War. By the end of the war, over 40,000 Timorese lives were lost on home soil.

17. In the 1950s Australia and Portugal respectively asserted their rights over the continental shelf. On 11 September 1953, Australia issued a Proclamation, declaring its sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coast.[2] On 21 March 1956, Portugal adopted legislation declaring the continental shelf adjacent to Portuguese territory to form part of the public domain of the State.[3]

18. On 29 April 1958, the First United Nations Conference on the Law of the Sea concluded with the adoption of the 1958 Convention on the Continental Shelf (the "1958 Continental Shelf Convention").[4]

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[1] *See generally* F.B. Durand, *History of Timor-Leste* (2016).

[2] Commonwealth of Australia Gazette, No. 56, 11 September 1953, *reproduced in* United Nations Legislative Series, Vol. 8, UN Doc. ST/LEG/SER.B/8 at p. 3 (1959).

[3] Act No. 2080 relating to the Continental Shelf, 21 March 1956, *reproduced in* United Nations Legislative Series, Vol. 8, UN Doc. ST/LEG/SER.B/8 at p. 16 (1959). Pursuant to Section V of the Act, "[t]his Act shall be applicable to the whole of Portuguese territory," which as defined by Article 1 of the Constitution of 1933, applicable in 1956, included the territory of Timor-Leste.

[4] Convention on the Continental Shelf, 29 April 1958, 499 U.N.T.S. 311.

19. Portugal ratified the 1958 Continental Shelf Convention on 8 January 1963; Australia on 14 May 1963.[5] This convention entered into force on 10 June 1964, in accordance with the terms of its Article 11.

20. On 9 October 1972, Australia and Indonesia concluded the *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas* (the "1972 Seabed Treaty").[6] In broad terms, the 1972 Seabed Treaty delimited the seabed between Australia and Indonesia along a line generally following the southern edge of the Timor Trough. The Timor Trough is a topographical depression in the floor of the Timor Sea, in which the ocean floor descends abruptly from relatively shallow depths to an average depth of 2,840 metres. The 1972 Seabed Treaty did not purport to delimit the seabed adjacent to what is now Timor-Leste, but anticipated that this would be the subject of a future treaty between Australia and Portugal. Article 3 of the 1972 Seabed Treaty anticipates the possible need to adjust certain portions of the Indonesia-Australia seabed boundary to the east and west of (then) Portuguese Timor, following the conclusion of further delimitation agreements in respect of the area.

21. Although Australia and Portugal engaged in some communications in the early 1970s concerning the continental shelf in the Timor Sea, no formal treaty negotiations were ever commenced.

22. In April 1974, the "Carnation Revolution" in Portugal initiated a transition to democracy in Lisbon and movement towards independence throughout Portugal's colonial territories.

23. In November 1975, the people of Timor-Leste declared their independence from Portugal. Promptly thereafter, Timor-Leste was occupied by the armed forces of Indonesia, which administered Timor-Leste as a province of Indonesia until 1999. The Indonesian occupation was strongly resisted by the Timorese people, and a long-running guerrilla conflict ensued. Conservative estimates put the loss of Timorese lives, both military and civilian, at over 100,000 during this period.[7]

24. Although Australia initially did not recognise Indonesia's annexation of Timor-Leste, on 20 January 1978 Australia recognised Timor-Leste as *de facto* part of Indonesia, stating that "the Government has decided that

[5] Instruments of Ratification or Accession, 499 U.N.T.S. 312 n. 1.

[6] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, 9 October 1972, 974 U.N.T.S. 319.

[7] *See* Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR), *Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR)*, p. 488 (31 October 2005). CAVR reached a minimum conservative estimate for the number of deaths between 1974 and 1999 of 102,800 persons (+/- 12,000). CAVR did not attempt to specify a maximum estimate, although it noted that deaths due to hunger and illness could have been as high as 183,000 persons. *See ibid*., p. 1338.

although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognise *de facto* that East Timor is part of Indonesia."[8]

25. In March 1978, Australia and Indonesia announced that they would begin negotiations on the delimitation of a seabed boundary in the area adjacent to the coast of Timor-Leste.[9]

26. In December 1978, the Minister for Foreign Affairs of Australia announced that Australia would grant *de jure* recognition of Indonesia's sovereignty over Timor-Leste early the next year through the formal commencement of negotiations on a boundary, stating that "[t]he negotiations when they start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor."[10] Formal boundary negotiations between Indonesia and Australia regarding the seabed adjacent to Timor-Leste began in February 1979.[11]

27. Protracted negotiations continued throughout the 1980s, and on 11 December 1989 Australia and Indonesia concluded the *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* (the "Timor Gap Treaty").[12] Rather than delimit a maritime boundary, the Timor Gap Treaty established a zone of cooperation and an area ("Area A") in which Australia and Indonesia would together exercise control over petroleum operations through a joint authority and share the resulting revenue equally. The Timor Gap Treaty also established two adjacent areas in which Australia and Indonesia, respectively, would exercise exclusive control over petroleum operations, but would nevertheless share ten percent of the resulting revenue with the other party.

28. On 10 December 1982, the Third United Nations Conference on the Law of the Sea concluded with the adoption of the Convention.[13]

29. On 16 November 1994, the Convention entered into force and thus became applicable as between Australia and Indonesia.[14]

30. On 14 March 1997, Australia and Indonesia concluded the *Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Sea-*

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[8] Statement by the Minister for Foreign Affairs of Australia, Comm. Rec. 1978, 25–6, *reproduced in* "Australian Practice in International Law 1978–1980," *Australian Yearbook of International Law*, Vol. 8, p. 279 (1983).

[9] *See* Parliament of the Commonwealth of Australia, *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee*, para. 7.18 (December 2000).

[10] "East Timor Takeover to be Recognized", *Canberra Times*, 16 December 1978, p. 1.

[11] *See Senate Hansard*, 8 March 1979, p. 720, *reproduced in* "Australian Practice in International Law 1978–1980," *The Australian Year Book of International Law*, Vol. 8, pp. 281–282.

[12] 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, 11 December 1989, 1654 U.N.T.S. 105.

[13] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

[14] Instruments of Ratification or Accession, 1833 U.N.T.S. 397–398.

bed Boundaries (the "Perth Treaty").[15] In broad terms, the Perth Treaty delimits the water column between Australia and Indonesia in the Timor Sea. The delimitation line generally follows the median line between the two States, at some distance from the 1972 Seabed Treaty boundary. The treaty includes certain provisions in relation to areas in which Australian rights to the seabed are overlapped by Indonesian rights to the water column. The Perth Treaty has never entered into force, but the Commission was informed by Australia that its provisions are observed in practice by the governments of Australia and Indonesia.

31. On 30 August 1999, in a referendum supervised by the United Nations, the people of Timor-Leste voted in favour of independence from Indonesia.

32. The results of the referendum were immediately met with widespread violence, over one thousand deaths, the destruction of most of Timor-Leste's infrastructure, and the flight of the population from the capital of Dili. On 20 September 1999, international troops under the International Force for East Timor ("INTERFET") were deployed in Timor-Leste to help prevent further violence. This deployment was organized and led by Australia, which also contributed the largest contingent of forces to the international effort. On 25 October 1999, the United Nations established the United Nations Transitional Administration in East Timor ("UNTAET"). UNTAET assumed command of international military operations on 28 February 2000 and temporarily administered Timor-Leste until it became an independent State on 20 May 2002.

33. On 10 February 2000, Australia and UNTAET concluded an exchange of notes to continue the terms of the Timor Gap Treaty as between Australia and UNTAET (acting on behalf of Timor-Leste),[16] since the treaty had ceased to apply as between Australia and Indonesia following Indonesia's renunciation on 19 October 1999 of its claim to the territory of Timor-Leste.

34. On 5 July 2001, Australia and UNTAET concluded a *Memorandum of Understanding of Timor Sea Arrangement* (the "Timor Sea Arrangement").[17] The Timor Sea Arrangement established a Joint Petroleum Development Area (the "JPDA") with boundaries that correspond to Area A of the Timor Gap Treaty (the area of joint control). However, whereas the Timor Gap Treaty divided petroleum revenue from within Area A equally between Australia and Indonesia, the Timor Sea Arrangement provided for a 90:10 division, in favour of Timor-Leste, within the JPDA. The area of the JPDA and the location of Indonesia's boundaries with Australia are set out in Map 2 [reproduced on page 260].

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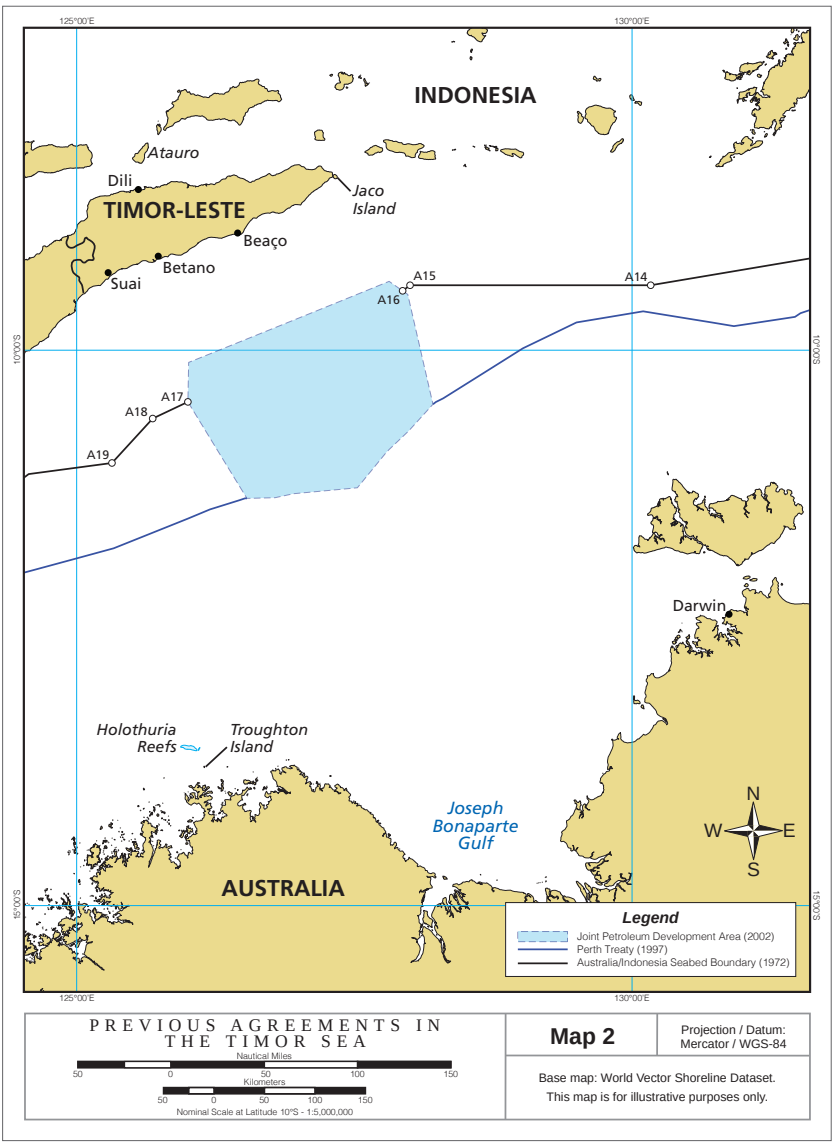
[15] Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, [1997] Australian Treaties (not in force) 4, *reproduced in* 36 I.L.M. 1053.

[16] Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the 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 of 11 December 1989, 10 February 2000, [2000] A.T.S. 9.

[17] Memorandum of Understanding of Timor Sea Arrangement, 5 July 2001, *available at* <www.austlii.edu.au/au/other/dfat/special/MOUTSA.html>.

35. On 20 May 2002, the same day that Timor-Leste regained its independence, Timor-Leste and Australia concluded the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (the "Timor Sea Treaty").[18] In broad terms, the Timor Sea Treaty provided for the formal application as between Timor-Leste and Australia of the Timor-Sea Arrange-



[18] Timor Sea Treaty, 20 May 2002, 2258 U.N.T.S. 3.

ment, including the continued division of petroleum revenue on a 90:10 basis, pending the delimitation of a permanent maritime boundary. Through an exchange of notes on 20 May 2002, Timor-Leste and Australia agreed to provisionally continue the Timor Sea Arrangement, pending ratification of the Timor Sea Treaty.[19] The Timor Sea Treaty was ratified by Timor-Leste on 17 December 2002 and by Australia on 2 April 2003, and entered into force with retroactive effect to the date of signature, *i.e.*, 20 May 2002.[20]

36. In Annex E of the Timor Sea Treaty, Timor-Leste and Australia agreed "to unitise the Sunrise and Troubadour deposits (collectively known as 'Greater Sunrise') on the basis that 20.1% of Greater Sunrise lies within the JPDA. Production from Greater Sunrise shall be distributed on the basis that 20.1% is attributed to the JPDA and 79.9% is attributed to Australia." On this basis, on 6 March 2003, Timor-Leste and Australia signed an *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* (the "Unitisation Agreement") with respect to Greater Sunrise.[21] Notwithstanding this division of Greater Sunrise, the Unitisation Agreement recorded that "Australia and Timor-Leste have, at the date of this agreement, made maritime claims, and not yet delimited their maritime boundaries, including in an area of the Timor Sea where Greater Sunrise lies" and further provided that nothing in the agreement could be interpreted as prejudicing the position of either Party with respect to maritime claims and boundaries.

37. Following the signature of the Unitisation Agreement and ratification of the Timor Sea Treaty, Timor-Leste and Australia began negotiations on the establishment of a permanent maritime boundary, with initial meetings in November 2003 and April 2004. The focus of these negotiations changed, however, leading to the signature on 12 January 2006 of the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* ("CMATS").[22] In broad terms, CMATS (*a*) extended the life of the Timor Sea Treaty until 50 years after the entry into force of CMATS; (*b*) provided for Timor-Leste to exercise jurisdiction over the water column within the JPDA; and (*c*) provided that revenues derived directly from the production of petroleum from Greater Sunrise would be shared equally between

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[19] Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor, 20 May 2002, [2002] A.T.S. 11.

[20] Resolução No. 2/2003 de 1 de Abril Que Ratifica o Tratado do Mar de Timor entre o Governo de Timor-Leste e o Governo da Austrália, Assinado em 20 de Maio de 2002 (Aprovada em 17 de Dezembro de 2002); Petroleum (Timor Sea Treaty) Act 2003, No. 9, 2003 (Assented to 2 April 2003).

[21] 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, 6 March 2003, 2483 U.N.T.S. 317.

[22] Treaty between Australia and the Democratic Republic of Timor-Leste on certain maritime arrangements in the Timor Sea, 12 January 2006, 2483 U.N.T.S. 359.

the two States (rather than according to the percentages set out in the Timor Sea Treaty and Unitisation Agreement). CMATS also included in Article 4 a moratorium on the settlement of permanent maritime boundaries.[23]

38. CMATS and the Unitisation Agreement were both ratified and entered into force on 23 February 2007.[24]

* *

39. Through the various agreements concluded between Australia and UNTAET and between Australia and Timor-Leste, Timor-Leste agreed to continue existing contracts and licences for petroleum operations issued to private actors pursuant to the Timor Gap Treaty on equivalent terms.

40. To date, the largest petroleum development within the JPDA has involved gas and condensate from the Bayu-Undan field. Discovered in 1995, Bayu-Undan commenced commercial production of condensate and liquid petroleum gas (LPG) in 2004. In 2006, the Bayu-Undan Joint Venture completed a 500 km pipeline to supply natural gas to the newly established plant for liquefied natural gas ("LNG") at Wickham Point in Darwin, Australia. As of early 2017, Bayu-Undan had generated approximately US$23.5 billion in upstream revenue for Timor-Leste and approximately US$2.4 billion in upstream revenue for Australia. The precise quantification of downstream economic benefits, which have largely accrued to Australia, is the subject of some debate. Production from Bayu-Undan is expected to continue until 2022.

41. Other petroleum operations within the JPDA have been undertaken on a smaller scale at the Kitan, Kuda Tasi, Jahal, and Elang Kakatua-Kakatua North oil fields. Although CMATS and the Unitisation Agreement were intended to facilitate the development of Greater Sunrise, no agreement on the development concept for Greater Sunrise was reached prior to these proceedings and exploitation of the Sunrise and Troubadour fields has not yet commenced.

42. Timor-Leste has allocated all of the revenue derived from petroleum operations to the Petroleum Fund for Timor-Leste (the "Petroleum Fund"), intended to "contribute to a wise management of the petroleum resources for the benefit of both current and future generations."[25] Pursuant to the relevant legislation, the Parliament of Timor-Leste may appropriate funds from the Petroleum Fund and

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[23] The text of Article 4 of CMATS is reproduced and analyzed at paragraphs 59 and following of the Commission's *Decision on Competence*, included at Annex 9 of this Report.

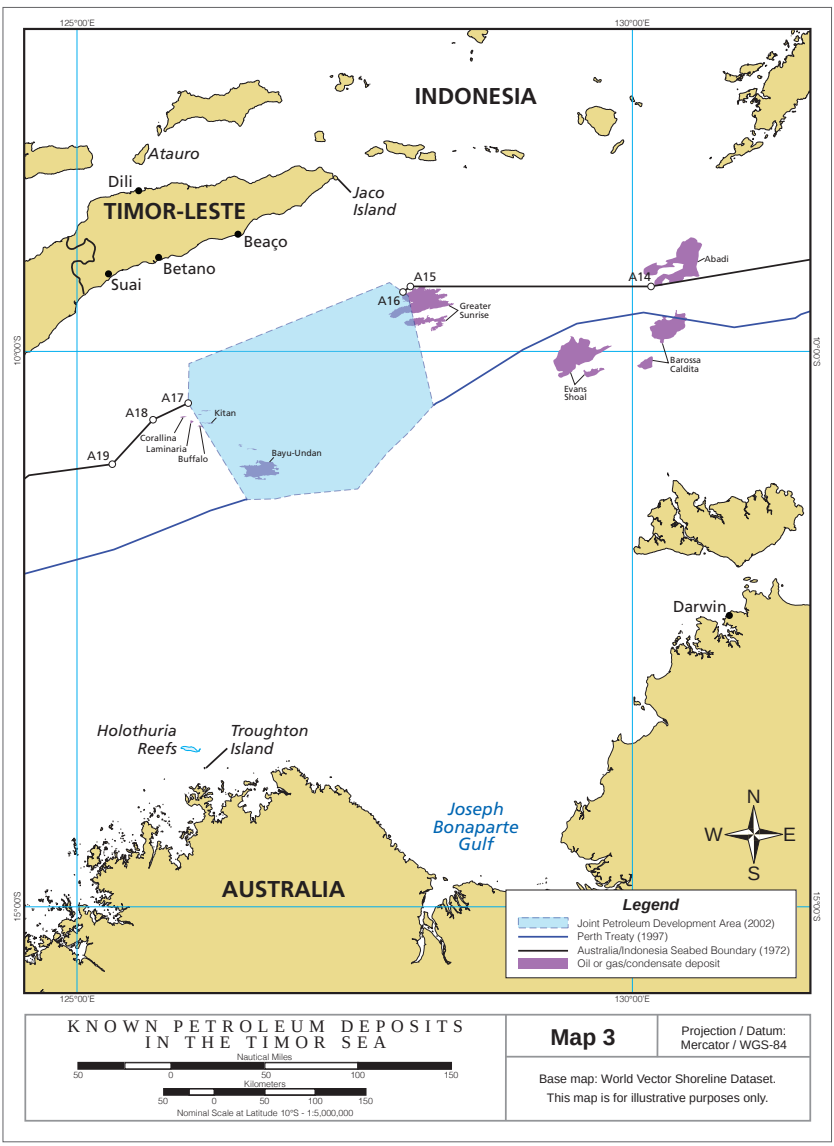
[24] Resolução do Parlamento Nacional No. 4/2007 de 8 de Março Que Ratifica o Tratado entre o Governo da República Democrática de Timor-Leste e o Governo da Austrália sobre Determinados Ajustes Marítimos no Mar de Timor (Aprovada em 20 de Fevereiro de 2007), *published in* Jornal da República, Serie I, No. 4 at p. 1692; Resolução do Parlamento Nacional No. 5/2007 de 8 de Março Que Ratifica o Acordo Entre o Governo da Austrália e o Governo da República Democrática de Timor-Leste Relativo a Unitização dos Campos do Sol Nascente e do Travador (Aprovada em 20 de Fevereiro de 2007) *published in* Jornal da República, Serie I, No. 4 at p. 1699; Minister for Foreign Affairs of Australia, "Entry into Force of Greater Sunrise Treaties with East Timor," Media Release.

[25] Petroleum Fund Law, Law No. 9/2005 of 3 August 2005, *as amended by* First amendment to Law no. 9-2005, of 3rd August, Petroleum Fund Law, Law No. 12/2011 of 19 September 2011.

has done so to supplement the government budget in recent years. Revenue from the Petroleum Fund constituted 82 percent of the government budget in 2016.

43. Over the same period, Australia authorized the development of the Corallina, Laminaria, and Buffalo fields located immediately to the west of the JPDA, as permitted under Article 4(2) of CMATS. The locations of known petroleum resources in the relevant portion of the Timor Sea are shown on Map 3 [reproduced below].

* *



44. On 8 January 2013, Timor-Leste acceded to the Convention, with effect as from 7 February 2013.[26]

45. On 23 April 2013, Timor-Leste initiated arbitration proceedings against Australia pursuant to the dispute resolution provisions of the Timor Sea Treaty (the "Timor Sea Treaty Arbitration").[27] The Commission was informed that the subject matter of the arbitration generally concerned the circumstances under which CMATS was concluded and, correspondingly, the validity of that treaty, including its extension of the life of the Timor Sea Treaty. The Commission was also informed that the arbitration proceedings were the subject of several suspensions while the Parties pursued the possibility of settlement, such that they remained pending at the commencement of these conciliation proceedings.

46. On 17 December 2013, Timor-Leste initiated proceedings against Australia before the International Court of Justice with regard to the seizure and subsequent detention of certain documents and data from the offices of one of Timor-Leste's legal advisers in Canberra. According to Timor-Leste, the seized documents and data contained correspondence between the Government of Timor-Leste and its legal advisers relating to the Timor Sea Treaty Arbitration. On 3 March 2014, the Court indicated provisional measures, and on 25 March 2015, Australia indicated that it wished to return the documents and data in question. Timor-Leste thereafter discontinued the proceedings on 11 June 2015.

47. On 15 September 2015, Timor-Leste initiated arbitration proceedings against Australia pursuant to the dispute resolution provisions of the Timor Sea Treaty (the "Article 8(*b*) Arbitration").[28] The Commission was informed that the subject matter of the arbitration generally concerned whether the provision of the Timor Sea Treaty giving Australia jurisdiction over any pipeline landing in Australia should be understood as conveying exclusive jurisdiction and precluding the exercise of jurisdiction by Timor-Leste over portions of the pipeline lying within the JPDA.

48. Both the *Timor Sea Treaty Arbitration* and *Article 8(b) Arbitration* were subsequently suspended and then terminated in the context of the present proceedings (see paragraphs 96 and 106 below).

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[26] United Nations Convention on the Law of the Sea, Accession by Timor-Leste, 8 January 2013, U.N.T.S. 1833, I-31363; Republicação Resolução do Parlamento Nacional No. 17/2012 de 27 de Dezembro Ratifica, para Adesão, a Convenção das Nações Unidas sobre o Direito do Mar e o Acordo Relativo à Aplicação da Parte XI da mesma Convenção, adotado pela Assembleia Geral das Nações Unidas em 28 de Julho de 1994, *published in* Jornal da República, Serie I, No. 4 at p. 1.

[27] *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2013–16. Publicly available details concerning the arbitration may be found at <pca-cpa.org/en/cases/37/>.

[28] *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2015–42. Publicly available details concerning the arbitration may be found at <pca-cpa.org/en/cases/141/>.

49. Timor-Leste has made substantial progress in developing the country and establishing a stable economic and political environment in the 15 years since it achieved independence. Despite these accomplishments, many challenges remain. Timor-Leste has emphasized to the Commission that it sees its petroleum resources, and in particular Greater Sunrise, as critical to its Strategic Development Plan 2011–2030 and its intention to build up a petroleum sector on the South Coast as part of the overall economic development of the country.

50. For its part, Australia has made clear to the Commission that it views the stability and prosperity of its regional neighbours as matters of high importance and very much in Australia's interest. Australia is conscious that the dispute over maritime boundaries has negatively affected its broader relationship with Timor-Leste and inhibited the development of natural resources that would benefit both the Australian and Timorese peoples. Australia has come to see these proceedings as an opportunity to establish its partnership with Timor-Leste on a new footing. The achievement of agreement on maritime boundaries may provide a foundation for a strong and effective partnership for the future.

* * *

IV. The Commission's Mandate, Establishment, and Rules of Procedure

A. The Purpose of Conciliation and the Commission's Mandate

51. Compulsory conciliation proceedings are governed by Annex V to the Convention. In such proceedings, a neutral commission is established to hear the parties, examine their claims and objections, make proposals to the parties, and otherwise assist the parties in reaching an amicable settlement. Conciliation is not an adjudicatory proceeding, nor does a conciliation commission have the power to impose a legally binding solution on the parties; instead, a conciliation commission may make recommendations to the parties.[29]

52. Conciliation has a long tradition in international law and developed in the early twentieth century from both the fact-finding commissions of enquiry and good offices procedures envisaged under the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.[30] Provisions for conciliation were included in many of the bilateral conventions for the settlement of disputes concluded during the 1920s and 1930s, and in 1945 conciliation was recognized in Article 33 of the Charter of the United Nations among the

[29] Convention, Annex V, Art. 7(2).

[30] For a general overview of the history of conciliation, see S.M.G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (2008); J.P. Cot, *La conciliation internationale* (1968).

peaceful means for the settlement of international disputes.[31] Other multilateral treaties, including the Vienna Convention on the Law of Treaties and the UN Convention on the Law of the Sea, introduced the possibility of compulsory conciliation—conciliation in which participation in the process is mandatory but the results are nevertheless non-binding—as an alternative, for example, for issues considered too sensitive to submit to binding dispute settlement.[32] Procedurally, conciliation seeks to combine the function of a mediator with the more active and objective role of a commission of inquiry.[33]

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[31] Charter of the United Nations, Art. 33.

[32] On the adoption of compulsory conciliation as a compromise procedure for the resolution of sea boundary disputes pursuant to the Convention, see generally S. Rosenne & L. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, pp. 12–15, 109–114 (M. Nordquist, gen. ed. 2012).

During the preparation of the Convention, extensive consideration was given to the categories of disputes that would be subject to procedures entailing a binding decision. Sea boundary disputes were identified early in the conference as a category of disputes for which agreement on third-party adjudication was unlikely to be broadly acceptable, and a proposal for an optional exemption for such disputes was proposed in 1974. *See* Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America, "Working Paper on the Settlement of Law of the Sea Disputes," UN Doc. A/CONF.62/L.7 (27 August 1974), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume III (Documents of the Conference, First and Second Sessions)*, p. 85 at p. 92. Early versions of what became Article 298 permitted States to exclude disputes relating to sea boundary delimitation from the dispute resolution provisions of the Convention, but required States exercising this option to "indicate therein a regional or other third party procedure, entailing a binding decision which it accepts for the settlement of such disputes." Revised Single Negotiating Text, Part IV, Art. 18, UN Doc. A/CONF.62/WP.9/Rev.2 (23 November 1976), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fifth Session)*, p. 144 at p. 148.

This approach, however, met with objections both from States opposed to the compulsory submission of sea boundary disputes to any form of binding dispute settlement, as well as from States opposed to any exception of boundary disputes from the dispute resolution provisions otherwise applicable pursuant to the Convention. An informal note from the President of the Conference recorded that "[t]he main criticism of article 18 centered around paragraph l(*a*) in relation to sea boundary delimitations. The opposing positions were on the one hand that the words 'entailing a binding decision' should be deleted, and on the other, that boundary delimitations be brought totally within the compass of section II of part IV." *Informal Note from the President of the Third United Nations Conference on the Law of the Sea to All Delegations*, para. 3 (25 March 1977) *reproduced in* S. Rosenne & L. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p. 112 (M. Nordquist, gen. ed. 2012).

A special Negotiating Group was thereafter created to give particular attention to the dispute resolution provisions applicable to the resolution of boundary disputes. In 1979, the Chairman of this Negotiating Group 7 noted his "understanding that only a proposal based upon the procedure of compulsory conciliation is consistent with a realistic view of the possibilities, if any, to reach a compromise on this controversial issue." *Report of the Chairman of Negotiating Group 7*, UN Doc. NG7/45 (22 August 1979) in *Reports to the Plenary Conference*, UN Doc. A/CONF.62/91, *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Eighth Session)*, p. 71 at p. 107. Compulsory conciliation for sea boundary disputes was then incorporated into the negotiating text in 1980. *Informal Composite Negotiating Text, Revision 2*, Art. 298, UN Doc. A/CONF.62/WP.10/Rev.2 (11 April 1980).

[33] *See* J.P. Cot, *La conciliation internationale*, pp. 29–57 (1968). As a method for the pacific settlement of international disputes, conciliation emerged from the combination of elements of

53. As an entity established pursuant to the Convention, the Commission looked first to that instrument to define the basis for its engagement with the Parties. In that respect, the Convention provides that the delimitation of a maritime boundary for the continental shelf and exclusive economic zone "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[34]

54. Annex V to the Convention, in turn, defines a commission's objectives and establishes certain principles for the conduct of the proceedings. Articles 4 through 7 of Annex V provide as follows:

> *Article 4*
> *Procedure*
>
> The conciliation commission shall, unless the parties otherwise agree, determine its own procedure. The commission may, with the consent of the parties to the dispute, invite any State Party to submit to it its views orally or in writing. Decisions of the commission regarding procedural matters, the report and recommendations shall be made by a majority vote of its members.
>
> *Article 5*
> *Amicable settlement*
>
> The commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.
>
> *Article 6*
> *Functions of the commission*
>
> The commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

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mediation and of international commissions of enquiry. Historically, international mediation was generally carried out by another sovereign power. Thus, while focused on the achievement of an amicable settlement, mediation was generally characterized by the independent political authority (and, potentially, interest in the dispute) of the mediating power. International commissions of enquiry, in contrast, largely replicated the arbitration procedures of the 1899 Hague Convention for the Pacific Settlement of International Disputes, but were focused solely on the determination of disputed facts. In contrast to mediation, the hallmark of a commission of enquiry was the absence of any independent political authority or interest in the dispute and the commission's reliance instead on its expertise and judgment in considering the facts at hand. In practice, early commissions of enquiry, as in the *Dogger Bank Case*, were sometimes mandated to go beyond a strict presentation of facts and address the apportionment of responsibility between the parties, *de facto* engaging in conciliation. This combination of inquiry, combined with recommendations as to the amicable settlement of the dispute was then codified as conciliation in the many bilateral treaties on the resolution of international disputes concluded in the 1920s and 1930s.

[34] Convention, Arts. 74(1), 83(1).

Article 7
Report

1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.

55. The full text of Annex V is attached as Annex 2 to this Report.

56. The Commission sought to elaborate on these principles in the preparation of its Rules of Procedure, which it adopted following consultations with the Parties in July 2016. The development of the Commission's Rules of Procedure was usefully informed by reference to the *Optional Conciliation Rules* adopted by the Permanent Court of Arbitration on 1 July 1996 (the "PCA Conciliation Rules") and to the *United Nations Model Rules for the Conciliation of Disputes between States* of 29 January 1996 (the "UN Conciliation Rules"). A copy of the Commission's Rules of Procedure is attached as Annex 8 to this Report.

57. In preparing the Rules of Procedure, the Commission and the Parties sought to maintain a flexible and informal approach to enable the Commission to follow the path that it considered most likely to lead to an amicable settlement. In particular, the Parties agreed that the Commission should not hesitate to meet with the Parties separately. In practice, most of the Commission's meetings with the Parties were held separately, and the Commission considers that its most important discussions with each Party would not have occurred in a joint setting.

58. The Parties further agreed that the Commission could authorize its Chairman or a delegation of the Commission to confer or meet with either Party and report to the full Commission. In the Commission's view, this flexibility was essential to the process in two respects: first, in enabling the Commission's engagement with the Parties to continue between meetings through regular, informal discussions by telephone and e-mail exchanges and, second, by facilitating discrete discussions with the political leadership of each Party that could not have occurred in a larger or more formal setting. The Commission also made extensive use of the Registry as a channel for informal communications with the Parties, both between and on the margins of the Commission's meetings with the Parties.

59. In order to enable an open discussion with each Party, the Commission sought to ensure that the Parties' legal positions would not be jeopardized by their participation in the proceedings and that the Parties would have complete control over the further disclosure, either to the other Party or to

the public, of anything they revealed in the course of the conciliation. In order to preserve the Parties' legal positions, Article 25 of the Rules of Procedure prohibits the members of the Commission from any involvement—whether as arbitrator, counsel, representative, or witness—in any subsequent judicial or arbitral proceedings in respect of a dispute that is the subject of the conciliation proceedings.[35] Article 26 goes further and builds on corresponding provisions of the PCA Conciliation Rules to ensure that documents or materials introduced in the conciliation proceedings, or views expressed in the course of discussions with the Commission, may not be used in any such subsequent proceedings. The Rules of Procedure also adopt the provision of the UN Conciliation Rules that expressly provides that a Party may accept a settlement on the basis of the Commission's recommendations without being considered to have accepted the legal or factual premise of those recommendations.

60. With respect to confidentiality, the Commission's Rules of Procedure establish comprehensive procedures in Article 16 and in Article 18(6) to ensure that the Parties would retain control over the further disclosure of information and documents made available to the Commission. These provisions on transparency and confidentiality were extensively discussed during the Commission's July 2016 procedural meeting with the Parties. In crafting these provisions, the Commission sought to balance two competing considerations. On the one hand, the Commission considered that engagement with the Parties could not be effective if conducted in a public setting, in which the Parties' comments and positions would be intended as much for public or domestic consumption as for a frank discussion with the Commission. The Commission also anticipated that each Party would be less forthcoming with the Commission if there were any significant risk that documents or information would be communicated to the other Party or made public without its consent. On the other hand, the Commission was acutely conscious that the delimitation of maritime boundaries has an impact on others than the Parties to the dispute.

61. The Commission sought to balance these competing interests by ensuring that the majority of the Commission's discussions with the Parties would take place in a confidential setting and that each Party would have complete control over information and documents submitted by it, including with respect to whether they were communicated to the other Party or made public. The Commission has observed that restriction, including with respect to this Report, which conveys the substance of the Parties' communications with the Commission only to the extent that the Parties have themselves agreed. At the same time, the Commission itself has sought to ensure that the public of both Timor-Leste and Australia, as well as other stakeholders with interests in the Timor Sea, have been kept informed of progress in the proceedings, including through the public opening session conducted in August 2016 that was

[35] This prohibition would not, however, apply the procedure contemplated in Article 12 of the Treaty, which mirrors the functions of the Conciliation Commission itself and would not constitute a judicial or arbitral proceeding.

webcast on the website of the Permanent Court of Arbitration (the "PCA")[36] and through the issuance of regular press releases by the Registry.[37] However, in adopting its Rules of Procedure, the Commission declined to decide at the outset whether this Report should be issued publicly, leaving this to be decided in consultation with the Parties in the course of the proceedings.[38] Indeed, the Rules of Procedure also contemplated the possibility of supplementing its official report with supplemental reports to be provided confidentially to each side.

62. The terms of the Convention and Timor-Leste's request for conciliation identified the Commission's initial mandate as being to "assist Timor-Leste and Australia in reaching an amicable settlement of their dispute relating to the delimitation of their permanent maritime boundaries in the Timor Sea."[39] Article 5 of Annex V to the Convention, however, empowers the Commission to recommend "any measures which might facilitate an amicable settlement of the dispute." On its own terms, this provision is extremely broad and, for the Commission, emblematic of the flexible pragmatism that lies at the heart of conciliation: the Commission's mandate is to take the steps necessary to assist the Parties in resolving their dispute. Over the course of these proceedings, the Commission's engagement with the Parties progressed through a number of issues, from the Commission's proposal of confidence-building measures in October 2016, to the location of the boundary, to the consideration of revenue-sharing and the resource governance mechanisms now forming part of the Greater Sunrise Special Regime. Rather than restrict itself to the most immediate or prominent elements of the Parties' dispute identified at the outset of the proceedings, the Commission has sought to comprehensively engage with the Parties to address the issues necessary to achieve an amicable and durable settlement. The Commission's mandate has also been prolonged through the Parties' request, on the basis of the 30 August Agreement, for the Commission to remain involved with respect to the development of Greater Sunrise and to engage with the Parties and the Joint Venture with a view to facilitating agreement on the development concept.

63. The Commission also notes that conciliation proceedings may differ in the extent to which they seek to mediate an agreement between the parties

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[36] The Commission understands that the opening session was also broadcast live on television in Timor-Leste.

[37] Copies of the English version of these press releases are attached (in chronological order) as Annexes 4, 7, 11, and 13 to this Report. The same press releases were also regularly issued in French and Portuguese.

[38] The Commission consulted the Parties with respect to the form and content of the Report in October 2017 and provided the Parties with the opportunity to comment on a draft of this report in March 2018. In the course of the proceedings, both Parties made clear their expectation that the Report would be made public. In connection with their comments, the Commission invited the Parties to indicate whether any portion of the Report should be redacted. Having considered the Parties' comments, the Commission has finalized the present Report.

[39] Timor-Leste's Notice of Conciliation also anticipated the need to establish appropriate transitional arrangements.

or to leave the parties with a report containing the commission's recommendations and conclusions. Historically, conciliation procedures have set out differing expectations regarding a commission's role in the course of proceedings, and conciliation commissions have taken different approaches with respect to this aspect of their mandate.[40] In the Commission's view, Annex V to the Convention anticipates both possibilities. Article 7 expressly anticipates that, in the absence of agreement, the Commission shall issue a report recording "its conclusions on all questions of fact and law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement."[41] At the same time, the structure of Annex V makes clear that this possibility is secondary to the possibility of agreement and the Commission's objective to assist the Parties in reaching an amicable settlement.

64. In the present proceedings, the Commission discussed with the Parties their expectations for the conciliation and whether the Parties wished the Commission to concentrate on recommendations or to seek to reach an agreement within the conciliation process. At the procedural meeting in July 2016, both Parties were in agreement that, in the words of Timor-Leste's counsel "the primary goal and aim is to try to reach an agreement before any report is issued." The Parties expressed the same view in October 2016, when the Commission revisited the question following its *Decision on Competence*. In the course of the proceedings, the Commission has sought to be guided by this objective. At the same time, the Commission considered it to be of great importance to the conciliation process that the possibility of a substantive report remain and that the Commission have the opportunity to offer conclusions and recommendations, whether in the course of discussions or in the report. Even where both parties are actively engaged, an agreement may

[40] For a summary of this aspect of historical conciliations, see J.P. Cot, *La conciliation internationale,* pp. 217–226 (1968). Based on the approach of commissions of enquiry, the earliest conciliation procedures anticipated that a commission would hear the parties' positions and proceed to issue a report with its recommendations. In such an approach, the report itself would constitute the mechanism to bring the parties' positions together. Subsequent conventions provided greater flexibility and anticipated that a commission might make proposals for settlement at an earlier stage of the proceedings and proceed with a report and recommendations only in the event that its proposals were not accepted. Other conciliation procedures, including the PCA Conciliation Rules, go further and focus entirely on achieving agreement between the parties, omitting even the possibility of a report and trending somewhat in the direction of mediation. *See* S.M.G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* pp. 112–114 (2008). In this respect, Annex V to the Convention strikes a middle ground, providing that a commission shall prepare a report that will be deposited with the UN Secretary-General, but may also "make proposals to the parties with a view to reaching an amicable settlement" throughout the proceedings. This flexibility leaves a commission with significant discretion as to the conduct of the procedure, and the most appropriate approach may well depend upon the identity of the parties, the nature of their dispute, and the likely receptiveness of the parties to proposals for a genuine settlement.

[41] Convention, Annex V, Art. 7(1). Indeed, given that the Convention's provisions for compulsory conciliation anticipate the possibility that a party may fail to participate and provide that this "shall not constitute a bar to the proceedings," a commission must have the power to set out its recommendations and conclusions in a report in the event that party declines to participate.

prove elusive and the willingness to make the difficult decisions and compromises necessary to secure agreement may rise and fall over the course of the proceedings. The report is a necessary component of this conciliation process.

65. The fact that the Convention provides for compulsory conciliation raises further the question of how a commission should proceed in the event that its competence is called into question. The Commission addressed this in its Rules of Procedure and considered several aspects of its mandate in the context of its *Decision on Competence* of 19 September 2016. At the outset of the proceedings, Australia objected to the competence of the Commission and sought to have the question of competence determined as a preliminary matter. Timor-Leste opposed Australia's objection, as well as its request for a preliminary decision on competence. The Commission's Rules of Procedure provided that the Commission would decide "whether or not to rule on its competence as a preliminary question." The Commission invited the Parties to address this point, as well as that of competence itself, during the hearing on competence and ultimately decided to address the issue of competence before proceeding with the conciliation.

66. Although the Commission does not exclude the hypothetical possibility of objections to competence that would need to be addressed in conjunction with the substance of a dispute, it does consider that the engagement required for effective conciliation would ordinarily require that doubts as to the competence of a commission be promptly resolved. Additionally, the Commission notes that considerations of due process were of particular importance to the proceedings on competence—where, in contrast to the remainder of the proceedings, the Commission's decision had binding legal effect—and that distinct procedures were established in Article 17 for the proceedings on competence. In the present case, the Commission does not see that it could properly have conducted these proceedings in the flexible manner otherwise necessary for conciliation without first dealing with Australia's objections. The Commission is also of the view that the agreement reached by the Parties would have been impossible had Australia's objections to competence not been addressed as a preliminary matter. In this respect, the Commission considers the proceedings on competence to have been, not an ancillary matter, but essential to establishing trust for successful discussions with the Parties.

67. The Commission also recalls that, in its *Decision on Competence*, it was called on to interpret the interaction of the 12-month deadline in Article 7 of Annex V with the Commission's duty, under Article 13 thereof, to decide on any disagreement regarding its competence. Reviewing the text and structure of Annex V, the Commission concluded as follows:

> The deadline in Article 7 must therefore give way to the time needed to consider and decide objections to competence and is thus properly understood to run only after a Commission has addressed any objections that may be made. Any other approach would run the risk of a commission failing to give proper consideration to a justified objection

> to competence or, alternatively, of giving such objections appropriate attention only to find that too much time had elapsed for the parties to fairly evaluate whether the conciliation process was likely to prove effective and worthy of extension by agreement.
>
> Accordingly, the Commission concludes that, in this compulsory conciliation process, the 12-month period in Article 7 of Annex will begin to run as of the date of this Decision.[42]

68. The Commission notes that the Parties have in fact extended these proceedings by agreement well beyond 19 September 2017. The Commission considers this to have been essential for the conclusion of the proceedings. In the Commission's view, the Parties would not have been able to reach agreement had the Commission been constrained to issue its Report by 25 June 2017. Accordingly, the Commission considers that the 12-month period set out in Annex V should be understood not as the timeframe in which a successful conciliation can likely be concluded, but rather as a safeguard to ensure that an unproductive conciliation is not unduly prolonged. Therefore, notwithstanding the salutary effect of deadlines to focus parties' consideration of acceptable outcomes, parties to a conciliation that appears to be making progress should anticipate that at least some extension by agreement beyond the 12-month period may likely be necessary.

69. Finally, the Commission observes that there is a question regarding the extent to which a conciliation commission should engage with the parties concerning questions of international law. This was the subject of some discussion with the Parties in the course of the proceedings. It is also an issue on which conciliation commissions have historically taken varying approaches.[43] In the Commission's view, this question is answered for an Annex V commission by the Convention itself. The Convention provides for compulsory conciliation with respect to maritime boundaries, the delimitation of which, Articles 74 and 83 provide, "shall be effected by agreement on the basis of international law … in order to achieve an equitable solution." Article 7 of Annex V further requires a commission, in the absence of an agreement, to

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[42] *Decision on Competence* of 19 September 2016, paras. 109–110.

[43] In the *Jan Mayen Conciliation*, for instance, the commission noted that:

> In order to submit recommendations to the two governments, such recommendations must be unanimously agreed upon by the Conciliation Commission. It follows from the mandate that the Conciliation Commission shall not act as a court of law. Its function is to make recommendations to the two governments which in the unanimous opinion of the Commission will lead to acceptable and equitable solutions of the problems involved.
>
> *Jan Mayen Conciliation (Iceland/Norway)*, Decision of June 1981, R.I.A.A. Vol. XXVII, p. 1.

The *Jan Mayen* commission went on to note that, although it had examined state practice and judicial decisions on maritime boundary delimitation, it considered it "inappropriate" to address them. Similarly, the UN Conciliation Rules provide in Article 20(1) that a conciliation commission shall refrain "from ruling formally on issues of law, unless the Parties have jointly asked it to do so."

report on its "conclusions on all questions of … law relevant to the matter in dispute." For the Commission, it follows from these provisions that it cannot be inappropriate for a conciliation commission to engage with the parties' legal views regarding the delimitation of maritime boundaries.

70. At the same time, the Commission recognizes that Annex V anticipates the possibility of a commission setting out its conclusions on questions of law only where the parties are unable to reach agreement. The function of a commission is to assist the parties to reach an amicable settlement, not to pronounce for its own sake on questions of international law, and the Commission has frequently noted that it is not an arbitral tribunal with the power to make a binding ruling. It follows, for the Commission, that a conciliation commission need not as a matter of course engage with the parties on their legal positions, but may engage with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement. It also follows, for the Commission, that a conciliation commission should not encourage parties to reach an agreement that it considers to be inconsistent with the Convention or other provisions of international law. The Commission has sought to be guided by these principles in its discussions with the Parties, in particular in responding to the Parties' positions and in elaborating the Commission's options and ideas.

71. In the paragraphs that follow, the Commission has set out the procedure followed in the course of these proceedings, before turning to the Parties' views on maritime boundaries and manner in which the 30 August Agreement was reached.

B. Establishment of the Commission and Rules of Procedure

72. On 11 April 2016, Timor-Leste commenced these conciliation proceedings by way of a *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS*. In its Notification, Timor-Leste appointed Judge Abdul G. Koroma and Judge Rüdiger Wolfrum as Timor-Leste's party-appointed conciliators.

73. On 2 May 2016, Australia submitted a *Response to the Notice of Conciliation*. In its Response, Australia appointed Dr. Rosalie Balkin and Professor Donald McRae as Australia's party-appointed conciliators.

74. On 11 May 2016, the Parties wrote jointly to the PCA, requesting that it act as the Registry for these conciliation proceedings.

75. On 25 June 2016, after the party-appointed conciliators had consulted with the Parties, H.E. Ambassador Peter Taksøe-Jensen was appointed to serve as Chairman of the Conciliation Commission. The Commission was accordingly constituted with effect from 25 June 2016.

76. On 27 June 2016, Australia submitted an *Application for Bifurcation of the Proceedings*, briefly setting out Australia's challenge to the competence of the Commission and requesting the Commission to "bifurcate the conciliation to enable Australia's challenge to the competence of the Commission to be decided as a separate preliminary matter."

77. On 18 July 2016, Timor-Leste submitted its *Comments on Australia's Application for Bifurcation of the Proceedings*, requesting that the Commission "not accede to Australia's request for bifurcation."

78. On 28 July 2016, the Commission convened a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.[44] At the procedural meeting, the Commission and the Parties discussed the rules of procedure and the organization of the proceedings and agreed that, following written submissions on competence from the Parties, the Commission would convene a hearing on competence from 29 to 31 August 2016 at which the Parties would address both the question of the Commission's competence and whether the Commission should decide on its competence as a preliminary matter. The Parties also agreed that there would be a public opening session, prior to the hearing on competence, in which the Parties would address the background to the dispute.

79. During the course of the procedural meeting, the Commission and the Parties also concluded Terms of Appointment to confirm the appointment of the Commission and the basis for the conduct of the proceedings. The Terms of Appointment also confirmed the Parties' agreement that the PCA act as the Registry for the proceedings. Further to the Terms of Appointment, the Secretary-General of the PCA appointed Mr. Garth Schofield, Senior Legal Counsel of the PCA, to serve as Registrar to the Commission. Mr. Martin Doe, Senior Legal Counsel of the PCA, was also assigned to assist the Commission in these proceedings.

80. Over the course of August 2016, the Commission provided the Parties with draft Rules of Procedure, sought and responded to their comments in respect of this draft, and adopted final Rules of Procedure on 22 August 2016. A copy of the Commission's Rules of Procedure is included as Annex 8 to this Report.

