

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Joint Standing Committee on Treaties

**AUSTRALIA-INDONESIA
MARITIME DELIMITATION
TREATY**

12th Report

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ISBN

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EXTRACT FROM RESOLUTION OF APPOINTMENT

The Joint Standing Committee on Treaties was formed in the 38th Parliament on 30 May 1996. The Committee's Resolution of Appointment allows it to inquire into and report upon:

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

Pursuant to this Resolution of Appointment the Committee resolved to inquire into the *Treaty between the Government of Australia and the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*.

RECOMMENDATIONS AND FINDINGS

Recommendations

The Joint Standing Committee on Treaties recommends that the Australian Government, in consultation with the relevant State and Territory governments, review the 1974 traditional fisher Memorandum of Understanding with Indonesia in light of the changes to the Exclusive Economic Zone boundary in the vicinity of the Ashmore Islands, and

the Australian Government, in consultation with the relevant State and Territory governments, review the issue of ongoing Indonesian traditional fisher access to Australian waters and its impact on the sustained management of Australian fish resources (Paragraph 7.3 refers).

The Joint Standing Committee on Treaties recommends that the Australian Government, in consultation with the relevant State and Territory governments, review existing Memorandum of Understanding and agreements with Indonesia, such as the *1992 Agreement relating to Cooperation in Fisheries*, to ensure that they adequately address the issue of managing shared fish resources (Paragraph 7.7 refers).

The Joint Standing Committee on Treaties recommends that the Australian Government identify, and advertise widely to the State and Territory governments, the points of contact within the relevant Commonwealth departments/agencies which will have responsibility for coordinating dispute resolution in any areas of overlapping jurisdiction between Australia and Indonesia (Paragraph 7.8 refers).

The Joint Standing Committee on Treaties recommends that the Government review existing, or establish as a matter of urgency, reciprocal maritime scientific research arrangements with Indonesia to facilitate cross-border access for Australian researchers in the vicinity of Christmas Island (Paragraph 7.13 refers).

The Joint Standing Committee on Treaties recommends that the Government review the issues of illegal immigration and maritime pollution on Christmas Island (Paragraph 7.14 refers).

The Joint Standing Committee on Treaties recommends that Commonwealth departmental officials conduct a thorough consultation process on Christmas Island with officials and the local community, prior to ratification, to explain to them the provisions of the Treaty (Paragraph 7.21 refers).

The Joint Standing Committee on Treaties recommends that the Government clarify with State and Territory Governments the process of their representation and participation throughout the negotiation of an agreement of treaty status (Paragraph 7.24 refers).

The Joint Standing Committee on Treaties recommends that the Government provide to the Committee, following the tabling of an agreement or National Interest Analysis, a complete list of those individuals, organisations and interest groups consulted both before signature, and during the preparation of the National Interest Analysis (Paragraph 7.27 refers).

The Joint Standing Committee on Treaties recommends that the Australia-Indonesia Maritime Delimitation Treaty be ratified (Paragraph 7.39 refers).

Findings

The Joint Standing Committee on Treaties finds that the consultation process in relation to Christmas Island was inadequate and re-emphasises the importance of involving all Australians, no matter how remote, in the consultation process as part of the treaty-making process. (Paragraph 7.20 refers)

ACKNOWLEDGMENTS

The Committee wishes to thank all those who participated in the Inquiry by appearing as witnesses, providing written submissions and assisting with the arrangements for Committee meetings, public hearings and inspections. The Committee is grateful for the interest shown and the co-operation and advice provided.

The Committee would also like to thank the following organisations for the use of diagrams, maps and photographs in the production of this Report:

Australian Geological Survey Organisation

Australian Surveying and Land Information Group

Parks Australia

ABBREVIATIONS

ADF	Australian Defence Force
AG's	Attorney-General's Department
AFFET	Australians for a Free East Timor
APPEA	Australian Petroleum Production and Exploration Association
AFMA	Australian Fisheries Management Authority
AFS	Australian Fisheries Service
AFZ	Australian Fishing Zone
AFP	Australian Federal Police
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DFAT	Department of Foreign Affairs and Trade
DPIE	Department of Primary Industries and Energy
EEZ	Exclusive Economic Zone
ETRA	East Timor Relief Association
ICJ	International Court of Justice
KMS	Kilometres
MOU	Memorandum of Understanding
NIA	National Interest Analysis
NGO	Non-Government Organisation
NM	Nautical Mile
NPF	Northern Prawn Fishery

OCS	Offshore Constitutional Settlement
PFSEL	Provisional Fisheries Surveillance and Enforcement Line
SBT	Southern Bluefin Tuna
SCOT	Standing Committee on Treaties
UNCLOS	United Nations Convention on the Law of the Sea
UCIW	Union of Christmas Island Workers
ZOCA	Zone of Cooperation Authority

CHAPTER 1

BACKGROUND TO THE INQUIRY

Introduction

1.1 Australia's relationship with Indonesia will always be fundamentally important. This reflects Indonesia's strategic location astride Australia's northern approaches through which 60 per cent of Australia's exports pass and its size - Indonesia is by far the largest and most populous country in Australia's immediate vicinity.¹

1.2 The signing of the *Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries* (the less formal title of *Australia-Indonesia Maritime Delimitation Treaty* will be used throughout this report) marks the culmination of 25 years of negotiation which began in the late 1960s. It is evidence of the good relations between the two countries and highlights the importance the Australian Government attaches to its relations with Indonesia. The treaty also exemplifies the manner in which the two countries are able to work together to resolve issues of common concern and achieve productive outcomes.²

1.3 The Treaty finalises the maritime boundaries between Australia and Indonesia in those areas which were not covered by existing treaties. The three boundaries finalised by the Treaty are, firstly, the exclusive economic zone-EEZ-and seabed boundary between Christmas Island and Java; secondly, the western extension of the seabed boundary between continental Australia and Indonesia; and, finally, the EEZ boundary between continental Australia and Indonesia. The boundaries delimited by the Treaty stretch over approximately 3,000 kms.³ The Treaty provides Australia with security of jurisdiction over the relevant offshore resources south of these boundaries.

1.4 The Treaty is of significance to Australia for two reasons. Firstly, it settles the issue of seabed jurisdiction, thereby providing a firm basis for the exploration and exploitation of the natural resources of the seabed in a climate

1 *In the National Interest*, Australia's Foreign and Trade Policy, White Paper, National Capital Printing, Canberra, 1997, p. 61.

2 Transcript, 2 September 1997, p. 3.

3 *ibid*, p. 3.

of confidence and certainty. Similarly, the finalisation of the EEZ water column between the two countries provides a clear foundation for the future management of fisheries resources.⁴

1.5 Secondly, the Treaty is a further boost to the broader bilateral relationship between Australia and Indonesia. In addition, the finalisation of Australia's maritime boundaries with Indonesia eliminates uncertainty with respect to sovereign rights over the areas involved and thereby contributes to the security of the broader region.⁵

The legal framework

1.6 Both Australia and Indonesia are Parties to the *United Nations Convention on the Law of the Sea (UNCLOS)*, which entered into force in 1994. Under UNCLOS, coastal States are entitled to a continental shelf and exclusive economic zone (EEZ) extending up to 200 nautical miles (nm) ⁶from the baselines from which the breadth of the territorial sea is measured. Where the geomorphological shelf (the natural prolongation of a coastal State's land mass) extends beyond 200 nm, a coastal State may claim an additional area of shelf within the limits established under UNCLOS. Figure 1 details the maritime zones contained within UNCLOS.

4 *ibid*, pp. 3-4.

5 *ibid*, p. 4.

6 A unit of distance equal to 1,852 metres.

Figure 1: Maritime Zones contained within the 1982 United Nations Convention on the Law of the Sea (Courtesy of AGSO)

1.7 The maximum extent that a coastal State can claim when its continental shelf extends beyond 200 nm is determined by a complex set of rules, (one of which generates a line known as the *Hedberg* line) but in no case can it exceed the greater of 350 nm from the baseline or 100 nm from the 2500-metre isobath (a line connecting all points lying at a depth of 2500 metres).

1.8 A *Hedberg line* is a line delineated by reference to fixed points not more than 60 nm from the foot of the continental slope. Article 76 of UNCLOS defines the foot of the continental slope as the point of maximum change in the gradient at its base. Application of the method to derive a *Hedberg line* requires information on the morphology of the seafloor so that the foot of slope points can be determined. The *Hedberg line* is then formed by straight lines not exceeding 60 nm in length, connecting selected points on the 60 nm arcs constructed from the foot of slope points. The use of the *Hedberg Line* is illustrated in Figure 2.

Figure 2: The use of the Hedberg Line in defining the outer limit of the continental shelf where it extends beyond 200 nautical miles
(Courtesy of AGSO)

Existing arrangements

1.9 Australia and Indonesia have conducted a series of maritime boundary delimitation negotiations since the late 1960s that have resulted in three treaties being concluded.

1.10 In May 1971, a treaty was signed settling the seabed (continental shelf) boundary in the Arafura Sea west of Cape York to the north of Arnhem Land. The treaty entered into force in November 1973.

1.11 In October 1972, a further treaty was signed settling the seabed boundary from the end-point north of Arnhem Land in the previous treaty to a point to the south of West Timor. A gap was left in the area of what was then Portuguese Timor. The treaty entered into force in November 1973.

1.12 In December 1989, 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 (Timor Gap Treaty)* was signed.

This treaty provisionally dealt with the gap in the seabed area not covered when the second (1972) treaty was signed. The Timor Gap Treaty entered into force in February 1991.

1.13 In 1974, Australia and Indonesia concluded a Memorandum of Understanding (MOU) that permitted Indonesian traditional fishermen access to a box-shaped area in the vicinity of the Ashmore Islands and other small features to the north-west of Western Australia.⁷

1.14 In 1981, however, concerned at the increasing problem of traditional fishermen straying outside the MOU area, the two States agreed to a Provisional Fisheries Surveillance and Enforcement Line (PFSEL). The PFSEL is a line equidistant between the Australian and Indonesian mainlands, and was intended not to prejudice any future negotiations over a permanent boundary.⁸

1.15 It is important to note that treaties negotiated to date have treated the seabed differently from the water column. Primarily, this is because recognition of continental shelf jurisdiction in international law predated the recognition Exclusive Economic Zone (EEZ) jurisdiction. That is, the concept of the EEZ was not known to international law at the time of the negotiation of the 1971 and 1972 seabed treaties.

1.16 Furthermore, the principle of natural prolongation that suggested using features such as the Timor Trough in maritime boundary delimitation was progressively eroded and ultimately rejected in a series of International Court of Justice cases.⁹

1.17 Except in the relation to the area between Christmas Island and Java, this Treaty continues to treat seabed jurisdiction separately from water column jurisdiction.

Relationship with the Timor Gap Treaty

1.18 The Treaty does not cover the area of the seabed that is subject to the *Timor Gap Treaty*. The Treaty does, however, establish a water column boundary in the Timor Gap.

7 Submissions, p. 22.

8 *ibid*, pp. 22-23.

9 *ibid*, p. 22.

