COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: Australia-Indonesia Maritime Delimitation Treaty

CANBERRA

Monday, 29 September 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

Members:

Mr Taylor (Chairman)

Mr McClelland (Deputy Chairman)

Senator Abetz	Mr Adams
Senator Bourne	Mr Bartlett
Senator Coonan	Mr Laurie Ferguson
Senator Cooney	Mr Hardgrave
Senator Murphy	Mr Tony Smith
Senator Neal	Mr Truss
Senator O'Chee	Mr Tuckey

For inquiry into and report on:

Australia-Indonesia Maritime Delimitation Treaty.

WITNESSES

KAYE, Mr Stuart Bruce, Lecturer in Law, University of Tasmania, GPO Box 252-89, Hobart, Tasmania 7001 52

JOINT STANDING COMMITTEE ON TREATIES

Australia-Indonesia Maritime Delimitation Treaty

CANBERRA

Monday, 29 September 1997

Present

Mr Taylor (Chairman)

Senator Coonan	Mr Adams
Senator Cooney	Mr Hardgrave
	Ms Jeanes
	Mr McClelland
	Mr Truss

The committee met at 10.35 a.m.

Mr Taylor took the chair.

KAYE, Mr Stuart Bruce, Lecturer in Law, University of Tasmania, GPO Box 252-89, Hobart, Tasmania 7001

CHAIRMAN—Before we start, there is a quick housekeeping matter. I welcome Susan Jeanes to the committee. I am sure you will find it a very interesting committee indeed. This particular inquiry into the Maritime Delimitation Treaty with Indonesia is a very important one, and it is a very technical one. It is a very technical one in legal terms and a very technical one in terms of the administrative wherewithal that goes with it.

We have already had a hearing here in Canberra. We have also taken evidence in Perth from the Solicitor-General of Western Australia, from the Western Australian government and from a number of interested individuals in Western Australia. Following today's hearing the committee will travel to Darwin on 8 October. We have just received approval from the Minister for Defence to use a VIP aircraft to travel to Christmas Island on 9 October to take further evidence in Christmas Island, for reasons that will come out in the evidence that will be given and has already been given.

At this stage we plan to have the final hearing here in Canberra on 20 October. After the visits to WA, to the Northern Territory and to Christmas Island we should have enough evidence to be able to represent all concerns and views to the parliament, and therefore to the government, for possible ratification of this treaty.

With those few opening remarks I welcome Mr Stuart Kaye from the University of Tasmania, who has appeared before this committee before on other matters. Stuart, I invite you to make a short opening statement.

Mr Kaye—Thank you. In relation to the committee's inquiry into the recent maritime boundary delimitation treaty between Australia and Indonesia, I believe it is important to note that this treaty represents the culmination of a negotiation process that began in the early 1970s, so to look at it in isolation without reference to some of these earlier efforts is perhaps to belie the tremendous effort that has gone into its preparation.

It represents an extremely creative solution to what a decade ago would have seemed an intractable problem, in that it provides a virtually complete delimitation of the seabed and water column areas between Australia and Indonesia. As an extremely creative solution, it provides a very useful example to other states in our region as to how to go about constructively solving maritime boundary problems that they have had.

I have recently returned from an AusAID funded trip to China to discuss with Chinese academics and officials their maritime boundary situation. During those discussions with an official from the state oceanic administration in China I was taken aside and it was impressed upon me how useful they found Australia's efforts in resolving its boundaries. Australia's efforts, not just with Indonesia but with Papua New Guinea, splitting boundaries and using joint development zones and so forth, represented an

example which the Chinese felt that they should try to emulate in some way in their discussions with their neighbours.

The present treaty provides a solution, which is not to suggest it is without any limitations; but I should like to say that, while I am aware that others have expressed doubts about the efficacy of the treaty, certainly I feel that these are not significant in the present environment of the relationship between Australia and Indonesia. Certainly the present agreement, even with these limitations taken to their nth degree, is definitely preferable to the absence of any agreement at all. What limitations are present, that have been identified by my colleagues in other institutions, I feel certain could be resolved without difficulty in time in the constructive environment that exists between Australia and Indonesia.