* * *

V. The Conciliation Proceedings

81. In the paragraphs that follow, the Commission has set out the steps taken in the course of these proceedings. Conscious of the potential relevance of these proceedings for future recourse to Annex V, the Commission has elected to set out its procedure in some detail. For coherence, these details are grouped roughly on a thematic basis.

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[44] The following persons participated in the procedural meeting:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Ambassador Joaquim da Fonseca, H.E. Ambassador Milena Pires, Ms. Elizabeth Exposto, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Professor Vaughan Lowe QC, Mr. Eran Sthoeger, Ms. Janet Legrand QC (Hon), Mr. Stephen Webb, and Ms. Gitanjali Bajaj.

For Australia: Mr. John Reid PSM, H.E. Ambassador Brett Mason, Sir Daniel Bethlehem KCMG QC, Ms. Amelia Telec, Mr. Justin Whyatt, Ms. Indra McCormick, and Mr. Will Underwood.

For the Registry: Mr. Garth Schofield, Mr. Martin Doe, and Ms. Pem Chhoden Tshering.

A. Proceedings on Competence

82. On 29 July 2016, the Commission wrote to the Parties, fixing the schedule for the Parties' written submissions on competence and setting out the procedure for the hearing on competence and for an opening session that would be webcast on the website of the PCA. At the same time, and without prejudice to the Commission's decision on competence, the Commission invited the Parties to reserve dates in January 2017 for a potential meeting.[45]

83. On 12 August 2016, Australia submitted its *Objection to Competence*. On 25 August 2016, Timor-Leste submitted its *Written Submission in Response to Australia's Objection to Competence*.[46] From 29 to 31 August 2016, the Commission convened a hearing on the issue of competence with the Parties at the Peace Palace in The Hague, the Netherlands.[47] As agreed with the Parties, the hearing was preceded by an opening session on the background to the dispute, which was webcast live on the website of the PCA.[48] During the opening session and hearing on competence, H.E. Minister Kay Rala Xanana Gusmão; H.E. Minister Hermenegildo Pereira, Agent for Timor-Leste; Ms. Elizabeth Exposto, Deputy Agent for Timor-Leste; Professor Vaughan Lowe QC; and Sir Michael Wood KCMG made oral submissions for Timor-Leste. Mr. John Reid PSM, Agent for Australia; Mr. Justin Gleeson SC, Solicitor General of Australia; Sir Daniel Bethlehem KCMG QC; Mr. Bill Campbell QC PSM; Professor Chester Brown; and Mr. Gary Quinlan AO made oral submissions for Australia.

84. On 31 August and 9 September 2016, the Parties wrote to the Commission, providing supplemental written answers to questions posed by the Commission during the hearing. Additionally, on 13 September 2016, Australia provided a further supplemental answer to a question from the Commission concerning Article 9 of CMATS.

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[45] Following its *Decision on Competence*, the Commission in fact convened a meeting with the Parties in October 2016.

[46] The substance of Australia's objection and Timor-Leste's response are addressed in the Commission's *Decision on Competence*, included as Annex 9 to this Report.

[47] The following persons participated in the opening session and hearing on competence:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, H.E. Ambassador Joaquim da Fonseca, H.E. Ambassador Abel Guterres, H.E. Ambassador Milena Pires, Mr. Simon Fenby, Ms. Sadhie Abayasekara, , Professor Vaughan Lowe QC, Sir Michael Wood KCMG, Mr. Eran Sthoeger, Dr. Robin Cleverly, Ms. Janet Legrand QC (Hon), Mr. Stephen Webb, Ms. Gitanjali Bajaj.

For Australia: Mr. John Reid PSM, Ms. Katrina Cooper, Solicitor-General Justin Gleeson SC, Sir Daniel Bethlehem KCMG QC, Mr. Bill Campbell QC PSM, Professor Chester Brown, Mr. Gary Quinlan AO, H.E. Ambassador Brett Mason, Ms. Amelia Telec, Mr. Benjamin Huntley, Ms. Anna Rangott, Mr. Justin Whyatt, Mr. Todd Quinn, Mr. Mark Alcock, Ms. Angela Robinson, Ms. Indra McCormick, and Ms. Christina Hey-Nguyen.

For the Registry: Mr. Garth Schofield, Mr. Martin Doe, and Ms. Pem Tschering.

A transcript of the opening session and hearing on competence was produced. This transcript and the Parties' presentation materials are available at https://pca-cpa.org/en/cases/132/.

[48] Video of the opening session is available at the website of the Permanent Court of Arbitration.

85. On 15 September 2016, the Commission informed the Parties that it would issue its *Decision on Competence* on 19 September 2016 and requested the Parties to keep the decision confidential until made public in accordance with the Rules of Procedure.

86. On 19 September 2016, the Commission issued to the Parties its *Decision on Competence* and concluded as follows:

> A. The Commission is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS* of 11 April 2016.
>
> B. There are no issues of admissibility or comity that preclude the Commission from continuing these proceedings.
>
> C. The 12-month period in Article 7 of Annex V of the Convention shall run from the date of this Decision.

87. A copy of the Commission's *Decision on Competence* is included as Annex 9 to this Report.

88. Following the rendering of its *Decision on Competence*, the Commission provided the Parties with the opportunity to indicate whether they considered necessary the redaction of any potentially confidential information included in the decision. As neither Party indicated a wish for redactions, the Commission published its *Decision on Competence* on 26 September 2016 on the website of the PCA.

B. Confidence-Building Measures

89. After completing its *Decision on Competence*, the Commission gave consideration to the approach to be followed in the further conduct of the proceedings. The Commission identified the following four objectives:

> (*a*) to map out and understand the Parties' objectives and interests, as well as their formal positions;
>
> (*b*) to manage the process for all stakeholders in the Timor Sea, including other governments and private actors with interests in the area;
>
> (*c*) to provide for a suitable interim arrangement that would provide stability and permit the Parties to concentrate their energies on a comprehensive resolution of their dispute; and
>
> (*d*) to advance a proposal capable of achieving agreement between the Parties on all elements of their dispute, including other matters closely related to the issue of boundaries.

90. On 21 September 2016, the Commission wrote to the Parties regarding the next steps to be taken in the proceedings. The Commission's letter stated as follows:

> Dear Colleagues,
>
> I write with respect to the next steps in this conciliation process.
>
> By now the Parties will have received the Commission's Decision on Competence. My hope with this Decision is that we will now be able to

turn to the question of how the Commission can best assist the Parties in finding an amicable resolution to the matters that separate them.

I have noted during both of our meetings that this is a conciliation process and not arbitration proceedings. I take the opportunity of this letter to do so again, and will continue to emphasize this point as we proceed. I believe that it is crucial to the success of the process that the Parties not be bound to litigation-style positions and statements and will do my utmost to encourage a flexible and open-minded way forward in which the Parties will feel free to explore possible avenues for engagement without fear that such flexibility will later be held against them. For its part, the Commission will be similarly flexible in organizing this process and will endeavor to accommodate the wishes and suggestions it may receive from the Parties.

The Commission looks forward to exploring with the Parties their ideas as to what the objectives of this process should be. At this point, however, I believe that it would be helpful to set out the Commission's initial view of four objectives that could guide our collective efforts:

First, to comprehensively inform the Commission regarding the issues in relation to boundaries in the Timor Sea, as well as the Parties' interests and objectives in this context.

Second, to manage this process with respect to all stakeholders, including nongovernmental entities and investors with interests in the Timor Sea, to ensure that these proceedings do not themselves become a cause of uncertainty or disruption.

Third, to develop with the Parties a mutually acceptable interim arrangement for the Timor Sea pending the final resolution of the Parties' differences.

Fourth, for the Commission to provide the Parties, at the close of this process, with an informed proposal for the final resolution of the Parties' differences that is in keeping with the principles underpinning the UN Convention on the Law of the Sea and sensitive to the interests and concerns expressed by the Parties in the course of this conciliation process.

As for concrete next steps, the Commission's first objective is to gain a better understanding of objectives and interests of the Parties. Although the Commission learned a great deal from the Parties' presentations during the opening session, there is still much that we do not know or may not understand. In keeping with the Commission's desire to avoid entrenching fixed positions, I do not wish, for the time being, to ask the Parties to inform the Commission through written memorials or formal submissions. Rather, the Commission would like to meet separately with each Party for an open-ended and informal exploration of the issues and of the Parties' interests and objectives.

In order not to lose the momentum developed during the proceedings on competence, the Commission wishes to meet with the Parties in Singapore during the period of 10 to 13 October 2016. I envisage that the Commission would spend at least one full day with the represent-

atives of each Party, which could take place on 10 and 11 October, but would ask that the Parties' representatives remain in Singapore on 12 and 13 October for potential further discussions or a joint meeting with the Commission. Although the Commission does not wish to restrict the Parties' representation for these meetings, I would encourage the Parties to consider keeping their delegations small, in order to facilitate a free-flowing discussion with the Commission.

In addition to preparing themselves for discussions with the Commission, there are two steps that the Commission would like the Parties to take between now and the October meetings in Singapore:

First, I believe that the Commission's separate discussions with the Parties would benefit from an indication, prior to the October meetings, of the full range of issues that the Parties believe could usefully be considered by the Commission in relation to the issue of boundaries in the Timor Sea. Accordingly, I would ask each Party to prepare a list for the Commission of the issues that it considers relevant to the process. This should not be a lengthy document or a statement of the Parties' positions on the issues to be addressed, but rather a checklist for the Commission's interactions with the Parties, to ensure that important issues are not overlooked.

Second, in the interest of managing the process for all stakeholders, the Commission would invite the Parties to consider the possibility of issuing a joint public statement after the October meetings. If helpful, the Commission would be available to confer with the Parties regarding the formulation of such a statement.

Going forward, I note that it will be important for the conciliation process to have a stable point of departure on the basis of which discussions can meaningfully be held. Accordingly, the Commission would ask the Parties to refrain for the time being from any steps that would alter the *status quo* in the Timor Sea and intends to explore this issue with the Parties in the course of discussions in October.

Finally, the Commission notes that it will be of critical importance for the proceedings that the Parties feel able to speak freely, both with the Commission and with each other. In this respect, I recall that the Rules of Procedure include provisions for the Parties to designate information as confidential or to provide information to the Commission on the condition that it not be shared with the other Party. The Rules also provide that information relating to this conciliation process that has not been made public shall not be relied on in other arbitral or judicial proceedings. The Commission takes these commitments seriously, and I encourage the Parties to make use of them as necessary in order to communicate freely with the Commission. Although the recent decision on competence will soon be made public, in keeping with the Rules of Procedure, I anticipate that the next phases of these proceedings will be (largely) confidential as the Commission seeks to explore the issues with the Parties and establish a constructive basis for discussions.

> I and my colleagues in the Commission look forward to the cooperation and assistance of the Parties in the conduct of the conciliation process ahead of us and to seeing the representatives of the Parties in person in Singapore in a few weeks.
>
> Yours faithfully,
>
> Peter Taksøe-Jensen
> Chairman

91. On 28 September 2016, the Commission wrote to the Parties regarding the organization of the October meetings in Singapore, noting that it intended to meet with the Parties separately. In order to encourage the Parties to speak freely, the Commission indicated that it would treat any statements made by either Party as confidential pursuant to Article 18(6) of the Rules of Procedure unless otherwise indicated. The Commission also requested each Party to convey its respective issues list, as requested in the Chairman's letter of 21 September 2016, to the Commission only.

92. On 7 October 2016, each of the Parties wrote confidentially to the Commission, enclosing a list of issues for discussion, as requested in the Chairman's letter of 21 September 2016.

93. On 9 October 2016, Australia wrote confidentially to the Commission, supplementing its list of issues and outlining its objectives for the conciliation process.

94. Between 10 and 13 October 2016, the Commission met separately with the Parties in Singapore.[49] To encourage the Parties to speak freely in their discussions with the Commission and explore avenues for settlement without fear of commitment, no formal written record was kept of these or subsequent meetings.

95. During the October 2016 session, both Parties provided the Commission with additional documents and materials on a confidential basis. The Commission also discussed with the Parties various steps that could be taken to build confidence between them and lay the groundwork for a productive discussion on maritime boundaries. Following these discussions, the Commission on 13 October 2016 provided the Parties with the following *Commission Proposal on Confidence-Building Measures*:

> The Commission has carefully considered how best to move forward with the Conciliation process and create the conditions most conducive to achieving an agreement on permanent maritime boundaries within

[49] The following persons participated in the October 2016 session:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, H.E. Ambassador Abel Guterres, Ms. Elizabeth Exposto, Mr. Stephen Webb, Ms. Sadhie Abayasekara, Ms. Iriana Ximenes, Mr. Simon Fenby, Ms. Gitanjali Bajaj.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Bill Campbell QC PSM, Mr. Gary Quinlan AO, Mr. Bruce Wilson, Mr. Justin Whyatt, Ms. Angela Robinson, Mr. Mark Alcock, Ms. Esther Harvey, Mr. Benjamin Huntley, and Ms. Hailee Adams.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

the timeframe of the Conciliation process. In this respect, the Commission proposes to the Parties certain measures to be implemented with a view to removing obstacles to progress, establishing a stable starting point for negotiations, and building trust between the Parties. If these measures are implemented by the Parties, the Commission is optimistic about obtaining full engagement to begin substantive negotiations on both provisional and final solutions on maritime boundaries at the Commission's next meetings with the Parties in January of next year.

As a general matter, the Commission places great importance on maintaining stability in the relationship between the Parties during the course of this Conciliation. Accordingly, as alluded to in its letter of 21 September 2016, the Commission initially thought that it would be helpful to maintain all the current treaty arrangements during the pendency of the process. However, based on its discussions with the Parties, it appears that CMATS may remain an obstacle to moving forward that could be productively removed from the equation.

Timor-Leste had previously indicated that it intends to proceed with the termination of CMATS in the near future. Australia does not dispute that Timor-Leste has the right to terminate CMATS. At the same time, both States share a common interest in maintaining regulatory stability and investor confidence by clarifying that the Timor Sea Treaty would continue to apply to activities undertaken in the Timor Sea following termination of CMATS and serve as part of the transitional arrangements until a final delimitation of maritime boundaries has come into effect.

With the above in mind, the Commission proposes that the Parties take the following steps as confidence-building measures:

1. Steps to be taken with respect to CMATS:
    - Either:

      - *Both Parties* to agree by 8 December 2016 to terminate CMATS by mutual consent, with such termination taking place according to an agreed schedule, bearing in mind domestic legal processes; or

      - *Timor-Leste* to initiate termination of CMATS unilaterally by 15 January 2017 (*i.e.*, one day prior to the opening of the January session with the Commission) and *Australia* to take note of Timor-Leste's termination of CMATS;
    - *Both Parties* to agree that, following the termination of CMATS, the Timor Sea Treaty will apply in its original form, prior to amendment by CMATS;
    - *Both Parties* to agree that Articles 12(3) and 12(4) of CMATS would no longer apply;
    - *Australia* to confirm that, following termination of CMATS, Article 4(5) of CMATS would not limit or exclude its obligation to negotiate an agreement with Timor-Leste on the basis

of any report the Commission may produce in the course of these proceedings;

2. The Parties' commitment to negotiate maritime boundaries:
   - *Australia* and *Timor-Leste* to commit to negotiate permanent maritime boundaries; such commitment to be formally confirmed in writing to the Commission by each government by 8 December 2016;
3. Steps to be taken with respect to pending arbitrations:
   - *Both Parties* to write jointly, by 21 October 2016, to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration*, suspending those proceedings by agreement until 20 January 2017 (*i.e.*, the final day of the January session with the Commission);
   - *Timor-Leste* to write to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration* by 20 January 2017 (*i.e.*, the final day of the January session with the Commission), withdrawing its claims and requesting termination of those proceedings;
4. Steps to be taken with respect to petroleum exploration in the Timor Sea:
   - *Australia* to remove the area in the recent acreage release identified by Timor-Leste as covered by its claim; such removal to be confirmed to the Commission in writing by 8 December 2016;
5. Steps to be taken with respect to the further work of the Commission:
   - *Both Parties* to set out their positions on maritime boundaries in the Timor Sea in written submissions not exceeding 30 pages (excluding annexes), to be received by 20 December 2016; such written submissions should include the Parties' respective positions on the delimitation of permanent maritime boundaries (including coordinates of the proposed delimitation line) and an explanation of the principles on which their delimitation is based;
   - *Australia* to provide the necessary mandate for its delegation to negotiate permanent maritime boundaries in the Timor Sea and to confirm to the Commission in writing the possession of such mandate by 9 January 2017;
   - *Both Parties* to take a forward-looking approach to the negotiations and to raise only issues that are directly relevant to reaching an agreement on maritime boundaries.
6. Steps to be taken with respect to public communications:
   - *Both Parties* to approach public statements on the issue of maritime boundaries and their relationship with one another generally with a view to creating space for constructive engagement, rather than to generate pressure on the other

Party or foreclose options; Accordingly, both Parties to generally express optimism about the Conciliation process;

- *Both Parties* to provide positive comments from senior members of their present delegations on the other Party's engagement in the Conciliation process for quotation in a press release to be issued by the PCA at the close of the present session with the Commission;
- *Both Parties* to issue a joint statement (the content of which will be developed in consultation with the Commission) concurrent with the termination of CMATS, outlining the effect of termination on the Timor Sea Treaty and operators in the Timor Sea;

96. On 21 October 2016, the Parties jointly wrote to the arbitral tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration*, requesting the suspension of those proceedings until 20 January 2017, as anticipated in the Commission's confidence-building measures.

97. On 8 November 2016, Timor-Leste wrote confidentially to the Commission, providing copies of a number of background documents referred to during the October meetings.

98. On 6 December 2016, Timor-Leste wrote to the Commission, conveying a letter from the Prime Minister of Timor-Leste, H.E. Dr. Rui Maria de Araújo, formally confirming Timor-Leste's commitment to negotiate permanent maritime boundaries with Australia.

99. On 8 December 2016, Australia wrote to the Commission confirming (*a*) its commitment to negotiate permanent maritime boundaries with Timor-Leste; (*b*) that its delegation had been provided with the necessary mandate to negotiate permanent maritime boundaries in the Timor Sea; and (*c*) that the area identified by Timor-Leste as being covered by its claim would be removed from the 2016 Offshore Petroleum Exploration Acreage Release area W16–2.

100. In its letter of 8 December 2016, Australia further indicated that it had decided not to jointly terminate the CMATS Treaty. Australia confirmed, however, that following the termination of CMATS by Timor-Leste, "the Timor Sea Treaty will apply in its original form, prior to amendment by CMATS," that "Articles 12(3) and 12(4) of CMATS would no longer apply," and that "Article 4(5) of CMATS would not limit or exclude its obligation to negotiate an agreement with Timor-Leste on the basis of any report the Commission may produce in the course of these proceedings."

101. On 14 December 2016, Australia wrote confidentially to the Commission regarding the modalities of the joint statement anticipated by the Commission's Proposal on Confidence-Building Measures to be issued concurrently with the termination of CMATS.

102. Throughout December 2016, the Commission communicated informally with both Parties regarding the content of the joint statement to be issued concurrently with the termination of CMATS.

103. On 9 January 2017, the Commission and the Foreign Ministers of Timor-Leste and Australia simultaneously issued a Trilateral Joint Statement concerning the termination of CMATS and the Parties' shared understanding of the legal effects of such termination, as follows:

> *Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea*
>
> Australia and Timor-Leste are engaged in the ongoing Conciliation under the United Nations Convention on the Law of the Sea. The purpose of this process is to resolve the differences between the two States over maritime boundaries in the Timor Sea.
>
> From 10 to 13 October 2016, the governments of Timor-Leste and Australia participated in a series of meetings convened by the Conciliation Commission constituted in this matter. In the course of those meetings the governments of Timor-Leste and Australia agreed to an integrated package of measures intended to facilitate the conciliation process and create the conditions conducive to the achievement of an agreement on permanent maritime boundaries in the Timor Sea.
>
> As part of this package of measures, the Government of Timor-Leste has decided to deliver to the Government of Australia a written notification of its wish to terminate the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea pursuant to Article 12(2) of that treaty. The Government of Australia has taken note of this wish and recognises that Timor-Leste has the right to initiate the termination of the treaty. Accordingly, the Treaty on Certain Maritime Arrangements in the Timor Sea will cease to be in force as of three months from the date of that notification.
>
> The Commission and the Parties recognise the importance of providing stability and certainty for petroleum companies with interests in the Timor Sea and of continuing to provide a stable framework for petroleum operations and the development of resources in the Timor Sea. In the interest of avoiding uncertainty, the governments of Timor-Leste and Australia wish to record their shared understanding of the legal effects of the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea as follows:
>
> - The governments of Timor-Leste and Australia agree that, following the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 and its supporting regulatory framework shall remain in force between them in its original form, that is, prior to its amendment by the Treaty on Certain Maritime Arrangements in the Timor Sea.

- The governments of Timor-Leste and Australia agree that the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea shall include the termination of the provisions listed in Article 12(4) of that treaty and thus no provision of the Treaty will survive termination. All provisions of the treaty will cease to have effect three months after the delivery of Timor-Leste's notification.

For the further conduct of the conciliation process, the governments of Timor-Leste and Australia have each confirmed to the other their commitment to negotiate permanent maritime boundaries under the auspices of the Commission as part of the integrated package of measures agreed by both countries. The governments of Timor-Leste and Australia look forward to continuing to engage with the Conciliation Commission and to the eventual conclusion of an agreement on maritime boundaries in the Timor Sea. The Commission will hold a number of meetings over the course of the year, which will largely be conducted in a confidential setting.

The governments of Australia and Timor-Leste remain committed to their close relationship and continue to work together on shared economic, development and regional interests.[50]

104. On 10 January 2017, Timor-Leste's Minister for Foreign Affairs and Cooperation, H.E. Hernâni Coelho da Silva, wrote to the Minister for Foreign Affairs of Australia, The Honourable Julie Bishop MP, conveying notice of Timor-Leste's wish to terminate CMATS in accordance with Article 12(2) of the treaty and restating the Parties' shared understanding regarding the legal effect of such termination.

105. On 12 January 2017, Australia wrote to the Commission to report on the steps taken by Australia to fulfil its undertakings in relation to the Australian Government's 2016 Offshore Petroleum Acreage Release W16–2.

106. On 20 January 2017, Timor-Leste wrote to the arbitral tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration*, requesting the termination of those proceedings, as anticipated in the Commission's confidence-building measures.

107. On 9 March 2017, Australia wrote to the Commission, providing an update on steps taken with respect to its domestic constitutional processes for the termination of CMATS and discussions between the Parties on a formal exchange of diplomatic notes, coincident with the termination of the treaty.

108. On 7 April 2017, the Parties exchanged diplomatic notes concerning the termination of CMATS.

109. On 10 April 2017, Australia wrote to the Commission, advising it of the Parties' exchange of diplomatic notes and confirming that, as of 10 April 2017, CMATS had ceased to be in force in its entirety, thereby completing the Commission's confidence-building measures.

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[50] A copy of this Trilateral Joint Statement is enclosed as Annex 16 to this Report.

C. Organization of the Proceedings

110. In connection with the *Commission Proposal on Confidence-Building Measures*, the Commission adopted a schedule for the remainder of the conciliation proceedings, leading up to the 19 September 2017 deadline established by Annex V to the Convention.[51] The Commission determined to convene a series of week-long sessions and reserved dates with the Parties in January, March, June, July, August, and September 2017.

111. During these sessions, the Commission met at various times with each Party, generally alternating between the Parties for short, separate meetings on discrete topics.

D. Exploration of the Parties' Positions on Maritime Boundaries

112. On 20 December 2016, each of the Parties provided the Commission with a *Written Submission on the Delimitation of Maritime Boundaries*. As agreed during the October meeting, each Party's Written Submission was also shared with the other Party.

113. On 9 January 2017, the Commission wrote to the Parties regarding the organization of the upcoming meetings in Singapore.

114. Between 16 and 20 January 2017, the Commission met separately with the Parties in Singapore.[52] In keeping with the Commission's practice, no formal written record was kept of the session.

115. At the close of January 2017 session, the Commission convened a short joint meeting with both Parties and invited the Parties' delegations to an informal social gathering. The Commission also provided the Parties with the following *Commission Proposal on Next Steps*:

> The Commission has now had the opportunity to confer with the Parties in two rounds of face-to-face discussions regarding the position papers submitted in December 2016. In the course of so doing, the Commission

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[51] As discussed below (see paragraphs 146 & 164), the Parties subsequently decided to extend this deadline by agreement, as permitted by Annex V.

[52] The following persons participated in the January 2017 session:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, H.E. Ambassador Abel Guterres, Sir Michael Wood KCMG, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Ms. Adelsia Coelho da Silva, Ms. Janet Legrand QC (Hon), Mr. Stephen Webb, and Ms. Gitanjali Bajaj.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Bill Campbell QC PSM, Mr. Gary Quinlan AO, Ms. Katrina Cooper, Mr. John Reid PSM, Mr. Bruce Wilson, Ms. Lisa Schofield, Mr. Justin Whyatt, Ms. Angela Robinson, Mr. Mark Alcock, Ms. Amelia Telec, Dr. Thomas Bernecker, Mr. Todd Quinn, Mr. Benjamin Huntley, Ms. Esther Harvey, Ms. Natalie Taffs, and Mr. Ben O'Sullivan.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

has gained a significantly better understanding of the Parties' legal positions and also of the Parties' motivations and interests.

From the vantage point of having consulted with both Parties, the Commission is of the view that it is time to consider in more detail factors relevant to delimitation, as well as options and ideas that might bring the Parties closer together, all of which will require further work and careful consideration. The Commission believes that the next step, as set out below, is to move from having the Parties explain their positions to the Commission to having the Commission indicate more precisely the issues to be taken into consideration in maritime boundary delimitation between the Parties, as well as the specific issues where further options and ideas might be explored.

In their communications with the Commission regarding its responses, guidance and proposals, the Parties are invited to bear in mind the principle that nothing is agreed until everything is agreed. The Parties are encouraged to take advantage of their ability to communicate with the Commission in confidence to provide the Commission with frank responses or to propose possible alternative approaches in the knowledge that such communications will not be treated as concessions.

With the above in mind, the Commission proposes the following steps leading up to the next session of meetings in March 2017:

1. Steps with respect to guidance on Parties' positions:
    - Commission to provide each Party separately by *1 February 2017* with a confidential non-paper setting out what the Commission considers at this stage to be the issues and concerns that are relevant for that Party that should be taken into consideration in maritime boundary delimitation between the Parties.
    - Each Party to provide the Commission with a confidential written response to the Commission's non-paper by *22 February 2017*.
    - Commission to provide the Parties by *3 March 2017* with a non-paper setting out what the Commission considers at this stage to be the issues and concerns relevant for both Parties that should be taken into consideration in maritime boundary delimitation between the Parties.
2. Continuing education of the Commission:
    - Parties to provide the Commission in confidence with working papers on topics arising out of the January meetings or any other submission they wish to make by *22 February 2017*.
3. Steps with respect to March meetings:
    - Commission to provide each Party with an annotated agenda for the March meetings by *10 March 2017*, which includes a general indication of the elements of the dispute on which the Commission intends to advance options and ideas during the March meetings.

- Parties to meet with the Commission during the week of *27 March to 1 April 2017.*

116. Following the January 2017 session, the Commission and the Parties issued a Trilateral Joint Statement concerning the completion by the Parties of the Commission's confidence-building measures and the Parties' commitment to maintaining a stable framework for existing petroleum operations in the Timor Sea, as follows:

> *Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea*
>
> Delegations from both Timor-Leste and Australia participated in a series of confidential meetings with the Conciliation Commission in Singapore from 16 to 20 January 2017. These meetings are part of an ongoing, structured dialogue in the context of the conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia being conducted pursuant to the UN Convention on the Law of the Sea and under the auspices of the Permanent Court of Arbitration. These meetings will continue over the course of the year in an effort to resolve the differences between the two States over maritime boundaries in the Timor Sea.
>
> In October 2016, the Conciliation Commission reached agreement with the Parties on certain confidence-building measures, which included a series of actions by both Timor-Leste and Australia to demonstrate each Party's commitment to the conciliation process and to create the conditions conducive to the achievement of an agreement on permanent maritime boundaries.
>
> As part of this integrated package of confidence-building measures, the Foreign Ministers of Timor-Leste and Australia and the Conciliation Commission issued a Trilateral Joint Statement on 9 January 2017, noting Timor-Leste's intention to terminate the Treaty on Certain Maritime Arrangements in the Timor Sea and setting out the Parties' agreement on the legal consequences of such termination. On 10 January 2017, Timor-Leste formally notified Australia of the termination of the Treaty, which shall cease to be in force on 10 April 2017, in accordance with its terms.
>
> Over the course of the week, the Commission met with the Parties to explore their negotiating positions on where the maritime boundary in the Timor Sea should be set with a view to identifying possible areas of agreement for discussion in future meetings. Both Timor-Leste and Australia agreed that the meetings were productive, and reaffirmed their commitment to work in good faith towards an agreement on maritime boundaries by the end of the conciliation process in September 2017. The Commission intends to do its utmost to help the Parties reach an agreement that is both equitable and achievable.

> Recognizing that the Parties are undertaking good faith negotiations on permanent maritime boundaries, and in continuation of the confidence-building measures and the dialogue between the Parties, on Friday, 20 January 2017, Timor-Leste wrote to the tribunals in the two arbitrations it had initiated with Australia under the Timor Sea Treaty in order to withdraw its claims. These arbitrations had previously been suspended by agreement of the two governments following the Commission's meeting with the Parties in October 2016. The withdrawal of these arbitrations was the last step in the integrated package of confidence-building measures agreed during the Commission's meetings with the Parties in October 2016.
>
> The Commission and the Parties recognise the importance of providing stability and certainty for petroleum companies with current rights in the Timor Sea. The Parties are committed to providing a stable framework for existing petroleum operations. They have agreed that the 2002 Timor Sea Treaty and its supporting regulatory framework will remain in force between them in its original form until a final delimitation of maritime boundaries has come into effect. As this process continues, the Commission and the Parties will ensure that the issue of transitional arrangements for any new regime will be included in the program of work for the conciliation with a view to ensuring that current rights of these companies are respected.
>
> Timor-Leste and Australia enjoy a close and strong friendship. The governments of both countries are committed to their important relationship and working together on many shared interests.[53]

117. On 6 February 2017, the Commission wrote separately to each Party, enclosing a confidential *Issues Paper* setting out what the Commission considered to be the issues and concerns that were relevant to that Party that should be taken into consideration in the course of the conciliation proceedings. The Commission invited each Party to provide the Commission with a confidential written response in order (*a*) to provide its comments on the formulation of the issues identified by the Commission; (*b*) to identify any issues not included by the Commission that it considered relevant; and (*c*) to indicate if it considered the Commission to have misunderstood its position. The Commission also invited each Party to indicate if it would object to any element of the Commission's *Issues Paper* being shared with the other Party in a subsequent joint paper.

118. On 27 February 2017, each Party wrote to the Commission, setting out its confidential comments on the *Issues Paper* provided to that Party by the Commission and agreeing to the Commission consolidating these papers into a single joint issues paper for both Parties. At the same time, each Party provided the Commission with a number of additional confidential background papers and documents as anticipated in the Commission's *Proposal on Next Steps*. The Parties also provided the Commission with their confidential views on the further conduct of the conciliation.

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[53] A copy of this Trilateral Joint Statement is enclosed as Annex 18 to this Report.

E. The Commission's Elaboration of Options and Ideas

119. In early March 2017, the Commission met for internal deliberations to consider the materials received from the Parties and to identify the Commission's intended approach for further meetings with the Parties. The Commission noted that the Parties had clearly elaborated their positions and that further engagement in this respect was likely to further entrench their positions on issues where the two Parties were diametrically opposed and already strongly committed. The Commission determined that it would complete the process by providing the Parties with a *Joint Issues Paper*, but would treat this document as a reference, rather than as the subject of further debate. Instead, the Commission would endeavour to shift the Parties' focus away from seeking to reinforce their legal positions and towards a search for a potential settlement. The Commission would engage with the Parties to indicate where it found their positions not convincing, but would also provide the Parties with a paper outlining the Commission's own options and ideas.

120. On 9 March 2017, the Commission wrote jointly to the Parties, enclosing a *Joint Issues Paper* setting out the Commission's understanding of the issues relevant to both Parties.

121. Also on 9 March 2017, the Commission wrote separately to each Party, enclosing an *Annotated Agenda* for that Party for the meetings scheduled for 27 to 31 March 2017. In these documents, the Commission noted that it intended to continue meeting separately with each Party and identified a number of issues that the Commission considered essential to explore further if the Parties were to find a potential agreement. The Commission also identified a number of issues on which it considered that it fully understood the Parties' respective legal positions and did not, for the time being, wish to explore further. The Commission indicated its intention to advance additional options and ideas in the course of the March meetings, on the basis of initial discussions with each Party.

122. Over the course of March 2017, the Chairman of the Commission engaged in a number of informal telephone consultations with representatives of each Party.

123. Between 27 and 31 March 2017, the Commission met separately with the Parties in Washington, D.C.[54] In keeping with the Commission's practice, no formal written record was kept of the session.

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[54] The following persons participated in the March 2017 session:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, H.E. Minister Alfredo Pires, Ms. Elizabeth Exposto, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Mr. Ricardo Alves Silva, Sir Michael Wood KCMG, Professor Vaughan Lowe QC, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Ms. Adelsia Coelho da Silva, Mr. Stephen Webb, Ms. Gitanjali Bajaj.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Gary Quinlan AO, Ms. Katrina Cooper, Mr. John Reid PSM, Mr. Bruce Wilson, Ms. Lisa Schofield, Mr. Justin Whyatt, Ms. Megan

124. During the March 2017 session, following initial discussions regarding certain aspects of the positions taken by each Party, the Commission provided the Parties with a *Commission Non-Paper* setting out options and ideas for a possible comprehensive agreement on maritime boundaries in the Timor Sea, including a sketch map of a possible boundary. The *Non-Paper* invited the Parties to consider a single maritime boundary as set out in an attached sketch map. In the east, the *Non-Paper* raised the possibility of seabed boundaries that would partially run through Greater Sunrise. The *Non-Paper* also invited the Parties to give consideration to the need for a shared regime for Greater Sunrise and agreement on the development of the resource as part of reaching an agreement on the maritime boundary. A copy of the *Commission Non-Paper* is enclosed as Annex 19 to this Report.

125. In presenting the *Non-Paper*, the Commission emphasized that it did not consider the package outlined therein to represent the only solution or to foreclose other possibilities. Rather, the package represented where the Commission could see a potential comprehensive solution that it wished the Parties to seriously consider. The Commission engaged in discussions with each Party regarding the *Commission Non-Paper* for the remainder of the session.

126. At the close of the March 2017 session, the Commission requested both Parties to give serious consideration to the ideas advanced by the Commission and to engage with all elements of the package identified in the *Commission Non-Paper*, including those that the Parties found difficult to accept or that would involve a departure from long-held positions. Without prejudice to the location of the boundary, the Commission invited both Parties to give further consideration to arrangements for the joint management of resources in the Timor Sea that could lessen the difficulties the Parties had encountered in previous instances of joint management. The Commission also requested the Australian delegation to confer with its political level regarding its negotiating mandate if the delegation considered that its mandate would prevent it from engaging on the basis of the *Commission Non-Paper*. The Commission also noted that the Chairman would, as necessary, be available for informal consultations with the Parties between sessions.

F. Informal Consultations at the Political Level

127. Over the course of April and May 2017, the Commission sought to engage with the Parties regarding their reactions to ideas set out in the *Commission Non-Paper*, in particular the ideas of seabed boundaries beyond the limits of the JPDA and the development of Greater Sunrise in a joint manner. The Commission also began to engage with the Parties at multiple levels and to

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Jones, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Mark Alcock, Dr. Thomas Bernecker, Mr. Benjamin Huntley, Ms. Natalie Taffs, Ms. Negah Rahmani, Ms. Hailee Adams, and Mr. Ben O'Sullivan.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

increase the frequency of informal contacts, with its Chairman meeting with the Parties' leadership in Singapore, Sydney, and Canberra.

128. In April and May 2017, the Chairman of the Commission engaged in a number of informal telephone consultations with representatives of each Party.

129. On 5 May 2017, Timor-Leste wrote confidentially to the Commission, providing it with an *Initial Response to the Commission's Non-Paper of 31 March 2017*.

130. On 20 May 2017, the Chairman of the Commission met informally in Singapore with Timor-Leste's Agent, H.E. Minister Hermenegildo Pereira. Also present at this meeting were Mr. Stephen Webb, Ms. Greta Bridge, and Messrs. Schofield and Doe of the Registry.

131. On 21 May 2017, the Chairman of the Commission met informally in Sydney with Mr. Gary Quinlan AO and Australia's Co-Agent, Ms. Katrina Cooper. Also present at this meeting were Messrs. Schofield and Doe of the Registry.

132. On 22 May 2017, the Chairman of the Commission met informally in Canberra with the Foreign Minister of Australia, the Honourable Julie Bishop MP, and the Attorney-General of Australia, the Honourable George Brandis QC. Also present at this meeting were Australia's Agent, Mr. John Reid PSM, Australia's Co-Agent, Ms. Katrina Cooper, and Messrs. Schofield and Doe of the Registry. No formal written record was kept of these meetings.

133. On 1 June 2017, following consultations at the political level, Australia wrote confidentially to inform the Commission that its delegation had been mandated to engage in negotiations on the basis of the *Commission Non-Paper*.

G. Discussions on Resource Sharing, Broader Economic Benefits, and Governance

134. On 2 June 2017, Australia wrote confidentially to the Commission, providing an *Australian Non-Paper on a Greater Sunrise Special Regime* regarding the joint management of resources, as requested by the Commission at the close of the March 2017 session.

135. Between 6 and 9 June 2017, the Commission met separately with the Parties in Copenhagen.[55] In keeping with the Commission's practice, no

[55] The following persons participated in the June 2017 session:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, H.E. Ambassador Abel Guterres, Sir Michael Wood KCMG, Professor Vaughan Lowe QC, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Ms. Adelsia Coelho da Silva, Ms. Iriana Ximenes, Mr. Stephen Webb, Ms. Gitanjali Bajaj.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Gary Quinlan AO, Ms. Katrina Cooper, Mr. John Reid PSM, Ms. Lisa Schofield, Mr. Justin Whyatt, Ms. Megan Jones, Ms. Angela Robinson, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Mark Alcock, Mr. Benjamin Huntley, Ms. Natalie Taffs, and Ms. Negah Rahmani.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

formal written record was kept of the meetings. On 8 June 2017, the Commission and the Parties attended an informal social reception hosted by the Danish Foreign Ministry.

136. During the June 2017 session, the Commission's discussions with the Parties focused on the potential governance arrangements for a special regime in respect of the Greater Sunrise gas field. Timor-Leste agreed for its delegation to participate in these discussions on an exploratory basis, without abandoning its position regarding the location of maritime boundaries. Each Party also provided the Commission with various papers regarding aspects of possible governance arrangements for a special regime for Greater Sunrise.

137. At the close of the June 2017 session, the Commission provided each Party with a separate paper containing the Commission's *Inter-Session Guidance* for that Party. These papers addressed four issues:

(*a*) First, the Commission noted that many aspects of the governance of a possible special regime were not issues in respect of which there were significant differences between the Parties. The Commission provided each Party with a Non-Paper setting out what the Commission understood to be uncontroversial elements of a special regime for Greater Sunrise and invited each Party to prepare a detailed paper on governance that could be shared with the other Party.

(*b*) Second, the Commission noted that the Parties' positions regarding the eastern seabed boundary were irreconcilable and deeply held on both sides. The Commission invited each Party to give further consideration to its position in the event that agreement on its preferred position could not be reached and to explore potential creative solutions in respect to the location of the boundary.

(*c*) Third, the Commission noted that both Parties had expressed a strong concern that any agreement must be sustainable. The Commission invited each Party to give consideration to steps that could be taken to increase the "legal durability" and political sustainability of a potential agreement. The Commission also invited the Parties to give further consideration to potential formulations for the legal status of areas within a possible special regime.

(*d*) Finally, the Commission requested the Parties to prepare for discussions on the revenue implications of the development of Greater Sunrise, including the revenue derived from downstream operations and the broader economic benefits accruing to the country in which the LNG plant for the field was located. The Commission also requested the Parties to prepare for discussions regarding the remaining production and revenue to be generated from petroleum resources within the existing JPDA.

138. In the course of June and July 2017, the Chairman of the Commission continued to engage in informal telephone consultations with representatives of each Party.

139. On 14 July 2017, Timor-Leste wrote confidentially to the Commission, transmitting five non-papers regarding (*a*) elements of a Greater Sunrise special regime, (*b*) the development plan for Greater Sunrise and its relationship to a comprehensive agreement, (*c*) the location of the eastern seabed boundary, (*d*) the status of the area within a special regime, legal durability, and political sustainability, and (*e*) elements to be considered with respect to revenue from Greater Sunrise.

140. On 17 July 2017, Australia wrote confidentially to the Commission, transmitting four non-papers regarding (*a*) elements of a Greater Sunrise special regime; (*b*) the development plan for Greater Sunrise and its relationship to a comprehensive agreement; (*c*) the status of the area within a special regime, legal durability, and political sustainability; and (*d*) elements to be considered with respect to revenue from Greater Sunrise. At the same time, Australia wrote to the Commission with a confidential proposal regarding the location of maritime boundaries.

141. On 19 July 2017, as anticipated in the Commission's *Inter-Session Guidance* at the end of the June meetings, the Commission shared each Party's non-paper regarding elements of a Greater Sunrise Special Regime with the other Party.

142. Between 24 and 28 July 2017, the Commission met separately with the Parties in Singapore.[56] In keeping with the Commission's practice, no formal written record was kept of the meetings. At the close of the July 2017 session, the Commission also invited the Parties' delegations to attend an informal social reception.

143. During the July 2017 session, the Commission's discussions with the Parties focused on their differing understandings of the broader economic benefits that had resulted from the downstream operations in Australia of previous petroleum development in the Timor Sea and the corresponding implications of different scenarios for the future development of other fields in the area to be delimited, in particular Greater Sunrise. The Commission also continued discussions with the Parties on the governance structure for a potential special regime for Greater Sunrise. At the Commission's invitation, the Parties organized a joint working group to seek agreement on governance arrangements, working in parallel with the Parties' separate discussions with

[56] The following persons participated in the July 2017 session:

For Timor-Leste: H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, H.E. Ambassador Abel Guterres, Professor Vaughan Lowe QC, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Alfredo Pires, Mr. Gualdino da Silva, Mr. Francisco Monteiro, Mr. Ricardo Alves Silva, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Ms. Adelsia Coelho da Silva, Mr. Stephen Webb, Ms. Gitanjali Bajaj, and Ms. Greta Bridge.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Gary Quinlan AO, Ms. Katrina Cooper, Ms. Lisa Schofield, Mr. Justin Whyatt, Ms. Megan Jones, Mr. Todd Quinn, Ms. Angela Robinson, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Mark Alcock, Mr. Benjamin Huntley, Ms. Natalie Taffs, Ms. Negah Rahmani, Mr. Geoffrey Francis, and Ms. Anastasia Phylactou.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

the Commission on other issues. This discussion was conducted on the basis that it was without prejudice to the Parties' differing positions on the location of the seabed boundary in relation to Greater Sunrise.

144. During that same session, the Commission, at the request of both Parties, wrote to the Greater Sunrise Joint Venture, the licence holder to Greater Sunrise, to invite the Joint Venture "to provide the governments and the Conciliation Commission with a comparative analysis of the Timor LNG and Darwin LNG development concepts, showing the Joint Venture's views as to costs, revenue and likely timing of each concept, as well as any additional information that you think the governments, and the Conciliation Commission, may find useful to know."

145. In addition, the Commission provided the Parties over the course of the week with a *Non-Paper on Political Sustainability* and a *Non-Paper on Legal Security*, consolidating the various ideas advanced by the Parties regarding steps that could be taken and elements that could be included in a potential agreement on maritime boundaries. At the close of the meetings, the Commission also provided each Party with a separate paper containing the Commission's *Inter-Session Guidance* for that Party. These papers identified "what the Commission sees as the principal issues that continue to separate the Parties" as follows:

> (*a*) The location of the eastern seabed boundary;
>
> (*b*) The legal status of the seabed within a Greater Sunrise Special Regime area;
>
> (*c*) The allocation of upstream revenue from the development of Greater Sunrise;
>
> (*d*) The scope of the broader economic benefits that would follow from the development of Greater Sunrise and the extent to which such benefits would be reflected in potential revenue-sharing arrangements for Greater Sunrise.

The Commission invited each Party to consider its position on these issues and to indicate to the Commission in writing in advance of the August meetings its views regarding the elements that would be necessary to forge a comprehensive package agreement.

146. The Commission and the Parties agreed during the July meetings that the conciliation process had so far been productive and should therefore continue beyond the 19 September 2017 deadline provided for in Annex V to the Convention and in the Commission's *Decision on Competence*. The Commission and the Parties also agreed that the deadline for the Commission to submit its report should be extended to occur only after the conclusion of the Commission's engagement with the Parties, so as to permit the Commission to devote its full attention to assisting the Parties in reaching a comprehensive agreement. The Parties agreed that the meeting scheduled for August 2017 would be the final substantive session between the Parties and the Commission, but that there would be an additional meeting in October 2017 to ena-

ble the Parties to come back to the Commission regarding the results of the August meetings after engaging in internal consultations. The Parties also agreed that the deadline for the Commission's report would be extended to 15 December 2017. These agreements were subsequently confirmed in correspondence exchanged on 7, 8, and 11 August 2017.

H. Further Informal Consultations at the Political Level

147. Over the course of the July meetings, Australia outlined to the Commission a number of areas where it considered that it could show significant flexibility in the interest of reaching a compromise with Timor-Leste. This flexibility from Australia was instrumental in enabling the Commission to engage effectively with the political leadership of Timor-Leste.

148. Following the conclusion of the July meetings, a delegation from the Commission composed of the Chairman and Judge Koroma travelled to Timor-Leste for informal consultations at the political level.

149. On 29 July 2017, the Chairman and Judge Koroma met in Dili with Timor-Leste's Chief Negotiator, H.E. Kay Rala Xanana Gusmão; Timor-Leste's Agent, H.E. Mr. Hermenegildo Pereira; and H.E. Ambassador Abel Guterres. Also present during this meeting were Messrs. Schofield and Doe of the Registry.

150. On 30 July 2017, the Chairman and Judge Koroma travelled to Suai on the south coast of Timor-Leste with H.E. Mr. Alfredo Pires, Minister of Petroleum and South Coast Development, and a delegation of representatives of Ministry of Petroleum, the Autoridade Nacional do Petróleo e Minerais (the "ANPM"), TIMOR GAP, the Timor-Leste Maritime Boundary Office, and the Registry. During the course of the visit, the Chairman and Judge Koroma inspected the infrastructure development in and around Suai.

151. Later on 30 July 2017, the Chairman and Judge Koroma met again with Timor-Leste's Chief Negotiator, H.E. Kay Rala Xanana Gusmão, and its Agent, H.E. Mr. Hermenegildo Pereira in Dili. Also present during this meeting were H.E. Ambassador Abel Guterres and Messrs. Schofield and Doe of the Registry.

152. On 1 August 2017, the Chairman and Judge Koroma met separately with the President of Timor-Leste, Dr. Francisco Guterres Lu-Olo; the Prime Minister, Dr. Rui Maria de Araújo; the Secretary-General of FRETILIN, Dr. Mari Alkatiri; and the former President, Dr. José Ramos Horta. Also present during these meetings were H.E. Ambassador Abel Guterres and Messrs. Schofield and Doe of the Registry.

153. During the course of these meetings, Timor-Leste's political leadership outlined for the Commission the elements of a package agreement that Timor-Leste could accept, modifying certain elements of its position in the interest of achieving an amicable settlement. These meetings represented a breakthrough in the proceedings. They provided both Parties with an opportunity and grounds to move away from established positions and allowed the

Commission to identify the core elements of an agreement that it anticipated that both Parties would ultimately be able to accept.

154. On 5 August 2017, the Chairman of the Commission conferred by telephone with Mr. Gary Quinlan AO. Thereafter, the Commission conveyed to Australia a paper setting out the elements of a package identified for possible agreement by the political leadership in Dili.

I. Discussions Leading to the Comprehensive Package Agreement

155. On 15 August 2017, the Chairman of the Commission conferred by telephone with representatives of the Australian delegation regarding Australia's initial reaction to the paper resulting from the consultations that had taken place in Dili.