1.19 The Treaty does not impact on the rights and obligations of either Party under the *Timor Gap Treaty*, nor do any of its provisions affect the respective seabed rights claimed by each Party in the Zone of Cooperation or prejudice the position of either Party in relation to a permanent seabed delimitation in the Zone of Cooperation.

Costs and future protocols

1.20 There are no expected financial costs associated with the implementation of the Treaty. No provision is made in the Treaty for future protocols of any kind, however, it can be amended at any time with the mutual consent of both Parties by means of a further instrument of treaty status.

Consultation

1.21 We were advised that throughout the negotiation of the Treaty, the interests of the States and Territories were represented by the Solicitor-General of Western Australia, who was a member of the Australian delegation.

1.22 The NIA indicates that consultations by the line departments were held in Canberra, Melbourne, Perth and Darwin with a range of interest groups and individuals, including the petroleum and fisheries industries, members of law and geography faculties from several universities, the Northern Land Council, the Australian Defence Forces, East Timor support groups based in Darwin and relevant agencies from State and Territory Governments.

1.23 The Department of Primary Industries and Energy kept the Australian Petroleum Production and Exploration Association (APPEA) informed, in general terms, of progress in the negotiations on the Treaty throughout.

1.24 Interest in the Treaty was particularly strong on the part of the petroleum and fishing industries in Western Australia and the Northern Territory, especially in relation to the how the Treaty will apply in areas of overlapping jurisdiction. The issue of consultation is addressed in detail in Chapter 6.

Conduct of the inquiry

1.25 The text and accompanying National Interest Analysis (NIA) for the Treaty were tabled in both Houses of Parliament on 26 August 1997.

1.26 On the same day, the Committee agreed that an inquiry should be undertaken into the Treaty, with a view to making recommendations to the Parliament about ratification of the Treaty and any other relevant matters.

1.27 The inquiry was advertised nationally and in two regional newspapers on Saturday, 30 August 1997. Moreover, on 17 September 1997, the inquiry was further advertised in the Aboriginal Independent Newspaper (based in Perth), which provided access to isolated regional centres in north-west Australia.

1.28 An initial public hearing was held in Canberra on Tuesday, 2 September 1997. This hearing was preceded by a private briefing to the Committee from the line departments involved in negotiating the Treaty. Further public hearings were held in Perth on Monday, 15 September, Canberra on Monday, 29 September and Darwin on Wednesday 8 October 1997. Additionally, on Thursday 9 October, the Committee conducted an inspection and public hearing on Christmas Island, while on Monday, 20 October 1997, a further hearing was held in Canberra. The final public hearing was held in Canberra on Tuesday, 28 October 1997.

1.29 Those people who gave evidence at the public hearings are listed in Appendix 1. Submissions received are at Appendix 2. Exhibits are listed at Appendix 3.

Report structure

1.30 The provisions of the Treaty are analysed briefly in Chapter 2. Material presented to the Inquiry relating to the establishment of the boundaries is addressed in Chapter 3, while Chapter 4 discusses those matters pertaining to resource management issues. Issues relating to Christmas Island are dealt with in Chapter 5, while we comment in detail on the consultation process in Chapter 6. In the final chapter we present our views and recommendations.

CHAPTER 2

PROVISIONS OF THE TREATY

Details of the boundaries

2.1 The existing maritime boundary arrangements between Australia and Indonesia are indicated on Map 1.

Western extension of the seabed boundary

2.2 The 1971 and 1972 seabed delimitation treaties were negotiated on the basis of international law as it then stood, which recognised a State's sovereignty over the resources of its adjacent continental shelf as flowing from the 'natural prolongation' of the State's land territory into and under the sea.¹

2.3 This approach, particularly considering Australia's broad continental margin and the presence of the Timor Trough, led to the boundary agreed under the 1972 seabed agreement being significantly north of a median line between the two countries in the Timor Sea, and thus favourable to Australia. That boundary stopped at a point known as A25, leaving the area to the west to be delimited at a future time.

2.4 Since 1972, international law has moved to encompass a distance-based criterion. Nevertheless, in Australia's view the 'natural prolongation' principle remains relevant to the negotiation of seabed boundaries. The existence of separate seabed and water column lines is the result of the application of different legal principles to delimitation of the EEZ and continental shelf. The result of the separate treatment of seabed and water column delimitation is that Australia has areas of seabed jurisdiction in which jurisdiction over the superjacent water column remains with Indonesia.

2.5 Article 1 establishes the western extension of the seabed boundary. The seabed line at its commencement at the western end recognises the maximum extension of the Australian continental shelf claimable under UNCLOS. The line then moves east, following a median line between the respective seabed claims: the natural prolongation of Australia's land mass and the PFSEL in the case of Indonesia. It then moves south from point A51 to the PFSEL at point

1 See Chapter 1, paragraph 1.15.

A50, whence a straight line is drawn to the westernmost point of the 24 nm radial boundary around the Ashmore Islands; the line follows the radial boundary around the islands until it intersects with a straight line drawn south from point A25, the concluding point of the 1972 seabed agreement.

2.6 A consolidated depiction of all Australian-Indonesian maritime boundaries proposed by the Treaty are shown on Map 2.

Water column delimitation

2.7 Australia and Indonesia have both claimed 200 nm EEZs under UNCLOS and, accordingly, there is a vast overlap in claimed jurisdictions in the Timor and Arafura Seas.

2.8 Article 2 of the Treaty confirms the 1981 PFSEL as the water column boundary with two changes to recognise the fact that Sandy Island (part of Scott reef) and the Ashmore Islands are full islands within the meaning of Article 121 of UNCLOS.

2.9 The first change is the extension of the boundary westwards to join up with the junction of the claimed Australian and Indonesian EEZs with the high seas.

2.10 The second change involves the boundary around the Ashmore Islands, which has been moved out to 24 nm, and is meridial to the south-west and radial to the north of the Islands. This change is a configuration more favourable (and administratively more manageable) to Australia than the 12 nm radial boundary of the PFSEL.

Christmas Island/Java delimitation

2.11 Christmas Island is 186 nm from Java. Under international law, as reflected in Article 121 of UNCLOS, Christmas Island is entitled to generate the full range of maritime zones. Australia's claim extends to the median line, while Indonesia's proclaimed EEZ extends the full 200 nm from the Javanese coast allowing only a 12 nm territorial 'bubble' around Christmas Island.

2.12 Article 3 of the Treaty establishes a maritime boundary between Christmas Island and Java that is a combined water column/seabed boundary resulting in a single line. The boundary configuration is an adjusted median line constructed by two straight-line segments extending from a point on the

shortest distance between Christmas Island and Java to the intersection of the Australian and Indonesian EEZ boundaries with the high seas to the west and east of Christmas Island. The position of that point on the line of shortest distance is 38.75 nm from Christmas Island.

2.13 The proposed maritime boundaries in the vicinity of Christmas Island are depicted at Map 3.

Obligations

2.14 Articles 5 and 6 of the Treaty relate to the Seabed and EEZ rights of each Party.

2.15 Article 7 specifies provisions which govern those areas where Indonesia's water column jurisdiction overlaps Australia's seabed jurisdiction. Subject to other provisions of the Treaty, in such areas:

- Indonesia exercises EEZ sovereign rights and jurisdiction provided for in UNCLOS in relation to the water column and Australia exercises continental shelf sovereign rights and jurisdiction provided for in UNCLOS in relation to the seabed;
- the construction of any artificial island is subject to the agreement of the Parties; an artificial island may be removed by the Party with jurisdiction over it, but such removal must have regard to fishing, the protection of the maritime environment and the safety of navigation;
- Australia must give Indonesia three months' notice of the proposed grant of exploration or exploitation rights;
- each Party must give due notice to the other of the construction of installations and structures and maintain a permanent means of giving warning of their presence;
- in order to ensure the safety of navigation, each Party must remove any installation or structure which is abandoned or disused and whose construction is authorised, taking into account any generally accepted international standards established in this regard by the International Maritime Organisation; such removal must also have due regard to fishing and to the protection of the marine environment, with appropriate publicity given to the depth, position

and dimensions of any installations or structures not entirely removed;

- the party constructing an artificial island, installation, structure or fish aggregating device has exclusive jurisdiction over it;
- marine scientific research carried out or authorised by Australia must be notified to Indonesia and *vice versa*;
- the Parties must take effective measures to prevent, reduce and control pollution of the marine environment;
- each Party is liable in accordance with international law for pollution of the marine environment caused by activities under its jurisdiction;
- any island within the meaning of UNCLOS which emerges after the entry-into-force of the Treaty will be the subject of consultations between the Parties with a view to determining its status;
- neither Party may exercise its rights and jurisdiction in a manner which unduly inhibits the exercise of the rights and jurisdiction of the other; and
- the Parties must cooperate with each other in relation to the exercise of their respective rights and jurisdiction.

2.16 It should be noted that the requirement for notice of the grant of exploration and exploitation rights, of the construction of installations and of the carrying out of marine scientific research is not a requirement to obtain permission in order to do any of these things.

2.17 These obligations will be further discussed in subsequent chapters.

Zone of Cooperation

2.18 Article 8 specifies that nothing in the Treaty affects the rights and obligations of either Party as a Contracting State to the Zone of Cooperation Treaty.

Exploitation of certain seabed deposits

2.19 Article 9 details the procedures to be adopted for the exploitation of certain seabed deposits that extend across the lines described in Articles 1 and 3

of the Treaty, and requires the Parties to seek to reach an agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

Dispute settlement

2.20 Article 10 determines that any dispute between the two Parties arising out of the interpretation or implementation of the Treaty shall be settled peacefully by consultation or negotiation.

Entry into force

2.21 Article 11 specifies that the Treaty shall be subject to ratification and shall enter into force on the date of exchange of the instruments of ratification.

Withdrawal or denunciation

2.22 The Treaty does not contain express provisions dealing with withdrawal or denunciation. Maritime delimitation agreements do not normally contain such provisions. One Party may withdraw from the Treaty, however, with the consent of the other Party.

CHAPTER 3

LOCATION OF THE BOUNDARIES

The final outcome

3.1 The Department of Foreign Affairs and Trade (DFAT) advised that the Treaty was negotiated as a package and represents a very good outcome for Australia. It also indicated that the Treaty has been welcomed by the resources industry and by the relevant State and Territory Governments whose interests were represented throughout the negotiations by the Western Australian Solicitor-General. DFAT also made specific comments in respect of the three boundaries established by the Treaty.¹

3.2 First, with regard to the Java-Christmas Island boundary, the final agreed boundary is a weighted median boundary reflecting in part the different coastal lengths of the two Islands.²

3.3 Second, with regard to the EEZ water column boundary between Indonesia and continental Australia, the boundary follows the Provisional Fisheries Surveillance and Enforcement Line (PFSEL), which was agreed in 1981. DFAT stated that it would have been difficult, if not impossible, to get Indonesia to agree to adjust this boundary. Australia negotiated two important changes in its favour, however, before accepting the PFSEL as the water column boundary. These changes were:

- a 24 nm boundary around Ashmore Islands in place of the 12 nm boundary in the PFSEL; and
- an extension of the EEZ boundary westwards to the point where the Australian and Indonesian EEZ claims meet the high seas; that is, Indonesia recognises as being under Australian water column jurisdiction an area it formerly maintained was part of the high seas.³

1 Transcript, 2 September 1997, p. 4.

2 *ibid*, p. 4.