CHAIRMAN—Thank you very much. There are just a couple of other housekeeping items before we get started on the evidence.

Resolved (on motion by Mr Hardgrave):

That this committee authorises publication of submission No. 8 from the East Timor Relief Association.

CHAIRMAN—I should mention that here this morning we have observers from Cultus Petroleum, Sydney. We also have observers from the Australian National Audit Office, who are observing the Department of Foreign Affairs and Trade's treaty making procedures in the context of a possible upcoming report. Welcome to this hearing.

Thank you for that short introduction, Mr Kaye. As with your previous appearance before this committee, it was very helpful. Whilst you were very quick to point out some of the qualifications in terms of some of these treaties, what you have to say always seems to make a lot of sense. What you are saying is basically that the bottom line is that it is better to have it than not to have one at all. Nevertheless, for the benefit of the parliament and for the executive which, as you know, makes these treaties, we need to make quite sure that in the consultation process some of the things that have or have not been included in the national interest analysis are explored in a little more detail by this committee. Barney, you might like to open.

Senator COONEY—I suppose you know the arguments against the treaty. What do you say about those? I will put you in as an answerer to the problems that have been raised.

Mr Kaye—Some of the concerns that have been raised are that you have a splitting of the water column and the seabed: any activities which are undertaken on the seabed must necessarily affect the water above it and therefore, if there was some sort of disaster or difficulty in undertaking exploration, you could have the ramifications of that impacting upon fisheries and the like. Similarly, there has to be some degree of

consultation between the parties. If one party decided to be obstructionist they could make the other's life particularly difficult in the administration of this treaty.

In answer to that, the concerns are legitimate and they do exist under the UN Convention on the Law of the Sea, in that the convention does not explain how you deal with this splitting of jurisdiction. It is something which one imagines that the delegates did not give any serious consideration to, although the International Court of Justice in a number of cases has expressly approved that this sort of solution is possible.

As to a solution to it, it is important to remember, first of all, that if the parties are sincere in their implementation of the treaty then logically they will not do anything to obstruct each other in the administration of their own responsibilities. At the present point in time, I have no reason to believe that Indonesia would be obstructionist in this. Similarly, I believe our own government would approach this in good faith.

Secondly, while it is possible to say that there could be some degree of difficulty, international law requires that states enter into treaties in good faith. If Indonesia began to construct artificial installations in the area with the express intention of trying to exclude Australian exploration companies from seeking oil and so on, we would have good reasons to say, 'You are not acting in good faith under this treaty and you are in breach of the obligations under it,' even though the scope of those obligations is not spelt out to the nth degree.

The other point to note is that while this treaty does not spell out precisely the mechanics of how these arrangements are to work, it does not prevent the parties from continuing to discuss these issues and dealing with specific instances of exploration and other difficulties as they come up and as they are needed. At the present point in time, I am not aware of any reason to go any further than this. If such reason does become apparent in the future, I have no doubt that if the parties explore those options in the same constructive manner they have explored this, then a solution is certainly possible.

Senator COONEY—I noticed some material put in this morning about the East Timor situation. Do you want to comment on that?

Mr Kaye—That is essentially a completely different issue. Once Australia recognised Indonesia as sovereign in East Timor that meant that we had to deal with Indonesia with respect to dealing with offshore areas. We have been doing so since 1979, when we gave complete de jure recognition to Indonesia. As far as a law of the sea lawyer's perspective on this is concerned, that is the end of the story.

It is significant to note that if we did turn around and say, 'No, we do not recognise Indonesia as sovereign over East Timor,' it would mean we would be in breach of a number of treaties that we have with them—most significantly, of course, the Timor Gap arrangements—and Indonesia would be entitled to object most strenuously under

international terms, and to say we were in breach of our obligations. So it could have rather unfortunate consequences for our relationship with Indonesia and for those companies that are active in the Timor Gap.

CHAIRMAN—Mr Kaye, it must be my jet lag, and I do apologise for this, but I should have said also that your submission dated 17 September has already been authorised for publication, and I should have asked you if there are any errors or omissions in terms of that written submission that you want to draw our attention to.