156. On 18 August 2017, the Joint Venture wrote to the Commission and to the Parties, responding to the Commission's letter of 26 July 2017 (see paragraph 144 above) and providing a submission on the development of the Greater Sunrise gas field by way of either a pipeline to Darwin, Australia ("Darwin LNG"), or a pipeline to Beaço on the south coast of Timor-Leste ("Timor LNG").

157. Also on 18 August 2017, the representative of ConocoPhillips, one of the members of the Joint Venture, wrote separately to the Commission and to the Parties regarding time constraints on the possible development of Greater Sunrise by way of a Darwin LNG concept.[57]

158. In the course of August 2017, the Chairman of the Commission engaged in a number of informal telephone consultations with representatives of each Party.

159. On 27 August 2017, Australia wrote to the Commission with a proposal for a comprehensive agreement and requested the Commission to transmit this proposal to Timor-Leste. Australia also wrote confidentially to the Commission, elaborating on the rationale behind aspects of its proposal.

160. Between 28 August and 1 September 2017, the Commission met separately with the Parties in Copenhagen.[58] In keeping with the Commission's practice, no formal written record was kept of the meetings.

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[57] ConocoPhillips is both a participant in the Greater Sunrise Joint Venture and a participant in the joint venture that operates the LNG plant at Wickham Point in Darwin, Australia (a separate commercial entity). Certain measures were thus taken by the Greater Sunrise Joint Venture participants to exclude the other members of the Joint Venture from ConocoPhillips' representations on behalf of the Wickham Point facility and to exclude ConocoPhillips from the Joint Venture's discussions regarding potential tolling arrangements for the Wickham Point facility.

[58] The following persons participated in the August 2017 session:

For Timor-Leste: H.E. Minister Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, H.E. Minister Alfredo Pires, Ms. Elizabeth Exposto, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Sir Michael Wood KCMG, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Simon Fenby, Ms. Sadhie Abayasekara, Ms. Adelsia

161. During the August 2017 session, the Commission's discussions with the Parties focused on each Party's proposal for a comprehensive package, on the allocation of revenue from Greater Sunrise, on the submission received from the Joint Venture concerning the development of Greater Sunrise, and on a procedure and timeline to engage with the Joint Venture and settle the issue of the approach to be taken to developing Greater Sunrise.

162. On 30 August 2017, on the basis of its discussions with the Parties, the Commission circulated a *Non-Paper on a Comprehensive Package Agreement*, outlining what the Commission considered to be the elements of a comprehensive package that would be acceptable to both Parties and compatible with the Convention's requirement that the delimitation of the maritime boundaries achieve an equitable solution.

163. On 31 August 2017, the Commission circulated a *Commission Non-Paper on Approach on the Greater Sunrise Development Concept*, along with a proposed action plan for engagement with the Joint Venture on the development of Greater Sunrise.

164. On 31 August and 1 September 2017, the Parties engaged in internal consultations at the political level, confirmed their agreement to the elements of the 30 August package, and finalized an agreed Action Plan for engagement with the Joint Venture (which documents collectively constituted the 30 August Agreement). The Parties also agreed that the Commission would remain involved to facilitate the Parties' engagement with the Joint Venture. A copy of the 30 August Agreement is enclosed as Annex 21 to this Report.

165. At the close of the meetings on 1 September 2017, the Commission convened a joint session with both Parties and invited the Parties to attend a social reception to celebrate the agreement reached.

166. At the close of the meetings, the Commission provided both Parties with the following *Inter-Session Guidance*:

> **General**
>
> The Commission considers that this week represents a breakthrough in these proceedings and that the Parties' agreement to the Proposal of 30 August 2017 addresses the core elements of a comprehensive solution to the issue of maritime boundaries in the Timor Sea. This achievement has only been possible through a great deal of hard work and good will on both sides, efforts that bode well for future relations between Timor-Leste and Australia.

Coelho da Silva, Ms. Iriana Ximenes, Mr. Stephen Webb, Ms. Gitanjali Bajaj, Ms. Lena Chapple, Mr. Ricardo Alves Silva.

For Australia: Sir Daniel Bethlehem KCMG QC, Ms. Katrina Cooper, Mr. John Reid PSM, Ms. Lisa Schofield, Mr. Geoffrey Francis, Mr. Justin Whyatt, Ms. Megan Jones, Ms. Diana Nelson, Ms. Angela Robinson, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Mark Alcock, Mr. Benjamin Huntley, Ms. Natalie Taffs, Mr. Ben O'Sullivan, Ms. Emily Stirzaker.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

In order to give concrete form to this agreement in principle, a large number of steps must now be taken.

The 30 August 2017 Agreement

The Parties' agreement to the Commission's Proposal of 30 August 2017 (the "30 August 2017 Agreement") will constitute the basis for the Commission's further engagement with the Parties and for the preparation of a draft treaty.

Other papers previously circulated by the Commission (in particular those concerning legal security and political sustainability) may usefully contribute to the further progress of the conciliation and the preparation of a treaty on the basis of 30 August 2017 Agreement.

Engagement with the Sunrise Joint Venture

As part of the 30 August 2017 Agreement, the Parties will now begin joint engagement with the Joint Venture, with a view to a timely and informed decision on the development concept for Greater Sunrise. The Parties are requested to immediately commence implementation of the first elements of the Action Plan, including (*a*) the provision of information to the Sunrise Joint Venture, (*b*) the formulation of an agreed timeline for a response from the Sunrise Joint Venture, and (*c*) the preparation of a detailed request for further and more comprehensive information from the Sunrise Joint Venture (to be sent through a letter from the Commission).

Preparation for September 2017 Meetings with the Commission

In order for the Parties and Commission to prepare for meetings in October 2017, the Parties are requested to take the following inter-sessional steps.

(1) *Issues Register:* In order to ensure that important issues or points of detail are not missed in the Commission's further work with the Parties or in the preparation of a treaty, each Party is requested to review its files and to provide to the Commission a list of all outstanding issues or points of detail that, in that Party's view, remain to be addressed. The Parties are requested to provide their separate lists to the Commission by *Monday, 11 September 2017*. Thereafter, the Commission will compile the Party's lists, along with any other issues or points of detail the Commission may identify, and circulate a common issues register.

(2) *Treaty Drafting:* The Commission understands that both Parties have draft treaties that are well advanced and believes that it would be helpful for the Parties to exchange their respective draft treaties and engage in informal consultations to identify areas of agreement and disagreement. The Commission considers, however, that in light of the large number of details to be resolved in October, the formulation of a common working text will need to be finalized through the Commission. The Parties are requested to exchange their respective draft

treaties and to confer bilaterally to identify areas of agreement and disagreement. By *Monday, 25 September 2017*, the Parties are requested to provide the Commission with their joint or separate draft treaty texts, together with whatever commentary or explanatory memoranda each considers appropriate regarding areas of agreement and disagreement. To the extent necessary, the Commission will consolidate the Parties' drafts into a common working text, identify points of disagreement for resolution during the October session, and prepare a recommendation on outstanding issues.

(3) *Political Sustainability:* In the discussions in Singapore, the Parties were in significant agreement on a number of steps that would contribute to the political sustainability of any agreement. Such steps were captured in the Commission's Non-Paper on Political Sustainability of 26 July 2017, and some (*e.g.*, signing ceremonies, or the presence of certain individuals to witness the conclusion of the treaty) may require advance planning. The Parties are requested to revisit this issue and to confer bilaterally regarding the political sustainability arrangements that they would consider appropriate and to begin making any necessary logistical arrangements. The Commission requests the Parties to provide it with an update on these discussions during the October session. Should it prove necessary, however, either Party may request that the Commission join the Parties' discussions on these issues to facilitate resolving any points of disagreement.

J. Formalization of the 30 August Agreement and Initial Engagement with the Joint Venture

167. In the course of September 2017, the Chairman of the Commission engaged in a number of informal telephone consultations with representatives of each Party.

168. Between 5 and 8 September 2017, the Parties and the Commission exchanged correspondence regarding engagement with the Joint Venture.

169. On 11 September 2017, the Commission wrote to the Joint Venture, outlining the Action Plan for engagement on the development of Greater Sunrise agreed to as part of the 30 August Agreement. The Chairman also indicated that he would shortly be writing to the Joint Venture regarding additional information sought by the Parties in respect of the development of Greater Sunrise.

170. On 12 and 18 September 2017, the Parties each wrote to the Commission, providing an initial register of outstanding issues, as anticipated in the Commission's *Inter-Session Guidance*.

171. On 12 September 2017, the Commission wrote to the Parties, requesting that they provide the Commission with complete details on (*a*) the information sought from the Joint Venture and (*b*) the areas where each Party considered that the Joint Venture's analysis regarding either Timor LNG or

Darwin LNG was incorrect or should be reconsidered. The Commission also invited Timor-Leste to provide a document setting out for the Joint Venture how Timor-Leste envisaged the development of Greater Sunrise proceeding and how the Greater Sunrise project could best integrate with Timor-Leste's broader development goals under each of the Timor LNG and Darwin LNG scenarios.

172. On 15 and 19 September 2017, the Parties each wrote to the Commission, providing the information requested in the Commission's letter of 12 September 2017.

173. Between 19 and 25 September 2017, the Parties engaged in bilateral consultations, in consultations with the Chairman of the Commission, and in discussions with representatives of the Joint Venture regarding engagement on the development of Greater Sunrise.

174. Between 13 and 22 September 2017, the Parties engaged in bilateral negotiations on the text of a draft treaty on maritime boundaries to formalise the content of the 30 August Agreement.

175. On 25 September 2017, the Parties wrote jointly to the Commission, enclosing the Parties' joint draft treaty text (the "Consolidated Draft Treaty"), as anticipated in the Commission's *Inter-Session Guidance*.

176. On 27 September 2017, the Commission wrote to the Joint Venture enclosing the Parties' agreed *Protocol to Meet Commission's Action Plan* and a preliminary list of further information required from the Joint Venture for the assessment of the Timor LNG and Darwin LNG development concepts. The Chairman also extended an invitation for Joint Venture to join the Parties and the Commission in The Hague in October for meetings devoted to the development of Greater Sunrise.

177. On 28 September 2017, the Commission wrote to the Parties, noting its appreciation for the extent to which the Parties had succeeded in reaching agreement on the Consolidated Draft Treaty and indicating that the Commission did not consider it constructive to address the outstanding issues before meeting with the Parties in October. Instead, the Commission invited each Party to "provide, in advance of the October meetings, a short written submission setting out the rationale for the position it has taken on each of the principal points of the draft treaty that remain outstanding between the Parties and identifying any considerations of which the Commission should be aware." The Commission also invited the Parties to provide updated versions of the issues registers submitted earlier in the month.

178. On 2 October 2017, the Joint Venture wrote to the Commission regarding the engagement process envisaged in the Chairman's letter of 27 September 2017. On the same day, ConocoPhillips wrote to the Commission offering to brief the Commission and the Parties (independently from the other members of the Joint Venture in order to prevent a conflict of interest) regarding time constraints on the possible development of Greater Sunrise by way of a Darwin LNG concept.

179. On 5 October 2017, the Parties each wrote to the Commission, enclosing a written submission on outstanding issues and points of detail in the Consolidated Draft Treaty.

180. On 6 October 2017, the Commission wrote to the Joint Venture regarding the agenda for the Commission and Parties' meetings with the Joint Venture. On the same day the Commission also wrote to the Joint Venture regarding the confidentiality of the proceedings and of information shared in the course of engagement between the Parties and the Joint Venture. The Commission also accepted ConocoPhillips offer of a separate briefing on time constraints on a Darwin LNG approach.

181. Between 9 and 13 October 2017, the Commission met jointly and separately with the Parties in The Hague.[59] In keeping with the Commission's practice, no formal written record was kept of the meetings.

182. On 10 October 2017, the Commission and the Parties met with the Joint Venture regarding the development of Greater Sunrise and, separately, with ConocoPhillips regarding time constraints on a Darwin LNG approach. On the margins of this meeting the Parties also reached agreement with the Joint Venture on a *Timeline for Greater Sunrise Deliverables* to elaborate on the 27 September 2017 Protocol to the Commission's *Action Plan*. Following those discussions, the Commission further wrote to the Joint Venture on 11 October 2017, setting out a confidentiality regime for the Parties' further engagement with the Joint Venture.

183. During the October 2017 session, the Parties continued to negotiate on a bilateral basis in respect of outstanding issues in the Consolidated Draft Treaty. On 12 October 2017, the Parties informed the Commission that they had reached complete agreement on the text of a *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* (the "Final Draft Treaty"). On 13 October 2017, the Agents of the

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[59] The following persons participated in the October 2017 session:

For Timor-Leste: H.E. Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, Mr. Alfredo Pires, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Sir Michael Wood KCMG, Mr. Eran Sthoeger, Dr. Robin Cleverly, Mr. Simon Fenby, Ms. Sadhie Abayasekarae, Ms. Erin Michelle Gourlay, Ms. Adelsia Coelho da Silva, Ms. Iriana Ximenes, Ms. Janet Legrand QC (Hon), Mr. Stephen Webb, Ms. Gitanjali Bajaj, Ms. Lena Chapple, and Mr. Ricardo Alves Silva.

For Australia: Sir Daniel Bethlehem KCMG QC, Mr. Gary Quinlan AO, Mr. John Reid PSM, Mr. James Larsen, Ms. Lisa Schofield, Mr. Justin Whyatt, Ms. Diana Nelson, Ms. Angela Robinson, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Simon Winckler, Mr. Mark Alcock, Mr. Benjamin Huntley, Ms. Natalie Taffs, Mr. Todd Quinn, Mr. Patrick Mullins, Ms. Indra McCormick, and Ms. Christina Hey-Nguyen.

For the Greater Sunrise Joint Venture: Mr. Mike Nazroo, Ms. Michelle Clark, and Ms. Larina Taylor of ConocoPhillips; Mr. Robert Edwardes, Mr. Hendrik Snyman, and Mr. John Prowse of Woodside Petroleum; Mr. Julian von Fumetti of Royal Dutch Shell; Ms. Patricia Lim of Osaka Gas; and Mr. Sam Luttrell of Clifford Chance LLP.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

Parties, H.E. Mr. Hermenegildo Pereira and Mr. John Reid PSM, initialled a copy of the Final Draft Treaty, which was deposited with the Registry for safe-keeping.

184. During the course of the week, it became evident that the Parties were not in agreement in respect of the timetable for signature of the Treaty or its relationship with the procedure for engagement with the Joint Venture regarding the development of Greater Sunrise. Accordingly, the Commission and the Parties agreed to revisit this question during a stock-taking meeting in November 2017 and to tentatively schedule two further meetings in December 2017 and January 2018 to consider the process of engagement with the Joint Venture and the Parties' decisions regarding the development of Greater Sunrise. At the close of the meeting, the Commission and the Parties agreed to the following *Draft Scheduling Protocol* regarding next steps:

> In July 2017, the Parties and Commission reached agreement on a schedule for the remainder of these proceedings, anticipating a meeting from 9 to 13 October 2017 and the completion of the Commission's report by 15 December 2017. This timeline has now been overtaken by the Parties' conclusion of the Comprehensive Package Agreement on 30 August 2017 and the included Action Plan for engagement with the Greater Sunrise Joint Venture.
>
> The Commission considers that the Report cannot be issued in the midst of the Parties' engagement with the Joint Venture and that it is essential that the Parties be given the opportunity to review the report in draft before it is made public or transmitted to the UN Secretary General as required by Annex V to the Convention. The Commission also considers that scheduling arrangements should be put in place for the Commission to engage with the Parties regarding the Development Concept as necessary, as anticipated in the Comprehensive Package Agreement. Accordingly, the Commission proposes the following timetable:
>
> **Disclosure of the Draft Treaty**
>
> - Parties to disclose details of the agreement to stakeholders during November 2017 in a manner to be agreed
> - Further details of the agreement to be made public during November as agreed between the Parties
>
> **Signature of the Treaty**
>
> - Parties to initial draft Treaty today in The Hague; PCA to hold initialled copy in vault.
> - Parties to pursue their domestic approval processes with a view to signing the treaty
> - Parties to meet in Singapore before the end of November with the Commission / Commission Chair, as appropriate, in order to review progress on the Comprehensive Package Agreement pathway to the development of the resource and set a date for

signing of the Treaty by the end of the year or early 2018 if satisfied with progress

Engagement with the Greater Sunrise Joint Venture:

- Parties to engage with Joint Venture according to the attached Timeline for Greater Sunrise Deliverables
- Parties to provide the Commission with informal weekly updates (by telephone, through the Registry) regarding the status of engagement with the Greater Sunrise Joint Venture
- Commission to confer with the Parties (and the Joint Venture as necessary) upon the request or if the Commission considers that the Parties' informal updates indicate a need for Commission engagement
- Dates reserved for a meeting between the Parties and the Commission regarding engagement with the Joint Venture and the Development Concept from 12–14 December 2017 in Singapore. The Commission will confer with the Parties by 30 November regarding whether to go ahead with this meeting.
- Dates reserved for a meeting between the Parties and the Commission regarding engagement with the Joint Venture and the Development Concept from 29–31 January 2018 in a location to be agreed. The Commission will confer with the Parties by 10 January 2018 regarding whether to go ahead with this meeting.

Procedure for the Commission's Report Unless Otherwise Agreed

- Commission's Report will follow the completion of the Action Plan for engagement with the Joint Venture.
- If the approach to the Development Concept is agreed by 15 December 2017: The Commission will transmit the Report to the Parties in draft by 10 January 2018. The Parties will provide any comments on the draft Report by 31 January 2018. The Commission will then consider Parties' comments and transmit the Report to the Parties and UN Secretary-General by 14 February 2018.
- If that is not the case: The Commission will transmit the Report to the Parties in draft by 14 February 2018. The Parties will provide any comments on the draft Report by 7 March 2018. The Commission will then consider the Parties' comments and transmit Report to the Parties and UN Secretary-General by 21 March 2018.
- Parties to confirm in writing, by Friday, 20 October 2017, their agreement to these new deadlines for the completion of the Report.

185. On 20 October 2017, Australia wrote to the Commission, confirming its agreement to the dates set out in the Draft Scheduling Protocol and to

the corresponding extension of the Commission's mandate. On 25 October 2017, Timor-Leste wrote to the Commission, confirming the same.

K. Engagement with the Greater Sunrise Joint Venture

186. On 17 October 2017, the Joint Venture wrote to the Commission regarding confidentiality. With its e-mail communication, the Joint Venture enclosed a counter-signed version of the Chairman's letter of 11 October 2017, but indicated that it wished to pursue a more comprehensive information-sharing agreement with the governments of Timor-Leste and Australia.

187. The Joint Venture subsequently wrote to the Parties on 19 October 2017, proposing a draft of a possible information-sharing agreement.

188. On 20 October 2017, Timor-Leste provided the Joint Venture and Australia access to a data room containing documents and data prepared by Timor-Leste in relation to the development of Greater Sunrise.

189. The Parties conducted a series of preliminary discussions with the Joint Venture by videoconference on 23 October 2017 concerning the modelling of reserve estimates for Greater Sunrise and the Joint Venture's ideas concerning potential initiatives to ensure Timorese local content and the development of the south coast of Timor-Leste in connection with the development of Greater Sunrise.

190. The Parties conducted another series of preliminary discussions with the Joint Venture by videoconference on 25 October 2017 concerning facilities and infrastructure on the south coast of Timor-Leste.

191. The Parties conducted a further series of preliminary discussions with the Joint Venture by videoconference on 27 October 2017 concerning the route of the pipeline and financial models for the development of Greater Sunrise. On the same day, the Parties conducted a preliminary discussion with Woodside Petroleum, without the involvement of the other Joint Venture partners, regarding tolling arrangements in the event that Greater Sunrise were to be developed through the use of the LNG Plant at Wickham Point in Darwin, Australia.

192. On 7 and 8 November 2017, the Parties met with the Joint Venture in Brisbane, Australia for a first trilateral meeting. During this meeting, the Joint Venture gave an presentation on each of the Darwin LNG and Timor LNG approaches to the development of Greater Sunrise, following which the Parties provided the Joint Venture with detailed feedback regarding issues on which they were unconvinced by the Joint Venture's analysis or considered that additional work and discussion would be required. The Parties and the Joint Venture also concluded an Information Sharing Agreement. The Commission was not involved in these various videoconferences or trilateral meetings.

L. Stocktaking and Arrangements for the Signature of the Treaty

193. Throughout late October and early November 2017, the Parties exchanged correspondence bilaterally regarding the manner and timing for the disclosure of details of the Parties' agreement on maritime boundaries to the Joint Venture and other stakeholders with interests in the Timor Sea. The Parties also exchanged correspondence regarding other transitional arrangements, including domestic legislation that would need to be adopted to implement the Parties' agreement on maritime boundaries and the Greater Sunrise Special Regime.

194. On 9 November 2017, the Parties met bilaterally in Brisbane to discuss transitional arrangements and the disclosure of details of the Final Draft Treaty.

195. On 18 November 2017, the Commission held a one-day stocktaking session in Singapore with the Parties and a separate meeting with the Joint Venture. During these meetings, Timor-Leste indicated its view that the timetable for engagement with the Joint Venture was unreasonably compressed. Australia, for its part, indicated that it did not believe that sufficient progress had been achieved with respect to the development concept to fix a timetable for signature of the Final Draft Treaty. In keeping with the Commission's practice, no formal written record was kept of the meetings.[60]

196. Following its November stocktaking session with the Parties, the Commission scheduled a further stocktaking session for mid-December, in order to review progress with respect to the development concept for Greater Sunrise and to coordinate steps regarding the disclosure and signature of the treaty.

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[60] The following persons participated in the November 2017 session:

For Timor-Leste: H.E. Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, Mr. Alfredo Pires, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Sir Michael Wood KCMG, Mr. Simon Fenby, Ms. Sadhie Abayasekarae, Mr. Stephen Webb, Ms. Gitanjali Bajaj, Ms. Lena Chapple, Mr. Jeffrey Sheehy, Mr. Ricardo Alves Silva, Mr. Sivakumar Muniappan, Mr. Paul Hayward, Mr. Rod McKellar, Mr. David Lawson, Ms. Emilie Barton, Mr. Ernesto Pinto, Mr. Angelo Lay, and Mr. Agus Maradona Tilman.

For Australia: Mr. Gary Quinlan AO, Mr. James Larsen, Ms. Lisa Schofield, Mr. Michael Googan, Ms. Amelia Telec, Ms. Esther Harvey, Ms. Rebecca Curtis, Mr. Steven Taylor, Mr. Benjamin Huntley, Mr. Peter Carter, Dr. Evan Hynd, Mr. Patrick Mullins, and Ms. Vrinda Tiwari.

For the Greater Sunrise Joint Venture: Mr. Mike Nazroo, Ms. Michelle Clark, Ms. Larina Taylor, Ms. Kayleen Ewin, Mr. Chris Wilson, Mr. Frank Krieger, Mr. Dave Fillman, Mr. David Jamieson, Mr. Mike Timmcke, Mr. Damien Yelverton, Mr. Seamus Arundel, Mr. Mark Hunter, and Mr. John Devins of ConocoPhillips; Ms. Tricia Desplace, Mr. Paul Baker, Mr. Robert Edwardes, Mr. Andrew Pearce, Mr. Scott Amos, Mr. Daniel Bathe, and Mr. Ben Coetzer of Woodside Petroleum; Mr. Damian Deveney and Mr. Nilofar Morgan of Royal Dutch Shell; and Ms. Patricia Lim, Mr. Wataru Kato, Mr. Prady Chaliha, and Mr. Craig Dingley of Osaka Gas.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

M. Further Engagement between the Parties and the Joint Venture

197. On 18 November 2017, the Joint Venture provided the Parties with a first draft of a possible Framework Agreement for the development of Greater Sunrise.

198. The Parties subsequently met with the Joint Venture in Singapore for a second trilateral meeting on 19 and 20 November 2017. During this meeting, the Parties and the Joint Venture discussed their respective positions concerning the Timor LNG and Darwin LNG approaches, including outstanding technical issues, economics, socio-economic considerations, and a potential Framework Agreement.

199. On 4 and 5 December 2017, the Parties met with the Joint Venture in Melbourne for a third trilateral meeting. During this meeting, the Parties and the Joint Venture discussed the two development concepts, technical issues relating to pipelines and the use of existing facilities, local content, and the economics of both concepts.

200. On 11 December 2017, the Parties met with the Joint Venture in Singapore for a fourth trilateral meeting concerning the economics of the two development concepts.

N. The Commission's Direct Engagement on the Greater Sunrise Development Concept

201. From 12 to 14 December 2017, the Commission held a session in Singapore with the Parties regarding the development concept for Greater Sunrise, as well as separate meetings with the Joint Venture.[61] During these

[61] The following persons participated in the December 2017 session:

For Timor-Leste: H.E. Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, Mr. Alfredo Pires, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Sir Michael Wood, Mr. Eran Sthoeger, Mr. Simon Fenby, Ms. Sadhie Abayasekarae, Ms. Adelsia Coelho da Silva, Mr. Stephen Webb, Ms. Gitanjali Bajaj, Ms. Lena Chapple, Mr. Jeffrey Sheehy, Mr. Ricardo Alves Silva, Mr. Sivakumar Muniappan, Mr. Paul Hayward, Mr. Rod McKellar, Mr. David Lawson, and Ms. Emilie Barton, Ms. Fiona Macrae, Ms. Felismina Carvalho dos Reis, Mr. Ernesto Pinto, Mr. Mateus da Costa, Mr. Angelo Lay, Mr. Agus Maradona Tilman, Mr. João Leite, and Mr. Nuno Delicado.

For Australia: Mr. Gary Quinlan AO, Mr. John Reid PSM, Mr. James Larsen, Ms. Lisa Schofield, Mr. Michael Googan, Ms. Amelia Telec, Ms. Esther Harvey, Mr. Jeremy Noye, Ms. Rebecca Curtis, Mr. Steven Taylor, Mr. Benjamin Huntley, Mr. Peter Carter, Dr. Evan Hynd, and Ms. Vrinda Tiwari.

For the Greater Sunrise Joint Venture: Mr. Chris Wilson, Mr. Mike Nazroo, Ms. Kayleen Ewin, Ms. Michelle Clark, Ms. Larina Taylor, Mr. Mark Hunter, and Mr. Marcello Iuliano of ConocoPhillips; Mr. Robert Edwardes, Ms. Tricia Desplace, Mr. Daniel Bathe, and Mr. Tom Van Der Meulen of Woodside Petroleum; Mr. Damian Deveney, Mr. Nilofar Morgan, and Ms. Elaine Loh of Royal Dutch Shell; and Ms. Patricia Lim, Mr. Wataru Kato, and Mr. Craig Dingley of Osaka Gas.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

meetings, the two governments indicated that it was not realistic, on the information before them, for the governments to take a decision on the development concept for Greater Sunrise by 15 December 2017 as anticipated by the 30 August Agreement. Both governments, however, reaffirmed to the Commission their wish to continue to discuss the development concept for Greater Sunrise with a view to resolving this matter within the context of the conciliation proceedings. During the course of the December session, the Parties also agreed on the terms of an exchange of letters concerning the interpretation of the Final Draft Treaty.

202. In accordance with the fall-back provisions of the 30 August Agreement, the Commission acceded to the Parties' request that it engage directly with the Parties and the Joint Venture "with a view to facilitating agreement on the Development Concept." In consultation with the two governments and the Joint Venture, the Commission adopted a Supplemental Action Plan pursuant to which the Commission would appoint an independent expert in oil and gas development planning to advise it and would meet with the Parties in January and February 2018, leading to a decision on the development concept by no later than 1 March 2018.[62] The Supplemental Action Plan also set out a detailed list of requests for additional information from both governments and from the Joint Venture. A copy of the Commission's Supplemental Action Plan is attached as Annex 27 to this Report. The Commission also agreed with the Parties on Terms of Reference for the expert to be appointed to assist the Commission. The Terms of Reference identified the scope of the expert's duties as follows:

> 3.1. The Expert shall assist the Conciliation Commission in relation to its consideration of the information provided by the Governments of Timor-Leste and Australia and the Joint Venture regarding the development of the Sunrise and Troubadour gas fields ("Greater Sunrise") and, in particular, in:
>
> 3.1.1. examining and analysing the data and materials relating to the development concept for Greater Sunrise;
>
> 3.1.2. assessing whether the informational basis exists to evaluate and compare the Darwin-LNG and Timor-LNG concepts in accordance with international best oilfield practice and the agreed development concept decision criteria;
>
> 3.1.3. identifying any gaps in the available information necessary for the comparison of the Darwin-LNG and Timor-LNG concepts and for an informed high-level decision between concepts in accordance with international best oilfield practice and the agreed development concept decision criteria;
>
> 3.1.4. assessing the comparative economics and economic viability of the Darwin-LNG and Timor-LNG concepts and

[62] Based on the information available to it regarding timing constraints on the potential availability of the Wickham Point LNG plant in Darwin, Australia, the Commission and the Parties considered that both options would likely remain available through 1 March 2018, rather than 1 February 2018 as anticipated in the 30 August Agreement.

> the economic implications of each concept for Australia, Timor-Leste, the Joint Venture, and any other relevant actors;
> 3.1.5. assessing the suitability for investment of the Darwin-LNG and Timor-LNG concepts in accordance with international best oilfield practice and the agreed development concept decision criteria;
> 3.1.6. consideration of any such other matters as the Commission or Expert may determine to be relevant during the course of the reference.

In keeping with the Commission's practice, no formal written record was kept of the meetings.

203. Both during and after the December 2017 session, the two governments conveyed a number of informal suggestions regarding individuals and organizations that could potentially be considered in seeking to identify an expert with the experience necessary to advise the Commission.

204. On 10 January 2018, the Commission wrote to the Parties, inviting their comments on three potential candidates for the expert to be appointed to assist the Commission. On 11 January 2018, the Commission wrote to the Parties regarding a fourth potential candidate for consideration.

205. On 12 and 13 January 2018, the Commission conferred informally with the Parties regarding the choice of the expert to be appointed. At this point, Timor-Leste raised the question of the Commission potentially also seeking expertise in development economics. In response, the Commission recalled the scope of the mandate in the Terms of Reference and emphasized that it did not intend to make any formal recommendation on the choice of development concept or on how best to develop the Timor-Leste economy. Consequently, the Commission had looked for individuals with the expertise to undertake a comparative technical and financial analysis of the two development concepts under consideration in order to allow for an informed decision by the two governments.

206. On 16 and 17 January 2018, the two governments and the Joint Venture wrote to the Commission, providing their responses to the Commission's requests for additional information, made as part of the Supplemental Action Plan. Upon receipt, each response was circulated to the other parties for their information.

207. On 17 January 2018, the Commission, with the agreement of the Parties, appointed Mr. Mike Wood of Gaffney, Cline & Associates as expert to assist the Commission in the final phase of the proceedings.[63]

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[63] Prior to confirming this appointment, the Commission exchanged correspondence with Gaffney, Cline & Associates and with Australia, acknowledging Gaffney, Cline & Associates' past work on behalf of the Government of Timor-Leste, confirming that no individuals involved in these prior engagements would play any role in supporting or advising the Commission, and recording Australia's non-objection to the appointment.

208. On 22, 23, and 25 January 2018, the two governments and the Joint Venture each wrote confidentially to the Commission, providing a submission setting out their views regarding the development concept for Greater Sunrise.

209. On 27 January 2018, the Commission wrote to the Parties with regard to its three objectives for the upcoming session:

> (*a*) First, the Commission noted its intention to develop with the two governments and the Joint Venture the details of both the Timor LNG and Darwin LNG concepts in order to allow both to be fully explored, with a strong commitment to the development of Timor-Leste regardless of the concept chosen and with a common understanding of the economic implications of that choice.
>
> (*b*) Second, in addition to consideration of the choice between development concepts, the Commission noted that it considered it imperative to also move forward on certain matters that would be relevant regardless of the choice between concepts and necessary to formalize agreement on the concept chosen. These included the fiscal regime to be applicable within the Greater Sunrise Special Regime and the terms of a Framework Agreement and production sharing contract that are not contingent on the choice of development concept.
>
> (*c*) Third, the Commission recalled that the issue of transitional arrangements for areas other than Greater Sunrise had proven more complicated than anticipated and requested an update from each government regarding outstanding issues in relation to transitional arrangements. The Commission indicated that it would then propose that the governments seek to agree a roadmap to move forward with these issues in advance of the signature of the Treaty in early March.

210. Between 29 January and 2 February 2018, the Commission met separately with the two governments and the Joint Venture in Sydney.[64] In keeping with the Commission's practice, no formal written record was kept of the meetings.

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[64] The following persons participated in the January 2018 session:

For Timor-Leste: H.E. Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, Mr. Alfredo Pires, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Mr. Amado Hei, Mr. Florentino Soares Ferreira, Mr. Carlos Alves, Mr. Rod McKellar, Mr. Sivakumar Muniappan, Mr. Simon Fenby, Mr. Stephen Webb, Ms. Gitanjali Bajaj, Mr. Jack Brumpton, Ms. Sadhie Abayasekara, Mr. Ricardo Alves Silva, Mr. João Leite, Mr. David Lawson, Mr. Paul Hayward, Mr. Nuno Delicado, Ms. Adelsia Coelho da Silva, Mr. Jeffrey Sheehy, Ms. Melody McLennan, and Mr. Agus Maradona Tilman.

For Australia: Mr. Gary Quinlan AO, Mr. James Larsen, Mr. Michael Googan, Ms. Rebecca Curtis, Ms. Vrinda Tiwari, Mr. Jeremy Noye, Ms. Rori Moyo, Mr. John Reid PSM, Ms. Amelia Telec, Ms. Holly Matley, Ms. Lisa Schofield, Ms. Esther Harvey, Ms. Bernadette Shanahan, Dr. Evan Hynd, Mr. Steven Taylor, and Mr. Peter Carter.

For the Joint Venture: Mr. Mike Nazroo, Ms. Michelle Clark, Mr. Mark Hunter, Ms. Larina Taylor, Mr. Damien Yelverton, Ms. Kayleen Ewin, Mr. Dane Paddon, Mr. David Jamieson, and Mr. Michael Britton of ConocoPhillips; Mr. Paul Baker, Mr. Ben Coetzer, Ms. Tricia Desplace, Mr. John Prowse, and Mr. Moses Kim of Woodside Petroleum; Mr. David Shepherd, Mr. Damian Deveney, and Mr. Doug Mckay of Royal Dutch Shell; and Ms. Patricia Lim, Mr. Wataru Kato, and Mr. Craig Dingley of Osaka Gas.

211. The Commission continued to confer informally with both governments and with the Joint Venture throughout February 2018.

212. On 9 February 2018, Australia wrote to the Commission in response to several requests from the Commission for additional information.

213. On 14 and 15 February 2018, Australia and Timor-Leste each wrote confidentially to the Commission providing a further submission on their views regarding the development concept for Greater Sunrise.

214. Between 19 and 23 February 2018, the Commission met separately with the two governments and the Joint Venture in Kuala Lumpur.[65] In keeping with the Commission's practice, no formal written record was kept of the meetings.

215. On Thursday, 22 February 2018, the Commission requested a meeting with the leadership of each government's delegation on the following morning, to discuss the Commission's conclusions on the development concept for Greater Sunrise.

216. On Friday, 23 February 2018, the Commission provided the two governments with a series of documents concerning the development of Greater Sunrise. These documents comprised: (1) the Commission's Paper on the Comparative Development Benefits of Timor LNG and Darwin LNG; (2) a condensed analysis of the comparative economics of the two concepts; and (3) the Commission's proposed framework agreements for a decision on a Timor LNG concept, for a decision on a Darwin LNG concept with operations from Timor-Leste, and for the event that no decision is taken. Copies of the first two documents are attached as Annex 28 to this Report.

217. On 28 February 2018, Timor-Leste informed the Commission that it was not in a position to take a decision on the development concept for Greater Sunrise, and expressed the wish to continue discussions with Australia with a view to agreeing on a development concept as soon as possible.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

[65] The following persons participated in the February 2018 session:

For Timor-Leste: H.E. Kay Rala Xanana Gusmão, H.E. Minister Hermenegildo Pereira, Ms. Elizabeth Exposto, Mr. Alfredo Pires, H.E. Ambassador Abel Guterres, Mr. Gualdino do Carmo da Silva, Mr. Francisco da Costa Monteiro, Mr. Amado Hei, Mr. Florentino Soares Ferreira, Mr. Carlos Alves, Mr. Rod McKellar, Mr. Sivakumar Muniappan, Mr. Simon Fenby, Mr. Stephen Webb, Ms. Gitanjali Bajaj, Mr. Jack Brumpton, Ms. Emilie Barton, Ms. Sadhie Abayasekara, Mr. Ricardo Alves Silva, Mr. João Leite, Mr. David Lawson, Mr. Paul Hayward, Mr. Nuno Delicado, Mr. Agus Maradona Pereira Tilman, Ms. Adelsia Coelho da Silve.

For Australia: Mr. Gary Quinlan AO, Mr. John Reid PSM, Mr. James Larsen, Ms. Lisa Schofield, Mr. Michael Googan, Ms. Rebecca Curtis, Ms. Vrinda Tiwari, Mr. Patrick Mullins, Ms. Esther Harvey, and Mr. Steven Taylor.

For the Joint Venture: Mr. Mike Nazroo, Mr. Mark Hunter, Ms. Larina Taylor, Mr. Damien Yelverton, Ms. Kayleen Ewin, Mr. Dane Paddon, Mr. Jason Fior, and Mr. Patrick Hastwell of ConocoPhillips; Mr. Paul Baker, Mr. Mark Kain, Ms. Tricia Desplace, and Mr. John Prowse of Woodside Petroleum; Mr. David Shepherd, Mr. Damian Deveney, Ms. Elaine Loh, and Mr. Doug Mckay of Royal Dutch Shell; Ms. Patricia Lim, Mr. Wataru Kato, Mr. Masaaki Kishimoto, and Mr. Craig Dingley of Osaka Gas; and Mr. Sam Luttrell of Clifford Chance LLP.

For the Registry: Mr. Garth Schofield and Mr. Martin Doe.

218. On 6 March 2018, the Parties both confirmed to the Commission their willingness to proceed with the signature of the Treaty on Maritime Boundaries.

O. Signature of the Treaty on Maritime Boundaries

219. On 6 March 2018, the Treaty on Maritime Boundaries (the "Treaty") was signed at the United Nations in New York for Australia by The Honourable Julie Bishop MP, Minister for Foreign Affairs, and for Timor-Leste by H.E. Hermenegildo Augusto Cabral Pereira, Minister in the Office of the Prime Minister for the Delimitation of Borders and the Agent in the Conciliation. The signing of the Treaty was witnessed by the Secretary-General of the United Nations, H.E. António Manuel de Oliveira Guterres and by the Chairman, in the presence of the other members of the Conciliation Commission.[66] The Chairman was also invited to sign the Treaty on behalf of the Commission.

* * *

VI. The Issues before the Commission

220. In the sections that follow, the Commission has set out for each phase of the proceedings the principal issues separating the Parties and the steps taken by the Commission to facilitate an amicable settlement.

A. The Commission's Decision on Competence

221. As mentioned earlier (see paragraphs 76 to 88 above), at the outset of these proceedings, in its Response to the Notice of Conciliation, Australia objected to the competence of the Commission, principally on the grounds that recourse to compulsory conciliation under the Convention was precluded by CMATS. The Commission decided at the July 2016 procedural meeting to hear Australia's objections as a preliminary matter, and thereafter received written submissions from the Parties and convened a hearing on competence in August 2016. Having considered Australia's objections and Timor-Leste's response, the Commission issued a *Decision on Competence* on 19 September 2016, rejecting Australia's objection and upholding its competence. A copy of the Commission's *Decision on Competence* is found at Annex 9 to this Report and is incorporated by reference herein.

B. Engagement on the Delimitation of Maritime Boundaries

222. This Report is issued in the context of the Parties having reached agreement on the delimitation of maritime boundaries in the Timor Sea, as

[66] Video of the signing ceremony is available at the website of the Permanent Court of Arbitration.

set out in Treaty annexed to this Report.[67] The preamble to the Treaty provides that the Parties' agreement "is based on a mutual accommodation between the Parties without prejudice to their respective legal positions."

223. The Commission briefly records the positions espoused by the Parties in the course of these proceedings, as well as certain of the reactions to these positions conveyed by the Commission. The Commission does this both to provide background to facilitate the understanding of the Parties' agreement and to make clear that the significant accommodation necessary to reach this agreement was not undertaken lightly by either Party.

1. Relevant Provisions of the Convention and Related Treaties

224. In order to better understand the Parties' initial positions with respect to their maritime delimitation in the Timor Sea, it is useful to recall the legal framework for maritime boundaries under international law, which has undergone significant evolution.

225. As already noted above, the 1958 Continental Shelf Convention was ratified in 1963 by both Australia and Portugal, with the latter having extended its application to its colony in East Timor.[68] In accordance with its terms, the 1958 Continental Shelf Convention entered into force on 10 June 1964 and defined the continental shelf as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

226. This convention governed the continental shelf claims made by Australia and Portugal, in 1953 and 1956 respectively, until the adoption of the Convention on 10 December 1982 and its subsequent entry into force for Australia and Timor-Leste.[69]

227. Article 76 of the Convention defines the continental shelf and continental margin as follows:

> 1. 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.

[67] The Treaty, in turn, was based on the agreement reached in Copenhagen on 30 August 2017.

[68] See paragraphs 17 to 19 above.

[69] See paragraphs 28 to 29 above.

> […]
>
> 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

The Convention recognises in Article 77 that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

228. The Convention also provides for the establishment by States Parties of exclusive economic zones for the exercise of sovereign rights, defined by Articles 55 and 56 as follows:

> *Article 55*
> *Specific legal regime of the exclusive economic zone*
>
> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.
>
> *Article 56*
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (*a*) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (*b*) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (*c*) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

229. As regards delimitation of the aforementioned continental shelf and exclusive economic zone, the Convention provides in Articles 74 and 83 as follows:

Article 74
Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Article 83
Delimitation of the continental shelf between States with opposite or adjacent coasts

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

2. The Parties' Opening Positions

230. As set out above (see paragraph 60), the Commission's Rules of Procedure permitted the Parties to communicate with the Commission in confidence, under an assurance that views expressed would not subsequently be made public without the consent of the Parties concerned. In preparing this Report, the Commission thus provides only a limited summary of the positions taken by the Parties in the course of the conciliation, in keeping with the aforementioned option of confidentiality which it considers to have been essential to the conduct of the proceedings.

a. Timor-Leste's Opening Position

231. In its discussions with the Commission, Timor-Leste took the position that the delimitation of a maritime boundary should be based upon contemporary international law as reflected in the recent jurisprudence of courts and tribunals engaged in the delimitation of maritime boundaries. Timor-Leste argued that this would entail the delimitation of a boundary for both the continental shelf and exclusive economic zone that would follow the median line between the coasts of Timor-Leste and Australia.

232. In Timor-Leste's view, there was no basis for the application of different principles to the delimitation of the exclusive economic zone and of the continental shelf. According to Timor-Leste, the adoption of the Convention and the introduction of distance from the coast as an element of the definition of the continental shelf were such that concepts of natural prolongation and the geology and geomorphology of the seabed were no longer relevant to the delimitation of a continental shelf between two States situated at a distance of less than 400 nautical miles. Moreover, Timor-Leste argued that it did not accept, as a matter of fact, that the Timor Trough represents a fundamental geological discontinuity separating the continental shelf of Australia from that of Timor-Leste. According to Timor-Leste, the outer edge of the continental shelf of Australia actually lies to the north of the island of Timor, and the Timor Trough represents only a "crumple zone" that was formed within the Australian continental plate as it collided with Eurasian continental plate to create the formation known as the Banda Arc.

233. With respect to the median line, Timor-Leste indicated that it did not consider that there were any relevant circumstances that would call for the adjustment of the median line. Timor-Leste thus took the view that the boundary between the Parties' exclusive economic zones should follow the median line until it reached an area in which the rights of Indonesia would be affected. Thereafter, Timor-Leste proposed that the median line would continue as a continental shelf boundary until, in the east, it reached the line of the 1972 Seabed Treaty between Australia and Indonesia. In the west, Timor-Leste argued that median line could continue as a continental shelf boundary until it reached a distance of 200 nautical miles from the coast of Timor-Leste.

b. Australia's Opening Position

234. In its discussions with the Commission, Australia took the position that the delimitation of the continental shelf between Timor-Leste and Australia should take account of the unique configuration of the seabed in the Timor Sea. Australia rejected Timor-Leste's account of the law on the delimitation of the continental shelf, and in particular that natural prolongation is no longer relevant to maritime boundary delimitation. Australia argued that the physical continental shelves of Australia to the south and Timor-Leste and Indonesia to the north are entirely separate, and that these significant factual characteristics geologically, geomorphologically and ecologically remained relevant in maritime boundary delimitation.[70] As such considerations would not, however, be relevant to the delimitation of the exclusive economic zone, Australia proposed that there should be separate boundaries for the two regimes, arguing that international law does not require or prefer a single maritime boundary.

235. In addition, Australia considered that the delimitation of eastern and western lateral seabed boundaries should be on the basis of equidistance lines drawn from the coasts of Timor-Leste and Indonesia. In particular, Australia argued that the lateral boundaries of the JPDA were based upon historical equidistance lines from the coasts of Timor-Leste and Indonesia.[71]

3. The Commission's Reaction and Exploration of Options and Ideas

236. In engaging with the Parties, the Commission explored a wide range of issues relating to the delimitation of maritime boundaries, including:

(*a*) whether either physically, or as a legal, matter, the seabed between Timor-Leste and Australia is composed of a single continental shelf or two separate shelves;

(*b*) the evolution of the law of the sea relating to the continental shelf and, in particular, the differences between the basis for sovereign rights to the continental shelf under the 1958 Continental Shelf Convention and under the Convention;

(*c*) the relevance of geologic and geomorphologic factors;

(*d*) the potential interaction between claims to sovereign rights based on natural prolongation and claims based on distance from the coast;

(*e*) the relevant base points for the calculation of a median line;

(*f*) relevant circumstances that might lead to the adjustment of a provisional median line;

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[70] Opening Session Transcript, pp. 91–92.

[71] Opening Session Transcript, p. 94.

(*g*) the concept of "lateral" boundaries and the role, if any, of the coast of third States in the delimitation of a boundary between Timor-Leste and Australia;

(*h*) the extent of potentially overlapping claims by third States and their effect;

(*i*) the effect of prior treaties and agreements in the area; and

(*j*) historic claims.

237. In responding to the positions set out by the Parties, the Commission sought to be guided by its understanding of its mandate pursuant to the Convention and by what it considered would best assist the Parties in reaching an amicable settlement. The Commission informed the Parties that it did not consider that it would be beneficial for the Commission to express a definite opinion on certain issues of the law of maritime boundary delimitation on which the Parties had divergent—and deeply held—views. At the same time, the Commission sought during its discussions with the Parties in March 2017 to meet the Parties' requests for the Commission to indicate a view on the positions they had presented and to advise the Parties as to where it did not consider their positions to be compatible with an amicable settlement.

238. After discussing the Parties' positions with them in March 2017, the Commission introduced a *Non-Paper* setting out options and ideas that the Commission wished the Parties to consider. In presenting its *Non-Paper*, the Commission sought to emphasize that it was not making a proposal, but rather wished to gauge the Parties' reactions to certain elements that could potentially form part of an amicable settlement. The Commission's *Non-Paper* was intended to—and did—provoke strong reactions from both Parties.

239. In broad terms, the *Non-Paper* invited the Parties to consider a single maritime boundary as set out in an attached sketch map. In the east, the *Non-Paper* set out a seabed boundary that would extend beyond the confines of the JPDA, but would still partially run through Greater Sunrise and would leave the intersection with the 1972 Seabed Treaty for future determination. Although the 30 August Agreement differs in significant respects from the Commission's options and ideas in March, the Commission considers this process to have been wholly beneficial in concentrating the Parties' minds and enabling further discussions to engage with the merits (and demerits) of potential agreed outcomes, rather than adhering to rigid positions.

240. In its further meetings with the Parties and in informal discussions with each Party at the political level, the Commission continued to engage with the Parties regarding the location of the seabed boundary. These discussions were particularly focused on the location of the eastern seabed boundary, where each Party's view on the appropriate location of the boundary was strongly coloured by the location of the known resources of Greater Sunrise. In these discussions, the Commission continued to emphasize five points, as follows:

(*a*) that it was not convinced either Party's opening legal position was entirely correct;

(*b*) that Timor-Leste's maritime entitlements could not be constrained by the boundaries of the JPDA or the 1972 Seabed Treaty boundary between Australia and Indonesia;

(*c*) that the Commission considered that there were relevant circumstances that would require the median line to be adjusted to achieve an equitable result;

(*d*) that the Commission would not exclude that an adjustment of the eastern portion of the median line could lead to a seabed boundary running through Greater Sunrise; and

(*e*) that the Commission did not see that such a seabed boundary dividing Greater Sunrise would be inequitable or inconsistent with the Convention.