3 *ibid*, p. 4.

3.4 Third, DFAT stressed that in relation to the seabed boundary west of the 1972 boundary, the fact that a separate seabed boundary was negotiated was in Australia's interest since any combined boundary could only have been further south.⁴

3.5 The Attorney-General's Department (AG's) concurred with DFAT. It emphasised, however, that there was also a perceived need by both countries for the Treaty to be negotiated against the relevant international legal principles, as reflected in the decisions of international courts and tribunals and also the practice of countries in delimiting their boundaries.⁵

3.6 In this respect, and as both Australia and Indonesia are Parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Treaty was negotiated against the principles of Articles 74 and 83 which provide for the delimitation of maritime boundaries. The Articles provide that the delimitation:

shall be affected 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.⁶

3.7 In the view of AG's, the principles contained in UNCLOS were applied throughout the negotiation of the Treaty and the solution achieved is one which is equitable for both Parties. Furthermore, it argued that the Treaty carries on the tradition in Australian maritime boundary delimitation, established by the Torres Strait Treaty with Papua New Guinea and the previous Timor Gap Treaty with Indonesia, of providing innovative solutions in order to reach an agreed boundary.⁷

3.8 Although the negotiations were consistent with international law and practice and the jurisprudence of the International Court of Justice, they were done ultimately by agreement between Australia and Indonesia.⁸ The absence of any prescriptive mechanism on how to negotiate and devise a boundary emphasises the significance of both countries arriving at an agreement. It is important to understand this point when aspects of the treaty are criticised for being at variance from particular principles of international law.

4 *ibid*, p. 4.

5 Transcript, 2 September 1997, p. 6 and Transcript, 28 October 1997, p. 228.

6 Transcript, 2 September 1997, p. 7 and Transcript, 28 October 1997, p. 228.

7 Transcript, 2 September 1997, p. 7.

8 Transcript, 28 October 1997, p. 228.

3.9 The innovative aspect of the Treaty highlighted by AG's is the creation of areas of overlapping jurisdiction. These are the areas in which Australia will exercise seabed jurisdiction, including jurisdiction over oil and gas reserves, while Indonesia will exercise jurisdiction in the water column, including jurisdiction over fisheries resources.⁹

3.10 AG's, like DFAT, stressed that Indonesia would not have accepted a water column boundary being located in the same place as seabed boundaries established by the 1971 and 1972 Agreements. Similarly, Australia would not have moved the 1971 and 1972 seabed lines south in order to achieve a single maritime boundary between the two countries embracing both the seabed and the water column. To do so would have resulted in the concession of large areas of seabed jurisdiction to Indonesia.¹⁰ Indeed, Professor Victor Prescott, Professor Emeritus of the University of Melbourne, explained in an unpublished article that:

The agreed boundary separating the exclusive economic zones delivered to Indonesia areas of the water column that were closer to Australian territory than Indonesian territory. Since 1981 this had seemed to be a likely outcome and in 1985 it was considered a reasonable assumption that the provisional line would become a permanent boundary.¹¹

3.11 It was argued by AG's, therefore, that any solution was going to involve separate boundaries for the water column and the seabed.¹² There is at least one precedent for the establishment of areas of overlapping jurisdiction. This precedent is the area known as the 'Top Hat', close to the Papua New Guinea coastline under the Torres Strait Treaty.¹³

3.12 Mr Stuart Kaye, while acknowledging that the separation of EEZ and continental shelf was unusual in international practice, confirmed that such an arrangement had been expressly approved in *obiter* statements by the International Court of Justice in the *Gulf of Maine Case*. He further argued that the separation of jurisdictions has the great advantage of permitting both States to retain some elements of their negotiating positions, and yet reach a mutually acceptable solution.¹⁴

9 Transcript, 2 September 1997, p. 7.

10 Submissions, p. 3a and Transcript, 2 September 1997, p. 7.

11 Professor V. Prescott, *The Completion of Marine Boundary Delimitation between Australia and Indonesia*, Unpublished Article, 3 September 1997, p. 5.

12 Submissions, p. 3a.

13 Submissions, p. 3a and Transcript, 2 September 1997, p. 7.

14 Submissions, p. 25.

3.13 Mr Kaye also indicated that the retention of both the existing seabed boundaries and the positioning of the EEZ and seabed boundary 24 nm north of the Ashmore Islands were a positive result for Australia, as Indonesia had asserted that the Ashmore Islands were incapable of human habitation or an economic life of their own, which under Article 121 (3) of the Law of the Sea Convention would disentitle the Islands from generating anything other than a 12 nm territorial sea. He concluded:

On balance, the Boundary Treaty is a positive development in Australia-Indonesia relations. Although the negotiating positions of the States were far apart, through the creative splitting of jurisdiction, a viable and practical accommodation has been reached. On this basis, the Boundary Treaty should serve as an example to other States with existing or potential maritime boundary disputes that innovative and constructive mechanisms can be used to resolve even the most apparently intractable dispute.¹⁵

3.14 The Western Australian Solicitor-General, Mr R.J. Meadows QC, who represented the interests of the States and Territories following his appointment in December 1994, also agreed that the outcome of the negotiations embodied in the Treaty are equitable and very satisfactory for Australia. The major benefit identified by Mr Meadows was that the boundaries will be delineated which will resolve any areas of uncertainty, thereby facilitating gas and oil exploration.¹⁶

3.15 In relation to the matter of equity, Professor Prescott, acknowledging that UNCLOS does not contain any guidance on how an equitable solution can be measured, utilised three characteristics of the delimitation of any maritime boundary to assist his assessment of the Treaty's equity.

3.16 The first characteristic concerned the way in which the Treaty was produced. He suggested that, as was the case with this Treaty, boundaries negotiated by two countries during a period of cordial relations will be equitable.¹⁷

3.17 The second of Professor Prescott's characteristics dealt with the previous experience of the two countries in negotiating such boundaries. He concluded the equitable nature of this latest Treaty is provided by the fact that both countries have more experience than most in negotiating such boundaries.¹⁸

¹⁵ *ibid*, p. 24, p. 26 and p. 28.

¹⁶ Transcript, 15 September 1997, p. 19 and p. 21.

¹⁷ Professor Victor Prescott, *op cit*, p. 9.

¹⁸ *ibid*, p. 10.

3.18 The final characteristic utilised by Professor Prescott was the proportion of the disputed zone that each country acquired. In this case he argued, however, that equity does not necessarily mean equality, and suggested that because both delegations would have had access to the best information available on the resource potential of the region, they therefore will believe they have reached an equitable outcome.¹⁹

3.19 Professor Prescott concluded:

The treaty signed in March 1997 shows that the teams representing each side achieved a set of compromises that were fair to both countries and that continued the innovative nature of marine boundaries between them.²⁰

The issue of overlapping jurisdiction

3.20 The joint Ministerial Statement of 14 March 1997 announced that, 'finalisation of the seabed boundary provides a basis on which exploitation of natural resources can proceed in a climate of confidence and certainty. The agreement on the complete EEZ boundary between the two countries provides a clear foundation for the future management of resources and the protection of the environment'.²¹ Mr Max Herriman and Professor Martin Tsamenyi, however, have argued that a detailed analysis of the Treaty provisions does not support such confident conclusions.²²

3.21 Mr Herriman and Professor Tsamenyi argue that although the Treaty recognises the existence of the area of overlapping jurisdiction, such an arrangement was not anticipated by the United Nations Convention on the Law of the Sea (UNCLOS) and the meaning of several provisions of that Convention are made unclear by the co-location of the EEZ of one State with the continental shelf of another.²³

3.22 They argue that while Article 7 of the Treaty purports to explain the rights of each Party and to provide special arrangements to resolve anticipated matters of potential conflict, it remains silent on a number of important issues. These issues include:

19 *ibid*, p. 11.

20 *ibid*, p. 2.

21 Joint Ministerial Statement by the Hon Alexander Downer MP and HE Mr Ali Alatas, *Signature of the Treaty between Australia and Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*, Perth, 14 March 1997.

22 Submissions, p.111.

23 *ibid*, p. 112.

- whether there is any obligation on behalf of Indonesia to allow construction of *all* proposed Australian installations, which, whilst in contact with the seabed, must of necessity exist within the water column;
- whether Australia will be exempt from claims of compensation for lost fishing opportunities occurring as a result of activity associated with the exploration or exploitation of seabed resources;
- whether Indonesia is compelled to allow all proposed marine scientific research by Australia that is associated with the continental shelf;
- with respect to marine research, whether Australia has a duty to provide to Indonesia all of the information detailed at UNCLOS Article 248 and 249(1)(b), and, importantly, to comply with any or all of the other conditions stipulated at Article 249; and
- whether construction of Australian installations in the Indonesian EEZ will be exempt from any levy to provide contingency funds to compensate for possible harm arising from 'pollution of the marine environment'.²⁴

3.23 Furthermore, Mr Herriman and Professor Tsamenyi determine that, in essence, the Treaty establishes a regime under which Indonesia practically enjoys unfettered sovereign rights to explore, exploit, conserve and manage the marine living resources in the water column, while Australia cannot exercise its right to explore and exploit the seabed without giving rise to the possibility that Indonesia's interests are harmed by such activity.²⁵ For example, there is the possibility that Australian trawl fishers may not be able to take sedentary species from the seabed without removing at least some free-swimming resources from the water column as by-catch, resulting in possible Indonesian measures to either prevent certain activities or to demand financial compensation.²⁶

3.24 The issue of terminology is also addressed by Mr Herriman and Professor Tsamenyi. They argue, for example, that the use in the Treaty of the terms 'water column' and 'seabed' to differentiate between the two legal regimes more formally described in UNCLOS as 'EEZ' and 'continental shelf' respectively,

²⁴ *ibid*, p. 112.

²⁵ *ibid*, p. 113.

²⁶ *ibid*, p. 113.

betrays an over simplistic understanding of the nature of the ocean and the international law of the sea. Put simply, they emphasise that the EEZ is not-for any intent and purpose-a legal regime that is concerned solely with the water column.²⁷

3.25 Article 7 is described by Mr Herriman and Professor Tsamenyi as a complex and crucially important part of the Treaty. They suggest that interpretation of the effect that the Treaty will have on the rights and jurisdiction of the two Parties turns largely on what the words of Article 7 are understood to mean.²⁸ For example, they argue that Article 7(e) gives the impression that construction and installation of structures is subject 'only' of due notice, but the word 'only' is not included.²⁹

3.26 Regarding the issue of marine research, Mr Herriman and Professor Tsamenyi conclude that Australia seems to have a right to conduct activities to explore and exploit but only in the context of what is reasonable, that is, no absolute sovereign right, and the right may be diminished with respect to research which is not in contact with the seabed and subsoil. They also questioned what notice must be afforded Indonesia before these research activities take place.³⁰

3.27 Mr Herriman and Professor Tsamenyi emphasised that in the event relations between Australia and Indonesia were to deteriorate, the Treaty is silent on matters that could be contentious and which might actually serve to aggravate relationship difficulties. While being an innovative solution to what might have otherwise been an intractable maritime delimitation problem, they conclude that the Treaty is inadequate in many respects and leaves open considerable scope for differing interpretation and misunderstanding.³¹

3.28 AG's have challenged many of the concerns and issues raised by Mr Herriman and Professor Tsamenyi. The Department argued that for the purposes of the Treaty, Australia is the 'coastal State' in respect of the seabed

27 Submissions, p. 115. The EEZ regime, as described in UNCLOS Part V, and recognised widely throughout the Convention, accords the coastal State 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 sea-bed and the sea-bed and its subsoil, and in regard to other activities...'.