Mr Kaye—Not so far as I know.

CHAIRMAN—Are you aware of some comments from the University of Wollongong, from Max Herriman and Martin Tsamenyi, in terms of the goodwill of the parties, that the treaty fails to address all areas of potential conflict? Do you think that is an extreme view, or do you stick with what you were saying in your opening address: that those issues can be overcome with a good bilateral relationship between the two countries?

Mr Kaye—I believe those issues can be overcome.

CHAIRMAN—Are you aware of the paper?

Mr Kaye—I have not read the paper, but Commander Herriman was one of the participants in my recent trip to China, and we had plenty of time to discuss these issues in some detail. I discussed them briefly with Professor Tsamenyi some months ago. I am aware of their concerns and I think, from a legal point of view, their concerns are valid. I am not suggesting that they are in error in interpreting the treaty itself. However, I think that from a practical perspective these problems are not significant at the present point in time. I still believe that even if these problems were to become significant, the present arrangement that we have is preferable to no treaty at all.

CHAIRMAN—Okay. We will not be calling them. In fact, we will use that paper as an exhibit, for a number of other reasons that I will not go into. I was just interested in your reaction to it. It is a straight legalistic interpretation of the situation—is that what you are saying?

Mr Kaye—They are concerned that since not all activities are dealt with in great detail, it would be possible for the parties to interpret some of the provisions very liberally and modify their behaviour to make it difficult for the other party to exercise their jurisdiction in areas of overlap. That, in theory, is possible. Professor Tsamenyi, in discussions, indicated that Indonesia could set up fish aggregation devices in the overlapping area and thereby exclude Australian companies from exploring those areas. That is theoretically possible, but one would have to question what the likelihood of such an event occurring would be, given that it would cost Indonesia an extremely large amount of money to do that and Australia would almost certainly protest and say that it was not in

the spirit of this particular arrangement.

Mr HARDGRAVE—Where is there greater potential for conflict? You are saying it is relying on goodwill, but where is the potential for conflict?

Mr Kaye—Within this arrangement there is no indication of any conflict on the horizon. The fact that this treaty has been concluded suggests that relations between the two countries are very good and that there is a strong desire of both countries to rationalise their maritime boundaries. In a world sense, that is not common. Where countries do not have good relations, or where they are concerned about their boundaries, they prefer to leave things in limbo. This suggests that the relationship between the parties is very sound, and I would suggest that there are no foreseeable indications of any conflict.

Mr HARDGRAVE—How do you rate your opinion on this? Are you being overly optimistic, or are you being more realistic? Are you supported by more people than those who would be critical of your assessment?

Mr Kaye—I am uncertain whether you would have sufficient interest in the Australian academic community to say that you had more or fewer people supporting it. It is not an area that tends to attract a lot of academic consideration. I would like to think that in world terms my position is closer to the median than perhaps a position that would suggest conflict was possible. I do not want to suggest, however, that events like Professor Tsamenyi and Commander Herriman have suggested are impossible. I feel that they are unlikely, and that the present treaty represents a sound means of dealing with our boundaries.

Mr HARDGRAVE—These are overlapping areas, and there is always going to be difficulty when you look at a line on the map, or a latitudinal-longitudinal description of a point on the map. In the case of fishing, obviously you have got nets that could stray. You have got oil drilling platforms that could drill at an angle and end up underneath that particular line, or you could hit an oil well the majority of which is on the other side of the line. They are all potential areas of conflict, are they not?

Mr Kaye—We are permitted under the treaty and in international law terms to declare safety zones around oil installations, which one would imagine would preclude the likelihood of oil installations and fishing vessels coming into direct contact. If there is a risk possible, it would be that some sort of accident would occur and there would be a significant oil spill that potentially could harm fishing.

Such an accident has not occurred, as far as I am aware, in Bass Strait, where we have had oil installations operating for a considerable period of time. I believe that we have had oil installations operating near the continental shelf boundary we had already concluded with Indonesia that are actually to the north of the provisional fisheries

arrangements; so to some extent this overlapping situation has, in practical terms, existed for quite a while. It has not presented any problems. We have also had an overlapping area with Papua New Guinea in the Torres Strait in operation now for over 12 years. Once again, that arrangement has operated very well and is a model to the rest of the world.