The Commission also emphasized to the Parties that it did not consider that a compromise could be reached that would restrict Timor-Leste's maritime entitlements to the area of the JPDA or that would give either Party exclusive control over Greater Sunrise.

C. Engagement on Resource Governance and Revenue Issues

1. Resource Governance and the Greater Sunrise Special Regime

241. At the Commission's suggestion, the Parties agreed to separate the discussion of Greater Sunrise from the location of the seabed boundary and to explore the possibility of establishing a special regime for Greater Sunrise. These discussions were begun further to the Commission's recommendation that it did not consider that an agreement could be reached without shared control over Greater Sunrise, but on the basis that a special regime was without prejudice to the location of the boundary in relation to Greater Sunrise.

242. In the Commission's discussions with the Parties, it quickly became clear that although the Parties continued to disagree as to whether a special regime was necessary, the differences between them regarding how the governance of a special regime should be structured were comparatively minor. The Parties already had significant experience in the joint management of petroleum resources through the JPDA and its associated governance structures and had similar views regarding how these mechanisms could be improved. Australia indicated to the Commission that it was comfortable with Timor-Leste's regulator, the ANPM, exercising day-to-day oversight over joint petroleum activities, as it had done within the JPDA. Indeed Australia indicated that it would prefer a mechanism that would encourage the ANPM to exercise greater discretion and to refer fewer issues for resolution at the inter-governmental level. Both Parties also recognized the need for a special regime to include greater clarity on the allocation of jurisdiction and a dispute-resolu-

tion procedure for issues that could not be resolved through consensus at the inter-governmental level, both areas in which the governance structure of the JPDA had proved lacking.

243. In addition to governance, the Commission's discussions with the Parties sought to explore the issue of how Greater Sunrise would be developed in the context of a potential special regime. In this respect, the Parties indicated that the Joint Venture had previously proposed to both governments to develop Greater Sunrise by re-using the LNG plant at Wickham Point in Darwin and a significant portion of the Bayu-Undan pipeline, once production from Bayu-Undan ceased in 2022 (*i.e.*, the Darwin LNG concept). Timor-Leste, however, indicated to the Commission that, in its view, the Joint Venture had never appropriately considered the possibility of developing Greater Sunrise by way of a pipeline to Timor-Leste. When the decision had been taken to develop Bayu-Undan by way of the pipeline to Darwin, the Timorese government had anticipated that the next pipeline developed in the Timor Sea would necessarily run to Timor-Leste, in order to support the economic development of Timor-Leste's south coast. In Timor-Leste's view, the location of the LNG Plant for Bayu-Undan in Australia had led to substantial economic benefits for the city of Darwin and the development there of significant expertise and infrastructure for offshore petroleum. In contrast, while Bayu-Undan had provided Timor-Leste with revenue, it had led to little in the way of broader economic development. Timor-Leste indicated to the Commission that its own studies indicated that development of Greater Sunrise by way of a pipeline to Timor-Leste and the construction of a new LNG plant in Timor-Leste (*i.e.*, a Timor LNG concept) was technically and commercially feasible, but had not been given serious consideration by the Joint Venture.

244. For its part, Australia indicated to the Commission that it had no preference regarding the development of Greater Sunrise or the choice between a Darwin LNG and Timor LNG concept. Under Australia's general approach to the regulation of petroleum activities, it would ordinarily approve a commercially viable development concept proposed by a licence holder and would not seek to influence the concept proposed. Australia indicated, however, that it believed, on the basis of the information available to it at that time, that the Joint Venture's analysis that a Timor LNG concept was not commercially viable in the existing market context was probably correct. Additionally, Australia noted that the operators of the Wickham Point LNG Plant would be seeking to link that infrastructure to a new gas field as soon as possible following the completion of production from Bayu-Undan. While Greater Sunrise represented the largest and highest quality of the known fields in the Timor Sea, it was not the only option, and a decision would be taken to connect the Wickham Point plant with another field if regulatory approval to develop Greater Sunrise did not appear to be forthcoming. In that case, Australia considered that there was a significant likelihood that Greater Sunrise would remain undeveloped for the foreseeable future, given an environment of low prices that rendered the con-

struction of new LNG plants generally non-viable. Australia thus emphasized that, while it had no view on the development concept to be chosen, it considered it essential that a decision on Greater Sunrise be made promptly.

245. Based on its discussions with each Party, the Commission informed the Parties that it believed there was significant common ground between the Parties on which the framework of a special regime could be constructed. The Commission provided the Parties with a *Non-Paper on Uncontroversial Elements of a Greater Sunrise Special Regime* setting out the elements of a regime where it believed agreement could be easily reached. The core elements of the Commission's *Non-Paper* included:

> (*a*) The objective of the special regime would be the shared development, exploitation, and management of the Greater Sunrise field, including the participation of both Timor-Leste and Australia in the overall benefits to be derived from the development and exploitation of Greater Sunrise.
>
> (*b*) The special regime would be limited to Greater Sunrise and would apply within an area corresponding to the area of the Unitisation Agreement.
>
> (*c*) The special regime would include clear allocation of areas of joint and exclusive jurisdiction.
>
> (*d*) The choice of development concept, as between Darwin LNG and Timor LNG, would be decided by Timor-Leste, in agreement with the Joint Venture, according to commercial principles consistent with good oilfield practice, but would be taken as part of the overall agreement on the special regime.
>
> (*e*) The Designated Authority for day-to-day oversight of petroleum operations in the special regime area would be Timor-Leste's ANPM.
>
> (*f*) New Production Sharing Contracts ("PSCs") would be concluded with the joint venture by the ANPM to replace and consolidate the existing PSCs and retention leases covering the area of Greater Sunrise on conditions equivalent to those existing instruments.
>
> (*g*) One or more governance/appeal boards would be established with responsibility for high-level strategic policy and decision-making, as well as ensuring accountability to that policy.
>
> (*h*) Revenue-sharing arrangements would include consideration of upstream and downstream activities, including direct and indirect tax revenues and other economic benefits.

246. The Commission invited the Parties to give further consideration to these issues and, during the July 2017 meetings, established a Working Group of representatives of both Parties, as well as an observer from the Registry, to formulate an agreed governance mechanism for a potential special regime. During the course of several meetings, the Working Group was able

to reach substantial agreement with the exception of three issues that were deferred for further consideration with the Commission:

> (*a*) the legal status of the seabed within the special regime area, which the Parties considered linked to the ongoing discussions on the location of the seabed boundary, as well as certain issues of jurisdiction that were also consequential thereto;
>
> (*b*) whether the governance mechanism would include procedures for the approval of the development concept, which Australia considered should be agreed promptly as part of the conciliation process and which Timor-Leste considered might need to be decided through the operation of the treaty mechanism; and
>
> (*c*) revenue sharing.

247. The product of the Working Group discussions was further refined during the Parties' preparation of the Consolidated Draft Treaty and during discussions in October 2017 and now constitute Annex B to the Final Draft Treaty.

2. Economic Benefits and Revenue Sharing

248. While the Parties were agreed in principle that Timor-Leste and Australia should share in the overall benefit of the development of Greater Sunrise, it became apparent to the Commission that there remained significant differences between them, stemming from their differing understanding of the broader economic benefits that would follow from developing Greater Sunrise.

249. As noted above, Timor-Leste was concerned that the broader economic benefits of developing Bayu-Undan by way of a pipeline to Darwin had largely accrued to Australia. According to Timor-Leste, although the Timor Sea Treaty had divided the upstream revenue from Bayu-Undan on a 90:10 basis in favour of Timor-Leste, the actual allocation of economic benefits was closer to 55:45 in favour of Australia once downstream tax revenues and economic multipliers were considered. Timor-Leste was determined not to repeat this scenario with the development of Greater Sunrise.

250. For its part, Australia questioned the methodology underlying Timor-Leste's study on economic multipliers and noted that the Bayu-Undan project had been deliberately structured to shift the majority of corporate profits to the upstream portion of the project where they would be subject to Timorese taxation. Australia derived only a small, fixed amount of tax revenue from the operation of the Wickham Point plant, which employed only a small number of people in its day-to-day operations. Australia acknowledged that the city of Darwin had experienced an economic boom during the decade in which the Bayu-Undan project had been operational, but denied that this growth could be significantly attributed to the LNG plant. Australia also indicated that it would be open to encouraging the Greater Sunrise Joint Venture to include significant Timorese local content under a Darwin LNG concept so as to help Timor-Leste meet its broader economic development goals for the south coast of Timor-Leste.

251. Based on these radically different understandings of the economic benefits of developing Greater Sunrise, the Parties proposed correspondingly different approaches to meet the objective of developing the field as a shared resource from which both States would derive benefits. Timor-Leste suggested that if the field were potentially to be developed through a pipeline to Darwin, Australia would already share in the economic benefits and no direct sharing of revenue was necessary. Even if, Timor-Leste noted, the field were to be developed by way of a pipeline to Timor-Leste, Australian companies would still end up carrying out the majority of the construction work and bringing benefits to Australia. Australia, in contrast, was of the view that sharing the benefits of Greater Sunrise necessarily entailed sharing in the revenue to be derived from the field.

252. The Commission invited the Parties to share their economic modelling with one another and engaged in extensive discussions on these issues with both Parties during the July 2017 meetings. The Commission indicated to both Parties that it did not consider either Party's economic analysis to be fully convincing. More importantly, however, the Commission informed the Parties that it did not see that either Party's economic arguments were capable of convincing the other or achieving a shared understanding of the broader economic benefits of Greater Sunrise.

253. The Commission explored with the Parties several potential approaches to reaching a neutral, agreed quantification of the broader value of Greater Sunrise. Ultimately, however, both Parties indicated to the Commission that they considered that any precise quantification would be extremely difficult and that they preferred to reach a simplified, negotiated outcome. Such an outcome would recognize and reflect the broader economic effects of development—and that these effects would differ depending on the development concept chosen—without attempting to reach agreement on precise figures. Through the course of their meetings and discussions with the Commission, the Parties ultimately arrived at the differential factor reflected in the 30 August Agreement to account for the broader economic benefits accruing to each State, respectively, from the Darwin LNG and Timor LNG development concepts.

D. The Comprehensive Package Agreement of 30 August 2017

254. Following the July 2017 meetings, a delegation from the Commission met with Timor-Leste at the political level in Dili regarding outstanding issues, in particular the location of the eastern seabed boundary and the approach to revenue sharing.[72] In these discussions, Timor-Leste indicated that it could accept the joint management of Greater Sunrise for the lifetime of the resource and the sharing of revenue, provided that the proportion sufficiently favoured Timor-Leste. Timor-Leste could also accept seabed bounda-

[72] The Commission's visit to Dili is also described above at paragraphs 147 to 153.

ries to the east and west of the JPDA that would connect with the 1972 Seabed Treaty boundary at its current endpoints (thus running through Greater Sunrise in east), provided that such boundaries were subject to adjustment once Timor-Leste concluded its seabed boundary with Indonesia and the relevant resources were depleted.[73]

255. Timor-Leste indicated, however, that it was not prepared, on the information available to it, to agree to the development concept for Greater Sunrise or, in particular, to accept the Joint Venture's view that the field could only feasibly be developed by way of a pipeline to Darwin. Timor-Leste maintained the view that the Joint Venture had never properly evaluated the possibility of developing Greater Sunrise through a Timor LNG concept. Timor-Leste reiterated to the Commission that it was unwilling to agree to any development concept for the field unless and until the Joint Venture gave fair consideration to Timor LNG, enabling Timor-Leste to make a proper comparison of the two approaches. While Timor-Leste emphasized that it had more interest than anyone in having Greater Sunrise developed as soon as possible, it was not willing to sacrifice a point of principle or take a rushed decision on the basis of what it considered to be incomplete information.

256. Australia, on the other hand, considered that prior agreements between the Parties had failed in significant part due to the failure to agree on a development concept for Greater Sunrise and was unwilling to conclude an agreement on a special regime for the resource without knowing that a development concept would be approved.

257. In its discussions with the Parties, the Commission sought to resolve this impasse on the basis of three principles. First, Timor-Leste must have the space to take a decision on a matter of great importance to its national development in accordance with its own national interest. Second, Timor-Leste could not be expected to take a decision without full information or proper engagement by the Joint Venture. Third, the interests of both Parties would best be served by their taking a decision on the development of Greater Sunrise as soon as possible and before the Wickham Point plant was allocated to another project, potentially foreclosing the possibility of Darwin LNG. The Commission indicated to the Parties that it considered these principles compatible if the Parties were to initiate an expedited process of joint engagement with the Joint Venture in order to generate the basis for Timor-Leste to take an informed decision on development of Greater Sunrise within the conciliation process. If the Parties could work together in negotiating with the Joint Venture on both concepts and the terms on which Greater Sunrise would be developed, the Commission indicated that it believed the basis existed for an agreement between the Parties on all aspects of their dispute.

* *

[73] Adjustment of the seabed boundary in the west may take place only after the commercial depletion of the the Laminaria and Corallina Fields, and adjustment in the east only after the commercial depletion of Greater Sunrise.

258. On the basis of these discussions, the Commission sought to assemble all of the elements of a settlement into a comprehensive package that would be acceptable to both Parties and that would meet the Convention's requirement that the delimitation of the maritime boundaries achieve an equitable solution, compatible with the Convention and with the international law of maritime boundary delimitation.

259. The 30 August Agreement was thus the product of a proposal advanced by the Commission during meetings in Copenhagen based on informal consultations. The agreement and the Treaty agreed between the Parties are annexed to this Report. The principal elements of this agreement were as follows.

260. The Parties agreed to maritime boundaries as depicted in Annex A to the Final Draft Treaty and in Map 4 [reproduced on page 326].

261. The southern maritime boundary between the Parties would take the form of a single maritime boundary (except in the southwest, where the rights of Indonesia to the water column may be affected) and would partially follow the median line and partially run to the north of the median line along an agreed course.

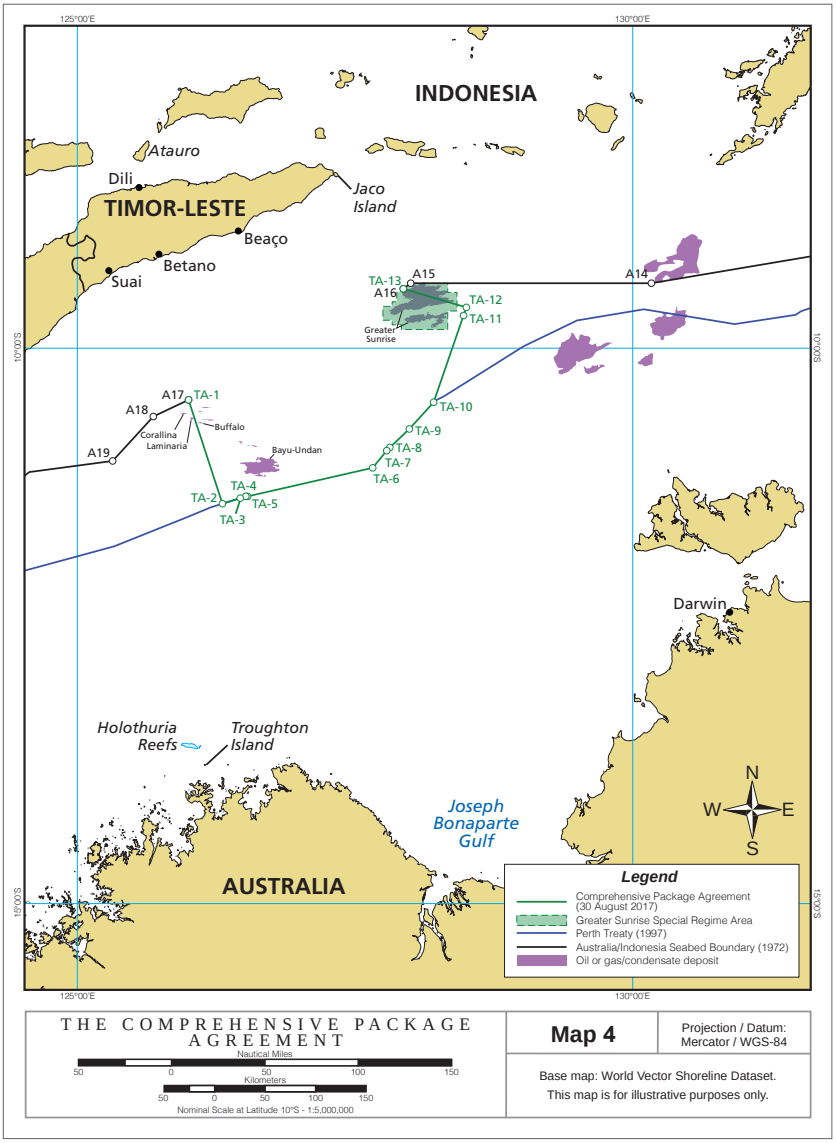
262. The western boundary would be a continental shelf boundary only and would run to the west of the JPDA. This would allocate the Buffalo oil field—where recent reports indicate a new find estimated at 31 million barrels of oil—to Timor-Leste, and the Corallina and Laminaria fields to Australia for their remaining production life.

263. The eastern boundary would be a continental shelf boundary only and would run to the east of the JPDA and largely to the east of Greater Sunrise before turning back to run through Greater Sunrise and meet the 1972 Seabed Treaty boundary.

264. The eastern and western seabed boundaries would meet the 1972 Seabed Treaty boundary at points A16 and A17, respectively, but pursuant to Article 2(2) of the Treaty, these portions of the boundary are "provisional," which for the purposes of the Treaty means they are subject to automatic adjustment as follows:

> (*a*) In the west, the boundary would adjust following (i) the commercial depletion of the Corallina and Laminaria fields and (ii) the conclusion of a continental shelf boundary between Timor-Leste and Indonesia. After adjustment the boundary would run to meet the 1972 Seabed Treaty boundary at either (i) the same point as the continental shelf boundary concluded between Timor-Leste and Indonesia, if that boundary meets the 1972 Seabed Treaty boundary between points A17 and A18, or (ii) point A18, if the continental shelf boundary concluded between Timor-Leste and Indonesia meets the 1972 Seabed Treaty boundary to the west of point A18.
>
> (*b*) In the east, the northern two segments of the boundary would adjust following (i) commercial depletion of the Sunrise and Troubadour fields and (ii) the entry into force of an agreement between

Timor-Leste and Indonesia delimiting the continental shelf. After adjustment the boundary would run to meet the 1972 Seabed Treaty boundary at the same point as the continental shelf boundary concluded between Timor-Leste and Indonesia.



Through this adjustment mechanism, the Parties' agreement is intended to avoid any prejudice to the 1972 Seabed Treaty or to Timor-Leste's ongoing negotiations with Indonesia concerning maritime boundaries.

265. Greater Sunrise would be governed through a special regime, within the area of which the Parties would jointly exercise their rights as coastal States pursuant to Article 77 of the Convention. Upstream revenue from Greater Sunrise would be split on an 80:20 basis in favour of Timor-Leste in the event that that field was developed through a Darwin LNG concept, and on a 70:30 basis in favour of Timor-Leste in the event that the field was developed through a Timor LNG concept. Through this contingent apportionment, the Parties agreed that they were reflecting the broader economic effects and benefits of developing Greater Sunrise.

266. For other petroleum resources previously located within the JPDA, the Parties agreed that Timor-Leste would receive all future revenue, including from the operating Bayu-Undan and Kitan fields. However, for simplicity and continuity, the governance and regulatory arrangements for the remaining life of Bayu-Undan and Kitan would be "grandfathered" (*i.e.*, remain as is).

267. Finally, the Parties agreed to initiate a process of intense engagement with the Joint Venture through an agreed action plan, and prolonged the Commission's mandate for it to remain involved in this process. The purpose of this engagement would be to reconcile the Joint Venture and Timor-Leste's differing views on the commercial viability of a Timor LNG approach and to establish the negotiated commercial terms on which both options could be undertaken. This was intended to permit a proper comparison of both approaches and to ensure that a decision on the development of Greater Sunrise was taken by 15 December 2017 or, at the latest, by 1 February 2018.

E. Engagement on the Development of Greater Sunrise

268. Although these proceedings were initially concerned with the delimitation of maritime boundaries, the Parties subsequently requested that the Commission engage with them with a view to facilitating agreement on the development concept for Greater Sunrise, it being an integral part of the 30 August Agreement that a decision on the development concept should be taken within the context of the conciliation process.

269. As noted above, the Parties and the Joint Venture had before them two concepts for the development of Greater Sunrise. Timor-Leste proposed a Timor LNG approach in which Greater Sunrise would be connected to an LNG plant to be constructed at Beaço in Timor-Leste by way of a pipeline across the Timor Trough. The Joint Venture proposed a Darwin LNG approach in which Greater Sunrise would be connected to the existing pipeline running from Bayu Undan and would make use of the existing LNG plant at Wickham Point in Darwin, following the depletion of Bayu Undan.

270. While Australia emphasized that it had no preference for either the Timor LNG or Darwin LNG approach (provided that the concept was technically feasible and commercially viable), it was concerned that a Darwin LNG concept would soon be foreclosed if the Wickham Point plant were to commit its capacity to the development of another field, potentially leaving Greater Sunrise without a commercially viable development option.

271. Timor-Leste, for its part, indicated that it could not take a decision on the development concept until it considered that Timor LNG had been properly considered and analysed. Timor-Leste emphasized, however, that it was the most interested party to see Greater Sunrise promptly developed and indicated that it was willing to engage intensively with the Joint Venture, provided that engagement was based on the consideration of both development concepts.

272. The 30 August Agreement accordingly set out an Action Plan for the two governments to engage with the Joint Venture, leading to a decision on the development concept to be taken by 15 December 2017, with a fall-back date of 1 February 2018. These dates were dictated by an understanding of the timeframe in which the Wickham Point plant was likely to award contracts for the use of the facility and thus the latest point at which a Darwin LNG concept could be safely be expected to remain available. Although Timor-Leste indicated that it considered this schedule to be ambitious, it endorsed the 30 August Agreement.

273. During the Parties' initial engagement with the Joint Venture in September and October 2017, the Commission sought to facilitate the process, but did not engage directly regarding the substance of the two development concepts. The Commission acted to facilitate an agreement between the two governments and the Joint Venture concerning confidentiality, to coordinate the two governments' requests to the Joint Venture for additional information, and to emphasize to all parties the need to build up both development concepts, rather than merely advocate for a preferred outcome. The Commission did not, however, participate in the videoconference sessions in October 2017 or in the three trilateral meetings held in Brisbane, Singapore, and Melbourne in November and December 2017.

274. During the course of this initial engagement, both Timor-Leste and the Joint Venture established virtual data rooms and exchanged a large volume of technical material and economic data regarding the Timor LNG and Darwin LNG concepts. These initial exchanges contributed to the parties' respective understanding of the views and concerns of the other. However, it became evident to the Commission in December 2017 that this initial engagement had not led the parties to a common understanding on the development of Greater Sunrise, or brought them any closer to taking a decision on the development concept. Rather, Timor-Leste and the Joint Venture each used the process to advocate for its preferred option.

275. The Joint Venture continued to assert that only a Darwin LNG concept was commercially viable and that Timor-Leste had not engaged with the economic reality facing a Timor LNG concept. Timor-Leste maintained

that Timor LNG was commercially viable and that only a Timor LNG concept would meet its development objectives. Timor-Leste also considered that the Joint Venture had not made a serious effort to ensure that either concept would meaningfully contribute to the development of Timor-Leste. Timor-Leste and the Joint Venture also had diametrically opposed views on the economics of the two concepts and the anticipated return of the project. While for Timor-Leste the mid- and long-term economic consequences for the national economy were decisive, the Joint Venture concentrated on the commercial viability and the ultimate economic return on investment. Australia continued to maintain that it had no preference between the two concepts, but was not convinced, on the basis of the information so far available to it, that a Timor LNG concept was commercially viable. During the December 2017 session, both governments were of the view that the engagement had not created the conditions necessary for a decision on the development concept. Each government, however, reiterated its interest in having the development concept settled in the context of the conciliation proceedings.

276. Pursuant to the 30 August Agreement, "[i]f the Parties are unable to agree to the Development Concept in accordance with the Criteria ahead of 15 December 2017, the Commission shall engage with the Parties with a view to facilitating agreement on the Development Concept by no later than 1 February 2018." In approaching this mandate, however, the Commission was of the view that it was unlikely to be able meaningfully to facilitate an agreement on the development concept without expert assistance with respect to the technical and financial aspects of the two development concepts. Accordingly, the Commission reached agreement with the Parties on the Terms of Reference for the appointment of an expert in oil and gas development planning as part of its Supplemental Action Plan. The Commission also engaged with the Joint Venture regarding the likelihood that a Darwin LNG concept would remain available until at least 1 March 2018. A copy of the Commission's Supplemental Action Plan is attached as Annex 27 to this Report.

277. During the course of its January session with the Parties and the Joint Venture, the Commission pursued five objectives:

(*a*) The Commission sought to build up understanding of both the Darwin LNG and Timor LNG concepts, engaging with the Joint Venture and Timor-Leste, respectively, regarding areas in which the Commission considered that their respective concepts could be further developed. In the case of Darwin LNG, the Commission sought more concrete detail on local content that would meaningfully contribute to the economic development of Timor-Leste. In the case of Timor LNG, the Commission sought clarification on the financing and operation of the project.

(*b*) The Commission sought to encourage both Timor-Leste and the Joint Venture to step away from their preferred concept and to consider what it would take to make the other approach viable and attractive. At the Commission's request, both Timor-Leste and the Joint Venture provided the Commission with details in this respect.

(*c*) The Commission sought to facilitate agreement on certain issues relating to the development of Greater Sunrise that would need to be determined irrespective of the development concept chosen. This concerned in particular the fiscal regime that would apply to the Greater Sunrise project and how the application of the Parties' taxation laws would provide the Joint Venture with "conditions equivalent", as required by Article 22 of the Timor Sea Treaty and Article 27 of the Unitisation Agreement.

(*d*) The Commission sought to reach agreement on a framework agreement to provide all parties with the necessary certainty to move forward with the project once the development concept was chosen. Both governments as well as the Joint Venture provided the Commission with their proposed drafts for a potential agreement.

(*e*) The Commission sought to ensure that its expert had all of the technical and economic information necessary for him to undertake a comparative analysis of the two development concepts.

278. In approaching its final session with the Parties, the Commission considered that it could best facilitate a decision on the development concept by providing the Parties with the basis for an informed decision. During the period between the January and February sessions as well as in the course of the February session, the Commission accordingly continued to engage with the Parties on the issues set forth above (see paragraph 277). At the request of the Commission, the Joint Venture and Australia indicated certain commitments they would be willing to make in respect of local content.

279. The Commission also sought to elaborate, with the input of both governments and the Joint Venture, draft framework agreements covering three scenarios: (*a*) for a decision on a Timor LNG concept; (*b*) for a decision on a Darwin LNG concept with operations from Timor-Leste; and (*c*) for the event that no decision is taken.

280. At the close of the February session, the Commission provided the Parties with a paper on the comparative benefits of the two concepts and a condensed comparative economic analysis of the two concepts undertaken by the Commission's expert. Copies of these documents are attached as Annex 28 to this Report. The Commission also provided both governments and the Joint Venture with copies of its proposed framework agreements for all three scenarios.[74]

281. As mentioned earlier (see paragraphs 215 to 218 above), the Parties have not yet agreed on the development concept for Greater Sunrise.

282. The Parties signed the Treaty on Maritime Boundaries on 6 March 2018 at a ceremony hosted by the Secretary-General of the United Nations in New York.

* * *

[74] Due to the inclusion of potentially confidential information in the draft framework agreement, the Commission has elected not to include copies of those documents with this Report.

VII. The Commission's Reflections on the Proceedings

283. Beyond the foregoing description of the procedural steps taken by the Commission and the agreement reached by the Parties, the Commission wishes to record some of the key elements that, in its view, contributed to the outcome of these proceedings.

284. As noted above, however, these proceedings have progressed through two distinct phases. The first phase, concerning the delimitation of a maritime boundary, has been brought to a full conclusion through the signature on 6 March 2018 of the Parties' Treaty on Maritime Boundaries. The second phase, in which the Commission, pursuant to the Parties' 30 August Agreement, sought to facilitate agreement on the development concept for Greater Sunrise, remains ongoing in that the Parties will still need to reach agreement on a concept, now without the involvement of the Commission. The Commission's reflections on these two phases are different, and the Commission will address each in turn.

A. Reflections on the Proceedings concerning Maritime Boundaries

285. The Commission recalls that the Parties came to these proceedings deeply entrenched in their legal positions, something which had frustrated previous efforts to achieve a settlement through negotiation. In considering how an agreement was ultimately reached, however, the Commission considers it important that the Parties' interests in the Timor Sea were such that it remained possible to envisage a mutually beneficial result meeting both sides' essential interests. In particular, given that the issue of maritime boundaries marked a serious obstacle in the otherwise close relationship between the peoples of Timor-Leste and Australia, the prospect of resolution itself offered the potential to unlock significant benefits in the broader bilateral relationship. While strongly committed to upholding their rights, both Parties ultimately preferred an amicable solution to the continuation of an unsatisfactory status quo. In this sense, the matter can be considered to have been ripe for resolution. In the Commission's view, it is in fact a significant benefit of conciliation that the proceedings were able to build on these aspirations for a positive outcome and preferable to a resolution of the dispute consisting merely of identifying a "winner".

286. In addition to the above, the Commission considers that a number of steps taken in the course of the conciliation were instrumental in bringing the Parties together. In particular, the Commission considers that a constructive outcome was enabled (*a*) by efforts throughout the proceedings to build the Parties' trust in each other, in the Commission, and in the process; (*b*) by the possibility of managing the scope of the proceedings to encompass the elements necessary for a solution; (*c*) by the Commission's pro-active efforts to advance ideas

and direct the course of the proceedings; and (*d*) by sustained, informal contacts with the Parties' representatives and counsel at a variety of different levels.

287. At the outset of these proceedings, the Parties were frank with the Commission regarding the extent that each distrusted the other, at least with respect to resources and maritime boundaries. A significant element of the Commission's efforts, both initially and throughout the proceedings was thus concerned with building trust between the Parties and removing obstacles to productive and successful conciliation on the substance of the Parties' dispute. As already noted, the Commission believes that the early resolution of Australia's objections to the competence of the Commission proved essential to allowing Australia to engage effectively in the conciliation process thereafter. At the same time, while the resolution of competence as a preliminary matter removed a significant obstacle, the unavoidably adversarial character of a challenge to competence did little to foster trust or compromise.

288. In the Commission's view, the confidence-building measures agreed in October 2016 were thus essential in changing the dynamic of the proceedings and generating early positive momentum. The Commission sought to mark a clear break from the competence proceedings by meeting with the Parties principally bilaterally, away from The Hague, and in as informal a setting as possible. From those early discussions it became apparent that a further break from the past would be necessary for both Parties to move forward. The continued presence of CMATS and pending arbitrations initiated by Timor-Leste under the Timor Sea Treaty constituted a symbolic barrier to progress and kept the Parties looking backwards. The Commission thus sought to establish a clean slate for these proceedings through confidence-building measures centred on the termination of the CMATS treaty and the withdrawal of both arbitrations. In the case of CMATS, however, the legal effects of termination were uncertain. At the suggestion of the Commission, both Parties thus undertook to cooperate in terminating CMATS in a manner that preserved the stability of their legal relations and thereby also maintained legal certainty for other stakeholders in the Timor Sea.

289. This confidence-building exercise benefited, in the Commission's view, from the fact that the proposed measures were not wholly transactional in nature. While remaining balanced and closely aligned in both timing and substance, the various steps were not strictly reciprocal, tit-for-tat concessions. They envisaged independent actions which sought to demonstrate to the other Party a genuine commitment to the success of the conciliation process. Inasmuch as the Rules of Procedure sought to enable the Parties to engage without prejudice to their respective legal positions, the Commission's confidence-building measures required the opposite: *i.e.*, that the Parties abandon certain stances which constituted an obstacle to moving forward with the conciliation and were intended to preserve leverage against the other for the possibility that the conciliation might fail to produce an agreed outcome. The Parties were thus required each to demonstrate through independent meas-

ures a sincere and substantial commitment to a successful conciliation. This initial investment paid dividends throughout the remainder of the process as the Parties did, through the conciliation, engage bilaterally in a constructive manner to achieve an equitable compromise.

290. At the same time, it was also necessary to establish a foundation of trust between the Parties and the Commission. The Commission is cognizant that Timor-Leste initiated these proceedings as much due to the absence of other options as from a belief in the virtues of conciliation or in the likelihood of success. The Commission thus devoted significant time to making sure that it fully understood not only the Parties' formal positions, but also the interests and sensitivities underpinning those positions. The first step in this process was to receive brief but comprehensive written statements of the Parties' opening positions. Although soliciting what amounted to legal argument bore the risk of entrenching positions, it provided an opportunity for the Parties to evaluate and express positions in detailed form, which they may not have done previously. It also had the associated benefit of requiring the Parties to define their own positions in a more precise manner, especially where some of their own priorities may not yet have been reconciled within their respective governments and delegations. The Commission then engaged the Parties in open-ended discussions in January 2017 and sought to confirm its understanding by providing the Parties, first separately and then jointly, with *Issues Papers* outlining—in the Commission's words—the elements of the dispute and the Parties' respective views. In the Commission's view, these proceedings truly became productive at the point at which both Parties became convinced that the Commission's objective was not to push them to abandon long-held positions, but rather to understand and assist the Parties to identify a solution they had been unable to reach themselves.

291. As the Commission moved to considering matters of substance, it proved essential that the Commission's mandate extended to the consideration of the Parties' broader, non-legal interests to the extent necessary for an amicable settlement and that the proceedings could be expanded, with the Parties' agreement, to encompass issues beyond the strict delimitation of the maritime boundary. These proceedings began with a focus exclusively on delimitation under Articles 74 and 83 of the Convention and always remained focused on achieving an equitable solution consistent with those legal provisions. At the same time, it was apparent that both Parties' views on the location of the boundary were—understandably—influenced by the effect of the boundary on prominent seabed resources, in particular Greater Sunrise. It became apparent to the Commission that any agreed outcome would also have to address in a comprehensive manner the development and exploitation of resources in the area and the Parties' respective rights and status as coastal States under Article 77 of the Convention. The Parties' 30 August Agreement thus incorporated a special regime for Greater Sunrise, defined the two States' respective legal rights within the area of the special regime, and incorporated a roadmap for

the development of the resource as an integral element of agreement. The conciliation proceedings were accordingly adapted to include the second phase of the proceedings discussed below.

292. The Commission notes that the very exercise of defining, with the Parties, the issues that were—or were not—relevant to achieving an agreement on maritime boundaries was itself a difficult process. For the Commission, however, the ability to calibrate the proceedings to address the elements necessary for an amicable settlement, even where those extend beyond purely legal considerations, is a hallmark advantage of conciliation as compared to adjudication.

293. In the course of engaging with the Parties, it was likewise essential for the Commission to take a pro-active role in managing the process. This was particularly the case when the Commission sought to shift the Parties' focus away from the arguments in favour of their opening positions and towards the requirements of a possible settlement by advancing the Commission's own options and ideas in March 2017. This was done with full knowledge that the Commission's *Non-Paper* was likely to encounter strong resistance, but would nevertheless provide a useful reference point around which further discussions could be oriented. Such a change in dynamic to a problem-solving approach was vital to obtaining the necessary flexibility from the Parties over the course of the various sessions that followed, so as to create a platform for creative thinking and eventually generate the space for mutually acceptable outcomes. The Commission likewise ensured that discussions were held on the modalities of the joint management of petroleum resources and on the broader economic effects of developing seabed gas deposits, notwithstanding doubts at the time by one Party or the other that these issues were truly necessary for an amicable settlement.

294. The proactive approach taken by the Commission required a high degree of coordination within the Commission itself. As most discussions took place between the Commission and one or the other of the Parties, the Commission was regularly called on to probe the Parties' positions and to respond with the Commission's reaction on the spot (or on short notice), while at the same time mapping the course with respect to next steps. It was important, in the Commission's view, that it maintain unity in its engagement with the Parties while still devoting the time for internal deliberation necessary to produce a considered response. The Commission notes that a different composition could well have rendered it difficult to maintain this objective while still keeping up the pace called for in these proceedings. Indeed, effective conciliation requires that a careful mix of diplomatic and legal skills, backgrounds, and approaches be deployed in varying combinations at different stages of the process.

295. A further key element of the procedure that the Commission wishes to highlight is the value and importance of informal contacts at a variety of levels. The Commission sought to engage with the Parties' representatives through formal and informal sessions, through conversations at the political level and working level, and through a nearly continuous flow of letters, e-mail communications, telephone calls, and text messages. The Commission also made

extensive use of its Registry as an additional channel of communication with the Parties and to record and share within the Commission the details of informal contacts and conversations. Many of the principal steps that were instrumental to bringing the Parties together occurred as much in late night conversations with various members of each delegation as in any formal meeting. The ongoing process of building trust with and between the Parties likewise occurred, not only through joint sessions or information sharing, but also through social receptions and other unplanned encounters. In many ways, one of the Commission's main functions was to provide as many opportunities as possible for the Parties to reassess the degree of flexibility in their positions and contemplate creative solutions to their differences, and to continually encourage them to do so.

296. Finally, it was essential that all discussions between the Parties and the Commission operated on the basis that a mutually acceptable outcome would necessarily be a package and that both Parties would have to make compromises, while at the same time recognizing that all concessions were made without prejudice to the Parties' evaluation and acceptance of a final, balanced package. While the importance of this may be obvious to some, it was something that the Commission found important to reiterate, along with the non-binding character of conciliation, at various key stages over the course of the process.

B. Reflections on the Proceedings concerning the Development Concept

297. Following the Parties' agreement on their maritime boundaries, the Commission was also requested, through the 30 August Agreement, to attempt to facilitate an agreement on the development concept for Greater Sunrise. The Commission interpreted its role as being to provide the Parties with the basis on which to take an informed decision, but not to recommend a development concept. No agreement has so far been reached, and it will remain for the Parties to continue with the process of seeking an agreement on the development concept for Greater Sunrise.

298. In the preceding sections, the Commission has set out the issues involved and the steps it took in engaging with the Parties and the Joint Venture in respect of the development concept. The Commission has also provided the Parties with a number of documents, some appended to this report and others confidential, that may inform future discussions between them. Insofar as discussions regarding the development concept remain ongoing, the Commission considers that no further comment or reflections are warranted.

299. The Commission hopes that its efforts may contribute to further discussions between the Parties. The Commission recommends that the Parties continue their discussions with a view to maximizing the benefit of this shared resource for the peoples of both States.

* * *

VIII. The Commission's Conclusions and Recommendations

300. The Commission commends the Parties on the manner in which they have approached these conciliation proceedings and welcomes the opportunity available to them to use these proceedings as the basis for a lasting partnership in their mutual relations.

301. The Commission records and recalls its decision that the Commission is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's *Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS* of 11 April 2016. That decision is incorporated here by reference.

302. As a result of the agreement reached between the Parties, the Commission's formal task under Article 7 of Annex V of the Convention has been rendered significantly more straightforward. Article 7 of its Annex V provides as follows:

> The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

303. In accordance with that provision, the Commission first records the Parties' agreement to extend by agreement the Commission's mandate and the period for the submission of this Report.

304. Having subsequently heard the Parties, examined their claims and objections, and made proposals to the Parties with a view to reaching an amicable settlement, the Commission is pleased to note the successful outcome of these conciliation proceedings. Pursuant to its mandate under Annex V to the Convention, the Commission therefore records that the Parties have reached agreement on the delimitation of a maritime boundary between them in the Timor Sea, as set out in the Treaty signed on 6 March 2018 and annexed to this Report.

305. The Commission further records that the Parties' agreements are consistent with the UN Convention on the Law of the Sea and other provisions of international law and recommends that the Parties implement the agreements reached in the course of these conciliation proceedings, including the transitional arrangements pertaining thereto.

306. The Commission also recommends that the Parties continue their discussions regarding the development of Greater Sunrise with a view to reaching agreement on a concept for the development of the resource.

* * *

Done this 9th day of May 2018,

[*Signed*]
Dr. Rosalie Balkin

[*Signed*]
Judge Abdul G. Koroma

[*Signed*]
Professor Donald McRae

[*Signed*]
Judge Rüdiger Wolfrum

[*Signed*]
H.E. Ambassador Peter Taksøe-Jensen
[Chairman]

[*Signed*]
Mr. Garth Schofield
[Registrar]

Annex 1:
The Parties' Representatives

Representatives of the Parties

Democratic Republic of Timor-Leste

Agent

— H.E. Hermenegildo Pereira, Deputy Minister to the Prime Minister for the Delimitation of Boundaries

Deputy Agent

— Ms. Elizabeth Exposto, Chief Executive Officer, Maritime Boundary Office

Principal Representatives

— H.E. Kay Rala Xanana Gusmão, Chief Negotiator for Maritime Boundaries

— Mr. Alfredo Pires, Former Minister of Petroleum and South Coast Development

— H.E. Santina Viegas Cardoso, Minister of Finance, (*until 15 September 2017*)

— H.E. Joaquim da Fonseca, Ambassador to the United Kingdom and the Netherlands

— H.E. Abel Guterres, Ambassador to the Commonwealth of Australia

— H.E. Milena Pires, Ambassador to the United States, Permanent Representative to the United Nations

— Mr. Gualdino do Carmo da Silva, President of the National Petroleum and Minerals Authority

— Mr. Francisco da Costa Monteiro, President and CEO of TIMOR GAP

Counsel and Advocates

— Professor Vaughan Lowe QC, Essex Court Chambers

— Sir Michael Wood KCMG, 20 Essex Street Chambers

— Mr. Eran Sthoeger

— Ms. Janet Legrand QC (Hon)

— Mr. Stephen Webb

— Ms. Gitanjali Bajaj

DLA Piper

Representatives and Advisors

— Mr. Simon Fenby
— Ms. Sadhie Abayasekara
— Ms. Adelsia Coelho da Silva
— Ms. Fiona Macrae
— Ms. Felismina Carvalho dos Reis
Maritime Boundary Office

— Ms. Iriana Ximenes, Office of the Deputy Minister to the Prime Minister for the Delimitation of Boundaries

— Mr. Amado Hei
— Mr. Florentino Soares Ferreira
— Mr. Carlos Alves
— Mr. Angelo Lay
— Mr. Agus Maradona Tilman
— Mr. Mateus da Costa
— Mr. Ermesto Pinto
National Petroleum and Minerals Authority

— Mr. Rod McKellar
— Mr. Sivakumar Muniappan
— Mr. Nuno Delicado
— Mr. Ricardo Alves Silva
— Mr. João Leite
— Mr. David Lawson
— Mr. Paul Hayward
TIMOR GAP

— Dr. Robin Cleverly, Marbdy Consulting

— Ms. Greta Bridge
— Ms. Efthimia Goudakis
— Mr. Jack Brumpton
— Ms. Lena Chapple
— Mr. Jeffrey Sheehy
— Ms. Emilie Barton
— Ms. Emily Chalk
DLA Piper

Commonwealth of Australia

Agent

— Mr. John Reid PSM, First Assistant Secretary, Office of International Law, Attorney-General's Department

Co-agent

— Ms. Katrina Cooper, Senior Legal Adviser, Department of Foreign Affairs and Trade (*until 1 November 2017*)

— Mr. James Larsen, Senior Legal Adviser, Department of Foreign Affairs and Trade (*from 1 November 2017*)

Principal Representatives

— The Honourable Julie Bishop MP, Minister for Foreign Affairs of Australia

— The Honourable George Brandis QC, Attorney-General for Australia (*until 20 December 2017*)

— Mr. Gary Quinlan AO, Deputy Secretary, Department of Foreign Affairs and Trade

— H.E. Brett Mason, Ambassador to the Kingdom of the Netherlands

— Mr. Bruce Wilson, Department of Industry and Natural Resources

— Ms. Lisa Schofield, Department of Industry and Natural Resources

Counsel and Advocates

— Sir Daniel Bethlehem KCMG QC, 20 Essex Street Chambers

— Mr. Justin Gleeson SC, Solicitor-General of Australia (*until 25 October 2016*)

— Mr. Bill Campbell QC PSM, General Counsel (International Law), Attorney-General's Department (*until 20 January 2017*)

— Professor Chester Brown, 7 Wentworth Selborne Chambers (*until 19 September 2016*)

Representatives and Advisors

— Ms. Angela Robinson

— Ms. Vrinda Tiwari

Australian Embassy to Timor-Leste

— Ms. Amelia Telec

— Mr. Benjamin Huntley

— Ms. Anna Rangott

— Ms. Holly Matley
Attorney-General's Department

— Mr. Justin Whyatt
— Mr. Todd Quinn
— Ms. Hailee Adams
— Mr. Ben O'Sullivan
— Mr. Michael Googan
— Ms. Rebecca Curtis
— Mr. Patrick Mullins
— Mr. Jeremy Noye
— Ms. Rori Moyo
— Ms. Megan Jones
— Ms. Diana Nelson
— Ms. Katherine Ruiz-Avila
Department of Foreign Affairs and Trade

— Ms. Esther Harvey
— Dr. Evan Hynd
— Ms. Bernadette Shanahan
— Mr. Peter Carter
— Mr. Steven Taylor
Department of Industry

— Mr. Geoffrey Francis
— Mr. Simon Winkler
— Ms. Anastasia Phylactou
The Treasury

— Mr. Mark Alcock
— Dr. Thomas Bernecker
— Ms. Natalie Taffs
Geoscience Australia

— Ms. Indra McCormick
— Mr. Will Underwood
— Ms. Christina Hey-Nguyen
Embassy of Australia to the Netherlands

Annex 2:
Part XV and Annex V of the United Nations Convention on the Law of the Sea

Part XV. Settlement of Disputes

Section 1. General Provisions

Article 279
Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 280
Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 281
Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 282
Obligations under general, regional or bilateral agreements

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a

binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Article 283
Obligation to exchange views

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 284
Conciliation

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Article 285
Application of this section to disputes submitted pursuant to Part XI

This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies *mutatis mutandis*.

Section 2. Compulsory Procedures Entailing Binding Decisions

Article 286
Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287
Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(*a*) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(*b*) the International Court of Justice;

(*c*) an arbitral tribunal constituted in accordance with Annex VII;

(*d*) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 288
Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 289
Experts

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.

Article 290
Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Article 291
Access

1. All the dispute settlement procedures specified in this Part shall be open to States Parties.

2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention.

Article 292
Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the

merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

Article 293
Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph l does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

Article 294
Preliminary proceedings

1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.

2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

Article 295
Exhaustion of local remedies

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

Article 296
Finality and binding force of decisions

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Section 3. Limitations and Exceptions to Applicability of Section 2

Article 297
Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

(*a*) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(*b*) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

(*c*) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

2. (*a*) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:

(i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

(ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

(*b*) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible

with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.

3. (*a*) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

(*b*) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

(*c*) In no case shall the conciliation commission substitute its discretion for that of the coastal State.

(*d*) The report of the conciliation commission shall be communicated to the appropriate international organizations.

(*e*) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

Article 298
Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(*a*) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(*b*) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(*c*) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of

disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(*a*), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 299
Right of the parties to agree upon a procedure

1. A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute.

2. Nothing in this section impairs the right of the parties to the dispute to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement.

Annex V. Conciliation

Section 1. Conciliation Procedure Pursuant to Section 1 of Part XV

Article 1
Institution of proceedings

If the parties to a dispute have agreed, in accordance with article 284, to submit it to conciliation under this section, any such party may institute the proceedings by written notification addressed to the other party or parties to the dispute.

Article 2
List of conciliators

A list of conciliators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four conciliators, each of whom shall be a person enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list. If at any time the conciliators nominated

by a State Party in the list so constituted shall be fewer than four, that State Party shall be entitled to make further nominations as necessary. The name of a conciliator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such conciliator shall continue to serve on any conciliation commission to which that conciliator has been appointed until the completion of the proceedings before that commission.

Article 3
Constitution of conciliation commission

The conciliation commission shall, unless the parties otherwise agree, be constituted as follows:

(*a*) Subject to subparagraph (*g*), the conciliation commission shall consist of five members.

(*b*) The party instituting the proceedings shall appoint two conciliators to be chosen preferably from the list referred to in article 2 of this Annex, one of whom may be its national, unless the parties otherwise agree. Such appointments shall be included in the notification referred to in article 1 of this Annex.

(*c*) The other party to the dispute shall appoint two conciliators in the manner set forth in subparagraph (*b*) within 21 days of receipt of the notification referred to in article 1 of this Annex. If the appointments are not made within that period, the party instituting the proceedings may, within one week of the expiration of that period, either terminate the proceedings by notification addressed to the other party or request the Secretary-General of the United Nations to make the appointments in accordance with subparagraph (*e*).