28 Submissions, p. 121.

29 *ibid*, p.124.

30 *ibid*, pp. 126-129.

31 *ibid*, pp. 129-130.

and Indonesia is the 'coastal State' in respect of the water column. Such a modification to UNCLOS is permitted, they suggest, as it has no adverse effect on the rights of third countries.³²

3.29 AG's have indicated that Article 7 of the Treaty, which deals specifically with the areas of overlapping jurisdiction, was also the subject of a good deal of scrutiny in the course of the negotiations. The Department emphasised that the fundamental basis underlying the Article is that Indonesia exercises jurisdiction over the resources of the water column and Australia exercises jurisdiction over the resources of the seabed. Moreover, Australia, as the 'coastal State' in relation to the seabed has sole control over the construction of installations and structures for the purpose exploring and exploiting the resources of the seabed.³³

3.30 In relation to the issue of notice and permission in the area of overlap, AG's emphasise that there is only one form of construction which requires the permission of both Parties, that is, the construction of an artificial island as defined in Article 7(c) of the Treaty. The term 'artificial island' was defined in a way which avoided its application to any known type of petroleum or gas installation.³⁴

3.31 Furthermore, AG's stressed that Australia is required only to give 'due' notice of the construction of installations and structures and three months notice of the proposed grant of exploration and exploitation rights. The word 'due' reflects the 1982 Convention and was used deliberately to take account of the fact that there may be very little time between the decision to construct an installation or structure and their actual construction, while the requirement for three months notice is not subject to the permission of Indonesia.³⁵

3.32 In respect of marine research, AG's stated that in the course of negotiations it was settled that within the areas of overlap, marine scientific research into the water column would be the subject of the jurisdiction of Indonesia and that marine scientific research into the seabed would be the subject of jurisdiction of Australia. There is no requirement for Australia to obtain the permission of Indonesia to carry out marine scientific research that is associated with the continental shelf.³⁶

32 *ibid*, p. 3a and 3b.

33 *ibid*, p. 3b.

34 *ibid*, p. 3c.

35 *ibid*, p. 3c.

36 *ibid*, p. 3c.

3.33 AG's concluded that while it might be suggested the areas of overlap create uncertainty, the Treaty in fact resolves existing uncertainties. Among those uncertainties are those arising out of the pre-Treaty claims of both countries to exercise the same form of jurisdiction in many areas. Within the area of overlap, the Department argued the Treaty sets out in clear language when notice is required to be given to Indonesia and when the permission of Indonesia is required - permission being required only in relation to creation of artificial islands.³⁷

Christmas Island

3.34 The Shire of Christmas Island suggested that, in relation to the EEZ and seabed boundaries between the Island and Java, a more equitable outcome would have been a boundary that was closer to the mid-point between the two land masses.³⁸ The Chamber of Commerce supported the Shire's comments, arguing that the boundary point junction to the north of Christmas Island (C2) be moved so that it was equidistant.³⁹

3.35 Mr Vivian Forbes has suggested that if Christmas Island was a sovereign state, under Article 121 of the 1982 Law of the Sea Convention, it would generate a full territorial sea and contiguous zone. He further commented that over the years Christmas Island has demonstrated the capacity to sustain human habitation and an economic 'life', thereby indicating that the Island may also generate a full EEZ and continental shelf.⁴⁰

3.36 Mr Forbes also argued that, based on the existence of the Java Trench between Christmas Island and Indonesia, Australia could rightly have argued for a seabed boundary up to the bathymetric axis of the Java Trench. He concluded that by agreeing to the boundary 38.75 nm north of Christmas Island, Australia had conceded 50,000 square kilometres of seabed and water column to Indonesia.⁴¹

3.37 Professor Prescott, however, argued that it was always predictable that the final agreed boundary would be a compromise between Australia's and Indonesia's initial, extreme positions. Australia had published the limits of its

37 *ibid*, p. 3c.

38 Transcript, 9 October 1997, p. 145.

39 Submissions, p. 68.

40 *ibid*, p. 10.

41 Transcript, 15 September 1997, p. 36, p. 39 and Submissions, p. 11.

EEZ in 1994 which had indicated an equidistant boundary, while Indonesia had claimed a boundary 200 nm from Indonesia's baseline except for a semi-circle with a radius of 12 nm around the Island.⁴²

3.38 He further commented that the final decision to discount Australia's claim from Christmas Island was assisted by the decision of the International Court of Justice, delivered on 14 June 1993, in the case between Denmark and Norway over the maritime boundary between Greenland, the world's largest island and *Jan Mayen* with an area of 373 square kilometres. The Court decided that the boundary should be moved in favour of Greenland because the disparity of the lengths of the two coastlines constituted a special or relevant circumstance. This finding confirmed a similar earlier finding in the Canada-France case over marine delimitations in the vicinity of *St Pierre and Miquelon* in 1992.⁴³

3.39 Professor Prescott concluded that because the depth of water in the disputed zone was between 4000 to 7000 metres, it was unlikely that hopes of major seabed resources influenced the negotiations.⁴⁴

3.40 Furthermore, Mr Kaye, while acknowledging that the EEZ boundary between Christmas Island and Java favoured Indonesia, also suggested that if this boundary was set off by Australia against gains in the Timor Sea, then the choice was well made, as the waters north of Christmas Island are deep and have limited economic potential.⁴⁵

3.41 Finally, AG's emphasised that had the issue of the boundary between Christmas Island and Java been taken to international adjudication, and based on the international jurisprudence as already described by Professor Prescott, then Australia could not have expected a better result than achieved by the Treaty.⁴⁶

The East Timor issue

3.42 The EEZ boundary established by the Treaty is located at a point equidistant between East Timor and Australia.⁴⁷

42 Professor Victor Prescott, *op cit*, p. 2.

43 *ibid*, p. 3.

44 *ibid*, p. 3.

45 Submissions, p. 28.

46 Transcript, 28 October 1997, p. 208.

47 Transcript, 2 September 1997, p. 6.

3.43 Following tabling of the Treaty in both Houses of Parliament, Australia received a protest note from the Portuguese Government against Australia's signature of the Treaty in so far as it establishes an EEZ boundary in the Timor Gap. Portugal has continued to argue that Indonesia has no right to make treaties in respect of East Timor because Portugal remains the administering power. The Australian Government does not accept the arguments put forward by Portugal.⁴⁸

3.44 Australians for a Free East Timor (AFFET) objected to the Treaty being ratified on both legal and moral grounds. The organisation emphasised that in its opinion, Australia does not have the legal right to enter into treaties which remove the legal right of the Timorese people to control their own resources.⁴⁹

3.45 AFFET further stressed that:

Australia argues that regardless of Indonesian illegality in invading East Timor, Australia is entitled to recognise that illegal title has been 'consolidated' into a legal one. This position is contrary to modern international law, which Australia helped to create, which requires states not to recognise territorial acquisition brought about by aggression.⁵⁰

3.46 AFFET emphasised that by entering into treaties such as this with Indonesia, Australia, as the country in the world which explicitly recognises Indonesia's occupation of East Timor, is leaving itself isolated amongst the world community.⁵¹

3.47 Morally, AFFET argued that Australia's decision to follow pragmatism rather than principle, particularly over the issue of natural resource sharing, was based on bad advice which led to bad policy which, in turn, now leaves Australia condemned as a nation.⁵² AFFET concluded that the Treaty should not be ratified on the basis of these legal and moral arguments.⁵³

48 *ibid*, p. 5.

49 Transcript, 8 October 1997, p. 92.

50 Submissions, p. 52 and Transcript, 8 October 1997, p. 93.

51 Submissions, p. 50 and Transcript, 8 October 1997, p. 92.

52 Submissions, p. 50.

53 Transcript, 8 October 1997, p. 96.

3.48 The East Timor Relief Association (ETRA), a non-government association with the broad aims of relief and development work inside East Timor and advocacy work internationally, strenuously argued that the Treaty should not be ratified in its current form.⁵⁴

3.49 ETRA emphasised that all provisions relating to the water column and fisheries rights in the so-called Timor Gap should be removed from the Treaty before it is ratified.⁵⁵ The Association arrived at this conclusion on the basis of international law and Australia's national interest.

3.50 Regarding international law, ETRA argued that East Timor is a United Nations scheduled non-self governing territory and has been since 1960, due for decolonisation. That is, the people of East Timor await and work for the exercise of their legally guaranteed right to self-determination. The Association suggested, therefore, that Indonesia has no right to sign international treaties on behalf of the people of East Timor.⁵⁶

3.51 ETRA also stressed that the Treaty defies repeated United Nations condemnations of Indonesia's invasion and ongoing military occupation of East Timor, General Assembly resolutions, Security Council resolutions and human rights commission resolutions and that Australia, by entering into this Treaty, is wilfully setting out to avoid the very international legal framework that it purports to operate within.⁵⁷

3.52 In relation to Australia's national interest, ETRA argued that the supporting NIA is too narrowly conceived and locks Australia into a political framework that ignores current and likely international initiatives and developments. It suggested that this position will have the effect of marginalising Australia in terms of this important regional issue, and in terms of developing community leadership in Indonesia itself. The Association stressed that it would be in Australia's national interest to adopt a wait and see approach to these initiatives and developments, instead of entering into treaties relating to the Timor Gap that may thwart their progress.⁵⁸

3.53 ETRA also argued that the Treaty would provide neither security of jurisdiction over resources, nor would it be a fair and equitable outcome for Australia when it was based on unfairness for the people of East Timor.

54 Transcript, 20 October 1997, p. 190.

55 *ibid*, p. 190.

56 Submissions, pp. 35-36 and Transcript, 20 October 1997, p. 190.

57 Submissions, p. 36 and Transcript, 20 October 1997, p. 190.

58 Submissions, p. 37 and Transcript, 20 October 1997, pp 190-191.

Moreover, the Association emphasised that the Treaty arrangements would not enhance regional stability and security, and in relation to the Timor Gap region, would increase the likelihood of future disputes.⁵⁹

3.54 ETRA concluded that the provisions relating to the water column rights in the Timor Gap should be removed from the Treaty. AFFET and ETRA both also commented on the issue of unsatisfactory consultation. These comments are addressed in Chapter 6.