Mr HARDGRAVE—So if we bury the suspicion that often occurs in the Australian community about our friends in Indonesia and get on with life, we will be a lot better off than sitting around worrying about it.

Mr Kaye—The Indonesians, in terms of their law of the sea practice, have tended to want to resolve issues with their laws to the satisfaction of their neighbours, and have worked hard at dealing with their boundaries. We do not always see eye to eye with them in the context of things like archipelagic sea lanes and so forth, but in the context of maritime boundary delimitation they have also taken a constructive view, which is why this arrangement has proved possible.

Mr ADAMS—I was interested in the situation of the overlapping and pollution spill-over from oil wells. Is there anywhere else in the world where that has occurred, and where litigation between states has occurred to solve those things?

Mr Kaye—Dealing with overlapping areas?

Mr ADAMS—Yes.

Mr Kaye—No, because this method of dealing with maritime boundary delimitation is quite unusual. It represents a very creative solution. It is certainly possible, and it has been indicated as possible by the international court, but for the most part the two most significant arrangements that have used it both involve Australia. One has been this most recently concluded treaty, and the other is the Torres Strait treaty. So as far as I am aware there has not been any litigation arising out of a situation like this, because situations like this are very rare.

Senator COONAN—When you have got a conflict between the shelf regime and the EEZ, how does article 56(2) actually get applied? What is 'due regard', and how does that actually work?

Mr Kaye—This is something that has not been effectively explored, because once again these arrangements are unusual. I think it is not unreasonable to assume that the delegates at the third United Nations Conference on the Law of the Sea did not believe that this situation was likely to occur, because the methods for calculating the continental shelf and the exclusive economic zone are essentially the same within 200 nautical miles.

On that basis, you basically have to work out how the law will operate on an ad hoc basis. You have to say that the parties must seek to resolve this in a spirit of

goodwill. They could perhaps use the mechanisms for dispute resolution under the convention and try to get the Law of the Sea Tribunal, the international court or some other arbitral tribunal to indicate how this should work. The convention itself provides virtually no clues, other than to suggest due regard. I have heard opinion that due regard should suggest that the continental shelf regime should be regarded as superior.

Senator COONAN—Yes, I noted that. Do you subscribe to that view?

Mr Kaye—No, I do not. I think it is reasonable to assume that the two regimes are complementary. The area of overlap is direct, because the EEZ regime ordinarily includes the seabed and subsurface activities. If you are going to separate the two, then logically they should be treated on an equal footing and the parties should cooperate as much as possible in the exercise of water column and seabed jurisdiction. That has obviously been the intention in this particular treaty.

Ms JEANES—Given that this is my first question, and I am not in the least familiar with this treaty, is there any further scope to deal with those overlapping problems within the convention? If I were Indonesia, I think I would be a little bit nervous about exploration activities possibly affecting my water column activities. Is there any possibility of including further detail in the convention as to how those disputes should be dealt with?

Mr Kaye—Within the treaty, probably not. Once these things have been set down, it is possible for the parties to agree in international law terms to amend or add to them; but practice would probably favour the conclusion of memorandums of understanding in relation to particular subjects. Australia has done this with Indonesia in a number of areas with regard to fisheries and other offshore activities. They can be used to supplement the basic provisions of this sort of treaty quite effectively, and can be concluded with relative speed between respective departments of foreign affairs.

Ms JEANES—Has there been any such move?

Mr Kaye—In relation to this particular treaty, I believe there was a memorandum of understanding concluded at about the same time this treaty was entered into, although the precise content of that escapes me. I believe it is referred to in one of the footnotes of my submission.

CHAIRMAN—I think that is in relation to the fishing rights in the islands. There is a memorandum of understanding in relation to that.