(*d*) Within 30 days after all four conciliators have been appointed, they shall appoint a fifth conciliator chosen from the list referred to in article 2 of this Annex, who shall be chairman. If the appointment is not made within that period, either party may, within one week of the expiration of that period, request the Secretary-General of the United Nations to make the appointment in accordance with subparagraph (*e*).

(*e*) Within 30 days of the receipt of a request under subparagraph (*c*) or (*d*), the Secretary-General of the United Nations shall make the necessary appointments from the list referred to in article 2 of this Annex in consultation with the parties to the dispute.

(*f*) Any vacancy shall be filled in the manner prescribed for the initial appointment.

(*g*) Two or more parties which determine by agreement that they are in the same interest shall appoint two conciliators jointly. Where two or more parties have separate interests or there is a disagree-

ment as to whether they are of the same interest, they shall appoint conciliators separately.

(*h*) In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply subparagraphs (*a*) to (*f*) in so far as possible.

Article 4
Procedure

The conciliation commission shall, unless the parties otherwise agree, determine its own procedure. The commission may, with the consent of the parties to the dispute, invite any State Party to submit to it its views orally or in writing. Decisions of the commission regarding procedural matters, the report and recommendations shall be made by a majority vote of its members.

Article 5
Amicable settlement

The commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.

Article 6
Functions of the commission

The commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

Article 7
Report

1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.

Article 8
Termination

The conciliation proceedings are terminated when a settlement has been reached, when the parties have accepted or one party has rejected the rec-

ommendations of the report by written notification addressed to the Secretary-General of the United Nations, or when a period of three months has expired from the date of transmission of the report to the parties.

Article 9
Fees and expenses

The fees and expenses of the commission shall be borne by the parties to the dispute.

Article 10
Right of parties to modify procedure

The parties to the dispute may by agreement applicable solely to that dispute modify any provision of this Annex.

Section 2. Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV

Article 11
Institution of proceedings

1. Any party to a dispute which, in accordance with Part XV, section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute.

2. Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceedings.

Article 12
Failure to reply or to submit to conciliation

The failure of a party or parties to the dispute to reply to notification of institution of proceedings or to submit to such proceedings shall not constitute a bar to the proceedings.

Article 13
Competence

A disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the commission.

Article 14
Application of section 1

Articles 2 to 10 of section l of this Annex apply subject to this section.

Annex 3:
Notice of Conciliation

1982 United Nations Convention on the Law of the Sea

In the Dispute Concerning Maritime Delimitation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia in the Timor Sea

Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS

11 April 2016

1. Pursuant to Article 298 and Annex V of the United Nations Convention on the Law of the Sea ("UNCLOS"), the undersigned, being duly authorised by the Government of the Democratic Republic of Timor-Leste ("Timor-Leste"), hereby transmits to the Government of the Commonwealth of Australia ("Australia") this notification instituting compulsory conciliation.

2. As Australia is aware, Timor-Leste and Australia are neighbouring States lying less than 400 nautical miles apart across the Timor Sea, with broadly parallel opposing coastlines. As States Parties to UNCLOS, they are obliged to negotiate the maritime boundaries between them.

3. Timor-Leste and Australia have not yet delimited their maritime boundaries in the Timor Sea. There have been various instruments, whose legal validity is disputed, that have set out provisional arrangements; but none of them purports to establish permanent maritime boundaries or impedes the conduct of these compulsory conciliation proceedings.

4. Timor-Leste's exercise of its sovereign rights within its maritime boundaries in the Timor Sea is frustrated by Australia's continuing refusals either to negotiate a permanent maritime delimitation agreement or to settle the dispute through other peaceful means such as arbitration or judicial settlement. Hence Timor-Leste has initiated compulsory conciliation as the only procedure available to it for the settlement of the dispute over its permanent maritime boundaries with Australia.

5. The dispute submitted for conciliation concerns the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States.

6. Timor-Leste has the right to permanent maritime boundaries with Australia, to be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution to the delimitation of its maritime zones

with Australia; and Australia is obliged to negotiate such boundaries in good faith. Timor-Leste will set out its position in detail at the appropriate stage in the proceedings.

7. Timor-Leste's goal in these proceedings is to conclude, with the assistance of the Conciliation Commission and in accordance with UNCLOS, an agreement with Australia that delimits Timor-Leste and Australia's permanent maritime boundaries in the Timor Sea. Timor-Leste is also prepared to agree upon and establish appropriate transitional arrangements in consequence of the agreement.

8. The Conciliation Commission is requested to assist Timor-Leste and Australia in reaching an amicable settlement of their dispute relating to the delimitation of their permanent maritime boundaries in the Timor Sea.

9. In accordance with the requirements of Annex V, Article 3(*b*) of UNCLOS, Timor-Leste hereby appoints Judge Abdul Koroma and Judge Rüdiger Wolfrum as Timor-Leste's party-appointed conciliators. Timor-Leste proposes that the Permanent Court of Arbitration be invited to act as the Registry for these conciliation proceedings.

10. Timor-Leste has appointed the Minister of State and of the Presidency of the Council of Ministers, His Excellency Hermenegildo Pereira, as Agent for these conciliation proceedings. The Chief Executive Officer of Timor-Leste's Maritime Boundary Office, Ms. Elizabeth Exposto, has been appointed as Deputy Agent.

11. All communications concerning these conciliation proceedings should be notified to the Agent at the following address:

His Excellency Hermenegildo Pereira
Ministerio de Estado e da Presidência do Conselho de Ministros
Edificio 1, R/C Esquerda
Palácio do Governo
Avenida Marginal
Dili, Timor-Leste

and also to the Deputy Agent at the following address:

Ms. Elizabeth Exposto
Conselho para a Delimitação Definitiva das Fronteiras Maritimas
Gabinete das Fronteiras Maritimas

Respectfully submitted,
Dr. Rui Maria de Araújo
Prime Minister of the Democratic Republic of Timor-Leste
Dili, 11 April 2016

Annex 4:
Response to Notice

The Democratic Republic of Timor-Leste and The Commonwealth of Australia

Australia's Response to the Notice of Conciliation

2 May 2016

1. In accordance with Annex V, Article 3(*c*) of the 1982 *United Nations Convention on the Law of the Sea* ("UNCLOS"), the Commonwealth of Australia ("Australia") provides this Response to the Notice of Conciliation received from the Democratic Republic of Timor-Leste ("Timor-Leste") on 11 April 2016.

2. Australia will engage in this process in good faith, in accordance with its international obligations including those under UNCLOS. To this end, and in exercise of its rights, Australia appoints Dr. Rosalie Balkin of Australian nationality and Professor Donald McRae of Canadian and New Zealand nationality as conciliators.

3. Australia takes this opportunity to note that once the Commission is constituted, Australia will make an immediate challenge to the competence of the Commission on a number of grounds, including on the basis that such competence is precluded by a bilateral treaty between the Parties, namely the 2006 *Certain Maritime Arrangements in the Timor Sea Treaty* ('CMATS Treaty'), which entered into force on 23 February 2007. Article 4 of the CMATS Treaty precludes recourse to any form of dispute settlement in relation to maritime boundary delimitation between Australia and Timor-Leste for the life of that treaty.

4. Annex V, Article 13 of UNCLOS provides that "[a] disagreement as to whether a conciliation commission … has competence shall be decided by the commission". The question of the Commission's competence in these proceedings should be resolved as a preliminary matter once the Commission is constituted. To allow for the preliminary determination of the Commission's competence, Australia would be willing, with Timor-Leste's agreement, to extend the timeframe given to the Commission to issue its report.

5. Australia agrees to Timor-Leste's proposal that the Permanent Court of Arbitration ('PCA') be invited to act as the Registry for these proceedings. With regard to location, in Australia's view it would be most appropriate to select a regional location for these proceedings, such as Singapore, where the facilities of the PCA will be available to the Parties free of charge.

6. Australia has appointed Mr. John Reid as Agent and Ms. Katrina Cooper as Co-Agent in this matter.

7. All communications concerning these conciliation proceedings should be notified to the Agent at the following address:

John Reid
First Assistant Secretary, Office of International Law
Attorney-General's Department

and also to the Co-Agent at the following address:

Katrina Cooper
Senior Legal Adviser
Department of Foreign Affairs and Trade

8. Australia's Response is without prejudice to any position or argument Australia may wish to take before the Conciliation Commission, once constituted, on the issues raised by Timor-Leste, including in relation to competence. In this regard, Australia expressly reserves all its rights.

Canberra, Australia, 2 May 2016
Commonwealth of Australia

Annex 5:
Letter from the Parties to the Permanent Court of Arbitration of 11 May 2016

Mr. Hugo Hans Siblesz
Secretary-General
Permanent Court of Arbitration
Peace Palace

11 May 2016

Dear Secretary-General

Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of UNCLOS

We write to inform you that on 11 April 2016, pursuant to Article 298 and Annex V of the United Nations Convention on the Law of the Sea ("UNCLOS"), the Government of the Democratic Republic of Timor-Leste ("Timor-Leste") initiated compulsory conciliation proceedings against the Government of the Commonwealth of Australia ("Australia") ("Conciliation Proceedings").

Both parties hereby invite the Permanent Court of Arbitration ("PCA") to act as the Registry for the Conciliation Proceedings.

In accordance with the requirements of Annex V, Articles 3(*b*) and 3(*c*) of UNCLOS, the parties have appointed the following conciliators:

Timor-Leste: Judge Abdul Koroma and Judge Rüdiger Wolfrum.
Australia: Dr. Rosalie Balkin and Professor Donald McRae.

By a letter of today's date, copied to the PCA, we have informed the party-appointed conciliators that we have agreed to invite the PCA to act as the Registry for the Conciliation Proceedings. We have also reminded them of the next steps in the Conciliation Proceedings.

For the avoidance of doubt, the next steps are as follows:

(*a*) in accordance with Annex V, Article 3(*d*) of UNCLOS, the party-appointed conciliators shall within 30 days after they have all been appointed, appoint a fifth conciliator from the list of conciliators maintained by the Secretary-General of the United Nations ("List of Conciliators"), who shall be chair; and

(*b*) in accordance with Annex V, Article 3(*d*)–(*e*) of UNCLOS, if the appointment is not made within the 30-day period referred to above, either party may, within one week of the expiration of that period, request the Secretary-General of the United Nations to make the appointment of the fifth conciliator from the List of Conciliators, in consultation with the parties to the dispute. Such appointment shall be made within 30 days of receipt of a request by a party.

For ease of reference, we enclose a copy of Article 298 and Annex V of UNCLOS.

We look forward to receiving confirmation from the PCA that it accepts our invitation to act as Registry for the Conciliation Proceedings.

Yours faithfully

Agent for Timor-Leste:
Mr. Hermenegildo Pereira
Minister of State and of the Presidency of the Council of Ministers

Agent for Australia:
Mr. John Reid
First Assistant Secretary, Office of International Law, Attorney-General's Department

Copy to:
Ms. Elizabeth Exposto
Deputy Agent for Timor-Leste
Chief Executive Officer
Maritime Boundary Office

Ms. Katrina Cooper
Co-Agent for Australia
Senior Legal Advisor
Department of Foreign Affairs and Trade

Encl.
Article 298 and Annex V, UNCLOS

Annex 6:
Letter from the Parties to the Commissioners of 11 May 2016

Judge Abdul Koroma

Dr. Rosalie Balkin

Judge Rüdiger Wolfrum
Max Planck Institute for Comparative Public Law and International Law

Professor Donald McRae
Faculty of Law, Common Law Section, University of Ottawa

Copy to:
Mr. Hugo Hans Siblesz
Secretary-General, Permanent Court of Arbitration

11 May 2016

Dear Madam and Sirs

Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of UNCLOS

As you are aware, on 11 April 2016, pursuant to Article 298 and Annex V of the United Nations Convention on the Law of the Sea ("UNCLOS"), the Government of the Democratic Republic of Timor-Leste ("Timor-Leste") initiated compulsory conciliation proceedings against the Government of the Commonwealth of Australia ("Australia") ("Conciliation Proceedings").

In accordance with Annex V, Articles 3(*b*) and 3(*c*) of UNCLOS, the parties have appointed each of you to act as conciliators in these Conciliation Proceedings.

The parties have invited the Permanent Court of Arbitration ("PCA") to act as the Registry for the Conciliation Proceedings. Assuming the PCA accepts, it will undoubtedly be in touch with you concerning the conduct of the Conciliation Proceedings.

By way of reminder, the next steps in the Conciliation Proceedings are as follows:

> (*a*) in accordance with Annex V, Article 3(*d*) of UNCLOS, the party-appointed conciliators shall within 30 days after they have all been appointed, appoint a fifth conciliator from the list of conciliators maintained by Secretary-General of the United Nations ("List of Conciliators"), who shall be chair; and
>
> (*b*) in accordance with Annex V. Article 3(*d*)-(*e*) of UNCLOS, if appointment is not made within 30-day period referred above, either party may, within one week of expiration of that period request the Secretary-General of the United Nations to make the appointment of fifth conciliator from the List of Conciliators, in consultation with the parties to the dispute. Such appointment shall be made within 30 days of receipt of request by a party.

For ease of reference, we enclose a copy of Article 298 of Annex V of UNCLOS.

In accordance with the usual practice, and recognising the intention for this process to be conducted amicably, the parties record their wish to be invited to provide their views to you on the selection and appointment of the Chairperson in these Conciliation Proceedings.

Yours faithfully

Agent for Timor-Leste:
Mr. Hermenegildo Pereira
Minister of State and of the Presidency of the Council of Ministers

Agent for Australia:
Mr. John Reid
First Assistant Secretary, Office of International Law, Attorney-General's Department

Copy to:
Ms. Elizabeth Exposto
Deputy Agent for Timor-Leste
Chief Executive Officer
Maritime Boundary Office

Ms. Katrina Cooper
Co-Agent for Australia
Senior Legal Advisor
Department of Foreign Affairs and Trade

Encl.
Article 298 and Annex V, UNCLOS

Annex 7:
Press Releases Nos. 1 to 3

[…]

Annex 8:
Rules of Procedure

PCA Case Nº 2016–10

In the Matter of a Conciliation

-before-

a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea

-between-

The Democratic Republic of Timor-Leste

-and-

The Commonwealth of Australia

Rules of Procedure

Conciliation Commission:

H.E. Ambassador Peter Taksøe-Jensen (Chairman)
Dr. Rosalie Balkin
Judge Abdul G. Koroma
Professor Donald McRae
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration
22 August 2016

WHEREAS the Democratic Republic of Timor-Leste and the Commonwealth of Australia are parties to the United Nations Convention on the Law of the Sea (the "Convention").

WHEREAS Article 298(1) of the Convention provides that "[w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to … disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, … ";

WHEREAS Article 298(1) further provides that "a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2";

WHEREAS Article 11(1) of Annex V to the Convention provides that "[a]ny party to a dispute which, in accordance with Part XV, section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute";

WHEREAS on 22 March 2002, Australia issued a declaration stating, inter alia, "that it does not accept any of the procedures provided for in section 2 of Part XV … with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles";

WHEREAS Timor-Leste has invoked Article 298 and Annex V to the Convention with respect to a dispute concerning "the interpretation and application of Articles 74 and 83 of UNCLOS for the delimitation of the exclusive economic zone and the continental shelf between Timor-Leste and Australia including the establishment of the permanent maritime boundaries between the two States," as set out in Timor-Leste's Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS dated 11 April 2016;

WHEREAS in accordance with Article 3 of Annex V to the Convention, on 25 June 2016, the Conciliation Commission composed of H.E. Mr. Peter Taksøe-Jensen (Chairman), Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum was constituted (the "Commission");

WHEREAS Article 4 of Annex V to the Convention provides that "[t]he conciliation commission shall, unless the parties otherwise agree, determine its own procedure";

WHEREAS the Commission met with the Parties regarding the organization of these proceedings at the headquarters of the Permanent Court of Arbitration at the Peace Palace in The Hague, the Netherlands on 28 July 2016;

THE CONCILIATION COMMISSION, after having sought the views of the Parties, adopts the following Rules of Procedure. These Rules of Procedure supplement those contained in Annex V to the Convention.

Section I. Introduction

Scope of Application

Article 1

1. The Commission shall function in accordance with these Rules, subject to Annex V to the Convention and other relevant provisions of the Convention. The Commission shall have the power to interpret the provisions of Annex V to the Convention and other relevant provisions of the Convention insofar as necessary.

2. In accordance with Articles 4 and 10 of Annex V to the Convention, the Parties may agree to exclude or vary any of these Rules, or to modify any provision of Annex V, at any time. These Rules are also subject to such modifications or additions as the Commission may find appropriate after seeking the views of the Parties.

3. To the extent that any issue arising is not expressly governed by these Rules or by Annex V or other relevant provisions of the Convention, and the Parties have not otherwise agreed, the issue shall be determined by the Commission, in consultation with the Parties.

Notice, Calculation of Periods of Time

Article 2

1. A notice, including a notification, communication, or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a Party specifically for this purpose, any notice shall be delivered to that Party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or email may only be made to an address so designated.

3. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraph 2. A notice transmitted by electronic means is deemed to have been received on the day it is sent.

4. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day in the State of the Party concerned, the period is extended until the first

business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

5. Unless otherwise provided, all time limits expire at midnight in The Hague on the relevant date.

Representation and Assistance

Article 3

1. Each Party shall appoint an agent and, if it so decides, one or more deputy agents or co-agents. Each Party may also be assisted by persons of their choice.

2. The names and addresses of agents, Party representatives, and other persons assisting the Parties, as well as any change by a Party of its agents or other representatives or of the contact details of any of its agents or other representatives, shall be communicated promptly to all Parties, to the Commission, and to the International Bureau of the Permanent Court of Arbitration. Such communication shall specify whether the appointment is being made for purposes of representation or assistance.

Administration

Article 4

The International Bureau of the Permanent Court of Arbitration at The Hague shall serve as the Registry for the proceedings (the "Registry"). In order to facilitate the conduct of the conciliation proceedings, the Registry will provide administrative assistance and registry services as directed by the Commission.

Section II. Composition of the Conciliation Commission

Number and Appointment of Conciliators

Article 5

The Commission consists of five Conciliators appointed in accordance with Article 3 of Annex V to the Convention.

Challenge of a Conciliator

Article 6

A Conciliator, once appointed or chosen, shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence unless the Parties have previously been informed by him or her of these circumstances.

Article 7

1. Any Conciliator may be challenged if circumstances exist that give rise to justifiable doubts as to the Conciliator's impartiality or independence.

2. A Party may challenge the Conciliator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that a Conciliator fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge of a Conciliator as provided in Article 8 shall apply.

Article 8

1. A Party that intends to challenge a Conciliator shall send notice of its challenge within 30 days after the appointment of the challenged Conciliator has been notified to the challenging party or within 30 days after the circumstances mentioned in Articles 6 and 7 became known to that Party.

2. The notice of challenge shall be communicated to the other Party, to the Conciliator who is challenged, to the other Conciliators, and to the Registry. The notice of challenge shall be in writing and shall state the reasons for the challenge.

3. When a Conciliator has been challenged by a Party, the other Party may agree to the challenge. The Conciliator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. In the event that the Party making the challenge elects to pursue it, the Commission may order that the proceedings be suspended during the pendency of the challenge.

5. If, within 15 days from the date of the notice of challenge, the Parties do not agree to the challenge or the challenged arbitrator does not withdraw, the decision on the challenge will be made by the Secretary-General of the Permanent Court of Arbitration.

Replacement of a Conciliator

Article 9

1. If a challenge to the appointment of a Conciliator is sustained, or in any other event where a Conciliator has to be replaced during the course of the proceedings, a substitute Conciliator shall be appointed in the manner prescribed for the initial appointment. In all cases, the procedure provided in Article 3 of Annex V to the Convention shall be used in full for the appointment of the substitute Conciliator even if during the process of appointing the Conciliator to be replaced a Party had failed to exercise his or her right to appoint or to participate in the appointment.

2. In such an event, the Commission shall decide, after consulting with the Parties, whether to revisit any aspect of the conciliation proceedings conducted previously.

Section III. The Proceedings

General Provisions

Article 10

1. Subject to these Rules, Annex V or other relevant provisions of the Convention, and any agreement between the Parties, the Commission may conduct the conciliation in such manner as it considers appropriate, taking into account the circumstances of the case and the wishes the Parties may express.

2. The Parties will in good faith co-operate with the Commission and, in particular, will endeavour to comply with requests by the Commission to submit written materials, provide evidence or documents, and attend meetings.

3. The Parties shall refrain during the conciliation proceedings from any measure which might aggravate or widen the dispute. They shall, in particular, refrain from any measures which might have an adverse effect on proposals which are or may reasonably be made by the Commission, so long as those proposals have not been explicitly rejected by either of the Parties.

Decisions

Article 11

Decisions of the Commission regarding procedural matters (including competence), the report and recommendations shall be made by a majority vote of its members, except that questions of administration or routine procedure may be decided by the Chairman alone, subject to revision, if any, by the full Commission.

Communications

Article 12

1. Written communication between the Parties and the Commission shall take place in accordance with paragraph 6 of the Commission's Terms of Appointment as supplemented by these Rules.

2. The Commission may invite the Parties to meet with it or may communicate with them orally or in writing. The Commission or any of its members may meet or communicate with the Parties together, or with each of them separately in accordance with Article 18.

Written Submissions

Article 13

1. The Commission may invite the Parties to make written submissions setting out their position with respect to one or more aspects of the Parties' dispute.

2. The Commission will determine the scope and timing of any written submissions in consultation with the Parties. At the request of either Party, and after having sought the views of the other Party, the Commission may extend the time for such written submissions.

3. Where the Parties are called upon to make written submissions, such submissions shall be accompanied by copies of any documentary or other evidence or legal authorities cited in their submissions. Submissions shall be transmitted in the following manner:

(*a*) The submitting Party shall transmit an electronic copy of its submission by e-mail, with accompanying documentary evidence and legal authorities to the other Party and the Registry, for onward transmission to the Commission.

(*b*) On the same day, the submitting party shall dispatch by courier to the opposing Party and the Registry, for onward transmission to the Commission, hard copies of the same materials sent electronically, together with hard copies of any accompanying documentary exhibits. Legal authorities shall not ordinarily be provided in hard copy unless specifically requested by the Commission.

(*c*) The submitting party shall dispatch two copies of its submission to the opposing Party and seven copies to the Registry.

(*d*) Along with every hard-copy submission, the submitting party shall dispatch a complete electronic copy (including accompanying documents and legal authorities) on USB flash drive or other electronic device, if possible in searchable Adobe PDF.

4. Documents and legal authorities appended to any written submissions shall be organised as follows:

(*a*) Documents submitted to the Commission shall be numbered consecutively throughout the conciliation and shall clearly distinguish between different types of documents (e.g., exhibits, witness statements, expert reports, legal authorities). The parties shall agree on a method of numbering and labelling of documents that is consistent between them.

(*b*) Hard copies of documents shall be submitted in an appropriate order in files or volumes.

(*c*) Written submissions shall be accompanied by a detailed table of contents describing all documents appended to them by exhibit number, date, type of document, and author or recipient, if and as applicable.

Location of Meetings

Article 14

1. The Commission shall determine the location of any hearings or meetings between the Commission and the Parties on a case-by-case basis, in consultation with the Parties.

2. The Commission shall determine the location of any meetings between the Commission and any Party separately on a case-by-case basis, in consultation with one or both Parties as appropriate.

3. The Commission may meet at any location it considers appropriate for deliberations or any other purpose.

Language of the Proceedings

Article 15

1. The language of the conciliation shall be English.

2. Any document submitted to the Commission that is written in a language other than English shall be accompanied by a translation into English. Informal translations will be acceptable unless either the Commission or the other Party request a certified translation.

Transparency and Confidentiality

Article 16

1. The existence of this conciliation shall be public. The Registry shall identify on its website the names of the Parties, the Commission, and the agents and counsel for the Parties, and will publish such further information and documents as provided in these Rules or as may be directed by the Commission.

2. The Commission may, in consultation with the Parties, designate any hearing, or any portion thereof, as a public hearing or meeting. The Registry shall make appropriate arrangements for any public hearing or meeting as directed by the Commission.

3. The Commission may, from time to time, at its own initiative or upon request of a Party, direct the Registry to issue press releases concerning the status of the proceedings. The Commission may, in its discretion and in consultation with the Parties, attach summaries or statements made by the Parties, transcripts of proceedings, and other documents forming part of the record of the proceedings to press releases issued by the Registry. In deciding when and whether to make public information or documents concerning the proceedings, the Commission shall bear in mind the purpose of the proceedings to assist the Parties in reaching an amicable settlement.

4. Any decision of the Commission on whether it has competence shall be made public.

5. The Commission shall decide, in consultation with the Parties, whether to make the Commission's Report or any portion thereof public.

6. Either Party may designate certain information or materials it submits to the Commission as confidential. Information or materials so designated shall not be made public or referred to in press releases issued by the Registry or in any other documents made public by the Commission except with the agreement of the Parties. Insofar as necessary, the Commission shall make appropriate arrangements in consultation with the Parties for the redaction of confidential information from any document made public.

7. Except as otherwise provided in this Article or agreed by the Parties, or except to the extent that the disclosure is required in connection with arbitral or judicial proceedings pursuant to Article 23 hereof, the Commission, the Registry, and the Parties shall keep confidential all matters relating to the conciliation proceedings.

Objections to Competence

Article 17

1. The Commission shall have the power to rule on any disagreement as to whether the Commission has competence under Section 2 of Annex V to the Convention.

2. Any objection that the Commission lacks competence shall be raised no later than in the Parties' first written submission to the Commission. A Party is not precluded from raising such an objection by the fact that it has appointed, or participated in the constitution of the Commission. Any objection that the Commission is exceeding the scope of its competence shall be raised as soon as the matter alleged to be beyond the scope of its competence is raised during the conciliation proceedings. The Commission may, in either case, admit a later plea if it considers the delay justified.

3. Where an objection to the competence of the Commission is raised, the Commission shall decide whether or not to rule on its competence as a preliminary question or in conjunction with the proceedings on the substance of the Parties' dispute. The decision whether or not to rule on its competence as a preliminary question need not contain reasons.

4. If at an appropriate stage of the proceedings any Party so requests, the Commission shall hold hearings on the question of its competence. In the absence of such a request, the Commission shall decide whether to hold such hearings or whether its decision on competence will be made on the basis of documents and other materials.

5. Any ruling by the Commission on its competence shall be accompanied by reasons.

Conciliation Proceedings on the Substance of the Dispute

Article 18

1. The procedure set out in this Article shall apply to all matters relevant to the conciliation, with the exception of disagreements as to whether a Commission has competence under Section 2 of Annex V to the Convention which shall be addressed in accordance with the other provisions of these Rules.

2. The Commission shall hear the parties, examine their claims and objections, make proposals to the Parties, and otherwise assist the Parties in an independent and impartial manner with a view to reaching an amicable settlement. The Commission will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the Parties and the circumstances surrounding the dispute, including any previous practices between the Parties.

3. The Commission may, at any stage of the proceedings, draw to the attention of the Parties any measure which the Commission considers might facilitate an amicable settlement of the dispute. In particular, when it appears to the Commission that there exist elements of a settlement which would be acceptable to the Parties, the Commission may formulate the terms of a possible settlement and submit them to the Parties for their observations. Each Party may also, on its own initiative or at the invitation of the Commission, submit to the Commission suggestions for the settlement of the dispute.

4. The Commission may meet or communicate with the Parties together or with each of them separately, whether orally or in writing. The Commission may request each Party to make such written submissions as it deems appropriate in accordance with Article 13.

5. Separate meetings with either Party may be conducted in conjunction with a joint meeting between the Commission and the Parties or as a distinct phase of the proceedings. The Commission may also, for reasons of efficiency, authorize the Chairman with or without any of the other members of the Commission to meet separately with either Party at any appropriate point in the conciliation process. In such event, the Chairman shall keep the Commission regularly informed with respect to the content and prospects of any separate meetings with either Party.

6. When a Party gives any information or documents to the Commission subject to a specific condition that it not be disclosed to the other Party, the Commission shall not disclose such information or documents to the other Party.

Termination of Conciliation Proceedings

Article 19

The conciliation proceedings are terminated:

(*a*) when a settlement has been reached;

(*b*) when the parties have accepted or one party has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations;

(*c*) when a period of three months has expired from the date of transmission of the report to the Parties; or

(*d*) by a written declaration signed by both Parties addressed to the Commission to the effect that the conciliation proceedings are terminated as of the date of the declaration or any other date specified in the declaration.

Section IV. The Report

Form and Effect of the Report

Article 20

1. The Commission shall, during the course of the conciliation phase, at its discretion, discuss with each Party and with the Parties jointly the appropriate scope and form of the Report.

2. The Commission, at its discretion, may supplement its Report to the Parties with confidential reports to each Party separately recommending to each Party steps that the Commission recommends might usefully be taken by the Party in question.

3. The Commission, at its discretion, may issue a confidential draft Report to the Parties prior to finalising its Report for the purposes of discussions with the Parties or information.

4. The Commission may, with the agreement of both Parties, extend the timeframe for completion of the report as set out in Article 7 of Annex V to the Convention.

5. The Commission may undertake a limited post-Report consultation with the Parties during the period prior to the termination of the proceedings.

Section V. Costs

Costs

Article 21

1. Upon termination of the conciliation proceedings, the Commission shall fix the costs of the conciliation and give written notice thereof to the Parties. The term 'costs' includes only:

(*a*) The fees of the Commission in accordance with the Commission's Terms of Appointment;

(*b*) The travel and other expenses of the Commission in accordance with the Commission's Terms of Appointment;

(*c*) The costs of any expert advice requested by the Commission with the consent of the Parties;

(*d*) The fees and expenses of the Registry appointed pursuant to Article 4 of these Rules.

(*e*) The costs of any services of the PCA Secretary-General and the Bureau.

2. The fees and expenses of the Commission shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the Conciliators, and any other relevant circumstances of the case.

3. Unless the Parties otherwise agree, the costs of the proceedings, including the fees and expenses of the Commission, shall be borne by the Parties in equal shares.

Deposit for Costs

Article 22

1. The Registry may request each Party to deposit an equal amount as an advance for the costs referred to in Article 21.

2. During the course of the proceedings, the Registry may request supplementary deposits from the Parties.

3. If the requested deposits are not paid in full within 30 days after the receipt of the request, the Commission shall so inform the Parties in order that one of them may make the required payment. If such payment is not made, the Commission may order the suspension or termination of the proceedings.

4. Upon termination of the conciliation proceedings, the Registry shall render an accounting to the Parties of the deposits received and return any unexpended balance to the Parties in proportion to the amounts received from each Party.

Section VI. Miscellaneous Provisions

Resort to Arbitral or Judicial Proceedings

Article 23

The Parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a Party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

Other Relevant Proceedings

Article 24

The Parties shall keep the Commission informed of the status and developments in any other proceedings involving the Parties which may be relevant to the dispute that is the subject of the conciliation proceedings.

Role of Commission in Other Proceedings

Article 25

The Parties and the Commission undertake that, unless the Parties agree otherwise, none of the members of the Commission shall act as an arbitrator or as a representative or counsel of a Party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The Parties also undertake that they will not present any Conciliator as a witness in any such proceedings.

Preservation of the Legal Position of the Parties

Article 26

1. The Parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(*a*) Views expressed or suggestions made by the other Party in respect of a possible settlement of the dispute;

(*b*) Admissions made by the other Party in the course of the conciliation proceedings;

(*c*) Proposals made by the Commission or individual Conciliators;

(*d*) The fact that the other Party had indicated its willingness to accept a proposal for settlement made by the Conciliators;

(*e*) Any information or materials designated as confidential by either Party in accordance with Article 16; or

(*f*) Any information or materials relating to the conciliation proceedings which have not been made public by the Commission in accordance with Article 16.

2. Acceptance by a party of recommendations submitted by the commission in no way implies any admission by it of the considerations of law or of fact which may have inspired the recommendations.

Annex 9:
Decision on Competence

[…]

Annex 10:
Letter from Australia to the Commission of 22 September 2016

22 September 2016

Mr. Garth Schofield
Legal Counsel, Permanent Court of Arbitration

Dear Mr. Schofield

Conciliation Proceedings under Article 298 and Annex V of UNCLOS (PCA Case No. 2016–10) Democratic Republic of Timor-Leste and Commonwealth of Australia

I refer to your letter of 19 September 2016, inviting Australia to indicate whether it considers necessary any redaction of the Commission's Decision on Competence in the above mentioned proceedings.

Having carefully reviewed the Decision, Australia does not seek any redaction of the Decision and approves the release of paragraphs 52 and 53.

I would be grateful if you would convey this letter to the Chairman and members of the Conciliation Commission. A copy of this letter has been forwarded to the Agent and Deputy Agent for Timor-Leste.

Yours sincerely

John Reid
Agent for Australia
First Assistant Secretary
Office of International Law
Attorney-General's Department
Canberra, Australia

Annex 11:
Press Releases Nos. 4 and 5

[…]

Annex 12: Commission's Proposal on Confidence-Building Measures of 14 October 2016

Conciliation between Timor-Leste and Australia

Commission Proposal on Confidence-Building Measures

The Commission has carefully considered how best to move forward with the Conciliation process and create the conditions most conducive to achieving an agreement on permanent maritime boundaries within the timeframe of the Conciliation process. In this respect, the Commission proposes to the Parties certain measures to be implemented with a view to removing obstacles to progress, establishing a stable starting point for negotiations, and building trust between the Parties. If these measures are implemented by the Parties, the Commission is optimistic about obtaining full engagement to begin substantive negotiations on both provisional and final solutions on maritime boundaries at the Commission's next meetings with the Parties in January of next year.

As a general matter, the Commission places great importance on maintaining stability in the relationship between the Parties during the course of this Conciliation. Accordingly, as alluded to in its letter of 21 September 2016, the Commission initially thought that it would be helpful to maintain all the current treaty arrangements during the pendency of the process. However, based on its discussions with the Parties, it appears that CMATS may remain an obstacle to moving forward that could be productively removed from the equation.

Timor-Leste had previously indicated that it intends to proceed with the termination of CMATS in the near future. Australia does not dispute that Timor-Leste has the right to terminate CMATS. At the same time, both States share a common interest in maintaining regulatory stability and investor confidence by clarifying that the Timor Sea Treaty would continue to apply to activities undertaken in the Timor Sea following termination of CMATS and serve as part of the transitional arrangements until a final delimitation of maritime boundaries has come into effect.

With the above in mind, the Commission proposes that the Parties take the following steps as confidence building measures:

1. Steps to be taken with respect to CMATS:
    - Either:
        - Both Parties to agree by 8 December 2016 to terminate CMATS by mutual consent, with such termination taking place according to an agreed schedule, bearing in mind domestic legal processes; or
        - Timor-Leste to initiate termination of CMATS unilaterally by 15 January 2017 (i.e., one day prior to the opening of the January session with the Commission) and Australia to take note of Timor-Leste's termination of CMATS;

- Both Parties to agree that, following the termination of CMATS, the Timor Sea Treaty will apply in its original form, prior to amendment by CMATS;
- Both Parties to agree that Articles 12(*3*) and 12(4) of CMATS would no longer apply;
- Australia to confirm that, following termination of CMATS, Article 4(*5*) of CMATS would not limit or exclude its obligation to negotiate an agreement with Timor-Leste on the basis of any report the Commission may produce in the course of these proceedings;

2. The Parties' commitment to negotiate maritime boundaries:
   - Australia and Timor-Leste to commit to negotiate permanent maritime boundaries; such commitment to be formally confirmed in writing to the Commission by each government by 8 December 2016;
3. Steps to be taken with respect to pending arbitrations:
   - Both Parties to write jointly, by 21 October 2016, to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration*, suspending those proceedings by agreement until 20 January 2017 (i.e., the final day of the January session with the Commission);
   - Timor-Leste to write to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration* by 20 January 2017 (i.e., the final day of the January session with the Commission), withdrawing its claims and requesting termination of those proceedings;
4. Steps to be taken with respect to petroleum exploration in the Timor Sea:
   - Australia to remove the area in the recent acreage release identified by Timor-Leste as covered by its claim; such removal to be confirmed to the Commission in writing by 8 December 2016;
5. Steps to be taken with respect to the further work of the Commission:
   - Both Parties to set out their positions on maritime boundaries in the Timor Sea in written submissions not exceeding 30 pages (excluding annexes), to be received by 20 December 2016; such written submissions should include the Parties' respective positions on the delimitation of permanent maritime boundaries (including coordinates of the proposed delimitation line) and an explanation of the principles on which their delimitation is based;
   - Australia to provide the necessary mandate for its delegation to negotiate permanent maritime boundaries in the Timor Sea and to confirm to the Commission in writing the possession of such mandate by 9 January 2017;
   - Both Parties to take a forward-looking approach to the negotiations and to raise only issues that are directly relevant to reaching an agreement on maritime boundaries.
6. Steps to be taken with respect to public communications:
   - Both Parties to approach public statements on the issue of maritime boundaries and their relationship with one another generally

with a view to creating space for constructive engagement, rather than to generate pressure on the other Party or foreclose options; Accordingly, both Parties to generally express optimism about the Conciliation process;

- Both Parties to provide positive comments from senior members of their present delegations on the other Party's engagement in the Conciliation process for quotation in a press release to be issued by the PCA at the close of the present session with the Commission;
- Both Parties to issue a joint statement (the content of which will be developed in consultation with the Commission) concurrent with the termination of CMATS, outlining the effect of termination on the Timor Sea Treaty and operators in the Timor Sea;

Annex: Timeline

Date	*Event*
Friday, 21 October 2016	Parties to write jointly to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration*, suspending those proceedings by agreement until 20 January 2017
Thursday, 8 December 2016	Each government to write formally to the Commission, confirming commitment to negotiate permanent maritime boundaries
Thursday, 8 December 2016	Australia to advise Commission whether CMATS is to be terminated by Agreement
Thursday, 8 December 2016	Australia to confirm to the Commission that it has taken steps to remove the area in the recent acreage release identified by Timor-Leste as covered by its claim
Mid-December 2016	Parties and Commission to agree on trilateral Joint Statement (to be issued concurrently by each government and by the Commission at the same time that the termination of CMATS is initiated (either by agreement or unilaterally)) on modalities of termination of CMATS and continued application of Timor Sea Treaty as a transitional arrangement
Tuesday, 20 December 2016	Parties to simultaneously submit written statements to the Registry; Registry to circulate statements after receipt from both Parties
Monday, 9 January 2017	Australia to confirm to the Commission that it has a mandate to negotiate permanent maritime boundaries

Date	*Event*
Sunday, 15 January 2017	If CMATS to be terminated unilaterally, Timor-Leste to initiate termination process
Monday, 16 January 2017 to Friday, 20 January 2017	Confidential Meetings between the Parties and the Commission
Friday, 20 January 2017	Timor-Leste to write to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration* by 20 January 2017, withdrawing its claims and requesting termination of those proceedings
Monday, 27 March 2017 to Friday, 31 March 2017	Confidential Meetings between the Parties and the Commission
Tuesday, 6 June 2017 to Friday, 9 June 2017	Confidential Meetings between the Parties and the Commission
Monday, 24 July 2017 to Friday, 28 July 2017	Confidential Meetings between the Parties and the Commission
Monday, 28 August 2017 to Friday, 1 September 2017	Confidential Meetings between the Parties and the Commission
Monday, 11 September 2017 to Friday, 15 September 2017	Dates reserved by Commission for purpose TBD

Annex 13:
Joint letter from the Parties to the Commission of 21 October 2016

Mr. Garth Schofield
Legal Counsel, Permanent Court of Arbitration
Peace Palace

21 October 2016

Dear Sir,

PCA Case No. 2016–10—Conciliation between The Democratic Republic of Timor-Leste and the Commonwealth of Australia

We refer to the Commission's Proposal on Confidence-Building Measures provided to the Parties following the conclusion of the recent *ex parte* meetings held in Singapore from 10–13 October 2016.

In accordance with the Commission's Proposal, please find attached correspondence from the Parties to the respective Arbitral Tribunals in the *Timor*

Sea Treaty Arbitration and the *Article 8(b) Arbitration,* requesting the Suspension of those proceedings from 21 October 2016 until 20 January 2016.

The Parties would be grateful if you would communicate this letter and the attached correspondence to the Commission.

Yours faithfully,

Ms. Elizabeth Exposto
Chief Executive Office
Maritime Boundary Office
Deputy Agent for Timor-Leste

John Reid
First Assistant Secretary
Office of International Law
Attorney-General' s Department
Agent for Australia

* * *

Mr. Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace
21 October 2016

Dear Sir,

PCA Case No. 2013–16—Arbitration under the Timor Sea Treaty—Timor-Leste v *Australia*

We are under joint instructions to notify the Tribunal that the Parties have decided to suspend these proceedings from today's date until 20 January 2017. This Suspension implements one important element of recent proposals put forward by the Commission in the conciliation proceedings initiated under Article 298 and Annex V of the *UN Convention on* the Law of the Sea.

During the period of suspension, neither Party will make any submission or application to the Tribunal or seek Orders from the Tribunal designed to advance these proceedings.

The Parties also wish to place on record that the above suspension is without prejudice to the position of either of them in respect of the dispute underly-

ing the arbitration or in respect of their procedural or substantive rights when the period of suspension comes to an end.

The Parties would be grateful if you would communicate this letter to the Tribunal.

Yours faithfully,

JOAQUIM DA FONSECA
Ambassador of Timor-Leste to the UK
Embassy of the Timor-Leste in London
Agent for Timor-Leste

JOHN REID
First Assistant Secretary
Office of International Law
Attorney-General's Department
Agent for Australia

* * *

MR. GARTH SCHOFIELD
Legal Counsel
Permanent Court of Arbitration
Peace Palace

21 October 2016

Dear Sir,

PCA Case No. 2015–42—Arbitration under the Timor Sea Treaty—Timor-Leste v *Australia*

We are writing to notify the Tribunal in the above mentioned proceedings that the Parties have decided to suspend these proceedings as of 21 October 2016 until 20 January 2017. This Suspension implements one important element of the proposals put forward by the Commission in the conciliation proceedings initiated under Article 298 and Annex V of the *UN Convention on the Law of the Sea*.

We note that in accordance with the Parties correspondence to the Tribunal of 23 September 2016, Australia submitted its Application for the Production of Documents from the ConocoPhillips Arbitration on 14 October 2016. Timor-Leste is due to submit its response on 28 October 2016. Given, however, that this agreed suspension is effective as of 21 October 2016, Timor-Leste

now has insufficient time to complete its responsive submission. Accordingly, the Parties agree that Timor-Leste will make its responsive submission within seven days of the lifting of the suspension.

During the period of suspension, neither Party will make any submission or application to the Tribunal or seek orders from the Tribunal, nor engage in any action designed to advance these proceedings.

The Parties would be grateful if you would communicate this letter to the Tribunal.

Yours faithfully,

Ambassador Pierre-Richard Prosper
Arent Fox LLP
Co-Agent for Timor-Leste

John Reid
First Assistant Secretary, Office of International Law
Attorney-General's Department
Agent for Australia

Annex 14:
Letter from Timor-Leste to the Commission of 6 December 2016

Data/Date: 6 December 2016

Para/To: Mr. Garth Schofield, Senior Legal Counsel, Permanent Court of Arbitration

Assunto/Subject: PCA Case No 2016–10: Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia pursuant to Article 298 and Annex V of UNCLOS

Dear Sir.

I refer to the Commission's proposal on confidence-building measures.

Pursuant to point 2 of the Commission's proposal, please find enclosed a letter from H.E. Dr. Rui Maria de Araújo, Prime Minister of Timor-Leste, to the Chairman of the Conciliation Commission, confirming Timor-Leste's commitment to negotiate permanent maritime boundaries with Australia.

Yours faithfully,

AGIO PEREIRA
Minister of State and the Presidency of the Council of Ministers
Agent for Timor-Leste

CC: Elizabeth Exposto

* * *

Dili, 6 December 2016

Assunto/Subject: PCA Case No 2016–10: Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia pursuant to Article 298 and Annex V of UNCLOS

Dear Ambassador,

I refer to the above proceedings and the Commission's proposal no, 2 on confidence-building measures,

I am pleased formally to confirm Timor-Leste's commitment to negotiate permanent maritime boundaries with Australia.

Timor-Leste looks forward to working with Australia and the Commission in resolving this long-standing dispute between the two countries.

Yours faithfully,

DR. RUI MARIA DE ARAÚJO
Prime Minister of the Democratic Republic of Timor-Leste

H.E. AMBASSADOR PETER TAKSØE-JENSEN
Chairman of the Conciliation Commission

Cc: H.E. Mr. Agio Pereira, Agent for Timor-Leste
Elizabeth Exposto, Deputy Agent for Timor-Leste

Annex 15: Letter from Australia to the Commission of 8 December 2016

8 December 2016

Mr. Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace

Dear Mr. Schofield

Conciliation Proceedings under Article 298 and Annex V of UNCLOS (PCA Case No. 2016–10) Democratic Republic of Timor-Leste and Commonwealth of Australia

We refer to the Commission's Proposal on Confidence-Building Measures provided to the Parties at the conclusion of *ex parte* meetings between the Commission and the Parties in Singapore from 10–13 October 2016.

Australia accepts the Commission's Proposal. In respect of maritime boundaries, Australia confirms the following:

i) Australia commits to negotiate permanent maritime boundaries with Timor-Leste
ii) Australia will make written submissions on maritime boundaries in the Timor Sea by 20 December 2016
iii) the Australian delegation has been provided the necessary mandate to negotiate permanent maritime boundaries in the Timor Sea, and
iv) Australia also confirms that the area identified by Timor-Leste as covered by its claim will be removed from the 2016 Offshore Petroleum Exploration Acreage Release area W162. Timor-Leste has provided Australia with the co-ordinates defining the northern area of W16–2 and Australia is taking steps to excise the area.

With regard to the termination of the CMATS Treaty, the Commission put forward two options. Australia has given careful consideration to these options and consistent with its long-held position, Australia has decided not to jointly terminate the CMATS Treaty. On that basis, Australia acknowledges that Timor-Leste will now make arrangements to terminate the CMATS Treaty unilaterally.

Australia agrees that, following its termination by Timor-Leste:

i) the Timor Sea Treaty will apply in its original form, prior to amendment by the CMATS Treaty, and
ii) Articles 12(3) and 12(4) of the CMATS Treaty will no longer apply and Article 4(5) of the CMATS Treaty will not limit or ex-

clude its obligation to negotiate an agreement with Timor-Leste on the basis of any report the Commission may produce in the course of these proceedings.

Australia will work with the Commission and Timor-Leste to agree by mid-December a trilateral Joint Statement on modalities of termination and the continued application of the Timor Sea Treaty. Australia also confirms its commitment to the other steps proposed by the Commission on public communication.

Australia understands that Timor-Leste will write to the respective tribunals in the *Timor Sea Treaty Arbitration* and the *Article 8(b) Arbitration* by 20 January 2017 withdrawing its claims and requesting termination of those proceedings.

Australia makes these commitments in good faith in order for the successful implementation of the overall package of confidence-building measures to proceed, including the range of actions required of Timor-Leste. We share the Commission's objective that the implementation of all of these measures will establish a stable starting point for negotiation and build trust between the Parties.

We would be grateful if you would convey this letter to the Chairman and members of the Conciliation Commission. We have copied this letter to the Agent and Deputy-Agent for Timor-Leste.

Yours sincerely

John Reid
Agent for Australia
First Assistant Secretary,
Office of International Law
Attorney-General's Department
Canberra, Australia

Katrina Cooper
Co-Agent for Australia
Senior Legal Advisor
Department of Foreign Affairs and Trade
Canberra, Australia

Cc:
H.E. Mr. Agio Pereira, Agent for Timor-Leste
Ms. Elizabeth Exposto, Deputy Agent for Timor-Leste

Annex 16:
Trilateral Joint Statement of 9 January 2017

Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea

Australia and Timor-Leste are engaged in the ongoing Conciliation under the United Nations Convention on the Law of the Sea. The purpose of this process is to resolve the differences between the two States over maritime boundaries in the Timor Sea.

From 10 to 13 October 2016, the governments of Timor-Leste and Australia participated in a series of meetings convened by the Conciliation Commission constituted in this matter. In the course of those meetings the governments of Timor-Leste and Australia agreed to an integrated package of measures intended to facilitate the conciliation process and create the conditions conducive to the achievement of an agreement on permanent maritime boundaries in the Timor Sea.