3.55 DFAT indicated that Australia recognises Indonesia as the sovereign power over East Timor and therefore that Indonesia is the appropriate government with which to negotiate the extent of Australia's seas. AG's emphasised, however, that Australia had stated before the International Court of Justice (ICJ) that it recognised there was a right of self-determination by the East Timorese people.⁶⁰

3.56 The ICJ noted in the *Case Concerning East Timor* (1995) that the fact East Timor was a non-self governing territory under a United Nations' mandate did not mean that other countries could not deal with Indonesia or make treaties with Indonesia in relation to various matters.⁶¹ The Court commented that:

...it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor.⁶²

3.57 Regarding the allegation that Australia was defying United Nations' resolutions over East Timor, AG's argued that in the ICJ judgement, the Court did not decide that, by reason of United Nations' resolutions, it was not open to Australia to deal with Indonesia over the continental shelf.⁶³ Indeed, paragraph 31 of the judgement stated:

The Court notes that the argument of Portugal under consideration rests on the premise that United Nations' resolutions and in particular those of the Security Council, can be read as imposing an obligation on States not to recognise any

59 Submissions, pp. 38-40

60 Transcript, 28 October 1997, p. 207 and *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995, p. 99.

61 Transcript, 2 September 1997, p. 6 and *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995, p. 99 and 102-104.

62 *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995, p. 104.

63 Transcript, 28 October 1997, p. 232.

authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolution went so far.⁶⁴

3.58 Furthermore, AG's submitted that the Court, in paragraph 32 of the judgement, stated that:

The Court notes furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory.⁶⁵

3.59 Apart from this legal position, DFAT emphasised that Australia has actively supported the United Nations' process between Portugal and Indonesia and has funded on a number of occasions the all-inclusive East Timorese dialogue process. While the Department concluded that nothing Australia has done, either legally or politically, has undermined the United Nations' processes regarding East Timor, ETRA argued that treaties such as this further legitimise Indonesia's occupation of East Timor.⁶⁶

Indonesian traditional fishers

3.60 A number of witnesses raised the issue of ongoing access by Indonesian traditional fishers to the area in the vicinity of the Ashmore Islands and the area covered by the 1974 Memorandum of Understanding (MOU) between Australia and Indonesia.

3.61 Parks Australia has commented that under the provisions of the Treaty a perceived anomaly will be created in the vicinity of the Ashmore Reef National Nature Reserve. Under the provisions of the Treaty, the Ashmore Islands will generate a 24 nm EEZ, while the existing 1974 MOU only incorporates the 12 nm zone in the area prescribed as being the area of Australian waters in which Indonesian traditional fishers may currently access fish and marine produce.⁶⁷

3.62 Should the Treaty be ratified in its current form, therefore, there will be a 12 nm arc of sea that will be Australian waters but will not be covered by the provisions of the 1974 MOU. According to Parks Australia, this situation raises the question of how law enforcement measures will be carried out in this area to

64 Transcript, 28 October 1997, p. 232 and *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995, p. 103.

65 Transcript, 28 October 1997, p. 232 and *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995, p. 104.

66 Transcript, 28 October 1997, p. 232 and Transcript, 20 October 1997, pp. 197-198.

67 Submissions, p. 97.

protect significant reef systems such as Hibernia Reef, particularly as Indonesian fishers currently perceive this area to be 'theirs' under existing arrangements.⁶⁸

3.63 Parks Australia have a tighter degree of control to be applied to fishers operating in Australian waters and the development of a new MOU.⁶⁹ They argued that a new MOU might:

- allow a more formal regulatory process to be imposed on traditional fishers; and
- incorporate the waters to the north of the Ashmore Islands.⁷⁰

3.64 If the waters to the north of the Ashmore Islands were not fully incorporated into a new MOU, Parks Australia argued that there should be a nominated phase-in period to warn traditional fishers that the area was now Australian and closed to traditional fishing.⁷¹

3.65 Parks Australia recommended that consideration be given to the convening of a regional forum to consider a range of issues arising from the Treaty, including to develop an approach to a joint enforcement regime.⁷²

3.66 Ms Natasha Stacey argued that under the existing boundary arrangements, Indonesian traditional fishers from various groups on the Indonesian archipelago can exploit swimming fish in the vicinity of the Ashmore Islands. She has suggested the adjustments to the existing boundary, however, will result in a significant loss of access and fishing grounds.⁷³

3.67 Ms Stacey also raised the vexed issue of conveying the changes implemented to the traditional fishers operating in the 1974 MOU 'box' when there has been very little research done to establish their identity, ethnic composition or location of origin.⁷⁴ Like Parks Australia, she suggested that one

68 *ibid*, p. 97.

69 *ibid*, p. 97.

70 *ibid*, p. 98.

71 *ibid*, p. 98.

72 *ibid*, p. 98.

73 Submissions, p. 42 and Transcript, 8 October 1997, pp. 104-105.

74 Submissions, p. 42 and Transcript, 8 October 1997, p. 105 and p. 108.

solution would be to renegotiate the 1974 MOU and extend the area to follow the new EEZ boundary. This extension, she argued, would also assist in simplifying surveillance and enforcement of the boundary.⁷⁵

3.68 Dr Ian Walters emphasised that visits to Australia and fishing in what are now claimed as Australian waters have been undertaken by peoples from the Indonesian archipelago for centuries. Although these people have cultural and historic track records of conservation and management of their resources, Dr Walters argues that Australia repatriates them at great cost to the taxpayer because we view them as usurpers and destroyers of Australian resources.⁷⁶

3.69 He suggests instead that a more flexible approach to maritime delimitation could include the concept of 'permeable boundaries' whereby traditional access rights are retained which in turn would save large sums of money in apprehension and repatriation.⁷⁷

3.70 Mr Paul Clark raised the specific issue of access by traditional fishers to the Hibernia Reef system. In Mr Clark's view, the Hibernia reef system should be managed collectively by Australian authorities with the Ashmore and Cartier systems and that this management should continue to include the rights of Indonesian fishers to utilise the marine resources in these areas.⁷⁸

3.71 In order to simplify the management of the area, Mr Clark also supported Ms Stacey's call for consideration to be given to extending the northern boundary of the 1974 MOU area to coincide with the proposed 24 nm EEZ boundary.⁷⁹

75 Submissions, pp. 42-43.

76 *ibid*, pp. 47-48.

77 *ibid*, p. 48.

78 *ibid*, pp. 70-71.

79 *ibid*, p. 71.

CHAPTER 4

RESOURCE MANAGEMENT ISSUES

General

4.1 Throughout the Inquiry a number of resource management issues were raised, particularly during the Perth, Darwin and Christmas Island public hearings. This chapter addresses these issues under the headings of fisheries matters, natural resource exploration and exploitation issues, and boundary enforcement.

Fisheries matters

4.2 The Fisheries Department of Western Australia emphasised that the Treaty would assist in providing jurisdictional clarity to marine resource management between Australia and Indonesia. It supported the ratification of the Treaty.¹ They suggested, however, that there were still broader issues which required further negotiation.²

4.3 The Department confirmed that while a number of fisheries in Western Australia were under the complete management of the Commonwealth, the Western Australian Government remained responsible for the majority of fisheries in their region. They suggested that the Treaty clarified the management responsibilities of the Western Australian Government. In respect to the area of overlapping water column and seabed jurisdictions, however, they argued there clearly needed to a good degree of cooperation in the management of fish resources not only between Australia and Indonesia, but also between the Northern Territory and Western Australian Governments.³

4.4 The Department argued that the significant gap (in excess of 40 nm) that exists between the extent of the water column jurisdiction (where Western Australia is responsible for managing finfish and sharks) and the seabed jurisdiction (containing sedentary species such as trepang) created significant

1 Transcript, 15 September 1997, pp. 24-25. The Fisheries Department of Western Australia is a service provider for the Australian Fisheries Management Authority (AFMA) in respect to surveillance, monitoring and control activities for fisheries in the Australian Fishing Zone.

2 Submissions, p. 7 and Transcript, 15 September 1997, p. 26.

3 Submissions, p. 7 and Transcript, 15 September 1997, p. 27.

enforcement problems, particularly in determining what species fishers were taking.⁴ Moreover, they argued that there was concern among scientists in relation to fish stock sustainability in the area and that the gap in the area of jurisdictions will cause difficulties in trying to manage straddling fish stock.⁵

4.5 Establishing a 'zone of fisheries cooperation', which involved authorities from the Australian, Indonesian, Western Australian and Northern Territory Governments, was suggested by the Department as a solution to overcome the fisheries problems created by overlapping jurisdictions.⁶

4.6 In addition to the issue of overlapping jurisdiction, the Department also raised a concern in relation to the access rights of Indonesian traditional fishers to the area detailed in the 1974 MOU between Australia and Indonesia. They confirmed that while Western Australia has the responsibility for managing the fish stock, they have no control over the level of fishing operations in the area.⁷

4.7 The Department emphasised that the continuance of unconstrained fishing activity by Indonesian traditional fishers, emphasised the Department, will allow little opportunity for effective management to take place. They concluded, therefore, that further discussion was required between Australia and Indonesia in relation to the operation of the 1974 MOU.⁸

4.8 The Department also stressed that although fisheries management may become more internationally cooperative, in their opinion, incursions by Indonesian fishers to the north-west coast of Western Australia are not expected to decline. Apprehensions of foreign fishing boats are currently occurring at the rate of approximately 40 to 60 per year. This situation will continue to pose, therefore, a continuing serious quarantine and health risk to Western Australia.⁹

4.9 The Department also questioned whether enough consideration had been given to the resource implications necessary to implement the Treaty, concluding that the budget situation needed to be addressed if Western Australia was to continue to provide their current service into the Australian Fishing Zone (AFZ).¹⁰

4 Transcript, 15 September 1997, p. 29.

5 Submissions, p. 7.

6 *ibid*, p. 7.

7 Transcript, 15 September 1997, p. 27.

8 Submissions, p. 7.

9 Submissions, p. 7 and Transcript, 15 September 1997, p. 24.

10 Transcript, 15 September 1997, p. 28.

4.10 Similarly, the Northern Territory Department of Primary Industry and Fisheries, while agreeing that the Treaty should be ratified, also indicated support for the implementation of further detailed management and administrative arrangements. The Department raised two principal matters that they argued were a consequence of the Treaty - the need to address resource management issues and the matter of marine pollution.¹¹

4.11 In relation to the first matter, the Department indicated that it had the responsibility for managing resources under the *Northern Territory Fisheries Act* and the five Offshore Constitutional Settlement (OCA) arrangements which were entered into by agreement between the Commonwealth and Northern Territory Governments.¹²

4.12 Four MOU between the Northern Territory and Western Australia and the Northern Territory and Queensland flowed from the OCA, details which included, among other matters, the basis for cooperation in the area of resource management. These MOU enable the responsible departments to manage fish in an ecosystem, rather than along political boundaries, and can accommodate joint research and the standardisation of compliance requirements.¹³

4.13 The areas of concern identified by the Department relate to the Timor Reef, demersal, and the shark fisheries, which are managed under joint authorities. In all three instances, the fisheries border the delimitation boundary with Indonesia resulting in clearly shared fish stocks.¹⁴

4.14 Dr Rex Pyne, representing the Northern Territory Government, expressed concern that what appeared to be happening on the Indonesian side of the boundary was unlimited or uncontrolled access to fish resources. The consequence of this situation for Australia was that the harvesting of fish by Indonesian fishers at significant depths was 'pulling' concentrations of fish across the boundary with the resultant impact on Australian stock levels. At the same time, Dr Pyne suggested that because Australian fish stocks were concentrated in shallower levels, this made it more attractive for illegal fishing activities in Australian waters by foreign vessels.¹⁵

11 Transcript, 8 October 1997, p. 63 and p. 68, See also p. 120.

12 Transcript, 8 October 1997, pp. 63-64. The five arrangements include the northern shark fishery, the demersal and Timor Reef fishery, the fish and aquatic life resources in waters relevant to the Northern territory, the tuna and tuna-like species, and the northern prawn fishery (the last two being managed under Commonwealth law)

13 Transcript, 8 October 1997, p. 64.

14 *ibid*, p. 64.