Mr Kaye—Yes. There is also a memorandum of understanding for traditional fishing in a large box that is inside areas subject to Australian jurisdiction. My understanding is that, because this arrangement is so new, it is unlikely that significant exploration activity has begun in this area. I am not sure, but perhaps representatives of

some of the oil companies would be better informed on this. Certainly it will take time for these sorts of activities to be undertaken; and if it is likely that there is a difference of opinion between the parties on that, then they can work it through before such activities commence.

CHAIRMAN—We are on the open record here, but there are one or two things we cannot talk about in the open record, and one of those is the prospectivity area. This committee has been briefed privately, and we will get some more briefing on this in terms of the commercial-in-confidence aspect of the results of this treaty.

In terms of linking this one in with the PNG one and the Timor Gap one, if and when this is ratified, how will all of that relate to the Timor Gap and what may or may not happen in the future to the Timor Gap?

Mr Kaye—My understanding is that the two parties are very pleased with the operation of the Timor Gap Treaty, and they have found that the Timor Gap Joint Authority has been a success. Accordingly, rather than disturb those arrangements, they have been left in place. In the long term, that means that a continental shelf boundary within the Timor Gap will still have to be delimited.

In practical terms it will not be a problem, because when the joint authority is brought to a close, one assumes that there will then be no more significant oil reserves or gas reserves in the region, and therefore nobody will much care where the boundary runs, because there will not be any significant economic activity that the boundary will impact upon. The gap arrangements will remain in place. By all accounts, they have proved a great success.

Once again, I was part of a team that went to Cambodia in January. It was arranged under the South-East Asian program for ocean law and policy, funded by the Canadian government. The Cambodians are interested in concluding a similar arrangement with Thailand to deal with oil reserves offshore there, and they wanted to know about the Timor Gap arrangements. They specifically asked not merely for an international lawyer, but for the two directors of the Timor Gap Joint Authority to have consultations with their government; so the arrangement itself is, once again, a model in the region.

CHAIRMAN—As you said in your opening remarks, this is groundbreaking stuff in terms of law of the sea and wider things. In terms of the ICJ judgments in some of the Scandinavian areas, and potential conflicts, has there been any potential conflict as a result of that, or as a result of that judgement?

Mr Kaye—Not so far as I am aware. The international court has not had a lot of opportunity to deal with issues of overlapping jurisdiction. They have considered it in the context of maritime boundary delimitations between Libya and Tunisia, and in the Gulf of Maine between the United States and Canada. Those comments were not directly related

to the judgments that they gave, simply because those parties had indicated they would prefer a single line to deal with all aspects of maritime jurisdiction; but what comments were made by some of the judges of the court suggested that creativity was possible. Other judges have suggested that they could create some difficulties in jurisdiction, presumably of the type indicated by Commander Herriman and Professor Tsamenyi.

CHAIRMAN—How do you think, in practical terms, the petroleum industry will react? They were consulted in great depth in the preparation of the NIA, but how do you see them reacting to these overlapping areas and areas of administrative interpretation?

Mr Kaye—I believe they will see this as a positive step. If you do not have a boundary you generally have no petroleum exploration, and certainly no exploitation, because your rights are in jeopardy and the rather large investment that you have to make to undertake those activities could be lost. In this area it is clear that if Australia grants certain rights over areas of seabed, exploration can quite legitimately take place and those investments will be adequately protected. Accordingly, I would imagine that providing they can be certain that they are not likely to get too much friction from Indonesia about the way they conduct their activities, they will have no qualms about operating in this area.

CHAIRMAN—I understand that in Darwin we may actually take evidence from Santos and maybe BHP. I guess it is best addressed to the commercial elements. Warren, do you want to ask any questions while Mr Kaye is here?

Mr TRUSS—I do not think so, no. I am impressed with what I have read.

CHAIRMAN—As always, we thank you for your evidence on this one. Basically what you are saying is that the ratification should proceed; that there will be administrative question marks in some areas which may need to be addressed, but that they can be addressed administratively by the governments on a bilateral basis. Is that basically what you are saying?

Mr Kaye—Yes, certainly.

CHAIRMAN—Thank you very much indeed.

Resolved (on motion by Mr Hardgrave):

That this committee authorises publication of the evidence given before it today.

Committee adjourned at 11.03 a.m.