As part of this package of measures, the Government of Timor-Leste has decided to deliver to the Government of Australia a written notification of its wish to terminate the 2006 *Treaty on Certain Maritime Arrangements in the Timor Sea* pursuant to Article 12(2) of that treaty. The Government of Australia has taken note of this wish and recognises that Timor-Leste has the right to initiate the termination of the treaty. Accordingly, the *Treaty on Certain Maritime Arrangements in the Timor Sea* will cease to be in force as of three months from the date of that notification.

The Commission and the Parties recognise the importance of providing stability and certainty for petroleum companies with interests in the Timor Sea and of continuing to provide a stable framework for petroleum operations and the development of resources in the Timor Sea. In the interest of avoiding uncertainty, the governments of Timor-Leste and Australia wish to record their shared understanding of the legal effects of the termination of the *Treaty on Certain Maritime Arrangements in the Timor Sea* as follows:

- The governments of Timor-Leste and Australia agree that, following the termination of the *Treaty on Certain Maritime Arrangements in the Timor Sea*, the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* of 20 May 2002 and its supporting regulatory framework shall remain in force between them in its original form, that is, prior to its amendment by the *Treaty on Certain Maritime Arrangements in the Timor Sea*.
- The governments of Timor-Leste and Australia agree that the termination of the *Treaty on Certain Maritime Arrangements in the*

> *Timor Sea* shall include the termination of the provisions listed in Article 12(*4*) of that treaty and thus no provision of the Treaty will survive termination. All provisions of the treaty will cease to have effect three months after the delivery of Timor-Leste's notification.

For the further conduct of the conciliation process, the governments of Timor-Leste and Australia have each confirmed to the other their commitment to negotiate permanent maritime boundaries under the auspices of the Commission as part of the integrated package of measures agreed by both countries. The governments of Timor-Leste and Australia look forward to continuing to engage with the Conciliation Commission and to the eventual conclusion of an agreement on maritime boundaries in the Timor Sea. The Commission will hold a number of meetings over the course of the year, which will largely be conducted in a confidential setting.

The governments of Australia and Timor-Leste remain committed to their close relationship and continue to work together on shared economic, development and regional interests.

This statement is being issued simultaneously by the Foreign Minister of Timor-Leste, the Foreign Minister of Australia, and the Permanent Court of Arbitration on behalf of the Conciliation Commission.

Annex 17: Letter from Australia to Timor-Leste of 12 January 2017

12 January 2017

Mr. Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace

Dear Mr. Schofield

Conciliation Proceedings under Article 298 and Annex V of UNCLS (PGA Case No. 2016-10) Democratic Republic of Timor-Leste and Commonwealth of Australia

I write to inform you of recent steps taken by Australia to fulfil its undertakings in relation to the Australian Government's 2016 Offshore Petroleum Acreage Release Area 'W16–2'.

As part of the integrated package of confidence building measures Australia and Timor-Leste agreed to complete as part of the Conciliation Commis-

sion process, Australia committed to removing the area Timor-Leste identified as covered by its maritime boundary claim in Acreage Release Area W16–2.

I can confirm that Australia has now completed this step. On 10 January 2017, the Commonwealth-Western Australia Offshore Petroleum Joint Authority announced it had officially amended the block listing for Acreage Release Area W16–2 by removing the area in question. Timor-Leste was advised of these actions in writing on 12 January 2017.

I have attached a copy of the Gazette notice published by the Commonwealth of Australia that confirms the completion of this confidence building measure. An online version of this gazette notice is also available at: https://www.legislation.gov.au/Details/C2017G00020.

The action taken to amend Acreage Release Area W16–2 is without prejudice to Australia's position on its continental shelf and EEZ entitlements and on maritime delimitation between Australia and Timor-Leste.

Yours sincerely,

Katrina Cooper
Co-Agent for Australia

Annex 18:
Trilateral Joint Statement of 24 January 2017

Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea

Delegations from both Timor-Leste and Australia participated in a series of confidential meetings with the Conciliation Commission in Singapore from 16 to 20 January 2017. These meetings are part of an ongoing, structured dialogue in the context of the conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia being conducted pursuant to the UN Convention on the Law of the Sea and under the auspices of the Permanent Court of Arbitration. These meetings will continue over the course of the year in an effort to resolve the differences between the two States over maritime boundaries in the Timor Sea.

In October 2016, the Conciliation Commission reached agreement with the Parties on certain confidence-building measures, which included a series of actions by both Timor-Leste and Australia to demonstrate each Party's

commitment to the conciliation process and to create the conditions conducive to the achievement of an agreement on permanent maritime boundaries.

As part of this integrated package of confidence-building measures, the Foreign Ministers of Timor-Leste and Australia and the Conciliation Commission issued a Trilateral Joint Statement on 9 January 2017, noting Timor-Leste's intention to terminate the *Treaty on Certain Maritime Arrangements in the Timor Sea* and setting out the Parties' agreement on the legal consequences of such termination. On 10 January 2017, Timor-Leste formally notified Australia of the termination of the Treaty, which shall cease to be in force on 10 April 2017, in accordance with its terms.

Over the course of the week, the Commission met with the Parties to explore their negotiating positions on where the maritime boundary in the Timor Sea should be set with a view to identifying possible areas of agreement for discussion in future meetings. Both Timor-Leste and Australia agreed that the meetings were productive, and reaffirmed their commitment to work in good faith towards an agreement on maritime boundaries by the end of the conciliation process in September 2017. The Commission intends to do its utmost to help the Parties reach an agreement that is both equitable and achievable.

Recognizing that the Parties are undertaking good faith negotiations on permanent maritime boundaries, and in continuation of the confidence-building measures and the dialogue between the Parties, on Friday, 20 January 2017, Timor-Leste wrote to the tribunals in the two arbitrations it had initiated with Australia under the *Timor Sea Treaty* in order to withdraw its claims. These arbitrations had previously been suspended by agreement of the two governments following the Commission's meeting with the Parties in October 2016. The withdrawal of these arbitrations was the last step in the integrated package of confidence-building measures agreed during the Commission's meetings with the Parties in October 2016.

The Commission and the Parties recognise the importance of providing stability and certainty for petroleum companies with current rights in the Timor Sea. The Parties are committed to providing a stable framework for existing petroleum operations. They have agreed that the 2002 *Timor Sea Treaty* and its supporting regulatory framework will remain in force between them in its original form until a final delimitation of maritime boundaries has come into effect. As this process continues, the Commission and the Parties will ensure that the issue of transitional arrangements for any new regime will be included in the program of work for the conciliation with a view to ensuring that current rights of these companies are respected.

Timor-Leste and Australia enjoy a close and strong friendship. The governments of both countries are committed to their important relationship and working together on many shared interests.

This statement is being issued simultaneously by the Government of Timor-Leste, the Government of Australia, and the Permanent Court of Arbitration on behalf of the Conciliation Commission.

Annex 19:
Commission Non-Paper of 31 March 2017

Non-Paper

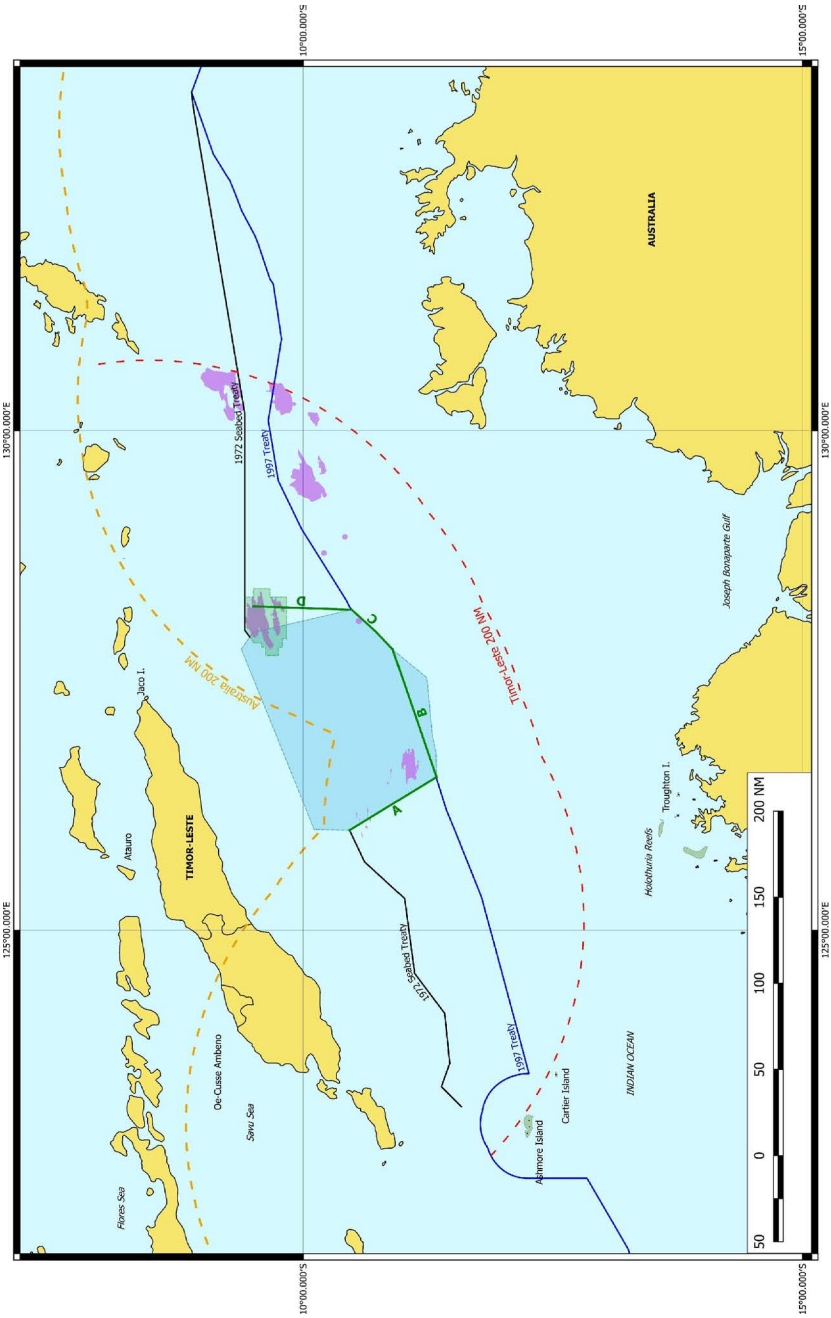
Indicative Description of Line

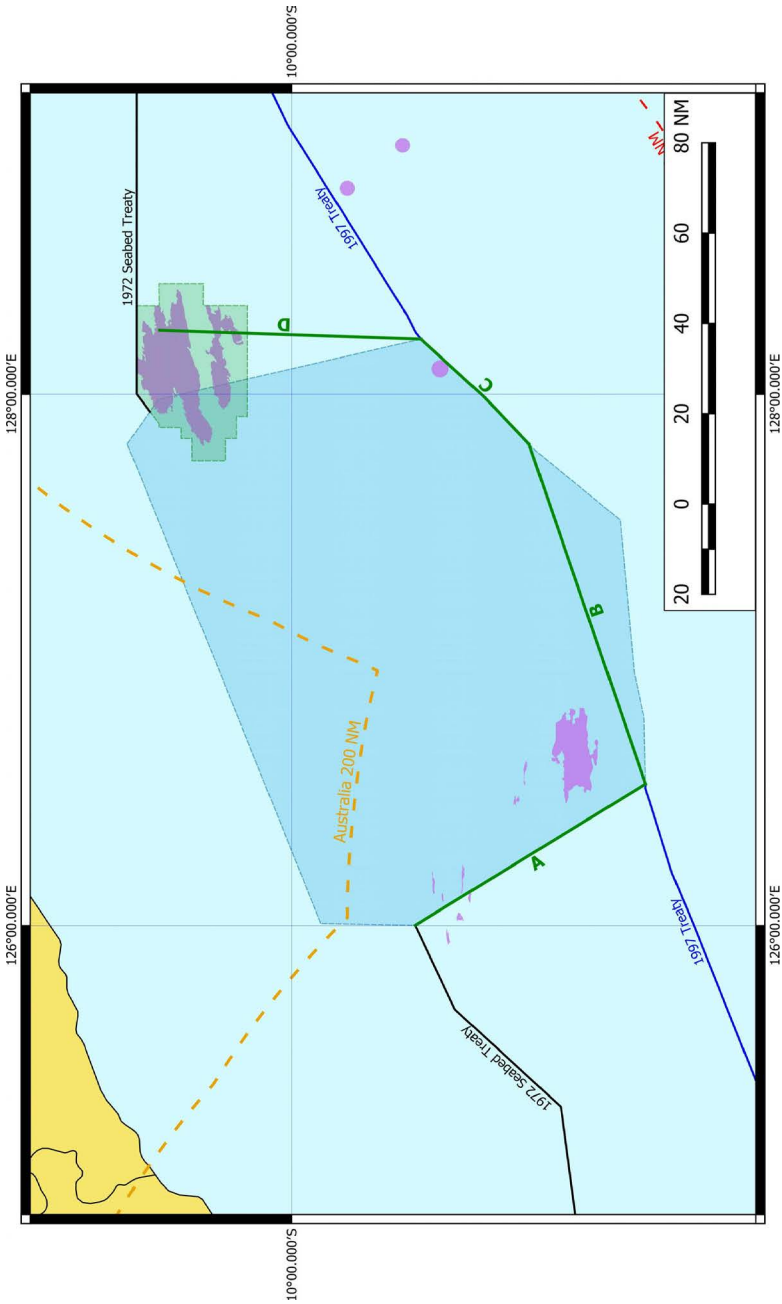
- *Segment A*: a seabed boundary only, running along the western boundary of the current JPDA, from the line of the 1972 Seabed Treaty between Australia and Indonesia until it intersects with the line of the 1997 Perth Treaty between Australia and Indonesia.
- *Segment B*: a single maritime boundary, running to the north-east from the point where the current JPDA boundary intersects with the 1997 Perth Treaty until it intersects with the median/southern boundary of the current JPDA at point 10° 54' 49.1" S; 127° 47' 30.2" E (WGS-84) (corresponding to point ATL-6 on the median line constructed by Timor-Leste).
- *Segment C*: a single maritime boundary, following the median line/southern boundary of the current JPDA from its intersection with Segment B at point 10° 54' 49.1" S; 127° 47' 30.2" E (WGS-84) until it reaches the eastern corner of the current JPDA.
- *Segment D*: a seabed boundary only, running along a geodetic line that has an initial azimuth of 2° 00' 00" from the eastern corner of the current JPDA, stopping at a point 5 nautical miles from the 1972 Seabed Treaty between Australia and Indonesia.
- The end of the line is without prejudice to the direction or extent of the continuation of the line, which will be determined subsequently. The location of the line in Segment D is without prejudice to the sharing of resources within the Greater Sunrise Special Regime.

Greater Sunrise Special Regime to be established as part of a comprehensive agreement

- Shared sovereign rights with respect to natural resources within Greater Sunrise area;
- Agreement on allocation of jurisdiction;
- Management according to best practices;
- Timor-Leste as Regulator/Designated Authority shall exercise all day-to-day regulatory management;
- Joint Commission including neutral third country members; decisions by majority vote, subject to Ministerial Council and binding arbitration (or other dispute resolution);
- Joint fiscal scheme;
- Comprehensive development plan;
- Environmental regulation, response, and liability arrangements;
- Revenue shares to be agreed in the course of the conciliation proceedings;

- Revenue-sharing arrangement, including with respect to tax revenues and downstream benefits, with independent oversight;
- Strategy to take account of Timor-Leste's economic development goals, in particular with regard to industrial development of south coast;

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Annex 20:
Press Releases Nos. 6 to 8

[…]

Annex 21:
Comprehensive Package Agreement of 30 August 2017

Comprehensive Package Agreement

30 August 2017

Western Boundary:

- The western boundary (Segment A1) is a boundary for the continental shelf regime only.
- Segment A1 runs in a southerly direction from point A17 until it reaches the line of the 1997 Treaty between Australia and Indonesia at point TA-1.
- Segment A1 is a provisional boundary until Timor-Leste (*a*) concludes a seabed boundary with Indonesia and (*b*) the existing Coralina and Laminaria fields are decommissioned. Thereafter, the boundary will be adjusted to run as a geodetic line from point TA-1:
  - to any point between points A17 and A18 at which the continental shelf boundary between Timor-Leste and Indonesia meets the 1972 Treaty between Indonesia and Australia; or
  - to point A18, if the boundary between Timor-Leste and Indonesia meets the 1972 Treaty to the west of point A18.

Southern Boundary:

- Segment A2 of the southern boundary is a boundary for the continental shelf regime only.
- Segment A2 follows the line of the 1997 Treaty between Australia and Indonesia until point TA-2.
- Segments B and C of the southern boundary are a comprehensive maritime boundary for both the continental shelf and exclusive economic zone.
- Segment B runs as a geodetic line from point TA-2 until it reaches the median line at point TA-3.
- Segment C follows the median line from point TA-3 to point TA-4.

Eastern Boundary:

- The eastern boundary (Segments D and E) is a boundary for the continental shelf regime only.

- Boundary runs to the east of Greater Sunrise before turning to connect back to point A16:
  - Segment D runs as a geodetic line from point TA-4 to point TA-5.
  - Segment E runs as a geodetic line from point TA-5 to point A16 on the line of the 1972 Treaty between Australia and Indonesia.
- Segment E of the boundary crosses the Greater Sunrise field in a proportion that is roughly congruent with the division of revenue from the resource.
- To the north of point X, Segments D and E are a provisional boundary until (*a*) Timor-Leste concludes a seabed boundary with Indonesia and (*b*) the existing Sunrise and Troubador fields are decommissioned. Thereafter, the boundary will run as a geodetic line from point X to the point at which the continental shelf boundary between Timor-Leste and Indonesia meets the 1972 Treaty between Indonesia and Australia.

Special Regime Elements

- Special Regime area equals the Greater Sunrise unitisation area.
- The treaty would provide that:

"(*a*) Within the Special Regime area, Timor-Leste and Australia jointly exercise their rights as coastal States pursuant to Article 77 of the United Nations Convention on the Law of the Sea.

(*b*) Governance and the exercise of jurisdiction within the Special Regime area are as set out in Annex ## to this Treaty."

- The Parties will agree to a revenue split. The revenue split will depend on the choice of development concept in order to reflect the impact of the downstream elements of the project and the broader economic benefits of the project.
  - Timor LNG: sharing of upstream revenue in the proportion of 70:30 in Timor-Leste's favour, reflecting downstream operations and broader economic benefits.
  - Darwin LNG: sharing of upstream revenue in the proportion of 80:20 in Timor-Leste's favour, reflecting downstream operations and broader economic benefits.
- Joint governance of Special Regime area (details to be elaborated and included in Annex ## to treaty).

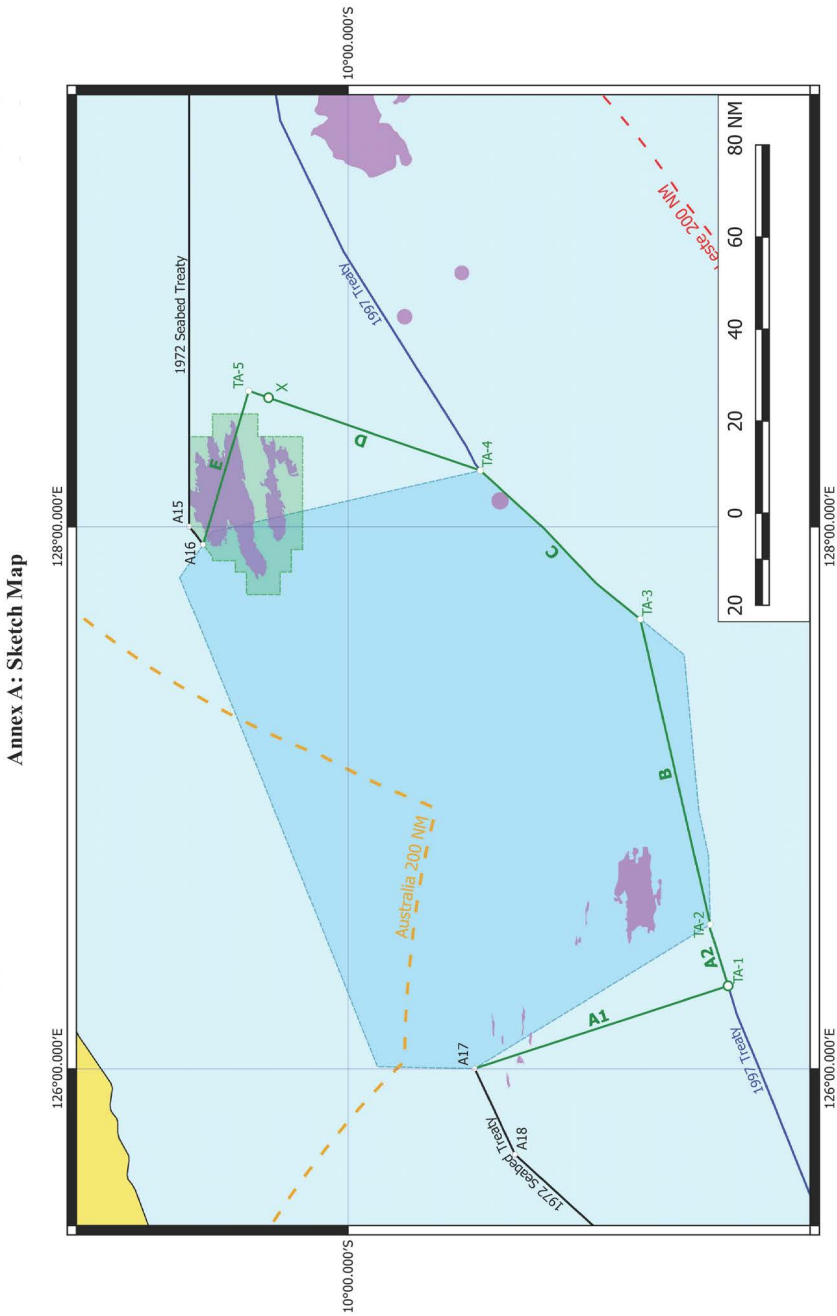
Mechanism for Development Concept

- Treaty to include a mechanism for engaging with the Sunrise Joint Venture and ensuring that a decision is taken with respect to the development concept.
- Details of mechanism are set out in Annex B to this document.

Other Resources

- Timor-Leste would obtain all future upstream revenue from Bayu-Undan, Buffalo, and Kitan fields.
- Governance and regulatory arrangements for currently operating Bayu-Undan and Kitan fields would be "grandfathered" (*i.e.* maintained as is).

- Transition of Buffalo field into Timor-Leste's jurisdiction would be covered by transitional arrangements which guarantee equivalent terms and conditions.
- No compensation for past exploitation.



Annex B: Approach on the Greater Sunrise Development Concept

- Following agreement in principle on the elements of a boundary agreement and Greater Sunrise Special Regime ("GSSR"), Timor-Leste and Australia to begin joint engagement with Joint Venture, with a view to a timely and informed decision on the development concept for Greater Sunrise (the "Development Concept") in accordance with the Criteria and Action Plan set forth below.
- The Development Concept will include:
  - Description of development strategy, consistent with good oilfield practice;
  - Commercial viability assessment;
  - Technical viability assessment;
  - Local content opportunities;
  - Timor-Leste development; and
  - Timor-Leste equity.
- The criteria for the assessment of proposals for the Development Concept (the "Criteria") shall be:
  - the Development Concept is commercially viable, including best commercial advantage;
  - the Development Concept is technically feasible;
  - the Development Concept supports the development objectives and needs of each of Timor-Leste and Australia, while at the same time providing a fair return to the Joint Venture;
  - the Development Concept demonstrates a significant contribution to the sustainable economic development of Timor-Leste, including through clear and measurable local content commitments;
  - the Development Concept is consistent with good oilfield practice;
  - the Joint Venture has, or has access to, the financial and technical competence to carry out the development of the Greater Sunrise field; and
  - the Joint Venture could reasonably be expected to carry out the Development Concept during the specified period.
- The Parties agree to not unreasonably refuse the development plan for the agreed Development Concept.
- The Commission may intervene, at any stage of the Action Plan, to engage on behalf of the Parties with the Joint Venture, or at the request of either Party, to engage with the Parties.
- Following the entry into force of the boundary agreement and GSSR, governance of the GSSR shall transfer to the Designated Authority and Governance Board in accordance with the terms of the GSSR.
- The relationship between the GSSR agreement, the agreement on the Development Concept, and the trilateral agreement with the Joint Venture to be addressed by the Commission in due course.

Action Plan

1. Parties engage with the Joint Venture

The following activities will be commenced immediately following the conclusion of the current meetings with the Commission:

- Parties provide all relevant information to the JV, and to each other, for further and more comprehensive analysis of the TLNG concept, in particular, any Timor-Leste financial contributions/subsidies towards the capital costs of TLNG
- Parties agree to timeline and procedures for delivery of such information and analysis from the JV. Timeline must ensure sufficient time for joint or separate analysis by the Parties
- Detailed request for further and more comprehensive information from the JV (via a letter from the Commission) including engaging in respect of:
  - South Coast development options
  - Local Content obligations
  - Equity participation for Timor-Leste
  - Fiscal arrangements/model for the project
- Regular engagement with the JV to ensure that at the completion of the process the Parties have access to all necessary information and analysis in order to reach an informed decision

2. Joint Venture Responds to the Parties

By 1 November 2017, the following tasks shall have been completed:

- Following JV response to Parties' requests for information and analysis, Parties to meet to consider information and analysis provided by the JV and determine whether any additional information or analysis remains outstanding for DLNG and/or TLNG
- Parties to review (including as necessary with their own independent experts) information and analysis provided by the JV for DLNG and/or TLNG
- Parties report back to the Commission at the October Commission meeting to provide an update on the process and identify any concerns regarding progress and/or information and analysis from the JV, with a view to Commission engagement if any blockage was identified

3. Parties Assess Options and Decide Development Concept

By 15 December 2017, the following tasks shall have been completed:

- Parties undertake assessment of Development Concept on the basis of the Criteria
- Parties agree to the Development Concept

4. Further Procedure

- Following agreement by the Parties on the Development Concept, Parties sign a trilateral agreement with the JV for the Development Concept including, among other things, terms on fiscal regime, the approval of operator, and the security of title
- If the Parties are unable to agree to the Development Concept in accordance with the Criteria ahead of 15 December 2017, the Commission shall engage with the Parties with a view to facilitating agreement on the Development Concept by no later than 1 February 2018

Annex 22: Protocol to meet the Commission's Action Plan of 25 September 2017

Protocol to meet the Commission's Action Plan

Date	*Action*
25 Sept	• Call between Parties and JV to explain Protocol including timing and details for exchange of information in order to meet Action Plan—seek initial response and settle agreed Protocol • On this call, Timor-Leste to run through its motives and plan to be in a position to choose from "two viable options", discuss request for further information on both options and further requests that may follow once industry advisors in place • Discuss timeline in the Commission`s Action Plan and realistic delivery times
25 Sept pm / Tuesday 26 Sept am	Parties and JV (or CP on behalf of JV) working call/meeting to discuss Protocol and add more detail around deliverables and timing
Date to be agreed	Australia to advise Commission whether CMATS is to be terminated by Agreement
Date/location to be agreed	More formal meeting between JV and senior members of both Parties (before and/or after Hague?)
October Commission in The Hague	Update Commission concerning Protocol and steps taken to meet Commission`s Action plan. Parties to agree with Commission what information around the 30 August agreement can be disclosed to JV in order to meet Commission's Action Plan.

Date	*Action*
Immediately Post October Commission	• Parties agree a detailed timeline for meetings and engagement through to the end of the year, data room, teams for communications, begin series of engagement on key information exchange; positions with respect to terms of engagement (if required, noting JV has proposed a HoA and Timor has raised confidentiality/ indemnity points) • Timor-Leste to provide information to JV as agreed with the Commission in October in the Hague • Timor-Leste to have appointed an expert consultant to review, verify and advise it on both options/JV to provide information in form required by expert
October–15 Dec	Series of meetings to discuss and agree on: • common assumptions on some key aspects of both options, such as a common cost basis for DLNG and TLNG, reserve capacity [others?] • Continued, regular engagement with JV to negotiate the terms of each option • Meetings between JV members and DLNG in terms of tolling arrangements • Completion of technical / other studies for each option (to be considered further) • Sign off with JV on final terms of the two options (including high level PSC and commercial terms)—in at least sufficient detail to ensure a comparison can be made in economic terms • Continued engagement with JV to clarify or negotiate changes to TLNG and DLNG options • fiscal and regulatory terms to apply to Greater Sunrise for both TLNG and DLNG • High-level discussions with JV on necessary changes to PSC terms for both TLNG and DLNG [See Action Plan for more detail]
15 Dec [TL has a concern as to whether this timeline is realistic/achievable. TL view is that it will not allow sufficient time to fully analyse TLNG]	Once both options are in a viable state both Parties to make recommendations to relevant leadership for a decision
Post 15 Dec / 1 February	Noted that, as per Action Plan, if Parties are unable to agree the Development concept, Parties to engage with Commission with a view to facilitating agreement on the Development Concept by no later than 1 February 2018

Annex 23:
Exchange of Correspondence between Australia and Timor-Leste on Transitional Arrangements for Bayu-Undan and Kitan of 13 October 2017

13 October 2017

Mr. Hermenegildo Pereira
Deputy Minister to the Prime Minister for the Delimitation of Boundaries
Agent for Timor-Leste

Your Excellency

Exchange of Correspondence on Bayu-Undan and Kitan Transitional Arrangements

I have the honour of referring to recent discussions between officials of the Government of Australia and the Government of Timor-Leste (hereinafter referred to as the Parties) under the auspices of the Conciliation Commission established pursuant to Article 298 and Annex V of the *United Nations Convention of the Law of the Sea* concerning transitional arrangements for the Bayu-Undan Gas Field (subject to PSC JPDA 03–12 and PSC JPDA 03–13) and the Kitan Oil Field (subject to PSC JPDA 06105) in the Timor Sea, forming part of the negotiation of the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* ("the Treaty").

I write to set out the following steps that the Parties have determined will take place expeditiously and be completed prior to the entry into force of the Treaty

The Joint Commission, as established under Article 6(*c*) of the Timor Sea Treaty, will approve:

(*a*) the entry into revised production sharing contracts by the relevant Timor-Leste statutory authority, amended as necessary to take into account the terms of the Treaty, relating to the Bayu-Undan Gas Field and the Kitan Oil Field;

(*b*) the continuation following the entry into force of the Treaty of any approved work programmes, expenditures and regulatory approvals relating to the Bayu-Undan Gas Field and the Kitan Oil Field which are applicable on the date the Treaty enters into force;

(*c*) the Interim Petroleum Mining Code as it applies to the Bayu-Undan Gas Field and the Petroleum Mining Code as it applies to the Kitan Oil Field, and any subsidiary instruments entered into under those Codes, amended as necessary taking into account the terms of the Treaty, for the purposes of incorporation into Timor-Leste's domestic legislation; and

(*d*) the Interim Regulations as they apply to the Bayu-Undan Gas Field and the Kitan Oil Field, and any subsidiary instruments entered into under those Regulations, amended as necessary taking into account the terms of the Treaty, for the purposes of incorporation into Timor-Leste's domestic legislation.

Timor-Leste will incorporate the following regulatory arrangements, as approved by the Joint Commission in accordance with the above, into its domestic legislation:

(i) the Interim Petroleum Mining Code;
(ii) the Petroleum Mining Code: and
(iii) the Interim Regulations,

Timor-Leste will include in its arrangements with the contractors of the Bayu-Undan Gas Field and Kitan Oil Field provisions that provide for:

(*a*) the stability of the regulatory arrangements referred to in the above paragraph: and

(*b*) the continuance of the fiscal regime on conditions equivalent to the fiscal regime in place on the date this arrangement takes effect.

I hope and trust that the preceding accords with Timor-Leste's understanding and look forward to your confirmation that this letter and your reply will constitute an arrangement between the Parties, which will take effect on the date of signature of your reply.

Mr. John Reid,
Agent for Australia

cc: Mr. Francisco da Costa Monteiro, Timor-Leste Joint Commissioner
Mr. Antonio Jose Loyola de Sousa, Timor-Leste Joint Commissioner
Mr. Bruce Wilson, Australian Joint Commissioner
Members of the Conciliation Commission

* * *

13 October 2017

Mr. John Reid
Acting Deputy Secretary
Commonwealth Attorney-General's Department
Agent for Australia

Dear Mr. Reid,

Exchange of Correspondence on Bayu-Undan and Kitan Transitional Arrangements

I refer to your letter of 13 October 2017, the terms of which are set out below.

> I write to set out the following steps that the Parties have determined will take place expeditiously and be completed prior to the entry into force of the Treaty.
>
> The Joint Commission, as established under Article 6(*c*) of the Timor Sea Treaty, will approve:
>
> (*a*) the entry into revised production sharing contracts by the relevant Timor-Leste statutory authority, amended as necessary to take into account the terms of the Treaty, relating to the Bayu-Undan Gas Field and the Kitan Oil Field;
>
> (*b*) the continuation following the entry into force of the Treaty of any approved work programmes, expenditures and regulatory approvals relating to the Bayu-Undan Gas Field and the Kitan Oil Field which are applicable on the date the Treaty enters into force;
>
> (*c*) the Interim Petroleum Mining Code as it applies to the Bayu-Undan Gas Field and the Petroleum Mining Code as it applies to the Kitan Oil Field, and any subsidiary instruments entered into under those Codes, amended as necessary taking into account the terms of the Treaty, for the purposes of incorporation into Timor-Leste's domestic legislation; and
>
> (*d*) the Interim Regulations as they apply to the Bayu-Undan Gas Field and the Kitan Oil Field, and any subsidiary instruments entered into under those Regulations, amended as necessary taking into account the terms of the Treaty, for the purposes of incorporation into Timor-Leste's domestic legislation.
>
> Timor-Leste will incorporate the following regulatory arrangements, as approved by the Joint Commission in accordance with the above, into its domestic legislation:
>
> (i) the Interim Petroleum Mining Code;
>
> (ii) the Petroleum Mining Code; and
>
> (iii) the Interim Regulations,
>
> Timor-Leste will include in its arrangements with the contractors of the Bayu-Undan Gas Field and Kitan Oil Field provisions that provide for:
>
> (*a*) the stability of the regulatory arrangements referred to in the above paragraph and
>
> (*b*) the continuance of the fiscal regime on conditions equivalent to the fiscal regime in place on the date this arrangement takes effect.

I have the honor to confirm that the terms of your letter as set out above are acceptable to the Government of the Democratic Republic of Timor-Leste and that each of the actions detailed in your letter will occur expeditiously and will be completed prior to the entry into force of the Treaty,

I have the further honour to confirm that your letter together with this reply will constitute an arrangement between Timor-Leste and Australia which will take effect on the date of signature of this letter.

Mr. Hermenegildo Pereira
Agent for Timor-Leste

cc: Mr. Francisco da Costa Monteiro, Timor-Leste Joint Commissioner
Mr. Antonio Jose Loyola de Sousa, Timor-Leste Joint Commissioner
Mr. Bruce Wilson, Australian Joint Commissioner
Members of the Conciliation Commission

Annex 24:
Press Releases Nos. 9 to 14

[…]

Annex 25:
Exchange of letters between the Commission and the Parties on the interpretation of treaty provisions relating to the fiscal regime for Greater Sunrise

His Excellency Hermenegildo Pereira
Ministro-Adjunto do Primeiro-Ministro para a
Delimitação das Fronteiras

Mr. John Reid
First Assistant Secretary
Office of International Law
Attorney-General's Department

Ms. Elizabeth Exposto
Conselho para a Delimitação Definitiva das
Fronteiras Marítimas
Gabinete das Fronteiras Marítimas

Mr. James Larsen
Senior Legal Adviser Department of Foreign Affairs and Trade

16 December 2017

AG 217386

RE: PCA Case Nº 2016–10: Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the

Commonwealth of Australia Pursuant to Article 298 and Annex V of the UN Convention on the Law of the Sea

Dear Mesdames, dear Sirs, Following the Parties' exchanges this week regarding the fiscal scheme for Greater Sunrise, the Commission does not believe that there is any dispute between the Parties as to the interpretation of the draft Treaty's provisions in this respect. Nevertheless, the Commission considers that it would be useful to confirm the Parties' shared understanding in order to avoid any possible future misunderstandings in the course of implementing transitional arrangements going forward.

As the Parties are well aware, Article 7 of the Treaty establishes a Greater Sunrise Special Regime under which the Parties jointly exercise their rights as coastal States pursuant to Article 77 of the Convention and do not individually exercise such rights until the Greater Sunrise Special Regime ceases to be in force. Title to the resource is not apportioned. The Treaty only apportions the upstream revenue derived directly from the upstream exploitation of Petroleum produced in the Greater Sunrise Fields, which comprises first tranche petroleum, profit petroleum and taxation. This is without prejudice to any arrangements agreed to by the Parties under PSCs for the Greater Sunrise area.

In light of this, it is necessary to define how this affects the "fiscal regime as agreed between the Parties and the Greater Sunrise Contractor" under Article 3(2) of Annex B of the draft Treaty. In the Commission's view, the "fiscal regime as agreed between the Parties and the Greater Sunrise Contractor" addressed in Article 3(2) of Annex B of the draft treaty means a fiscal regime that will:

1. provide "conditions equivalent" to those under the TST (pursuant to Article 22) and "terms equivalent" to those under the IUA (pursuant to Article 27(3)) to the Greater Sunrise Contractor, and
2. ensure that the upstream revenue can be divided between the Parties in the ratios agreed in Article 2(2) of Annex B.

Further, the Commission understands that the Parties are agreed that "conditions/terms equivalent" does not guarantee the Greater Sunrise Contractor terms and conditions that are identical to those in place under the TST/IUA. In the context of Article 3 of Annex B, it does not guarantee identical fiscal terms as those that applied to Petroleum Activities entered into under the TST/IUA. The overall effect of providing conditions/terms equivalent is to ensure that Petroleum Activities entered into under the terms of the TST/IUA continue under conditions which ensure the Greater Sunrise Contractor is in no worse commercial position than under those agreements.

The Commission trusts that the preceding accords with the Parties' own understanding. For the sake of certainty and good order, the Commission would however ask that each Party confirm the above in writing at their earliest convenience.

Yours sincerely,

Garth Schofield

Senior Legal Counsel

cc:
Conciliation Commission:
Ambassador Peter Taksøe-Jensen
Judge Abdul Koroma
Judge Rudiger Wolfrum
Dr. Rosalie Balkin
Professor Donald McRae

Counsel and Legal Representatives of Timor-Leste:
Professor Vaughan Lowe QC
Sir Michael Wood KCMG
Mr. Eran Sthoeger
Ms. Janet Legrand
Mr. Stephen Webb
Ms. Gitanjali Bajaj

Representatives and Counsel for Australia:
Mr. Gary Quinlan AO
Sir Daniel Bethlehem KCMG QC

* * *

Subject: RE: PCA Case Nº 2016–10: Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of the UN Convention on the Law of the Sea

Date: 19 December 2017 01:25:14

Dear Martin and Garth,

I refer to your letter of 16 December 2017, indicating that the Commission considered that it would be useful to confirm the Parties' shared understanding as to the interpretation of the draft Treaty's provisions regarding the fiscal scheme for Greater Sunrise.

I am happy to confirm that what is set out in your letter accords with Timor-Leste's understanding.

Kind regards,

Elizabeth Exposto
Diretora Executiva / Chief Executive Officer

* * *

Subject: PCA Case Nº 2016–10: Conciliation Proceedings between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of the UN Convention on the Law of the Sea

Dear Mesdames, dear Sirs,

Please see the attached correspondence.

Yours sincerely,

Martin Doe
Senior Legal Counsel / Conseiller juridique senior
Permanent Court of Arbitration / Cour permanente d'arbitrage

* * *

9 January 2018

Mr. Garth Schofield
Senior Legal Counsel
Permanent Court of Arbitration

Dear Mr. Schofield

Conciliation Proceedings under Article 298 and Annex V of UNCLOS (PCA Case No. 2016 10) Democratic Republic Timor-Leste and Commonwealth of Australia

Thank you for your letter of 16 December 2017 regarding the interpretation of the draft Treaty's provisions on the Greater Sunrise Special Regime and its fiscal scheme.

I am pleased to confirm your letter accords with Australia's understanding of these provisions.

We note the Deputy Agent for Timor-Leste's confirmation, by email to the Permanent Court of Arbitration on 19 December 2017, that what is set out in the Commission's letter also accords with Timor-Leste's understanding.

We appreciate the opportunity to clarify the Parties' agreement as to the interpretation of these provisions.

Yours sincerely,

James Larsen
Co-Agent for Australia

Annex 26:
Supplemental Action Plan of 23 December 2017

Supplemental Action Plan for the Greater Sunrise Development Concept

23 December 2017

On 30 August 2017 in Copenhagen, the Parties reached agreement on a Comprehensive Package Agreement in respect of the maritime boundary between them in the Timor Sea, a special regime for the governance of the Sunrise and Troubadour gas fields and an Action Plan for engagement with the Greater Sunrise Joint Venture regarding the development of the resource.

Pursuant to the Action Plan, the Parties agreed to engage with the Joint Venture in order to assess the development concepts for Greater Sunrise against the criteria agreed in the 30 August Agreement and to take a decision on the development concept by 15 December 2017. As a fall back, the Action Plan provided that "[i]f the Parties are unable to agree to the Development Concept in accordance with the Criteria ahead of 15 December 2017, the Commission shall engage with the Parties with a view to facilitating agreement on the Development Concept by no later than 1 February 2018."

Following consultations with the Commission in Singapore, both Parties have concluded that it is not realistic, on the information before them, for the two governments to take a decision on the development concept for Greater Sunrise by 15 December 2017. Both Parties have, however, reaffirmed to the Commission their wish to consider the development concept for Greater Sunrise in the context of the present conciliation proceedings and to take a decision between a D-LNG concept and a T-LNG concept on the basis of information sufficient to permit an appropriate comparison and evaluation of the two concepts.

Pursuant to the fall-back provisions of the Action Plan of the 30 August Agreement, the Commission intends to engage directly with the Parties and with the Joint Venture to ensure that the necessary information to permit an appropriate comparison and evaluation of the D-LNG and T-LNG concepts is available to the Parties and to assist the Parties in taking a decision on the development concept for Greater Sunrise. As part of this engagement, the Commission has adopted the schedule set out in Annex A to this Supplemental Action Plan. The Commission further invokes Article 10(2) of its Rules of Procedure and requests the Parties' good faith cooperation in the timely provision of the information and materials set out in Annex B to this Supplemental Action Plan. The Commission will also retain an independent expert to assist it with neutral advice regarding the technical and economic data and materials provided by the Parties and by the Joint Venture.

Having consulted with ConocoPhillips, the Commission is satisfied that there is a realistic prospect that the window of availability for a D-LNG concept will remain open until 1 March 2018 (especially if Woodside/Shell/Osaka Gas make an approach to Darwin LNG prior to 15 January 2018) , however the Commission also acknowledges that Darwin LNG is currently engaged in discussions with other projects and may enter into an agreement committing capacity to another project prior to 1 March 2018. The Commission and the Parties have accordingly agreed to extend the deadline for a decision on the development concept until 1 March 2018.

Annex A: Schedule for Engagement Regarding the Greater Sunrise Development Concept

Date	*Action*
By 23 December 2017	Commission to adopt the Terms of Reference for its expert adviser
By 29 December 2017	Commission to conclude any supplemental confidentiality agreement necessary for access to the Joint Venture data room
By 29 December 2017	Timor-Leste and Joint Venture to provide Commission with access to their respective data rooms
By 5 January 2018	Commission to notify the Parties and the Joint Venture of the identity of the proposed expert adviser
By 6 January 2018	Parties and the Joint Venture to provide any comments they may have on the identity of the proposed expert adviser
By 15 January 2018	Parties and the Joint Venture to provide all information and materials requested in Annex B to this Action Plan
16 January 2018	Commission to confirm that all information and materials requested pursuant to this Action Plan have been provided
22 January 2018	Parties and the Joint Venture each to provide the Commission with a written submission setting out its views regarding the T-LNG and D-LNG development concepts and the information and materials provided

Date	*Action*
29 January to 2 February 2018	Commission, Parties, and Joint Venture to meet in a location to be confirmed in order to analyse the information provided by the Parties and the Joint Venture, and assess the sufficiency and adequacy of that information in order for the Parties to take a decision on the selection of a development concept; review Parties' comments on the Framework Agreement and discussion of the process for concluding a Framework Agreement for D-LNG and for T-LNG
By 9 February 2018	Parties and the Joint Venture to provide any additional information and materials identified as necessary by the Commission
14 February 2018	Parties and the Joint Venture each to provide the Commission with a written submission setting out its views regarding the T-LNG and D-LNG development concepts and the information and materials provided
19–23 February 2018	Commission, Parties, and Joint Venture to meet in a location to be confirmed in order to analyse the information provided by the Parties and the Joint Venture, and in order for the Parties to make a decision on the selection of a development concept; discussion leading to the completion of Framework Agreements for D-LNG and for T-LNG
1 March 2018	Latest date for decision on the development concept for Greater Sunrise
1–16 March 2018	Timeframe for signature of Treaty in New York, NY
16 March 2018	Commission to transmit its Report to the Parties in draft
5 April 2018	Parties to provide any comments on the draft Report
19 April 2018	Having considered the Parties' comments, Commission to transmit its final Report to the Parties and the UN Secretary-General

Annex B: Requests for Information and Materials Regarding the Greater Sunrise Development Concept

Having consulted with the Parties and with the Greater Sunrise Joint Venture, the Commission has determined that the following information and

materials are integral to the assessment and comparison of the D-LNG and T-LNG development concepts. The Commission requests that the Parties and Joint Venture provide the following information by 15 January 2018, in accordance with the schedule annexed to this Action Plan.

Information and Materials in Respect of the D-LNG Concept

The Joint Venture is requested to make a specific offer of equity participation by Timor-Leste in the Greater Sunrise Joint Venture and the Darwin Joint Venture, including details of the conditions attached to the acquisition and holding of such equity, and any option to acquire further equity at cost;

The Joint Venture is requested to confirm that spending in respect of local content activities would be exempted from the cost recovery provisions of the production sharing contract;

The Joint Venture is requested to commit to an overall level of spending on local content activities to be agreed as part of the Heads of Agreement, as well as an indicative plan and timeframe for such spending along the different project phases (to be refined in the course of the elaboration of the development plan), including at least the following items:

- a domestic gas pipeline or regasification plant;
- a contribution to the development of supporting infrastructure for the development of petroleum activities in the South Coast, including in particular the Suai supply base/port project;
- a fibre optic broadband link; and
- a commitment to establishing a business development center, which will act as an employment and business gateway that promotes opportunities for enabling local capabilities to supply goods and services for petroleum operations, though training, financing, and other support;
- a commitment to establishing a comprehensive training plan, a Technical College, and targets for employment of Timorese nationals throughout the lifetime of the project;
- a commitment to establish operational offices in Timor-Leste, run logistics for Greater Sunrise from Timor-Leste, and generally source through Timor-Leste suppliers;

The Joint Venture and Timor-Leste are requested to provide a full copy of their economic models for D-LNG;

Australia is requested to provide the latest audit of Darwin Plant.

Woodside/Shell/Osaka Gas are requested to approach the Darwin Joint Venture on behalf of the Greater Sunrise Joint Venture in order to (*a*) commence exchanges of technical information, including in respect of the physical condition and reliability of the Darwin plant and (*b*) narrow the current estimated range for the tolling fee and clarify whether that fee would be all-in including OPEX or excluding OPEX.

Woodside/Shell/Osaka Gas are requested to elaborate on the basis for the Joint Venture's views on the condition of the Darwin plant and existing pipeline.

The Joint Venture is requested to provide technical definition and justification for the selection of FPSO Upstream Concept and how this concept compares with a fixed platform concept.

Information and Materials in Respect of the T-LNG Concept

Timor-Leste is requested to provide a specific proposal for how it would arrange sustainable financing for additional costs involved in the downstream elements of a T-LNG approach;

The Joint Venture is requested to indicate the conditions under which it would and would not agree to proceed with a T-LNG approach supported by additional financing, including an indication of specific concerns about sustainability and corresponding local content and equity offers under a T-LNG scenario;

Timor-Leste and the Joint Venture are requested to provide a full copy of their economic models for T-LNG;

The Joint Venture is invited to indicate its views on conditions under which it could or could not offer equity participation by Timor-Leste in the Greater Sunrise Joint Venture in the context of a T-LNG concept, including details on the conditions attached to the acquisition and holding of such equity, and any option to acquire equity at cost;

The Joint Venture is invited to indicate its views on conditions under which it would or would not be interested in equity participation in a T-LNG Joint Venture;

Timor-Leste is requested to provide details on its proposal for the construction of the T-LNG downstream facilities including scheduling and start date;

Timor-Leste is requested to provide details on potential operators of the T-LNG downstream facilities and engagement to date;

Timor-Leste is requested to provide details regarding its pipeline construction cost estimates;

Timor-Leste and Joint Venture are requested to provide a written clarification of the basis for their respective assumptions and estimates in respect of the following items, including references to any relevant documentation in data rooms:

- Size of recoverable reserves;
- Owners cost percentage;
- Facilities contingency percentage;
- T-LNG production tariff (all-in including OPEX, and excluding OPEX);
- T-LNG and D-LNG production profile (including reasonable potential downtime of facilities); and
- Condensate production rate.