15 *ibid*, p. 64

4.15 While the Northern Territory was responsible for matters within Australia, Dr Pyne questioned where the responsibility lay in terms of dealing with Indonesia to encourage a greater responsibility for managing fish resources, for administering their vessels, for attempting to reduce the incidents of illegal transgressions, and hence, providing the Australian fishing industry with greater security of investment and tenure.¹⁶

4.16 The second matter raised by the Department dealt with marine pollution, a matter also discussed in the next chapter in relation to Christmas Island. Dr Pyne suggested that 75 per cent of the waste fishing net that arrives on Australian shores, a figure arrived at through samples taken from Groote Eylandt,¹⁷ was generated by foreign fishing vessels.¹⁸

4.17 He stressed that, while it was difficult to determine exactly the origin of the net, the local Aboriginal communities spanning the coast of the Northern Territory were gravely concerned about the amount of net arriving on their shores. Dr Pyne urged the Commonwealth Government to negotiate with the Indonesian Government to stem the flow of waste net onto Australian shores.¹⁹

4.18 He also stated that in relation to fisheries issues, there appeared to be no process in place for dealing with the total program, emphasising:

My concern, and the concern of this Government, is such that by the time such a program gets into place, the problem will have gone because we will have no fish...While the three States have had talks on this matter...we do not seem to be able to link into a central Commonwealth process...They, in turn, do not seem to have a linkage into the Indonesian system at the right level which then, in turn, comes back down to the regional level.²⁰

4.19 Dr Pyne also suggested that even though Australia would be 'worse off' should the Treaty not be ratified, it was up to the Commonwealth Government to now establish as a matter of urgency the necessary MOUs with Indonesia, possibly mirroring the arrangements currently in place between the Commonwealth and State and Territory Governments. He concluded:

I would prefer to think that we could work as responsible persons on both sides, maybe in the form of subsidiary MOUs of some sort in declared areas to work together. I am sure from the Australian side there is an interest in doing research, with the Indonesians on the other side, to work with them in terms of

16 *ibid*, p. 65.

17 *ibid*, p. 66.

18 *ibid*, pp. 65-66.

19 *ibid*, p. 67.

20 *ibid*, p. 126.

tagging and to understand the movement across the lines. A whole range of activities could be entered into and I believe that is really what we should be heading towards.²¹

4.20 The Department of Foreign Affairs and Trade emphasised that the Treaty gives Australia a stronger basis from which to argue for MOUs and other formal and informal arrangements with the Indonesian Government. Having a firm boundary acts as a confidence building measure and as a basis for Australia suggesting that frameworks in areas such as fish resource management requires improvement.²²

4.21 Mr Stuart Kaye also suggested that current practice would favour the conclusion of MOUs in relation to particular subjects. He emphasised that they can be used to supplement the basic provisions of a treaty quite effectively, and can be concluded with relative speed between respective Government officials.²³

4.22 The Department emphasised that there is an ongoing dialogue already established with Indonesia regarding fisheries management, such as the 1992 fisheries agreement. This Treaty will strengthen this dialogue across a range of management issues on the boundary.²⁴

Natural resource exploration and exploitation issues

4.23 The Western Australian Department of Minerals and Energy is a joint authority with the Commonwealth Government which administers the Commonwealth offshore areas from Western Australia in relation to petroleum and mineral resources. The Department performs the administration of these areas on behalf of the joint authority.²⁵

4.24 The Department emphasised that they were satisfied with the outcome of the Treaty negotiations and that their administrative responsibilities would not be varied significantly by the implementation of the provisions of the Treaty.

21 *ibid*, p. 71, See also p. 120.

22 Transcript, 28 October 1997, p. 228.

23 Transcript, 29 September 1997, p. 58.

24 Transcript, 28 October 1997, p. 228.

25 Transcript, 15 September 1997, p. 25.

All existing industry operators will continue to operate through the joint authority, which the Department indicated will continue to have exclusive rights to regulate the areas.²⁶

4.25 There were certain areas, however, such as special prospecting authorities and scientific investigation authorities, that the Department suggested may have the potential to be affected depending on the circumstances. They suggested that the requirement to notify Indonesia three months in advance might cause some delay, but they expected such delays to be infrequent.²⁷

4.26 The Department concluded by stressing that the Treaty will create a degree of certainty regarding seabed resources that will give to the Department the ability to grant titles in the affected area.²⁸

4.27 PGS Exploration and Santos both raised concerns in relation to the management of the area of overlapping jurisdiction.

4.28 PGS Exploration is a service company which conducts contract and multi-client marine 3D seismic surveys for oil companies, using leading edge technology and a multi-stream of technologists. The company provides oil and gas exploration companies with the essential data necessary for finding prospects, positioning wells on those prospects, assessing the hydrocarbon reserves within any discoveries, and understanding the reservoir characteristics within the existing fields for optimal field development.²⁹

4.29 The Company indicated that their main concern with the provisions of the Treaty was the three month notification period to Indonesia of exploration activities. If the survey being conducted by PGS Exploration is a proprietary survey for an oil company, such as BHP or Santos, then the Company indicated the three month notification period is not of such concern. If the survey is a multi-client survey, however, where late notice adjustments may be required, then the three month notification period could become commercially unrealistic and catastrophic for the exploration program.³⁰

26 *ibid*, p. 25.

27 *ibid*, p. 25.

28 *ibid*, p. 32.

29 Transcript, 8 October 1997, pp. 78-79.

30 Submissions, p. 63, and Transcript, 8 October 1997, pp. 82-83.

4.30 Santos is an oil and gas exploration and producer which operates on behalf of various joint ventures in the Timor Sea. The Company raised three specific concerns in relation to the area of overlapping jurisdiction. These concerns were in relation to:

- seismic surveys - the danger of vessels trailing arrays of floating cables encountering commercial or traditional fishing fleets which may result in lengthy delays and equipment damage;
- floating drilling rigs, which claim under Australian regulations an exclusive zone around the rig; and
- Floating Production Storage and Offtake Vessels (FPSO), where the mooring systems and riser pipes from producing wells use the water column and visiting offtake tankers require manoeuvring space to pick up floating transfer hoses.³¹

4.31 In each of the specific examples cited by Santos, interference with the types of operations being conducted could create a hazardous situation involving rig safety and potential environmental damage.³² Mr Alex Wood, representing Santos, suggested that the solution to these potential problems was:

a matter of communication to the Indonesian authorised activities within the overlapping areas of jurisdiction so that they know and are aware of the potential hazards and the requirement to stay clear of a drilling rig or a floating production facility merely for safety reasons.³³

4.32 The Department of Primary Industries and Energy (DPIE) clarified aspects of the administration of petroleum exploration and development activities in the the areas of overlapping jurisdiction. Australia will exercise exclusive sovereign rights and jurisdiction in relation to the exploration and exploitation of the seabed. No approval from Indonesia is required for any any aspect of these activities. This includes exclusive control of safety, including exclusion zones around structures; environment, taxation; and communication matters.³⁴

4.33 Moreover, DPIE confirmed that Indonesia will be given three months notice of the proposed grant of all petroleum titles. For exploration permits, this will be done at the time of advertising areas and will be accommodated in the

31 Submissions, pp. 44-45.

32 Submissions, p. 45 and Transcript, 8 October 1997, p. 89.

33 Transcript, 8 October 1997, p. 89.

34 Transcript, 28 October 1997, p. 209.

normal period of lodging applications. For retention, production and pipeline leases, notice to Indonesia normally will be given on receipt of a substantive application and will be accommodated within the normal period of processing these applications. Indonesia will also be given notice of the construction of installations and structures which will be done in concurrently with notices required under international regimes such as the International Maritime Organisation. In practice, the Department emphasised that titleholders in the overlapping areas should not expect any different arrangements compared to other areas.³⁵

4.34 DPIE confirmed in relation to the issues raised by PGS Exploration regarding special prospecting authorities and extensions to multi-client survey areas, that the Company would retain any initial approval granted but would require three months notification to extend a survey into an area if that area was not subject to an existing exploration permit, retention lease or production licence.³⁶

4.35 The Department stressed that in relation to the extension of a survey within a currently permitted, leased or licensed area, Australia does not have to give three months notice to Indonesia. Indeed, DPIE emphasised that if the Company is undertaking a multi-client survey under an access authority which relates to existing permits, licences or leases, then there is no need to give Indonesia notice at all. Notice is only required outside of these areas.³⁷

4.36 DPIE assured the Committee that they have clarified with both PGS Exploration and the Northern Territory Government the provisions relating to the requirement for three months notice to be given to Indonesia.³⁸

Boundary enforcement

4.37 The Fisheries Department of Western Australia raised the issue of the phasing out of the *Fremantle* class patrol boats and the impact that this will have on its future ability to prevent illegal incursions by foreign fishing vessels into Australian waters. The Department stressed that what was required was not

35 *ibid*, p. 209.

36 *ibid*, p. 230.

37 *ibid*, p. 230.

38 *ibid*, p. 230.

additional aerial surveillance and detection assests, but surface vessels that could assist with apprehension and processing of the vessels conducting the illegal activities.³⁹

4.38 The Northern Territory Department of Primary Industry and Fisheries (AFMA) indicated that in its area the proliferation of illegal incursions began in 1988, with approximately 75 per cent of current incursions being made by commercially based operators.⁴⁰ The Department estimated that it was apprehending approximately 80 per cent of the illegal incursions being made.⁴¹ It also acknowledged that while it believed there was currently adequate patrol and response resources, there was 'no quick fix' to the issue of illegal fishing.⁴²

4.39 The Australian Defence Force (ADF) emphasised that as the changes to the overall size of the Australian EEZ resulting from the Treaty would be very small, the impact of the Treaty on its ability to conduct policing and patrolling on behalf of a number of Australian agencies would be minimal.⁴³

4.40 In relation to the replacement of the *Fremantle* class patrol boats, the ADF indicated that following Malaysia's withdrawal from the proposed joint patrol vessel, the Department of Defence will be re-examining its capability requirement to carry out the Government's endorsed role. A new capability is currently under detailed examination within the Department and will go to the Department's committee process shortly. The ADF concluded that there appeared little doubt that it will go forward to the committee process with a recommendation that the capability be replaced once the *Fremantle* class reaches the end of its life.⁴⁴

39 Transcript, 15 September 1997, p. 29.

40 Transcript, 8 October 1997, p. 115.

41 *ibid*, p. 117.