Annex 27: Commission Paper on the Comparative Benefits of Timor LNG and Darwin LNG & Condensed Comparative Analysis of Alternative Development Concepts

Commission Paper on the Comparative Benefits of Timor-LNG and Darwin-LNG

The present Paper is intended to set out an objective comparison of the benefits of the development options available for the Greater Sunrise field based on the information available to the Commission as of 22 February 2018.

The Commission recalls that, as part of the 30 August Agreement the governments of Timor-Leste and Australia agreed to criteria for the assessment of proposals for the development concept. In the Commission's view, the differences between the two governments and the Joint Venture in assessing the two concepts relate principally to:

> (*a*) whether both concepts will "support[] the development objectives and needs of each of Timor-Leste and Australia" and make "a significant contribution to the sustainable economic development of Timor-Leste"; and
>
> (*b*) whether both concepts are "commercially viable, including best commercial advantage".

From the perspective of the sovereign decision of how to develop the resource, however, these criteria are inter-related. Development considerations bear on the benefits that the two governments—and, in particular, Timor-Leste—will derive from the resource. Development benefits, however, can only be realized if an approach to developing the resource is designed that is commercially viable.

The Commission does not wish to make a recommendation to the Parties regarding the development of Greater Sunrise, but considers that the Parties' decision-making would benefit from a neutral comparison of the two concepts in terms of the above metrics. A concise comparison of the two concepts is also set out in the chart included with this Paper as an Annex.

A. Development Benefits of the Timor-LNG and Darwin-LNG Concepts

1. Timor-LNG

The principal development benefits of a Timor LNG concept would follow from the construction and operation of an LNG plant and associated marine facilities at Beaço on the south coast of Timor-Leste. As the Commission understands it, these benefits include the following:

(*a*) the return on investment for capital committed to the construction of the LNG plant;

(*b*) the economic multiplier effects of oil and gas activity in Timor-Leste;

(*c*) the employment of Timorese nationals and the procurement of local materials and supplies during the construction of the plant;

(*d*) the employment of Timorese nationals in the operation of the LNG plant, marine facilities, and onshore liquids process facilities with estimated annual operating expenditures of US$280,000,000;

(*e*) savings of at least US$25,000,000 per year from the reduced cost of power generation as a result of converting Timor-Leste's power stations from diesel to gas;

(*f*) the development in Timor-Leste of expertise in LNG operations to facilitate the future development of other gas fields;

(*g*) the construction in Timor-Leste of infrastructure, such as the marine facilities and the LNG plant itself, that can facilitate the future development of other gas fields.

The Commission notes that Timor-Leste has repeatedly emphasized that it is more concerned with the development of human capital and long-term economic activity, rather than immediate revenue, and is cognizant of the value of such an approach.

The Commission also notes that, in the event a Timor LNG concept were realized, other elements of the project, such as offshore operations and supply, could well be managed and operated from Timor-Leste, provided that the Joint Venture has agreed to a specific approach to upstream operations. However, the Commission does not consider that such operations can be considered a development benefit of Timor-LNG until the Joint Venture has agreed to a specific approach to upstream operations.

Finally, the Commission notes that a number of consultant reports have endeavoured to quantify the broader economic benefits to Timor-Leste of Timor-LNG or the benefits to Australia of LNG operations in Darwin. The Commission recalls that earlier in these proceedings both governments agreed that such economic effects are difficult to quantify with precision. This continues to be the case.

2. Darwin-LNG with operations from Timor-Leste

The Commission recalls that the governments of Timor-Leste and Australia have already agreed that the revenue sharing arrangements under the Australia-Timor-Leste Maritime Boundaries Treaty will compensate for the broader economic benefits of processing the gas from Greater Sunrise in either Timor-Leste or Australia by allocating to Timor-Leste an additional 10 percent of the government revenue from the field, in addition to the 70 percent to which Timor-Leste would be entitled under either concept. The Commission

estimates that this 10 percent will amount to between US$3,134,000,000 and US$3,539,000,000 in additional revenue to Timor-Leste over the life of the project that would be available for infrastructure and industrial development initiatives on the South Coast (and effectively matches the total capital investment that Timor-Leste has estimated for the entirety of the Tasi Mane Project, other than the LNG plant itself).

In addition, development benefits of a Darwin-LNG concept would follow from the conduct of offshore operations and supply for the Greater Sunrise fields from Timor-Leste and from the industrial development options available to Timor-Leste with the additional capital made available under this concept. As the Commission understands it, these benefits would be as follows.

First, given that the Darwin-LNG concept leverages existing infrastructure in Australia, the Joint Venture has committed to:

> (*a*) locating offshore, management, and support operations for the Greater Sunrise Project in Timor-Leste;
>
> (*b*) funding for a domestic gas pipeline to Timor-Leste which could be used for power generation, industrial development, and petrochemicals, for the benefit of the Timorese people.

In conjunction with the above, the Joint Venture has made a number of specific commitments with respect to equity participation by Timor-Leste in the project, employment, and supply sourcing, as well as other local content commitments and support for the development of the petroleum sector in Timor-Leste. The benefits to Timor-Leste would be as follows:

> (*a*) an offer of 3% free equity and up to 6% additional equity purchased on commercial terms for Timor Gap in the Greater Sunrise Joint Venture and an offer of 0.9% free equity and up to 1.8% additional equity purchased on commercial terms in the Darwin-LNG Joint Venture in order to provide Timor-Leste with a direct interest in all aspects of the project;
>
> (*b*) participation by Timor Gap, as a result of its equity share in the Great Sunrise Joint Venture, in the design, construction, management, and operations of the Greater Sunrise Project;
>
> (*c*) the employment of Timorese nationals in the offshore, management, and support operations for the Greater Sunrise project, which would be run from Timor-Leste with estimated annual operating expenditures of US$282,000,000;
>
> (*d*) the establishment of a fabrication and manufacturing facility in Timor-Leste with estimated annual revenues of US$6,000,000, as well as the employment in the facility of Timorese nationals;
>
> (*e*) a commitment to maximize Timorese sources of supply to the Greater Sunrise project;

(*f*) a commitment to prioritize Timorese training and employment in all aspects of the Greater Sunrise project (including career development opportunities in the Darwin LNG facility);

(*g*) a commitment of US$2,500,000 per year during front end engineering design, US$10,000,000 per year during the first five years after a final investment decision, and US$5,000,000 per year for the 10 years thereafter, to be used for:

i. a business development centre focused on enabling Timorese companies to meet the supply needs of the project;
ii. technical education in Timor-Leste, either through the establishment of a new institution or through the expansion and support of existing educational institutions in Timor-Leste;

(*h*) a commitment of US$200,000,000 in additional capital investment to enable the construction of a domestic gas pipeline to Timor-Leste, along with a commitment to supply gas to Timor-Leste for domestic power generation and other activities at the gas transfer price for up to 50M cu ft per day;

(*i*) a stream of condensate of up to 10% of production at market value;

(*j*) savings of at least US$25,000,000 per year from the reduced cost of power generation as a result of converting Timor-Leste's power stations from diesel to gas;

(*k*) a commitment of US$50,000,000 in additional capital investment to the Suai supply base and marine facilities;

(*l*) the development in Timor-Leste of expertise in offshore petroleum operations, management, logistics, and manufacturing to facilitate the future development of other oil and gas fields, including the potential development of a future Timor-LNG facility;

(*m*) the construction in Timor-Leste of infrastructure, such as marine facilities and fabrication, that can facilitate the future development of other oil and gas fields, including the potential development of a future Timor-LNG facility;

(*n*) the economic multiplier effects across the Timor-Leste economy of the foregoing activity in Timor-Leste;

The Joint Venture has further committed that investment in respect of the above commitments will be exempted from the uplift provisions of the production sharing contracts and that the commitment of US$50,000,000 to the Suai supply base and marine facilities will be treated as non-cost recoverable. Pursuant to requirements of the Treaty, the Joint Venture's development plan will be required to establish "clear, measurable, binding and enforceable local content commitments" in respect of employment and the development of the Timorese workforce, procurement and the development of Timorese suppliers, and Timorese commercial and industrial capacity. The Treaty also requires the development plan to include mechanisms to ensure that such commitments are implemented in practice.

In addition to the commitments made by the Joint Venture, the government of Australia has made a commitment of US$100,000,000 toward the capital investment in relation to the domestic gas pipeline to Timor-Leste. Australia has also offered certain additional commitments to support the development of the Timorese petroleum sector and the use of the south coast of Timor-Leste as a petroleum hub for the Timor Sea and surrounding areas. These benefits include:

> (*a*) a commitment to facilitate access by Timor-Leste employees, vessels and aircraft, goods and services to the Greater Sunrise Area, the Darwin LNG Plant, and other oilfields in the Timor Sea in order to facilitate the development of Timor-Leste as a regional petroleum hub;
>
> (*b*) a commitment to implement a dedicated visa and labour scheme to provide Timor-Leste citizens access to employment in the onshore petroleum sector in the Northern Territory of Australia in order enable the Joint Venture to meet its commitments regarding Timorese training and employment and to build experience and capacity for the future development of a Timor LNG facility; and
>
> (*c*) a commitment to provide US$4,000,000 in funding for engineering and technical education in Timor-Leste with a particular focus on the development of the Timorese petroleum sector.

Finally, the development benefits of Darwin-LNG should be considered to include the infrastructure and industrial development initiatives that could be undertaken with the investment capital that Timor-Leste would need to commit to the construction of an LNG plant in a Timor-LNG scenario. As set out below, it is estimated that this would involve a direct subsidy of approximately US$5,600,000,000 that would be available for other development investment if not used for Timor-LNG.

B. Certainty of Development Benefits under the Timor-LNG and Darwin-LNG Concepts

As noted at the outset, the Commission takes no view regarding which concept would offer greater development benefits to either Timor-Leste or Australia. The Commission does, however, consider that the benefits of developing Greater Sunrise will only be realized if the field is in fact developed. This consideration goes to the question of the commercial viability of the project.

In the Commission's engagement with the Joint Venture and the Parties, Timor-Leste has maintained that both Timor-LNG and Darwin-LNG are commercially viable. On the other hand, the Joint Venture have consistently held the view that only Darwin-LNG is commercially viable. Both Timor-Leste and the Joint Venture have provided the Commission with detailed economic models that produce diametrically opposite results. The Commission has not been able to accept either conclusion without independent confirmation and considers that a neutral assessment of both concepts is beneficial to the governments' decision-making.

As set out in detail in the Commission's Condensed Comparative Analysis of Alternative Development Concepts, the Commission considers the following assessment to be reasonable on the basis of neutral economic modelling:

(*a*) Timor-Leste and the Joint Venture have analysed a Timor-LNG concept both as an integrated project (*i.e.*, with both upstream and downstream returns combined) and on a tolling basis (*i.e.*, with a fee paid to the downstream plant for LNG processing). A Darwin-LNG concept would only be on a tolling basis.

(*b*) As an integrated project, the Commission anticipates that, under currently expected market conditions, Timor-LNG would generate a return in the order of 7.0% on a capital investment of US$15,621,000,000. This would not be sufficient to meet the industry standard for investment by an international oil company.

(*c*) As a tolling project, the upstream concept for Greater Sunrise (as envisaged either by Timor-Leste or the Joint Venture) has a fairly high cost of production and, under currently anticipated market conditions, is limited in the tolling fee that it could pay for LNG processing while remaining economically viable. At a tolling fee of US$2.00 per MMBtu or lower, the return on the upstream project would fall within industry investment levels. However, should the tolling fee be higher than US$2.50 per MMBtu, the return on the upstream project would fall below industry investment levels and the Commission does not anticipate that either concept would be investable for the members of the Joint Venture or other private sector actors.

(*d*) The range of tolling fees currently under negotiation with Darwin-LNG are below US$2.00 per MMBtu, and would thus fall within the range in which the upstream concept would be economically viable.

(*e*) Due to the need to construct a new LNG plant at Beaço in Timor-Leste, a Timor-LNG plant would require a higher tolling fee to generate an adequate rate of return. After adjusting costs estimates, the Commission estimates that, with a toll of US$2.00 per MMBtu, Timor-LNG would have a negative return of minus 4% on a capital investment of US$7,142,000,000.

(*f*) In order to match the target return of the Timor-Leste Petroleum Fund of 4%, it is estimated that Timor-LNG would need to charge a tolling fee of at least US$3.50. In order to achieve a return of 7% to permit debt financing or the equity participation of an experienced operator, the Commission anticipates that the Timor-LNG would need to charge a tolling fee of at least US$4.50. Both scenarios exceed the level that the upstream concept could reasonably be expected to bear.

Based on this assessment, the Commission considers that the challenge for Timor-LNG would be to achieve an acceptable rate of return on the downstream project without exceeding the tolling fee that the upstream concept could actually bear. The Commission considers that this could be done, but

only with a direct subsidy of Timor-LNG by the government of Timor-Leste or another funder. The Commission estimates that a direct subsidy of the project's capital expenditure on the order of US$5,600,000,000 would be required in order to render the remainder of the downstream project financeable through equity or debt.

In the Commission's view, these elements should be borne in mind in the consideration by Timor-Leste and Australia of the development benefits of the two concepts.

* * *

Annex: Comparative Estimation for T-LNG and D-LNG

	Timor-LNG Case	*Darwin-LNG Case (with operations from Timor-Leste)*
Investment Required		
Investment by Timor-Leste	Timor-Leste required to finance or arrange capital financing of US$7,142,000,000	US$0
Estimated return on investment	Negative 4% return on 100% TL equity (Direct subsidy of US$5.6 billion necessary to secure debt finance or operator equity)	2.7% equity in Darwin LNG (0.9% free) 9% equity in Sunrise JV (3% free)
Development Benefits		
Location of LNG Plant	Beaço, Timor-Leste	Darwin, Australia
Pipeline	LNG pipeline to Beaço, Timor-Leste	Domestic gas pipeline to Timor-Leste; LNG pipeline to Darwin
Additional revenue to Timor-Leste pursuant to Treaty	US$0	10% of government take (approx. US$3.134 to US$3.539 billion) available for development investment
Downstream operations	In Timor-Leste (estimated US$280,000,000 in OPEX per year)	In Australia

	Timor-LNG Case	*Darwin-LNG Case (with operations from Timor-Leste)*
Offshore operations and logistics support		Operated from Timor-Leste (estimated US$282,000,000 in OPEX per year)
Fabrication		Fabrication facility in Timor-Leste (approximately US$6,000,000 per year)
Sourcing of supplies		Commitment to prioritize Timorese supply, plus up to US$10,000,000 per year to support business development in Timor-Leste
Employment and training		Commitment to prioritize Timorese employment, plus up to US$10,000,000 per year for training and technical education in Timor-Leste
Support for Timor-Leste Petroleum Industry (JV)		US$200,000,000 for domestic gas pipeline; US$50,000,000 for Suai supply base
Gas and condensate stream		50M cu ft per day gas at gas transfer price; 10% of condensate at market value
Support for Timor-Leste Petroleum Industry (Australia)		US$100,000,000 for domestic gas pipeline; and commitment to facilitate use of Timor-Leste facilities to supply Australian offshore fields, and facilitate Timorese employment in Darwin
Certainty of Implementation		
Assessment of commercial viability	Considered commercially viable by Timor-Leste only	Considered commercially viable by all parties
Estimated project return (IRR) Integrated Project	7.0%	N/A (Darwin facility would charge a tolling fee)

	Timor-LNG Case	*Darwin-LNG Case (with operations from Timor-Leste)*
Segmented Project (Upstream) Estimated return (IRR)	11.82% at US$4.00 tolling fee 13.18% at US$3.00 tolling fee 14.44% at US$2.00 tolling fee	14.52% at US$3.00 tolling fee 16.08% at US$2.00 tolling fee 17.27% at US$1.20 tolling fee
Segmented Project (Upstream) Maximum viable tolling fee	Below US$2.00 per MMbtu to achieve 15% IRR	US$2.50 per MMbtu to achieve 15% IRR
Segmented Project (Downstream) Estimated return (IRR)	4.51% at US$4.00 tolling fee 2.69% at US$3.00 tolling fee negative 4% at US$2.00 tolling fee	N/A (Darwin-LNG would handle downstream)
Segmented Project (Downstream) Minimum viable tolling fee	US$3.57 toll to achieve 4% IRR (govt equity) US$4.51 toll to achieve 7% IRR (debt finance)	N/A (Darwin-LNG would handle downstream)

Condensed Comparative Analysis of Alternative Development Concepts

Pursuant to the Supplemental Action Plan agreed with the Parties in December 2017, the Commission has retained the assistance of an expert in oil and gas development planning to undertake a comparative analysis of the alternative development concepts proposed by Timor Gap and the Greater Sunrise Joint Venture based on neutral economic modelling. This document is intended to set out a condensed account of that comparative analysis.

A. Introduction

This analysis examines the subsurface (reservoir) assumptions, development plans, costs estimates and commercial potential of the respective alternative development concepts for the Greater Sunrise field prepared by Timor Gap and the Greater Sunrise Joint Venture ("SJV"). These alternatives are Timor Gap's concept for the development of the field by way of a fixed platform and multiples pipelines to a new LNG plant in Timor-Leste (also known as Timor-LNG) and the SJV's concept for the development of the field by way of a Floating Production Storage and Offloading ("FPSO") unit with a pipeline to tie in to the Bayu Undan pipeline to the existing LNG plant at Wickham Point in Darwin, Australia.

The key technical drivers of the differences between the concepts are the resource volumes assumed and the relative technical risk of the upstream

development concepts. The key commercial issue is the comparative economics of the two concepts, the requirement to invest in the construction of a new LNG plant in Timor Gap's concept, and the tolling fee that such new plant would need to receive to be commercially viable.

B. Subsurface (Reservoir) Assessment and Production Forecasts

As part of their respective concepts, Timor Gap and the SJV have each independently undertaken technical evaluations of the gas initially in place in the Greater Sunrise reservoir and reached similar mid-case estimates. Both Timor Gap and the SJV have also identified field segmentation (discontinuities in the reservoir that reduce the area drained by each well) and the influx of water, which reduces the proportion of gas recovered, as key issues in the development of the field.

Both Timor Gap and the SJV have presented a range of potential recovery factors for gas from the Greater Sunrise field. The SJV's economic model appears to be based on a 53% recovery factor (*i.e.*, an estimate that 53% of the gas initially in place could be recovered). Timor Gap appears to estimate a higher 75% recovery factor, based on continued low-level production for domestic gas after the end of LNG production. Without this tail production, Timor Gap's recovery factor appears to be 61%. The variance in recovery factor between 53% and 61% is within expected estimated range, given the data available and prior to production from the field. Subsequent economic analysis is considered for both a 60% and 50% recovery factor. The tail domestic gas production anticipated by Timor Gap has no significant effect on the economics of the two concepts and is not considered further.

In the SJV concept, should a higher recovery factor of 60% be achieved, production could be extended by about 6 years as more gas would be recovered. In the Timor Gap concept, a lower recovery factor of 50% would reduce the production period by approximately 5 years.

C. Timor Gap Upstream Concept

The Timor Gap upstream concept envisages a fixed platform offshore with twin gas pipelines to shore in Timor-Leste with two additional pipelines to Timor-Leste for liquids and for the return of regenerated mono ethylene glycol ("MEG"). Condensate processing and MEG regeneration takes place on shore in Timor-Leste.

The concept is technically feasible. However, the requirement for onshore condensate processing and the use of multiple pipelines across the Timor Trough increases the comparative risk of pipeline damage due to localised failure of the Timor slope and hence potentially decreases the reliability and

operability of the project. The concept also carries increased risk of hydrate blockage in both the gas and liquids pipelines.[1] Timor Gap's proposed pipelines are at the limit of current industry water depth capability.

For capital expenditure, the Timor Gap well design concept, configuration, and cost estimates appear to be inconsistent with the high initial well flow rate assumed in the production profile. The Timor Gap estimate for the twin 18" gas pipelines is very close to its original estimate for a single 24" pipeline and does not appear to address the increased installation costs of multiple pipelines. The costs of a full integrated project front end engineering design ("FEED") also appear to be omitted from Timor Gap's estimate.[2]

For operating expenditure, Timor Gap's costs estimates for the platform appear to be reasonable, but omit the operating expenditure of the onshore liquids processing facility (which would be separate from the LNG plant and would have limited operational synergies), as well as the operations, inspection and maintenance costs of the multiple pipelines.[3] Given the risks of the concept, it would be reasonable to make an economic provision for one pipeline repair in the 25 year life of the project, however this has not been added to the Timor Gap operating expenditure estimates.

D. Sunrise Joint Venture Upstream Concept

The SJV upstream concept is for all gas and liquids processing to take place offshore on an FPSO. Gas would be delivered to Darwin by a single pipeline joining the existing Bayu Undan pipeline. The SJV upstream concept is industry standard. The FPSO is large, but within industry technology for water depth, swivel, processing, topsides load, and vessel size.

For capital expenditure, the SJV's estimates for subsea costs appear to be higher than recent analogue projects. In particular, the SJV's installation costs appear to be based on vessel spread rates prevailing several years ago at the market peak. Similarly, the SJV costs estimates for drilling appear to be based on rig rates prevailing several years ago at the market peak.[4]

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[1] These risks could be mitigated by locating condensate processing and MEG regeneration on a second offshore platform or FPSO. As this would not meaningfully alter the economic results, however, this possibility has not been evaluated further.

[2] For modelling purposes, the following adjustments were made to Timor-Gap's assumptions: (*a*) drilling cost estimates adjusted to current market rates for drilling rigs and well services; (*b*) subsea cost estimates adjusted to current market rates for installation vessels; (*c*) gas pipeline costs re-estimated for twin lines; (*d*) condensate/MEG costs re-estimated for twin lines; and (*e*) capital provision added for integrated project FEED. Specific adjustments are set out in an annex to this paper.

[3] For modelling purposes, the following adjustments were made to Timor-Gap's assumptions: (*a*) operating expenditure added for liquids processing facility; and (*b*) operating expenditure added for pipeline operations, expenditure, and maintenance. Specific adjustments are set out in an annex to this paper.

[4] For modelling purposes, the following adjustments were made to the SJV's assumptions: (*a*) drilling cost estimates adjusted to current market rates for drilling rigs and well services;

The SJV's estimate for operating expenditure appears reasonable, as does the project schedule.

E. Timor Gap Downstream Concept

The Timor Gap concept is for the construction of a greenfield 5 MMTpa LNG plant at Beaço on the south coast of Timor-Leste that would receive gas from the offshore project. Condensate would also be processed onshore with MEG regeneration and return to offshore.

For capital expenditure, Timor Gap's estimates for the LNG liquefaction plant and marine facilities appear reasonable. However, Timor Gap's estimate does not appear to include the cost of direct infrastructure associated with the LNG plant, such as roads, offices, and warehousing, and excludes LNG technology licence fees. Timor Gap's concept also appears to exclude the costs for the LNG Plant FEED.[5]

Timor Gap's estimate of LNG plant operating costs (in its economic model) appears to be based on a notional figure of US$100 million per year, rather than the US$204 million per year estimated by Timor Gap in its Greater Sunrise Timor LNG Project Development Concept Report, which also appears to be below prevailing industry levels.[6]

While Timor Gap's overall construction schedule appears reasonable, it is based on timetable with pre-FEED work commencing in 2016, which has now slipped by some 2 years, resulting in an earliest start-up date one year later than that used by Timor Gap in its economic model. Timor Gap's concept also appears to envisage 100% production from day one, rather than the industry standard expectation for a new facility of 50% production efficiency during the first year.[7] The Timor Gap economic model does not make any provision for operational downtime in subsequent years, which is likely to be in the order of 5% based on industry experience

E. SJV Downstream Concept

The SJV concept is for gas to be processed at the existing LNG plant at Wickham Point in Darwin, Australia. Although the existing pipeline and LNG plant are some 20 years old, industry experience indicates that they

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and (*b*) subsea cost estimates adjusted to current market rates for installation vessels. Specific adjustments are set out in an annex to this paper.

[5] For modelling purposes, the following adjustments were made to Timor-Gap's assumptions: (a) costs added for roads, offices, warehousing, and licence fees; (*b*) costs added for LNG plant FEED. Specific adjustments are set out in an annex to this paper.

[6] For modelling purposes, the annual operating expenditure of the LNG plant was increased to US$250 million.

[7] For modelling purposes, the following adjustments were made to Timor-Gap's assumptions: (*a*) a one-year delay in startup; and (*b*) 50% production for year one.

should remain serviceable and reliable for the life of the project with appropriate inspection and maintenance. It is understood that full responsibility for maintenance and repair of the existing infrastructure would be covered by the tolling fee charged by the downstream owner, limiting the risk to the upstream joint venture

As the Wickham Point facility is owned by a different corporate entity and would charge a tolling fee to process gas from Greater Sunrise, the economics of the SJV downstream concept have not been independently analysed.

F. Economic Model Assumptions

Both Timor Gap and the SJV have assumed the application of the existing fiscal terms under which 20.1% of the asset is governed by JPDA production sharing contract terms (divided 90:10 between Timor-Leste and Australia) and 79.9% is governed by Australian terms. Although this fiscal regime will be replaced under the new treaty, the treaty provides that new fiscal arrangements will provide "conditions equivalent" and the existing regimes is used for modelling purposes.

The economic models prepared by Timor Gap and the SJV, as would be expected, make several non-comparable assumptions. In the SJV model, provision is made for a notional marketing entity that is understood to reflect the specifics of the application of the Australian petroleum resources rent tax. An alternative approximation of petroleum resources rent tax is used in the Timor Gap model. For comparability, the marketing arrangement of the SJV model has been simplified, with all revenues accruing to the upstream JV.[8] For comparability, adjustments are likewise made to the Timor Gap model as follows:

- The Timor Gap model applies the tolling fee to the feedstock (*i.e.*, the gas going into the plant), rather than the LNG sales volumes (the gas coming out of the plant). The industry norm is to apply the tolling fee to LNG sales volume, and the Timor Gap model is adjusted accordingly.
- The Timor Gap model is premised upon no downtime (*i.e.*, 365 days per year operations). The industry norm is to allow for 20 days downtime, and the Timor Gap model is adjusted accordingly.

Additionally, the JV and Timor Gap models differ as to whether LNG price inflation on the tolling fee would start in 2018 or upon production. While either approach is reasonable, the same approach must be used to enable an accurate comparison and the Timor Gap model is adjusted such that escalation of the tolling fee starts upon production, in line with SJV model.

[8] This adjustment slightly decreases the returns of the SJV upstream concept and increase the government tax revenue, but renders the two models more comparable.

H. Comparative Economic Analysis: Upstream Concepts

For analysis purposes, the required gas price (*i.e.*, the price at entry to the LNG plant required to achieve a 15% IRR for the upstream joint venture) was calculated for each of the Timor Gap and SJV upstream concepts after adjusting costs and assumptions. The results for the SJV upstream concept are as follows:

SJV Upstream Concept	
Case	*Required Gas Price for Upstream 15% IRR US$/MMBtu*
SJV Base Case	US$5.49
Adjusted Assumptions (exclude notional marketing entity)	US$6.11
Production Normalized to 60% recovery	US$6.01
Costs Normalized	US$5.19
Final Normalized Case	US$5.19

The results for the Timor Gap upstream concept are as follows:

Timor Gap Upstream Concept	
Case	*Required Gas Price for Upstream 15% IRR US$/MMBtu*
Timor Gap Base Case	US$2.89
Apply toll to LNG sales gas Include downtime Escalate toll from production start	US$3.04
Delay start up by 1 year 50% uptime in first year	US$4.52
Production normalized to 60% recovery	US$4.57
Normalize capital expenditure	US$6.18
Normalize operational expenditure	US$6.21
Normalized Case at 60% recovery	US$6.21
Normalized Case at 50% recovery	US$6.52

The approximate IRR that each upstream concept could be expected to generate at different potential tolling fees (assuming a 60% recovery factor and after normalizing costs and inputs) are as follows:

Tolling Fee US$/MMBtu	*SJV Upstream Concept IRR %*	*Timor Gap Upstream Concept IRR %*
$1.2	17.27%	15.40%
$2	16.08%	14.44%
$2.5	15.32%	13.82%
$3	14.52%	13.18%
$3.5	13.70%	12.51%
$4	12.83%	11.82%
$4.5	11.92%	11.10%

I. Comparative Economic Analysis: Timor Gap Downstream Concept

For analysis purposes, the Timor Gap downstream concept was evaluated with respect to the tolling fee required for the Timor Gap downstream project to earn between 0% and 10% IRR, calculated as follows:

Timor Gap Downstream Concept				
Cases	*Required Toll for 0% IRR US$/MMBtu*	*Required Toll for 4% IRR US$/MMBtu*	*Required Toll for 7% IRR US$/MMBtu*	*Required Toll for 10% IRR US$/MMBtu*
Timor Gap Base Case	$1.26	$1.82	$2.49	$3.35
Apply toll to LNG sales gas Include down-time Escalate toll from production	$1.72	$2.49	$3.41	$4.59
Delay start up by 1 year 50% production efficiency in first year	$1.75	$2.67	$3.79	$5.30
Production normalized to 60% recovery	$1.95	$2.94	$4.06	$5.54
Normalize capital expenditure	$1.91	$2.79	$3.75	$4.99

Normalize operational expenditure	$2.73	$3.57	$4.51	$5.74
Normalized Case at 60% recovery	$2.73	$3.57	$4.51	$5.74
Normalized Case at 50% recovery	$3.11	$4.00	$4.95	$6.17

The approximate IRR that the Timor Gap downstream concept could be expected to generate at different potential tolling fees (assuming a 60% recovery factor and after normalizing costs and inputs) are as follows:

Timor Gap Downstream Concept	
Tolling Fee US$/MMBtu	*IRR %*
$2	negative 4.62%
$3	2.69%
$4	6.23%

J. Comparative Economic Analysis: Upstream Concepts

A further analysis was undertaken of total government take (in accumulated cash flow) for Australia and Timor-Leste under both the SJV and Timor Gap Concepts at a range of possible tolling fees.

In the case of the SJV concept, this analysis was undertaken at the US$2.00 toll used as a base in both the SJV and Timor Gap models and at a hypothetical lower toll of US$1.20 in the event that significant savings are achieved in negotiations with Darwin LNG JV. This analysis excludes the income to the operator of the Wickham Point plant or the corporate income taxation paid by the downstream operator to Australia:

SJV Concept			
Tolling Fee US$/MMBtu	*Total Gov. Upstream Take US$MM*	*Timor-Leste Upstream Take US$MM*	*Australia Upstream Take US$MM*
$1.20	$35,392	$28,314	$7,078
$2.00	$31,337	$25,070	$6,267

In the case of the Timor Gap concept, this analysis was undertaken at a range of tolling fees. This analysis includes the income to the operator of Timor-LNG and the corporate income taxation paid to Timor-Leste:

Timor Gap Concept						
Tolling Fee US$/ MMBtu	*Total Upstream Gov. Take US$MM*	*Australia Upstream Take US$MM*	*Timor-Leste Upstream Take US$MM*	*Timor-LNG Owner Take US$MM*	*Timor-Leste Income Tax US$MM*	*Timor-Leste + Timor-LNG Take US$MM*
$2.00	$28,775	$8,632	$20,142	neg. $4,895	0	$15,247
$3.00	$24,555	$7,366	$17,188	$1,661	$333	$19,182
$3.50	$22,432	$6,729	$15,702	$4,772	$666	$21,140
$4.00	$20,299	$6,090	$14,209	$7,881	$1,001	$23,091
$4.50	$18,155	$5,446	$12,708	$10,986	$1,340	$25,035

K. Economic Analysis: Financing and Subsidy

A final analysis was undertaken of the potential for Timor Gap's development concept to address the feasibility of equity participation from an experienced international operator and to secure debt financing, and to estimate the level of government subsidy that would be necessary to render the remainder of the project financeable.

Without knowing the specific financing or operator arrangements contemplated by Timor Gap, it is likely that an international operator or institutional lender would require an IRR in the order of 10%. Even if the government of Timor-Leste were willing to provide equity financing for the remainder of the project at an IRR of 0% or debt financing could be achieved at 7%, the project would still need to generate an overall IRR in the order of 4% to 5% to be sustainable (depending on the respective shares of the project). To achieve an overall IRR of 4%, (similar to the return understood to be achieved by the Timor-Leste Petroleum Fund) the LNG plant would require a tolling fee of approximately US$3.50 per MMBtu.

In order to achieve a US$2.00 tolling fee while preserving a 7% IRR on the overall project, it would be necessary for the government of Timor-Leste to directly subsidise the capital expenditure of the LNG facility. A subsidy on the order of US$5.6 billion (or about 80% of capital expenditure)—with no expectation of receiving revenue from the operation of the facility—would be required in order to render the remainder of the downstream project financeable.

L. Conclusion

The foregoing analysis supports the following conclusions on the basis of neutral economic modelling:

(*a*) Timor-Leste and the SJV have analysed the Timor Gap concept both as an integrated project (i.e., with both upstream and downstream returns combined) and on a tolling basis (i.e., with a fee paid to the downstream plant for LNG processing). The SJV concept would only be on a tolling basis.

(*b*) As an integrated project, the Commission anticipates that, under currently expected market conditions, Timor Gap's concept would generate a return in the order of 7.0% on a capital investment of US$15,621,000,000. This would not be sufficient to meet the industry standard for investment by an international oil company.

(*c*) As a tolling project, the upstream concept for Greater Sunrise (as envisaged either by Timor-Leste or the SJV) has a fairly high cost of production and, under currently anticipated market conditions, is limited in the tolling fee that it could pay for LNG processing while remaining economically viable. At a tolling fee of US$2.00 per MMBtu or lower, the return on the upstream project would fall within industry investment levels. However, should the tolling fee be higher than US$2.50 per MMBtu, the return on the upstream project would fall below industry investment levels and the Commission does not anticipate that either concept would be investable for the members of the Joint Venture or other private sector actors.

(*d*) The range of tolling fees currently under negotiation with Darwin-LNG are below US$2.00 per MMBtu, and would thus fall within the range in which the upstream concept would be economically viable.

(*e*) Due to the need to construct a new LNG plant at Beaço in Timor-Leste, a Timor Gap downstream concept would require a higher tolling fee to generate an adequate rate of return. After adjusting costs estimates, the Commission estimates that, with a toll of US$2.00 per MMBtu, Timor Gap's downstream concept would have a negative return of minus 4% on a capital investment of US$7,142,000,000.

(*f*) In order to match the target return of the Timor-Leste Petroleum Fund of 4%, it is estimated that the LNG plant in Timor-Leste would need to charge a tolling fee of at least US$3.50. In order to achieve a return of 7% to permit debt financing or the equity participation of an experienced operator, the Commission anticipates that Timor-LNG would need to charge a tolling fee of at least US$4.50. Both scenarios exceed the level that the upstream concept could reasonably be expected to bear.

Based on this assessment, the challenge for Timor Gap's concept would be to achieve an acceptable rate of return on the downstream project without

exceeding the tolling fee that the upstream concept could actually bear. The Commission considers that this could be done, but only with a direct subsidy of the downstream project by the government of Timor-Leste or another funder. A direct subsidy of the project's capital expenditure on the order of US$5,600,000,000 would be required in order to render the remainder of the downstream project financeable through the equity participation of an experience operator or by debt.

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Annex:
Adjustments to Economic Assumptions

Adjustments to Joint Venture Economic Assumptions for Upstream Concept	
Comment	*Adjustment*
Cost estimates for wells and drilling do not appear to reflect reduction of rates in current market conditions	Reduce capital expenditure for wells to US$1,040 million
Cost estimates for subsea installations do not appear to reflect reduction of rates in current market conditions	Reduce capital expenditure for subsea to US$2,080 million
Adjustments to Timor Gap Economic Assumptions for Upstream Concept	
Comment	*Adjustment*
Cost estimates for wells appear overly optimistic	Increase capital expenditure for wells to US$1,040 million
Cost estimates for subsea installations appear overly optimistic	Increase capital expenditure for subsea to US$2,080 million
Cost estimates for gas pipelines for two 18" pipelines (derived from estimate for one 24" pipeline) appear overly optimistic	Increase capital expenditure for gas pipelines to US$1,500 million
Cost estimates for two 18" MEG pipelines based on estimate for gas pipeline	Increase capital expenditure for MEG pipelines to US$1,400 million
No provision made for costs of Upstream Front-End Engineering and Design (FEED)	Add capital expenditure of US$300 million
Upstream operating expenditure does not include operating expenditure for onshore MEG plant and liquid processing or pipeline repair contingency	Increase upstream operating expenditure to US$193 million per year

Adjustments to Timor Gap Economic Assumptions for Timor-LNG Concept	
Comment	*Adjustment*
Tolling fee is applied to raw gas feedstock rather than LNG sales volumes	Apply tolling fee to LNG sales volumes per industry standard
Inflation of tolling fee starts from 2017	Begin inflation of tolling fee from start of production, for comparability
Model assumes operation 365 days per year	Add assumption of 20 days per year downtime, per industry standard
LNG costs estimates do not include for infrastructure associated with the LNG plant, LNG technology licence fees, or LNG Front-End Engineering and Design (FEED) costs	Increase LNG Plant capital expenditure to US$7,142 million
LNG plant operating expenditure appears overly optimistic	Increase LNG Plant OPEX to US$250 million per year
Economic model is based on a schedule which has already slipped by one to two years	Add one-year delay to project schedule
Model assumes operation at 100% capacity from day 1 of operations	Assume operation at 50% capacity for first year, per industry standard

Annex 28: Treaty signed by the Parties on 6 March 2018

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

The Government of the Democratic Republic of Timor-Leste (Timor-Leste) and the Government of Australia (Australia) (hereinafter referred to as the Parties);

Having regard to the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (the Convention);

Taking into particular account Articles 74(1) and 83(1) of the Convention, regarding the delimitation of the exclusive economic zone and the continental shelf;

Wishing to delimit the maritime areas between Timor-Leste and Australia in the Timor Sea;

Wishing also in this context to establish a special regime for the Greater Sunrise Fields for the benefit of both Parties;

REAFFIRMING the importance of developing and managing the living and non-living resources of the Timor Sea in an economically and environmentally sustainable manner, and the importance of promoting investment and long-term development in Timor-Leste and Australia;

HAVING REACHED, with the assistance of the Conciliation Commission established under Article 298 and Annex V of the Convention, an overall negotiated solution to the dispute between the Parties concerning the delimitation of their permanent maritime boundaries;

RECOGNISING that there exists an inextricable link between the delimitation of the maritime boundaries and the establishment of the special regime for the Greater Sunrise Fields and that both elements are integral to the agreement of the Parties to this Treaty;

CONSCIOUS of the importance of promoting Timor-Leste's economic development;

REAFFIRMING that benefits will flow to both Timor-Leste and Australia from the establishment of a stable long-term basis for Petroleum Activities in the area of seabed between Timor-Leste and Australia;

RESOLVING as good neighbours and in a spirit of co-operation and friendship, to settle finally their maritime boundaries in the Timor Sea in order to achieve an equitable solution;

ACKNOWLEDGING that the settlement contained in this Treaty is based on a mutual accommodation between the Parties without prejudice to their respective legal positions;

AFFIRMING the compatibility of this Treaty with the Convention;

AFFIRMING that nothing in this Treaty shall be interpreted as prejudicing the rights of third States with regard to delimitation of the exclusive economic zone and the continental shelf in the Timor Sea;

HAVE AGREED as follows:

Article 1: Definitions

1. For the purposes of this Treaty, including its Annexes:

   (*a*) "1972 Seabed Treaty Boundary" means the boundary established by Articles 1 and 2 of the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 (Jakarta, 9 October 1972);

   (*b*) "Bayu-Undan Pipeline" means the export pipeline which transports gas produced from the Bayu-Undan Gas Field to the Darwin liquefied natural gas processing facility at Wickham Point;

(*c*) "Bayu-Undan Gas Field" means the field which, at the time of signing of this Treaty, is subject to the Production Sharing Contracts JPDA 03–12 and JPDA 03–13;

(*d*) "Buffalo Oil Field" means the field known as Buffalo which, at the time of the signing of this Treaty, lies in the WA-523-P exploration permit area;

(*e*) "Commercial Depletion" means the date by which the relevant authority confirms that the contractor or titleholder has fulfilled all of its production and decommissioning obligations under the relevant development or decommissioning plan, contract or licence and that the relevant contract or licence has terminated or otherwise expired;

(*f*) "Development Concept" means the basic terms on which the Greater Sunrise Fields are to be developed;

(*g*) "Development Plan" means the development, exploitation and management plan for the Petroleum in the Greater Sunrise Fields consistent with Good Oilfield Practice, including, but not limited to, details of the sub-surface evaluation and facilities, production facilities, the production profile for the expected life of the project, the expected life of the fields, the estimated capital and non-capital expenditure covering the feasibility, fabrication, installation and pre-production stages of the project, which is approved and assessed in accordance with the criteria established in Article 9(3) of Annex B of this Treaty;

(*h*) "Good Oilfield Practice" means such practices and procedures employed in the petroleum industry worldwide by prudent and diligent operators under conditions and circumstances similar to those experienced in connection with the relevant aspects of Petroleum operations, having regard to relevant factors including:

(i) conservation of Petroleum, which includes the utilisation of methods and processes to maximise the recovery of hydrocarbons in a technically and economically efficient manner, and to minimise losses at the surface;

(ii) operational safety, which entails the use of methods and processes aimed at preventing major accident events and occupational health and safety incidents; and

(iii) environmental protection, which calls for the adoption of methods and processes that minimise the impact of the Petroleum operations on the environment;

(*i*) "Greater Sunrise Contractor" means all those individuals or bodies corporate holding from time to time a permit, lease, licence or contract in respect of an area within the Special Regime Area under which exploitation, including any appraisal activities related to that exploitation, and production of Petroleum may be carried out;

(*j*) "Greater Sunrise Fields" means that part of the rock formation known as the Plover Formation (Upper and Lower) that underlies the Special Regime Area and contains the Sunrise and Troubadour depos-

its of Petroleum, together with any extension of those deposits that is in direct hydrocarbon fluid communication with either deposit;

(*k*) "Greater Sunrise Production Sharing Contract" means the contract entered into in accordance with Article 4 of Annex B of this Treaty, between the Designated Authority and the Greater Sunrise Contractor for the development of, and production from, the Greater Sunrise Fields and replacing Production Sharing Contracts JPDA 03–19 and JPDA 03–20 and Retention Leases NT/RL2 and NT/RL4;

(*l*) "International Unitisation Agreement" means the 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 (Dili, 6 March 2003);

(*m*) "Kitan Oil Field" means the field which, at the time of signing this Treaty, is subject to the Production Sharing Contract JPDA 06–105;

(*n*) "Laminaria and Corallina Fields" means the fields known as Laminaria and Corallina which, at the time of the signing of this Treaty, lie partly in the AC/L5 and WA-18-L production licence areas;

(*o*) "Petroleum" means:

(i) any naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state;

(ii) any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquid or solid state; or

(iii) any naturally occurring mixture of one or more hydrocarbons, whether in a gaseous, liquid or solid state, as well as other gaseous substances produced in association with such hydrocarbons, including, but not limited to, helium, nitrogen, hydrogen sulphide and carbon dioxide; and

includes any Petroleum as defined by sub-paragraph (i), (ii) or (iii) that has been returned to a natural reservoir;

(*p*) "Petroleum Activities" means all activities undertaken to produce Petroleum, authorised or contemplated under a contract, permit or licence, and includes exploration, development, initial processing, production, transportation and marketing, as well as the planning and preparation for such activities;

(*q*) "Pipeline" means any pipeline by which Petroleum is discharged from the Special Regime Area;

(*r*) "Production Sharing Contract" means a contract between the Designated Authority, whether as established under this Treaty or as established under the Timor Sea Treaty, and a limited liability corporation or entity with limited liability under which production from a specified area is shared between the parties to the contract;

(*s*) "Retention Leases" means the retention leases granted by Australia pursuant to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) to individuals or bodies corporate, as renewed

from time to time, referred to as Retention Lease NT/RL2 and Retention Lease NT/RL4;

(*t*) "Special Regime Area" means the area of the continental shelf described in Annex C of this Treaty;

(*u*) "Special Regime Installation" means any installation, structure or facility located within the Special Regime Area for the purposes of engaging in or conducting Petroleum Activities;

(*v*) "Timor Sea Treaty" means the Timor Sea Treaty between the Government of East Timor and the Government of Australia (Dili, 20 May 2002); and

(*w*) "Valuation Point" means the point of the first commercial sale of Petroleum produced from the Special Regime Area which shall occur no later than the earlier of:

(i) the point where the Petroleum enters a pipeline; and
(ii) the marketable petroleum commodity point for the Petroleum.

2. Unless otherwise expressly provided, terms in this Treaty are to be given the same meaning as in the Convention.

Article 2: Continental Shelf Boundary

1. Subject to Article 3 of this Treaty, the continental shelf boundary between the Parties in the Timor Sea comprises the geodesic lines connecting the following points:

Point	*Latitude*	*Longitude*
TA-1	10° 27' 54.91"S	126° 00' 04.40"E
TA-2	11° 24' 00.61"S	126° 18' 22.48"E
TA-3	11° 21' 00.00"S	126° 28' 00.00"E
TA-4	11° 20' 00.00"S	126° 31' 00.00"E
TA-5	11° 20' 02.90"S	126° 31' 58.40"E
TA-6	11° 04' 37.65"S	127° 39' 32.81"E
TA-7	10° 55' 20.88"S	127° 47' 08.37"E
TA-8	10° 53' 36.88"S	127° 48' 49.37"E
TA-9	10° 43' 37.88"S	127° 59' 20.36"E
TA-10	10° 29' 11.87"S	128° 12' 28.36"E
TA-11	09° 42' 21.49"S	128° 28' 35.97"E
TA-12	09° 37' 57.54"S	128° 30' 07.24"E
TA-13	09° 27' 54.88"S	127° 56' 04.35"E

2. The line connecting points TA-1 and TA-2, and the lines connecting points TA-11, TA-12, and TA-13 are "Provisional", which for the purposes of this Treaty means that they are subject to adjustment in accordance with Article 3 of this Treaty.

3. For the purposes of this Treaty, all coordinates are determined by reference to the World Geodetic System 1984. For the purposes of this Treaty, the World Geodetic System 1984 shall be deemed equivalent to the Geodetic Datum of Australia 1994.

Article 3: Adjustment of the Continental Shelf Boundary

1. Should Timor-Leste and Indonesia agree an endpoint to their continental shelf boundary west of point A17 or east of point A16 on the 1972 Seabed Treaty Boundary, the continental shelf boundary between Timor-Leste and Australia shall be adjusted in accordance with paragraphs 2, 3 and 4 of this Article.

2. On the later of:

(*a*) the Commercial Depletion of the Laminaria and Corallina Fields; and

(*b*) the entry into force of an agreement between Timor-Leste and Indonesia delimiting the continental shelf boundary between those two States,

the continental shelf boundary between Timor-Leste and Australia shall, unless paragraph 3 of this Article applies, be adjusted so that it proceeds in a geodesic line from point TA-2, as defined in Article 2(1) of this Treaty, to a point between points A17 and A18 on the 1972 Seabed Treaty Boundary at which the continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty Boundary.

3. In the event that the continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty Boundary at a point to the west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary shall be adjusted so that it proceeds in a geodesic line from point TA-2, as defined in Article 2(1) of this Treaty, to point A18.

4. On the later of:

(*a*) the Commercial Depletion of the Greater Sunrise Fields; and

(*b*) the entry into force of an agreement between Timor-Leste and Indonesia delimiting the continental shelf boundary between those two States,

the continental shelf boundary between Timor-Leste and Australia shall be adjusted so that it proceeds in a geodesic line from point TA-11, as defined in Article 2(1) of this Treaty, to the point at which the continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty Boundary.