42 *ibid*, p. 119.

43 Transcript, 28 October 1997, p. 235.

44 *ibid*, p. 236.

CHAPTER 5

CHRISTMAS ISLAND

Location and description

5.1 Christmas Island is located in the Indian Ocean approximately 2,600 km west of Darwin and 360 km south of Java. The island covers approximately 135 square km, of which about 85 square km, or 63 per cent, is Christmas Island National Park (the Park). In addition to the terrestrial zone, the Park includes a marine zone extending 50 metres seaward of the low water mark where terrestrial zones of the Park include the coastline.¹ It is home to a number of endemic flora and fauna species, including the Abbott's Booby bird and the Red Crab.²

5.2 Christmas Island lies on the edge of the Java Trench and represents the north-west end of a series of undersea rises known as the Vening Meinesz Seamounts which range from the Ninetyeast Ridge and include the Cocos (Keeling) Islands.

History and background

5.3 The first written record of Christmas Island was made by John Millard on board the *Thomas* in 1615. On 25 December 1643, Captain William Mynors of the *Royal Mary* saw the island and named it after the day. The first recorded landing was in 1688 by crew from the British buccaneer vessel *Cygnets*. Although several landings were made in the next 169 years it was not until 1887 that an attempt was made to extensively explore the island.³

5.4 In 1888 Christmas Island was declared part of the British Dominion and in 1897 the Christmas Island Phosphate Company Limited was granted a 99 year lease to mine phosphate deposits.⁴

1 Australian Nature Conservation Agency, *Christmas Island National Park: Plan of Management*, Commonwealth of Australia, 1994, p. 1.

2 Submissions, p. 15.

3 Australian Nature Conservation Agency, *op cit*, p. 1.

4 Submissions, p. 13.

5.5 Workers of Chinese, Malaysian and Indian descent were sourced from South East Asia to work in the mine operation. Their descendants comprise the majority of the population on Christmas Island. The current population of the island is approximately 2,000.⁵

5.6 Christmas Island was occupied by the Japanese during World War II and in 1948 the Christmas Island Phosphate Company Limited sold its operation to the Australian and New Zealand Governments.⁶

5.7 On 1 January 1958, Christmas Island, which had until then been administered as part of the Colony of Singapore, became a separate colony. Subsequently, on 1 October 1958 Christmas Island became an Australian Territory following a request from the Commonwealth of Australia to the United Kingdom Parliament.⁷

5.8 In 1987 the Commonwealth of Australia ceased the phosphate mining operation on Christmas Island. The mining operation was reopened in 1989, however, by a private company, Phosphate Resources Limited. The majority of shareholders of Phosphate Resources Limited are residents of Christmas Island. In May 1997, Phosphate Resources Limited entered into a further twenty-one year lease with the Commonwealth of Australia for the continued removal and export of previously prepared phosphate stockpiles.⁸

Legal position and Commonwealth administrative arrangements

5.9 Prior to Christmas Island being transferred to Australia in 1958, the legislation in force on the island was sourced mainly from the Christmas Island Order in Council 1957 which, inter alia, provided that the laws applicable to Christmas Island included all Acts of the United Kingdom Parliament and Orders in Council, certain Ordinances of the Colony of Singapore and any other laws in force in Christmas Island immediately prior to its detachment from the Colony of Singapore.

5 Submissions, p. 13.

6 *ibid*, p. 13.

7 Australian Nature Conservation Agency, *op cit*, p. 3.

8 Submissions, p. 13.

5.10 Currently, most Western Australian legislation applies on Christmas Island. Christmas Island is an electoral district of the Commonwealth Division of the Northern Territory for the purpose of enrolment and voting in Federal elections.⁹

5.11 Since Christmas Island is an Australian Territory, the Commonwealth of Australia, through the Minister for Regional Development, Territories and Local Government, is responsible for the delivery of government services.

The Shire of Christmas Island

5.12 The Local Government (Transition) Ordinance 1992, made under the Christmas Island Act 1958, established the Christmas Island Shire Council on 1 July 1992.

5.13 The first election of the Christmas Island Shire Council was held in December 1992 resulting in nine councillors being appointed to office. The Christmas Island Shire Council changed its name to the Shire of Christmas Island (the Shire) in 1996.¹⁰

Environmental issues and maritime research

5.14 Staff from Parks Australia, supported by a number of other witnesses, raised a series of significant environmental issues that they believe will be exacerbated by the Treaty. These issues include the impact of long-line fishing on sea-birds, the impact of increased fishing by the Indonesians on pelagic and migratory fish species, and the impact of oil spills from undetermined sources.¹¹

5.15 The Abbott's booby (*Sula abbotti*), is a large sea-bird, around 79 cm in length and weighing from 1.4 to 1.6 kg. It is believed that Abbott's Booby forages widely in the Indian Ocean, but particularly prefers to feed in an area of upwelling currents near Sumatra and Java.¹² The species is endemic to Christmas Island, and while no other breeding population of Abbott's Booby

9 *ibid*, p. 14.

10 *ibid*, pp. 14-15.

11 Transcript, 9 October 1997, p. 140 and p. 156.

12 Senate Standing Committee on Science, Technology and the Environment, *The Preservation of the Abbott's Booby on Christmas Island*, Australian Government Publishing Service, Canberra, 1983, p. 1.

has ever been found, there is some evidence that the species once nested on Assumption Island, the Chagos Archipelago and Rodriguez and Glorioso Islands in the Indian Ocean.¹³

5.16 A inquiry conducted by the Senate Standing Committee on Science, Technology and the Environment in 1983 concluded that Australia has a clear obligation to preserve the Abbott's Booby.¹⁴

5.17 Scientific knowledge of the Abbott's Booby's terrestrial biology is extremely well researched. There is currently very little information, however, on its feeding biology and general distribution throughout the Indian Ocean when it is not breeding and in the time between fledgling and first breeding attempt, which maybe up to eight years.¹⁵

5.18 Dr Holgar Rumpff stressed that to bridge this knowledge gap researchers, whether located on Christmas Island or those engaged through contractual research agreements, would require access to the areas suspected of being the Abbott's Booby's foraging areas, that is, to areas north of the proposed EEZ and seabed boundary. He also expressed concern that the bird's feeding grounds and food resources would not remain protected following ratification of the Treaty.¹⁶ This situation may lead to added pressure being placed on an already endangered species.¹⁷

5.19 Research into the Abbott's Booby's ecology is but one of the important maritime research activities undertaken to the north of Christmas Island. For example, the CSIRO research vessel the *Franklin* has also conducted sea surface temperature monitoring and research on *El Nino* events.¹⁸

5.20 Parks Australia commented that while there is a significant amount of research that needs to be undertaken from Christmas Island, the establishment of the EEZ boundary will force them to re-think what research they may or may not be able to undertake.¹⁹

13 B.J. Reville, J.D. Tranter, H.D. Yorkston, Australian National Parks and Wildlife Service, *Conservation of the Endangered Seabird Abbott's Booby on Christmas Island, The Monitoring Program 1983-89*, Occasional Paper No. 20, 1990, p. 1 and Transcript, 9 October 1997, p. 157.

14 Senate Standing Committee on Science, Technology and the Environment, *op cit*, p. 31.

15 Transcript, 9 October 1997, p. 157.

16 *ibid*, p. 157.

17 *ibid*, p. 160.

18 *ibid*, p. 157-158.

19 *ibid*, p. 164.

5.21 An agreement with the Indonesian Government regarding reciprocal rights for scientific research teams operating across the boundary was suggested by Parks Australia as a solution to their concerns over ongoing access for research activities. They argued that such an agreement offers a cooperative approach which would be of benefit to both countries, while a cooperative research venture could also possibly involve the twinning of Christmas Island National Park with an Indonesian national park.²⁰

5.22 The ocean surrounding Christmas Island is also of importance as the spawning ground for the Southern Bluefin Tuna (SBT), which lies approximately between latitude 7 degrees south and 20 degrees south and east of longitude 100 degrees east.²¹ Australia needs to exert strong influence on this issue given our high involvement in SBT fishing and the importance of the species to the Australian fishing industry.

5.23 The SBT fishery extends from South Africa through the Indian Ocean, south of Australia off Tasmania and across to New Zealand. These fish spawn in the waters south of Java then migrate down the west coast of Australia and move either towards Tasmania in the east or South Africa in the west. In our 3rd Report, *Two International Agreements on Tuna*, we reported extensively on the issue relating to tuna exploitation and the protection of the species and noted that the potential increase in long-line fishing activity in the area south of Java is an issue of concern.²²

5.24 Concerns over the depletion in the SBT stock resulted in the establishment of the *Convention for the Conservation of Southern Bluefin Tuna*. Australia, New Zealand and Japan are parties to this Convention. The Convention also created the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), which meets annually to determine the global total allowable catch and quota allocations for the SBT fishery. Indonesia is not a Party to the Convention, but it participates in Commission meetings as an observer.²³

5.25 The Indian Ocean Tuna Commission (IOTC) was established also in 1996 as an additional mechanism for the management of the highly migratory tuna species in view of its vulnerability to fishing on the high seas. Membership is available to Indian Ocean rim countries and countries that fish

20 Submissions, pp. 97-98.

21 Transcript, 9 October 1997, p. 143.

22 Joint Standing Committee on Treaties, *Two International Agreements on Tuna*, 3rd Report, Australian Government Publishing Service, Canberra 1996, p. 3 and p. 41.

23 *ibid*, p. 5 and p. 10.

in the Indian Ocean. Australia joined the IOTC in December 1996. Indonesia is not a member. In supporting our proposed membership of this organisation, we noted previously that Australia's participation would benefit the conservation of fish stocks within and adjacent to our EEZ and enhance cooperation with other countries involved in the fishery.²⁴

5.26 The Shire and the Chamber of Commerce expressed strong reservations about relinquishing control of areas of the tuna spawning grounds to Indonesia. The Chamber of Commerce stated that while Australian fishing methods and regulations strictly control the region and protect the fish resource, it believed Indonesian fishing methods were not based on the sustainability of a particular fishery.²⁵ The effect of relinquishing control, argued both organisations, could be a profound, long term impact on the majority of fisheries in the region.²⁶

5.27 The Shire has concluded, however, that the most potentially damaging effect of the location of the boundary on the local environment could be increased incidences of pollution and its resultant impact on the Island's fragile northern coastline. Not only does pollution threaten marine life such as crustaceans, seabirds and turtles, but it may also impact on the Island's fledgling tourism industry which relies on the pristine nature of the surrounding waters.²⁷

5.28 Furthermore, Parks Australia (North) confirmed that a number of observations have been made of turtles unsuccessfully attempting to breed on Greta and Dolly beaches because they were unable to dig through to the substrata because of the depth of the pollution washed up on the beaches. Both beaches have also been subject to oil spills earlier in 1997, however, the source of the spills has not yet been identified.²⁸ The level of pollution occurring on the beaches is indicated by the opposite photograph of Greta Beach.

24 *ibid*, p. 41.