Article 4: Exclusive Economic Zone Boundary

1. The exclusive economic zone boundary between the Parties in the Timor Sea comprises the geodesic lines connecting the following points:

Point	*Latitude*	*Longitude*
TA-5	11° 20' 02.90"S	126° 31' 58.40"E
TA-6	11° 04' 37.65"S	127° 39' 32.81"E
TA-7	10° 55' 20.88"S	127° 47' 08.37"E
TA-8	10° 53' 36.88"S	127° 48' 49.37"E
TA-9	10° 43' 37.88"S	127° 59' 20.36"E
TA-10	10° 29' 11.87"S	128° 12' 28.36"E

2. The Parties may agree to extend the exclusive economic zone boundary established by paragraph 1 of this Article, as necessary.

Article 5: Depiction of Maritime Boundaries

The maritime boundaries described in Articles 2 and 4 of this Treaty are depicted for illustrative purposes at Annex A of this Treaty.

Article 6: Without Prejudice

1. Nothing in this Treaty shall be interpreted as prejudicing negotiations with third States with regard to delimitation of the exclusive economic zone and the continental shelf in the Timor Sea.

2. In exercising their rights as coastal States, the Parties shall:

(*a*) provide due notice of activities conducted on the continental shelf and in the exclusive economic zone consistent with the terms of the Convention; and

(*b*) not infringe upon or unjustifiably interfere with the exercise of rights and freedoms of other States as provided for in the Convention.

Article 7: Greater Sunrise Special Regime

1. The Parties hereby establish the Greater Sunrise Special Regime as set out in Annex B of this Treaty for the Special Regime Area.

2. Within the Special Regime Area, the Parties shall jointly exercise their rights as coastal States pursuant to Article 77 of the Convention.

3. The governance and exercise of jurisdiction within the Special Regime Area is as set out in the Greater Sunrise Special Regime.

4. Except as provided in this Treaty, the rights and obligations of the Parties in the Special Regime Area are governed by the Convention.

5. When the Greater Sunrise Special Regime ceases to be in force, the Parties shall individually exercise their rights as coastal States pursuant to Article 77 of the Convention on the basis of the continental shelf boundary as delimited by this Treaty.

6. Except as provided in Article 3 of this Treaty, the entry into force of an agreement between Timor-Leste and Indonesia delimiting the continental shelf boundary between those two States shall have no effect on the Greater Sunrise Special Regime.

Article 8: Straddling Deposits

If any Petroleum deposit extends across the continental shelf boundary as defined in Articles 2 and 3 of this Treaty, the Parties shall work expeditiously and in good faith to reach agreement as to the manner in which that deposit is to be most effectively exploited and equitably shared.

Article 9: Previous Agreements

1. Upon the entry into force of this Treaty, the following agreements shall cease to be in force:

(*a*) the Timor Sea Treaty; and

(*b*) the International Unitisation Agreement.

2. This Treaty shall have no effect on rights or obligations arising under the agreements set out in paragraph 1 of this Article while they were in force.

Article 10: Compensation

The Parties agree that neither Party shall have a claim for compensation with respect to Petroleum Activities conducted in the Timor Sea as a result of:

(*a*) the cessation of the Joint Petroleum Development Area as established by Article 3 of the Timor Sea Treaty upon termination of that treaty;

(*b*) the establishment of the continental shelf boundary under this Treaty;

(*c*) an adjustment to the continental shelf boundary as a result of the application of Article 3 of this Treaty; or

(*d*) the cessation of the Greater Sunrise Special Regime.

Article 11: Permanence of the Treaty

1. The Parties agree that this Treaty shall not be subject to a unilateral right of denunciation, withdrawal or suspension.

2. This Treaty may be amended only by agreement between the Parties, and by express provision to that effect.

3. The Annexes to this Treaty form an integral part thereof.

4. All of the provisions of this Treaty are inextricably linked and form a single whole. The provisions of this Treaty are not separable in any circumstances, and each provision of this Treaty constitutes an essential basis of the Parties' agreement to be bound by this Treaty as a whole.

Article 12: Settlement of Disputes

1. Without prejudice to paragraph 3 of this Article, for a period of five years following the entry into force of this Treaty, any dispute regarding the interpretation or application of this Treaty which is not settled by negotiation within six months of either Party notifying the other Party of the existence of the dispute, may be submitted by the Parties jointly to one or more members of the Conciliation Commission.

2. Once the dispute has been submitted in accordance with paragraph 1 of this Article, the member or members of the Conciliation Commission shall hear the Parties, examine their claims and objections, and make proposals to the Parties with a view to reaching an amicable settlement.

3. Subject to paragraph 4 of this Article, any dispute concerning the interpretation or application of this Treaty, which cannot be settled by negotiation within six months of either Party notifying the other Party of the existence of the dispute, may be submitted by either Party to an arbitral tribunal in accordance with Annex E of this Treaty.

4. The Parties shall not submit to an arbitral tribunal under this Article any dispute concerning the interpretation or application of Article 2, 3, 4, 5, 7 or 11, Annex A or Annex D of this Treaty, or any dispute falling within the scope of Article 8 of Annex B, which shall be settled in accordance with the provisions of that Article.

Article 13: Entry into Force

This Treaty shall enter into force on the day on which Timor-Leste and Australia have notified each other in writing through diplomatic channels that their respective requirements for entry into force of this Treaty have been fulfilled.

Article 14: Registration

The Parties shall transmit this Treaty by joint letter to the Secretary-General of the United Nations for registration in accordance with the provisions of Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty.

DONE at New York, on this sixth day of March, two thousand and eighteen, in two counterparts in English and Portuguese. In the event of a discrepancy, the English language version shall prevail.

HIS EXCELLENCY HERMENEGILDO AUGUSTO CABRAL PEREIRA

Minister in the Office of the Prime Minister for the Delimitation of Borders and the Agent in the Conciliation

For the Government of the Democratic Republic of Timor-Leste

THE HON JULIE BISHOP MP

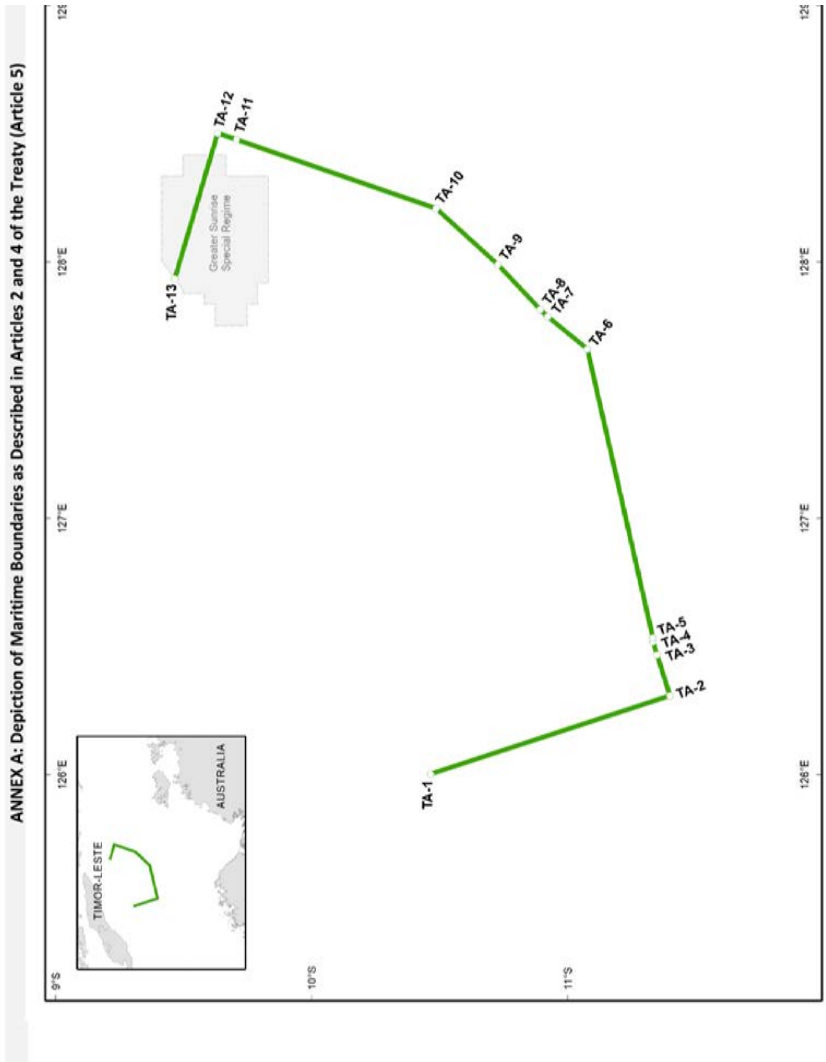
Minister for Foreign Affairs

For the Government of Australia

IN THE PRESENCE OF the Chair of the Conciliation Commission,

HIS EXCELLENCY AMBASSADOR PETER TAKSØE-JENSEN

Signed in the presence of the Secretary-General of the United Nations, HIS EXCELLENCY ANTÓNIO MANUEL DE OLIVEIRA GUTERRES.



Annex B: Greater Sunrise Special Regime

Article 1: Objective of the Greater Sunrise Special Regime

The objective of the Greater Sunrise Special Regime is the joint development, exploitation and management of Petroleum in the Greater Sunrise Fields for the benefit of both Parties.

Article 2: Title to Petroleum and Revenue Sharing

1. Timor-Leste and Australia shall have title to all Petroleum produced in the Greater Sunrise Fields.

2. The Parties shall share upstream revenue, meaning revenue derived directly from the upstream exploitation of Petroleum produced in the Greater Sunrise Fields:

(*a*) in the ratio of 70 per cent to Timor-Leste and 30 per cent to Australia in the event that the Greater Sunrise Fields are developed by means of a Pipeline to Timor-Leste; or

(*b*) in the ratio of 80 per cent to Timor-Leste and 20 per cent to Australia in the event that the Greater Sunrise Fields are developed by means of a Pipeline to Australia.

3. For the purposes of this Annex, upstream revenue is limited to first tranche petroleum, profit petroleum and taxation in accordance with Article 3 of this Annex.

Article 3: Taxation

1. Subject to paragraph 3 of this Article, upstream revenue includes taxation by the Parties as applicable in accordance with their respective laws. The Parties shall provide each other with a list of the applicable taxes.

2. The application of the Parties' taxation law shall be specified in the fiscal regime as agreed between the Parties and the Greater Sunrise Contractor, in accordance with obligations under Article 22 of the Timor Sea Treaty and Article 27 of the International Unitisation Agreement.

3. Taxation under paragraph 1 of this Article shall only apply in respect of Petroleum Activities and Special Regime Installations prior to the Valuation Point.

4. Timor-Leste taxation law shall apply to all other activities related to the development and exploitation of Petroleum in the Special Regime Area, unless otherwise provided for by the terms of this Treaty.

Article 4: Greater Sunrise Production Sharing Contract

As soon as practicable, the Designated Authority shall enter into the Greater Sunrise Production Sharing Contract under conditions equivalent to those in Production Sharing Contracts JPDA 03–19 and JPDA 03–20, and to the legal rights held under Retention Leases NT/RL2 and NT/RL4 in accordance with Article 22 of the Timor Sea Treaty and Article 27 of the International Unitisation Agreement.

Article 5: Regulatory Bodies

The Parties hereby establish a two-tiered regulatory structure for the regulation and administration of the Greater Sunrise Special Regime, consisting of a Designated Authority and a Governance Board.

Article 6: Designated Authority

1. The Designated Authority shall be responsible for carrying out the day-to-day regulation and management of Petroleum Activities in the Special Regime Area. In doing so, the Designated Authority acts on behalf of Timor-Leste and Australia and reports to the Governance Board.

2. The Designated Authority shall:

(*a*) be the Timor-Leste statutory authority as determined by the member of the Government of Timor-Leste responsible for the petroleum sector to act as the Designated Authority;

(*b*) regulate the Special Regime Area according to Good Oilfield Practice;

(*c*) be financed from fees collected under the applicable Petroleum Mining Code and the Greater Sunrise Production Sharing Contract; and

(*d*) subject to Articles 7 and 8 of this Annex, exercise its powers and functions, as set out in this Article, without interference by any other entity and in accordance with this Treaty.

3. The Designated Authority shall have the following powers and functions:

(*a*) day-to-day regulation and management of Petroleum Activities in the Special Regime Area in accordance with this Treaty and its functions as outlined in the applicable Petroleum Mining Code and any regulations thereunder, except with respect to Strategic Issues;

(*b*) three times a year, meeting with and reporting to the Governance Board on:

(i) the exercise of its powers and functions, in accordance with the applicable regulatory framework;
(ii) progress on the preparation of the Development Plan and, once approved, progress against the Development Plan and schedule;
(iii) production and revenue data from the Greater Sunrise Fields;
(iv) updates on issues referred to the Dispute Resolution Committee, if any;
(v) the Greater Sunrise Contractor's compliance with regulatory standards, including its local content obligations as set out in this Treaty, the Development Plan and the Greater Sunrise Production Sharing Contract; and
(vi) safety, environmental and well-integrity management;

(*c*) pursuant to Article 9 of this Annex, powers and functions with respect to the Development Plan;

(*d*) entering into the Greater Sunrise Production Sharing Contract, subject to the approval of the Governance Board, in accordance with Articles 4 and 7(3)(*b*) of this Annex;

(*e*) supervising, managing and agreeing on non-material amendments to the Greater Sunrise Production Sharing Contract;

(*f*) agreeing material amendments to the Greater Sunrise Production Sharing Contract as defined in that Contract or terminating the Greater Sunrise Production Sharing Contract, subject to approval of the Governance Board in accordance with Article 7(3)(*b*) of this Annex;

(*g*) approving assignments, production plans, lifting agreements and other technical documents and agreements relating to the Greater Sunrise Production Sharing Contract;

(*h*) reporting annual income and expenditure, as these relate to the Special Regime Area, to the Governance Board;

(*i*) accessing, consolidating and disseminating, on an annual basis, all information pertaining to the Greater Sunrise Fields' reserves based on information provided by the Greater Sunrise Contractor or as otherwise audited by the Designated Authority;

(*j*) collecting revenues received from Petroleum Activities and Special Regime Installations prior to the Valuation Point on behalf of both Parties and distribution thereof;

(*k*) auditing and inspecting the Greater Sunrise Contractor's books and accounts;

(*l*) inspecting Special Regime Installations in the Special Regime Area;

(*m*) ensuring compliance by the Greater Sunrise Contractor with its local content obligations in accordance with this Treaty, the Development Plan and the Greater Sunrise Production Sharing Contract, including by giving directions and instructions as necessary;

(*n*) issuing regulations to protect the marine environment in the Special Regime Area and monitoring compliance with them, ensuring there is a contingency plan for combatting pollution from Petroleum Activities in the Special Regime Area, and investigating safety and environmental incidents in the Special Regime Area;

(*o*) issuing regulations and developing and adopting standards and procedures on occupational health and safety for persons employed on Special Regime Installations that are no less effective than those standards and procedures that would apply to persons employed on similar structures in Timor-Leste and Australia;

(*p*) requesting assistance from the appropriate authorities for search and rescue operations, security threats, air traffic services, anti-pollution prevention measures, and safety and environmental incidents, or the activation of emergency procedures, in accordance with international law;

(*q*) establishing safety zones to ensure the safety of navigation and Special Regime Installations, in accordance with the Convention;

(*r*) controlling movements into, within and out of the Special Regime Area of vessels, aircraft, structures, and other equipment employed in exploration for and exploitation of the Greater Sunrise Fields, consistent with Articles 17, 18 and 19 of this Annex;

(*s*) pursuant to Article 21 of this Annex, powers and functions with respect to the decommissioning plan, including entry into and oversight of financial arrangements for the decommissioning plan;

(*t*) oversight of the abandonment and decommissioning phase of the Greater Sunrise Fields;

(*u*) authorising the construction, operation and use of Special Regime Installations, subject to the provisions in this Annex; and

(*v*) any other powers or functions in respect of the Special Regime Area, including regulatory powers, conferred upon it by the Governance Board.

4. The Designated Authority shall refer all Strategic Issues as defined in Article 7(3) of this Annex to the Governance Board and, in the event of a dispute between the Designated Authority and the Greater Sunrise Contractor as to whether an issue is a Strategic Issue, either the Designated Authority or the Greater Sunrise Contractor may refer that issue to the Governance Board.

5. Within 14 days of a Strategic Issue being referred to the Governance Board, the Designated Authority and the Greater Sunrise Contractor may provide any relevant information concerning the issue and the Designated Authority may provide any recommendations on the issue.

Article 7: Governance Board

1. The Governance Board shall be comprised of two representatives appointed by Timor-Leste and one representative appointed by Australia. The representatives on the Governance Board shall not have any direct financial or other commercial interest in the operation of the Greater Sunrise Special Regime that would create any reasonable perception of, or actual, conflict of interest, and they shall disclose details of any material personal interest in connection with their position on the Governance Board.

2. The Governance Board shall have the following powers and functions:

(*a*) providing strategic oversight over the Greater Sunrise Special Regime;

(*b*) establishing and overseeing an assurance and audit framework for revenue verification and offshore petroleum regulation and administration. This shall include:

(i) issuing an annual 'Statement of Expectation' to frame the operation and management of the Greater Sunrise Special Regime to

guide the work of the Designated Authority;

(ii) reporting requirements of the Designated Authority in accordance with Article 6(3)(*b*) of this Annex; and

(iii) engaging an independent qualified firm to conduct an annual audit in accordance with international auditing standards so as to provide a high level of assurance over the completeness and accuracy of revenues payable from Petroleum Activities in the Special Regime Area including monthly reporting, incorporating an explanation for variances between forecast and actual revenue;

(*c*) making decisions on Strategic Issues referred to it under Article 6(4) of this Annex, in accordance with paragraphs 5 and 6 of this Article;

(*d*) approving amendments to the Interim Petroleum Mining Code and any regulations thereunder;

(*e*) approving the final Petroleum Mining Code and any regulations thereunder, and any amendments thereto;

(*f*) other than as necessary for Strategic Issues, meet three times a year with the Designated Authority and receive reports under Article 6(3)(*b*) of this Annex; and

(*g*) conferring any additional powers and functions on the Designated Authority.

3. Subject to paragraph 4 of this Article, the following is an exhaustive list of Strategic Issues:

(*a*) assessment and approval of a Development Plan pursuant to Article 9(2) of this Annex and any material change to a Development Plan as defined in that Development Plan, pursuant to Article 9(4) of this Annex;

(*b*) approval of the decision by the Designated Authority to enter into or terminate the Greater Sunrise Production Sharing Contract, or propose any material changes to that Contract as defined in that Contract;

(*c*) approval of, and any material change to, a decommissioning plan, in accordance with Article 21 of this Annex; and

(*d*) approval of the construction and operation of a Pipeline.

4. The Governance Board may add additional Strategic Issues to those listed in paragraph 3 of this Article.

5. In making a decision on a Strategic Issue, the Governance Board shall give due consideration to all recommendations and relevant information provided by the Designated Authority and relevant information provided by the Greater Sunrise Contractor.

6. All decisions of the Governance Board shall be made by Consensus, within 30 days or such other period as may be agreed with both the Designated Authority and the Greater Sunrise Contractor, and be final and binding on the Designated Authority and the Greater Sunrise Contractor. For the purposes of this Treaty "Consensus" means the absence of formal objection to a proposed decision.

7. If the Governance Board has exhausted every effort to reach Consensus on a Strategic Issue, either the Designated Authority or the Greater Sunrise Contractor may refer that issue to the Dispute Resolution Committee for resolution. Nothing in this paragraph limits the Governance Board's own right to refer any Strategic Issue to the Dispute Resolution Committee.

Article 8: Dispute Resolution Committee

1. The Dispute Resolution Committee shall:

(*a*) be an independent body with a mandate to hear any matters referred to it under Article 7(7) or Article 9(2) of this Annex or any matters as otherwise agreed by the Designated Authority and the Greater Sunrise Contractor;

(*b*) be comprised of:

(i) one member appointed from each of the Parties (Party Appointees); and

(ii) a third independent member, who will act as Chair, to be selected by the Party Appointees when a matter is referred to the Dispute Resolution Committee from a list of approved experts selected and maintained by Timor-Leste and Australia and refreshed every three years, and in case of disagreement, by the Secretary-General of the Permanent Court of Arbitration;

(*c*) establish its own procedures;

(*d*) make all decisions in writing and by Consensus, or where Consensus cannot be reached, by simple majority, within 60 days or as otherwise agreed with the referring party or parties;

(*e*) in making any decision, provide a reasonable opportunity for the Designated Authority and the Greater Sunrise Contractor to submit any relevant information and give due consideration to any information so provided; and

(*f*) have the power to request any information from the Designated Authority and/or the Greater Sunrise Contractor which it considers reasonably necessary to make its decision.

2. Members of the Dispute Resolution Committee shall not have any direct financial or other commercial interest in the operation of the Greater Sunrise Special Regime that would create any reasonable perception of, or actual, conflict of interest, and they shall disclose details of any material personal interest in connection with their position on the Dispute Resolution Committee. Serving members of the Governance Board shall not be members of the Dispute Resolution Committee.

3. All decisions of the Dispute Resolution Committee shall be final and binding on the Designated Authority and the Greater Sunrise Contractor.

Article 9: Development Plan for the Greater Sunrise Fields

1. Production of Petroleum from the Greater Sunrise Fields shall not commence until a Development Plan, which has been submitted by the Greater Sunrise Contractor in accordance with the Greater Sunrise Production Sharing Contract and the process provided for in this Article, has been approved in accordance with this Article.

2. The process of assessing and approving a Development Plan for the Greater Sunrise Fields is as follows:

(*a*) the Development Plan shall be assessed against the criteria listed at paragraph 3 of this Article (Development Plan Criteria);

(*b*) the Greater Sunrise Contractor shall submit the Development Plan to both the Governance Board and the Designated Authority;

(*c*) the Designated Authority shall consider the Development Plan and shall provide its recommendations to the Governance Board as to whether it should be approved or rejected within 180 days of receipt, if practicable. During this period, the Designated Authority may exchange views and information with the Greater Sunrise Contractor regarding the Development Plan. Any amendments agreed between the Designated Authority and the Greater Sunrise Contractor may be included in the Development Plan prior to the Designated Authority's recommendation to the Governance Board;

(*d*) the Governance Board shall consider the Development Plan, the Designated Authority's recommendation and any other information submitted by the Designated Authority;

(*e*) if the Governance Board considers that the Development Plan is both in accordance with the approved Development Concept and meets the Development Plan Criteria, the Governance Board shall approve the Development Plan within 180 days of receipt, if practicable;

(*f*) if the Governance Board does not approve the Development Plan under paragraph 2(*e*) of this Article, the Development Plan is rejected and the Governance Board shall specify its reasons for not approving it to the Greater Sunrise Contractor and Designated Authority. Any of these parties may, at their discretion, refer the matter to the Dispute Resolution Committee within 15 days of the Governance Board's decision;

(*g*) the Dispute Resolution Committee shall review the Development Plan, the Designated Authority's recommendation and any other information submitted pursuant to this Article. The Dispute Resolution Committee shall determine whether the Development Plan meets the Development Plan Criteria within 90 days of referral of the matter, or such other period as may be agreed with the Greater Sunrise Contractor;

(*h*) if the Dispute Resolution Committee determines that the Development Plan is in accordance with the approved Development

Concept and meets the Development Plan Criteria, the Dispute Resolution Committee shall approve the Development Plan;

(*i*) if the Dispute Resolution Committee determines that the Development Plan either is not in accordance with the approved Development Concept, or does not meet the Development Plan Criteria, the Dispute Resolution Committee shall reject the Development Plan, specifying its reasons for doing so; and

(*j*) the Parties shall be bound by, and give effect to, the decision of the Governance Board or, if applicable, the Dispute Resolution Committee pursuant to this Article.

3. The criteria that shall apply to the assessment of any Development Plan under paragraph 2 of this Article are as follows:

(*a*) the Development Plan supports the development policy, objectives and needs of each of the Parties, while at the same time providing a fair return to the Greater Sunrise Contractor;

(*b*) the project is commercially viable;

(*c*) the Greater Sunrise Contractor is seeking to exploit the Greater Sunrise Fields to the best commercial advantage;

(*d*) the project is technically feasible;

(*e*) the Greater Sunrise Contractor has, or has access to, the financial and technical competence to carry out the development of the Greater Sunrise Fields;

(*f*) the Development Plan is consistent with Good Oilfield Practice and, in particular, documents the Greater Sunrise Contractor's quality, health, safety and environmental strategies;

(*g*) the Development Plan demonstrates clear, measurable and enforceable commitments to local content through a local content plan, in accordance with Article 14 of this Annex;

(*h*) the Greater Sunrise Contractor could reasonably be expected to carry out the Development Plan during the specified period;

(*i*) the Greater Sunrise Contractor has, as applicable, entered into binding, arms-length arrangements for the sale and/or processing of gas, including liquefied natural gas, from the Greater Sunrise Fields or has provided sufficient details of any such processing and/or sale agreements to be entered into by affiliates of the Greater Sunrise Contractor or other companies; and

(*j*) the Greater Sunrise Contractor has provided summaries of, or where applicable, the project execution plan and the petroleum production plan, including relevant engineering and cost specifications, in accordance with the applicable regulatory framework and Good Oilfield Practice.

4. The Greater Sunrise Contractor may at any time submit, and if at any time the Designated Authority so decides may be required to submit, proposals

to bring up to date or otherwise amend a Development Plan. All amendments of, or additions to, any Development Plan require prior approval of the Designated Authority, which in turn requires the approval of the Governance Board.

5. The Designated Authority shall require the Greater Sunrise Contractor not to change the status or function of any Special Regime Installation in any way except in accordance with an amendment to a Development Plan in accordance with paragraph 4 of this Article.

Article 10: Pipeline

1. A Pipeline which commences within the Special Regime Area and lands in the territory of Timor-Leste shall be under the exclusive jurisdiction of Timor-Leste. A Pipeline which commences within the Special Regime Area and lands in the territory of Australia shall be under the exclusive jurisdiction of Australia. The Party exercising exclusive jurisdiction has both rights and responsibilities in relation to the Pipeline.

2. The Party exercising exclusive jurisdiction under paragraph 1 of this Article shall cooperate with the Designated Authority in relation to the Pipeline to ensure the effective management and regulation of the Special Regime Area.

3. There shall be open access to the Pipeline. The open access arrangements shall be in accordance with good international regulatory practice. If Timor-Leste has exclusive jurisdiction over the Pipeline, it shall consult with Australia over access to the Pipeline. If Australia has exclusive jurisdiction over the pipeline, it shall consult with Timor-Leste over access to the Pipeline.

Article 11: Petroleum Mining Code

1. The Interim Petroleum Mining Code, including the interim regulations, as in force at the date of entry into force of this Treaty shall govern the development and exploitation of Petroleum from within the Greater Sunrise Fields, as well as the export of such Petroleum until such a time as a final Petroleum Mining Code is approved by the Governance Board.

2. The Governance Board shall coordinate with the Designated Authority, and shall endeavour to approve and issue a final Petroleum Mining Code within six months of the entry into force of this Treaty or, if such a date is not achieved, as soon as possible thereafter.

Article 12: Audit and Information Rights

1. For the purposes of transparency, the Greater Sunrise Contractor shall include in its agreements with the operators of the downstream facilities the necessary provisions to ensure that the Designated Authority has audit and information rights from the operators of downstream facilities, and from

their respective affiliates, equivalent to those audit and information rights the Designated Authority has in respect to the Greater Sunrise Production Sharing Contract. In the event of a request by the Designated Authority, the Greater Sunrise Contractor shall consult with the operators of the downstream facilities with a view to providing access to metering facilities.

2. The rights mentioned in paragraph 1 of this Article are granted to ensure that the Designated Authority is able to verify the volume and value of natural gas.

Article 13: Applicable Law

Petroleum Activities in the Special Regime Area shall be governed by this Annex, the applicable Petroleum Mining Code and any regulations issued thereunder.

Article 14: Local Content

1. The Greater Sunrise Contractor shall set out its local content commitments during the development, operation and decommissioning of the Greater Sunrise Fields through a local content plan to be included as part of the Development Plan and the decommissioning plan.

2. The local content plan shall contain clear, measurable, binding and enforceable local content commitments, including to:

(*a*) improve Timor-Leste's workforce and skills development and promote employment opportunities and career progression for Timor-Leste nationals through capacity-building initiatives, training of Timor-Leste nationals and a preference for the employment of Timor-Leste nationals;

(*b*) improve Timor-Leste's supplier and capability development by seeking the procurement of goods and services (including engineering, fabrication and maintenance services) from Timor-Leste in the first instance; and

(*c*) improve and promote Timor-Leste's commercial and industrial capacity through the transfer of knowledge, technology and research capability.

3. The Greater Sunrise Contractor shall ensure that any subcontracts entered into for the supply of goods and services for the Special Regime Area give effect to its local content commitments.

4. Failure by the Greater Sunrise Contractor to meet its local content commitments shall be deemed as non-compliance and subject to the mechanisms and penalties referred to in the local content plan as agreed between the Designated Authority and the Greater Sunrise Contractor.

5. The Parties shall consult with a view to ensuring that the exercise of jurisdiction by either Party under Articles 17, 18 and 19 does not hinder the implementation of local content commitments referred to in this Article.

Article 15: Cooperation and Coordination

In the Special Regime Area, each Party shall, as appropriate, cooperate and coordinate with, and assist, the other Party, including in relation to:

(*a*) search and rescue operations with respect to Special Regime Installations; and

(*b*) surveillance activities with respect to Special Regime Installations.

Article 16: Exercise of Jurisdiction

1. In exercising jointly their rights as coastal States pursuant to Article 77 of the Convention, Timor-Leste and Australia exercise jurisdiction in accordance with the Convention with respect to:

(*a*) customs and migration pursuant to Article 17 of this Annex;

(*b*) quarantine pursuant to Article 18 of this Annex;

(*c*) environmental protection, management and regulation;

(*d*) marine scientific research;

(*e*) air traffic services related to Special Regime Installations;

(*f*) security and establishment of safety zones around Special Regime Installations;

(*g*) health and safety;

(*h*) management of living resources; and

(*i*) criminal jurisdiction pursuant to Article 20 of this Annex.

2. The Parties agree to consult as necessary on the cooperative exercise of the jurisdictional competencies set out in paragraph 1 of this Article.

3. The Parties have agreed to delegate the exercise of certain jurisdictional and regulatory competencies to the Designated Authority, as specified in this Treaty.

Article 17: Customs and Migration

1. The Parties may apply their customs and migration laws to persons, equipment and goods entering their territory from, or leaving their territory for, the Special Regime Area and adopt arrangements to facilitate entry and departure.

2. Limited liability corporations or other limited liability entities shall ensure, unless otherwise authorised by Timor-Leste or Australia, that persons, equipment and goods do not enter Special Regime Installations without first

entering Timor-Leste or Australia, and that their employees and the employees of their subcontractors are authorised by the Designated Authority to enter the Special Regime Area.

3. Timor-Leste and Australia may apply customs and migration controls to persons, equipment and goods entering the Special Regime Area without the authority of either country and may adopt arrangements to co-ordinate the exercise of such rights.

4. Goods and equipment shall not be subject to customs duties where they are:

(*a*) entering the Special Regime Area for purposes related to Petroleum Activities; or

(*b*) leaving or in transit through either Timor-Leste or Australia for the purpose of entering the Special Regime Area for purposes related to Petroleum Activities.

5. Goods and equipment leaving the Special Regime Area for the purpose of being permanently transferred to either Timor-Leste or Australia may be subject to customs duties of that country.

Article 18: Quarantine

1. The Parties may apply their quarantine laws to persons, equipment and goods entering their territory from, or leaving their territory for, the Special Regime Area and adopt arrangements to facilitate entry and departure.

2. The Parties shall consult with a view to reaching agreement with each other before entering into a commercial arrangement with the Greater Sunrise Contractor with respect to quarantine.

Article 19: Vessels

1. Vessels of the nationality of Timor-Leste or Australia engaged in Petroleum Activities in the Special Regime Area shall be subject to the law of their nationality in relation to safety and operating standards and crewing regulations.

2. Vessels with the nationality of other countries engaged in Petroleum Activities in the Special Regime Area shall, in relation to safety and operating standards and crewing regulations, apply:

(*a*) the laws of Australia, if the vessels are operating from an Australian port; or

(*b*) the laws of Timor-Leste, if the vessels are operating from a Timor-Leste port.

3. Such vessels engaged in Petroleum Activities in the Special Regime Area that do not operate out of either Timor-Leste or Australia shall under the

law of both Timor-Leste and Australia be subject to the relevant international safety and operating standards.

4. The Parties shall, promptly upon the entry into force of this Treaty and consistent with their laws, consult with a view to reaching the agreement required for swift recognition of any international seafarer certifications issued by the other Party, so as to allow their national seafarers to have access to employment opportunities aboard vessels operating in the Special Regime Area.

Article 20: Criminal Jurisdiction

1. A national or permanent resident of Timor-Leste or Australia shall be subject to the criminal law of that country in respect of acts or omissions occurring in the Special Regime Area connected with or arising out of Petroleum Activities, provided that a permanent resident of Timor-Leste or Australia who is a national of the other country shall be subject to the criminal law of that country.

2. Subject to paragraph 4 of this Article, a national of a third State, not being a national or permanent resident of either Timor-Leste or Australia, shall be subject to the criminal law of both Timor-Leste and Australia in respect of acts or omissions occurring in the Special Regime Area connected with or arising out of Petroleum Activities. Such a person shall not be subject to criminal proceedings under the law of either Timor-Leste or Australia if he or she has already been tried and discharged or acquitted by a competent tribunal or already undergone punishment for the same act or omission under the law of the other country or where the competent authorities of one country, in accordance with its law, have decided in the public interest to refrain from prosecuting the person for that act or omission.

3. In cases referred to in paragraph 2 of this Article, Timor-Leste and Australia shall, as and when necessary, consult each other to determine which criminal law is to be applied, taking into account the nationality of the victim and the interests of the country most affected by the alleged offence.

4. The criminal law of the flag State shall apply in relation to acts or omissions on board vessels, including seismic or drill vessels in, or aircraft in flight over, the Special Regime Area.

5. Timor-Leste and Australia shall provide assistance to and co-operate with each other, including through agreements or arrangements as appropriate, for the purposes of enforcement of criminal law under this Article, including the obtaining of evidence and information.

6. Both Timor-Leste and Australia recognise the interest of the other country where a victim of an alleged offence is a national of that other country and shall keep that other country informed to the extent permitted by its law, of action being taken with regard to the alleged offence.

7. Timor-Leste and Australia may make arrangements permitting officials of one country to assist in the enforcement of the criminal law of the other

country. Where such assistance involves the detention of a person who under paragraph 1 of this Article is subject to the jurisdiction of the other country that detention may only continue until it is practicable to hand the person over to the relevant officials of that other country.

Article 21: Decommissioning

1. The Greater Sunrise Contractor shall submit to the Designated Authority a preliminary decommissioning plan and, in so far as possible, preliminary decommissioning cost estimate as part of the Development Plan.

2. As soon as practicable, but in any case no later than seven years after commencement of production of Petroleum in the Special Regime Area, the Greater Sunrise Contractor shall be required to submit to the Designated Authority a decommissioning plan and total estimate of decommissioning costs for approval in accordance with Articles 6(3)(*s*) and 7(3)(*c*) of this Annex, which shall be updated in accordance with the Development Plan and the applicable Petroleum Mining Code.

3. The Designated Authority and the Greater Sunrise Contractor shall enter into an agreement on the holding of decommissioning cost reserves to meet the costs of fulfilling decommissioning obligations. This agreement shall be incorporated into the Greater Sunrise Production Sharing Contract. Any reserves remaining after decommissioning shall be divided between the Parties in the same ratio as their upstream revenue share pursuant to Article 2 of this Annex.

4. Following Commercial Depletion of the Greater Sunrise Fields, the Parties shall consult with a view to reaching agreement on arrangements as necessary with regard to access and monitoring of any remaining structures, including partially remaining structures, for the purposes of environmental protection and compliance with either Party's domestic laws or regulations.

Article 22: Special Regime Installations

1. The Greater Sunrise Contractor shall inform the Designated Authority of the exact position of every Special Regime Installation.

2. For the purposes of exploiting the Greater Sunrise Fields and subject to Articles 17 and 18 of this Annex and to the requirements of safety, neither Government shall hinder the free movement of personnel and materials between Special Regime Installations and landing facilities on those structures shall be freely available to vessels and aircraft of Timor-Leste and Australia.

Article 23: Duration of the Greater Sunrise Special Regime

1. The Greater Sunrise Special Regime shall cease to be in force following the Commercial Depletion of the Greater Sunrise Fields.

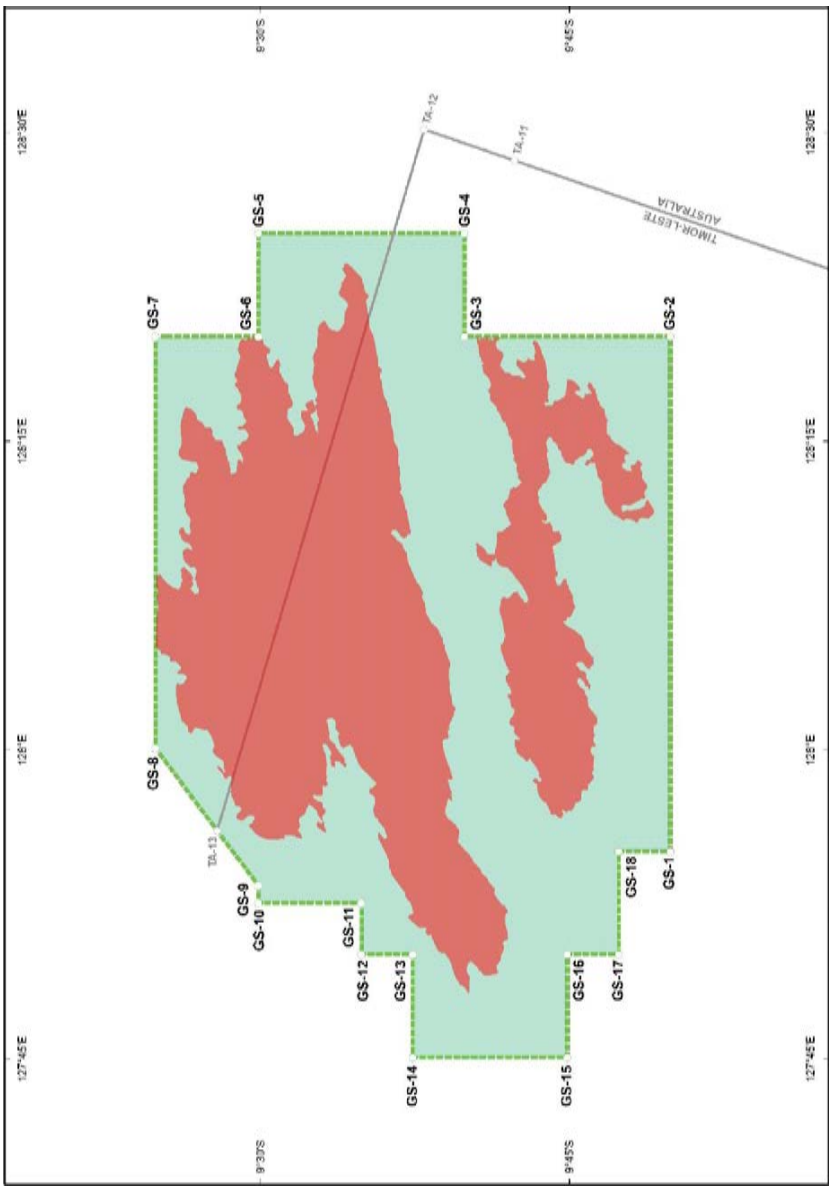
2. The Parties shall confirm their common understanding that the Greater Sunrise Fields have been commercially depleted and that the Greater Sunrise Special Regime has ceased to be in force by an exchange of notes through diplomatic channels.

Annex C: Special Regime Area

1. The Special Regime Area consists of the area of the continental shelf contained within the rhumb lines connecting the following points:

Point	*Latitude*	*Longitude*
GS-1	09° 49' 54.88"S	127° 55' 04.35"E
GS-2	09° 49' 54.88"S	128° 20' 04.34"E
GS-3	09° 39' 54.88"S	128° 20' 04.34"E
GS-4	09° 39' 54.88"S	128° 25' 04.34"E
GS-5	09° 29' 54.88"S	128° 25' 04.34"E
GS-6	09° 29' 54.88"S	128° 20' 04.34"E
GS-7	09° 24' 54.88"S	128° 20' 04.34"E
GS-8	09° 24' 54.88"S	128° 00' 04.34"E
GS-9	09° 29' 54.88"S	127° 53' 24.35"E
GS-10	09° 29' 54.88"S	127° 52' 34.35"E
GS-11	09° 34' 54.88"S	127° 52' 34.35"E
GS-12	09° 34' 54.88"S	127° 50' 04.35"E
GS-13	09° 37' 24.88"S	127° 50' 04.35"E
GS-14	09° 37' 24.89"S	127° 45' 04.35"E
GS-15	09° 44' 54.88"S	127° 45' 04.35"E
GS-16	09° 44' 54.88"S	127° 50' 04.35"E
GS-17	09° 47' 24.88"S	127° 50' 04.35"E
GS-18	09° 47' 24.88"S	127° 55' 04.35"E

2. The following is a depiction of the outline of the Special Regime Area and the Greater Sunrise Fields for illustrative purposes only:


GS-1
GS-2
GS-3
GS-4
GS-5
GS-6
GS-7
GS-8
GS-9
GS-10
GS-11
GS-12
GS-13
GS-14
GS-15
GS-16
GS-17
GS-18
TA-12
TA-17
TA-13
TIMOR-LESTE
AUSTRALIA
128°30'E
128°15'E
128°E
127°45'E
9°30'S
9°45'S

Annex D: Transitional Provisions

Article 1: Obligations under Previous Agreements

1. Pursuant to the terms of Article 22 of the Timor Sea Treaty and Article 27 of the International Unitisation Agreement, the Parties agree that any Petroleum Activities entered into under the terms of the Timor Sea Treaty or the International Unitisation Agreement shall continue under conditions or terms equivalent to those in place under those agreements as applicable.

2. Paragraph 1 of this Article shall apply to those Petroleum Activities undertaken or still to be undertaken pursuant to the terms of the following Production Sharing Contracts and/or licences:

(*a*) Production Sharing Contract JPDA 03–12;
(*b*) Production Sharing Contract JPDA 03–13;
(*c*) Production Sharing Contract JPDA 03–19;
(*d*) Production Sharing Contract JPDA 03–20;
(*e*) Production Sharing Contract JPDA 06–105;
(*f*) Production Sharing Contract JPDA 11–106;
(*g*) Retention Lease NT/RL2; and
(*h*) Retention Lease NT/RL4.

3. From the date of entry into force of this Treaty, the Parties agree that Timor-Leste shall receive all future upstream revenue derived from Petroleum Activities from the Bayu-Undan Gas Field and Kitan Oil Field.

Article 2: Arrangements for Existing Joint Petroleum Development Area Activities

1. The transitional arrangements for the Bayu-Undan Gas Field and the Kitan Oil Field are implemented in accordance with the Exchange of Correspondence on Bayu-Undan and Kitan Transitional Arrangements.

2. The Parties agree to maintain the fiscal regime relating to both the upstream and downstream components for the exploitation of the Bayu-Undan Gas Field, as applicable at the time this Treaty enters into force.

3. Goods and equipment leaving Timor-Leste or Australia for purposes related to Petroleum Activities relating to the Bayu-Undan Gas Field or the Kitan Oil Field shall not be subject to customs duties.

4. Nothing in this Treaty shall affect the ongoing application of commercial agreements entered into by the contractor for the Bayu-Undan Gas Field relating to the sale, transportation and/or processing of Petroleum from the Bayu-Undan Gas Field.

5. The relevant Timor-Leste statutory authority shall provide information to the Governance Board established under Article 7 of Annex B of this

Treaty on an annual basis regarding the operation and decommissioning of the Bayu-Undan Gas Field and the decommissioning of the Kitan Oil Field. Such information shall include an update on progress against the relevant development plan, progress against the relevant decommissioning plan and information on any safety or environmental issues.

6. The Parties shall agree on arrangements for cooperation between their relevant regulatory authorities for the safe and efficient regulation of the Bayu-Undan Gas Field having regard to the integrated nature of the upstream and downstream component of that field.

7. The Parties shall agree on arrangements for cooperation between their relevant regulatory authorities for the purposes of the safe and efficient decommissioning of the Bayu-Undan Gas Field, including the Bayu-Undan Pipeline, consistent with terms of the Bayu-Undan Gas Field and Bayu-Undan Pipeline decommissioning plans.

Article 3: Bayu-Undan Pipeline

1. The Parties agree that Australia shall exercise exclusive jurisdiction over the Bayu-Undan Pipeline, including for the purposes of taxation. Australia has both rights and responsibilities in relation to the Bayu-Undan Pipeline.

2. The fiscal regime applicable to the Bayu-Undan Pipeline at the time this Treaty enters into force shall apply until the commencement of decommissioning in accordance with the Bayu-Undan Pipeline decommissioning plan.

3. In exercising its exclusive jurisdiction in accordance with paragraph 1, Australia shall cooperate with the relevant Timor-Leste statutory authority in relation to the Bayu-Undan Pipeline.

Article 4: Arrangements for other Existing Activities outside Joint Petroleum Development Area

1. The Parties recognise that pursuant to Articles 2 and 3 of this Treaty, the Buffalo Oil Field will be situated on the continental shelf of Timor-Leste.

2. The Parties agree that for the portion of Australian exploration permit WA-523-P, including the Buffalo Oil Field, which previously fell within the continental shelf of Australia and which now falls within the continental shelf of Timor-Leste pursuant to Article 2 of this Treaty, the security of title and any other rights held by the titleholder shall be preserved through conditions equivalent to those in place under Australian domestic law and as determined by agreement between the Parties and the titleholder.

3. Pursuant to paragraph 2 of this Article, Timor-Leste agrees that it will enter into a Production Sharing Contract with the titleholder to replace the Australian exploration permit WA-523-P in respect of that portion.

4. Timor-Leste shall indemnify Australia in respect of liability arising from an act or omission which contravenes its obligations under paragraphs 2 or 3 of this Article.

5. Upon entry into a Production Sharing Contract in accordance with paragraph 3 of this Article, the Parties affirm that Timor-Leste will not assume any liability arising out of, or in relation to, Australia's exercise of jurisdiction over the Buffalo Oil Field prior to entry into the Production Sharing Contract.

Annex E: Arbitration

Article 1: Institution of Proceedings

Pursuant to Article 12 of this Treaty, either Party may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other Party. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

Article 2: Constitution of Arbitral Tribunal

The arbitral tribunal shall, unless the Parties agree otherwise, be constituted as follows:

(*a*) it shall consist of three members;

(*b*) the Party instituting the proceedings shall appoint one member. The appointment shall be included in the notification of arbitration under Article 1 of this Annex;

(*c*) the other Party shall, within 30 days of receipt of the notification of arbitration, appoint one member;

(*d*) the Parties shall, within 60 days of the appointment of the second arbitrator, appoint the third member who shall act as President of the tribunal;

(*e*) if an appointment is not made within the time limits provided for in paragraphs (*c*) and (*d*) of this Article, either Party may request the Secretary-General of the Permanent Court of Arbitration to make the necessary appointment. If the Secretary-General is a national of either Timor-Leste or Australia or is otherwise prevented from discharging this function, the role of the appointing authority shall be carried out by the Deputy Secretary-General or by the official of the International Bureau of the Permanent Court of Arbitration next in seniority who is not a national of either Timor-Leste or Australia; and

(*f*) any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3: Registry

Unless the Parties otherwise agree, the International Bureau of the Permanent Court of Arbitration shall act as registry to administer the arbitral proceedings.

Article 4: Procedure

1. The arbitral tribunal shall decide all questions in relation to its competence.

2. Unless the Parties otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each Party a full opportunity to be heard and to present its case.

Article 5: Duties of the Parties

The Parties shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:

(*a*) provide it with all relevant documents, facilities and information; and

(*b*) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

Article 6: Expenses

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.

Article 7: Required Majority for Decisions

Decisions of the arbitral tribunal shall be taken by a majority vote of its members. The absence or abstention of one member shall not constitute a bar to the tribunal reaching a decision. In the event of an equality of votes, the President of the tribunal shall have a casting vote.

Article 8: Default of Appearance

If one of the Parties does not appear before the arbitral tribunal or fails to defend its case, the other Party may request the arbitral tribunal to continue the proceedings and to make its award. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 9: Award

The award of the arbitral tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the award. Any member of the tribunal may attach a separate or dissenting opinion to the award.

Article 10: Finality of Award

The award shall be final and without appeal. It shall be complied with by the Parties.

Article 11: Applicable Law

The arbitral tribunal shall reach its award in accordance with the terms of this Treaty and relevant international law.

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