25 Submissions, p. 67.

26 Transcript, 9 October 1997, p. 147 and Submissions, p. 67.

27 Submissions, p. 64.

28 Transcript, 9 October 1997, p. 161 and p. 163.

Figure 3: Pollution washed ashore at Greta Beach (Courtesy of Parks Australia)

5.29 Critical of the amount of pollution washing ashore on Christmas Island, Parks Australia (North) also acknowledged that it is extremely difficult to identify the source of the majority of the items involved. While there was some suggestion the majority of pollution was from Indonesian vessels,²⁹ Dr Rumpff confirmed that once floating matter enters the oceans, it can travel thousands of kilometres making it difficult to determine the origin of the debris.³⁰

5.30 Parks Australia (North) concluded that what was really needed to address their environmental concerns was an instrument or mechanism to facilitate collaborative research with Indonesian scientists in the waters between Christmas Island and Indonesia. This collaborative research could involve reciprocal exchanges between researchers and would fill in knowledge gaps such as in the area of marine foraging by the Abbott's Booby.³¹

Impact on the local fishing industry

5.31 Licensed Australian commercial fishing in the Christmas Island area only commenced in 1992 with the number of licenses issued to date being very limited. During the period 1992 to 1995 the Australian Fisheries Management

29 Submissions, p. 64.

30 Transcript, 9 October 1997, p. 161.

31 *ibid*, pp. 156-157, p. 159 and p. 162.

Authority (AFMA) issued up to six permits for commercial trolling, longlining and handlining with the number of reef fish caught being limited to no more than 50 per cent of the total annual fish catch.³²

5.32 In 1996, under its Three Year Management Strategy for domestic fishing, AFMA issued licenses to three operators for the trialling of longline fishing with a restriction per operator of a one tonne annual quota for deep reef fishes.³³ The three operators can also catch and export yellowfin tuna up to 12 nm from the Island, while restrictions currently exist preventing the catch of Southern Bluefin Tuna.³⁴

5.33 The Christmas Island Chamber of Commerce (the Chamber of Commerce) indicated that Christmas Island is in a unique position to exploit the lucrative South East Asian fresh, sashimi grade fish market. This market is currently being explored by the fishing permit holders with the intention being to develop an export business of high grade fish. The proximity of the fishing grounds to the Island, combined with the frequency and length of flights to the market area, mean that local operators would have a distinct economic advantage over their competitors.³⁵

5.34 Investment to date in the fishing industry on Christmas Island has been restricted to approximately \$250,000 - \$450,000.³⁶ The Shire and the Chamber of Commerce expressed concern, however, that the location of the EEZ boundary would have a negative impact on the future development of the local fishing industry and restrict the capacity for its growth.³⁷

5.35 The Union of Christmas Island Workers (the Union) went further, however, suggesting that not only would the location of the EEZ boundary restrict future development, but that:

the development of the industry in the region will now take on a very different aspect. The philosophy of the industry on the Island definitely takes into account all the environmental issues and the intention is to develop small business ventures involving quality exports to niche markets such as Japan, and the development of the tourism market for game fishing and diving. The Indonesian fishing industry has a rather different approach. Longline boats,

32 Submissions, p. 65.

33 *ibid*, p. 65.

34 Transcript, 9 October 1997, p. 143 and p. 169.

35 Submissions, p. 67 and Transcript, 9 October 1997, pp. 166-167.

36 Transcript, 9 October 1997, p. 170.

37 Submissions, p. 65 and p. 67 and Transcript, 9 October 1997, p. 167.

driftnetters, and warehouse ships trawl the Indonesian waters in search of large catches...Not enough is known about the fragile ecology of this unique Ocean system, to have any realistic appraisal of that increased activity by mass fishing within the area.³⁸

5.36 The issue of over-fishing by foreign vessels and its impact on other marine species was also raised by the Shire and the Chamber of Commerce. They argued that over-fishing has the potential to impact on the long term viability of the fisheries and to adversely affect the local turtle and crustacean populations. Moreover, the Shire stated that over-fishing could impact on the Whale Shark migration and would likely lead to an increase in the amount of pollution arriving on the northern shores of the Island.³⁹

Illegal immigration

5.37 In 1996, approximately 486 people arrived by sea on Christmas Island without passports. All were of Chinese background, having departed from ports in Behai in China. In 1997, however, there have been three significant arrivals to date of illegal immigrants involving Iraqi, Bangladeshi, Algerian, Afghan and Sudanese nationals. The arrivals were made using boats in poor repair and often during dangerous sea conditions. Two of the three instances have involved the same Indonesian captain who is currently in the custody of the Australian Federal Police (AFP).⁴⁰

5.38 The AFP have indicated they are firmly convinced that an organised route for people seeking illegal entry into Australia exists between Asia and Christmas Island. People seeking entry to Australia via this illegal and perilious route are understood to be charged between \$US3,000 to \$US8,000. The AFP also believe that the number of individuals seeking illegal entry into Australia by this route is contining to grow.⁴¹

5.39 From interviewing the Indonesian captain involved in repeat offences, the AFP have confirmed that the greatest fear he had was being identified too close to Christmas Island by Coastwatch. They argue that if the EEZ boundary is

38 Submissions, p. 58.

39 Submissions, p. 65 and p. 67 and Transcript, 9 October 1997, p. 140.

40 Transcript, 9 October 1997, pp. 172-173.

41 *ibid*, p. 174.

located 38.75 nm north of Christmas Island, attempts to enter Australia illegally via this route will be greatly assisted, resulting perhaps sooner, rather than later, in a tragedy at sea of vast proportions.⁴²

5.40 The Shire, the Union and the Chamber of Commerce also expressed concern about the number of illegal immigrants arriving on Christmas Island. The Shire and the Chamber of Commerce have indicated that they believe there is a strong correlation between the frequency of visits of vessels containing illegal immigrants and the physical obstacles to their movement. They argue, therefore, that the positioning of the EEZ and seabed boundary 38.75 nm to the north of the Island will result in a significant increase in the frequency of visits by these type of vessels.⁴³

5.41 Similarly, the Union argues that with a boundary of less than 50 kilometres, the vessels involved in delivering illegal immigrants will be able to use the cover of night to drop passengers off and avoid detection, thereby saving their vessels from apprehension and destruction by Australian authorities.⁴⁴

5.42 A number of individuals and organisations raised the issue of the lack of consultation with Christmas Island over the Treaty. This matter is discussed in Chapter 6.

The Departmental perspective

5.43 The Department of Foreign Affairs argued in evidence to the Committee that the Treaty draws the international boundaries between Australia and Indonesia, but it is not intended to manage the area thus delineated. The Department suggested that separate instruments, such as the 1992 fisheries cooperation agreement, govern the bilateral effort in matters like fisheries, illegal immigration, and protection of the environment. The Department concluded that while the concerns raised on Christmas Island were legitimate, defined boundaries simplify the policing of the areas, but do not purport to solve all of the problems.⁴⁵

42 *ibid*, p. 174.

43 Submissions, p. 17 and 68 and Transcript, 9 October 1997, p. 139.

44 Submissions, p. 59.

45 Transcript, 9 October 1997, p. 207.

5.44 The Attorney-General's Department held similar views to those expressed by the Department of Foreign Affairs and Trade. The Department stressed that the Treaty was not intended to resolve all maritime related concerns in the areas subject to delimitation and that some of the issues raised on Christmas Island, such as illegal immigration, were not capable of being resolved by a maritime delimitation treaty.⁴⁶

5.45 AG's also stressed that under the existing situation, the Indonesians have an EEZ that goes within 12 nm of Christmas Island. They suggested that the Treaty will, in actual fact, be 'pushing' the the EEZ back so that the closest point will be 38.75 nm from the Island.⁴⁷

46 *ibid*, p. 208.

47 *ibid*, p. 227.

CHAPTER 6

CONSULTATION

General

6.1 AG's confirmed during our initial public hearing in Canberra that consultations were held with interested parties after the Treaty was signed and before it was tabled in Parliament. The consultations were partly in the nature of information sessions, but they were also designed to receive criticism and comments. The consultation sessions were held in Melbourne, Canberra, Perth and Darwin. We were advised that a wide range of interested groups were invited to each of the consultation sessions, including environmental organisations and East Timorese interest groups.¹

6.2 Although a number of queries were raised in relation to the functioning of the areas of overlapping jurisdiction and matters such as illegal fishing, not all comments received from these meetings were negative. Many positive comments were made about the Treaty and the benefits it will bring to Australia.²

6.3 DFAT also indicated that all major stakeholders were involved in the crucial negotiations. They argued that although the consultation process took place by and large after the signature of the Treaty and involved a number of different, well attended public seminars, major stakeholders were involved in the process right through the time of negotiation, through signature and after signature.³

6.4 As an example of this participatory process, DPIE confirmed that the Australian Petroleum Producers and Exploration Association (APPEA) was made aware of the Treaty. Immediately prior to the signing of the Treaty, the Department held a meeting with APPEA to brief them in confidence regarding the outcome of the negotiations in general terms. Additionally, DPIE met with Woodside Offshore Petroleum Pty Ltd and the Western Australian Department of Minerals and Energy.⁴

1 Transcript, 2 September 1997, pp. 8-9 and 28 October 1997, p. 215.

2 *ibid*, pp. 8-9.

3 Transcript, 28 October 1997, pp. 211-212.

4 *ibid*, p. 231.

6.5 AG's indicated that a number of issues were raised during the rounds of consultation following signature of the Treaty. Issues related to Christmas Island were raised in Perth, particularly regarding the location of the boundary between the Island and Java. In Melbourne the Department stated that there was very little criticism of the Treaty, but questions were asked which related to how the Treaty would operate, particularly in the areas of overlapping jurisdiction. In Canberra issues were raised in relation to fisheries jurisdiction, while in Darwin, conservation issues and the matter of East Timor were discussed.⁵

6.6 Throughout the consultations, AG's mentioned that an issue of concern which was raised was the lack of consultation which had taken place prior to the signature of the Treaty. They explained that, by reason of the practice of States in the negotiation of treaties, it was not open to hold extensive consultations prior to entry into a treaty because of confidentiality requirements and the fear of weakening a negotiating position.⁶

6.7 By its very nature, AG's argued that:

a maritime delimitation agreement is not the sort of agreement where you can go out after each round of consultation and say where you have got to with the other Party and say what lies behind it.⁷

6.8 AG's concluded that a genuine attempt was made to consult as widely as possible following signature of the Treaty, which included an attempt to identify those individuals and interest groups who would be most interested in the Treaty.⁸

6.9 DFAT also stressed that consultation is an issue that the Government takes very seriously and that it was proud of its record on this and other treaties.⁹ The Department also confirmed that the NIA developed for the Treaty reflected the concerns and information obtained during the consultation sessions.¹⁰

5 *ibid*, pp. 215-217.

6 *ibid*, p. 216.

7 *ibid*, p. 216.

8 *ibid*, p. 217.

9 *ibid*, p. 211.

10 *ibid*, p. 223.

Commonwealth and State/Territory Governments

6.10 Mr R.J. Meadows QC, Solicitor-General, Government of Western Australia and representative of the States and Territories, indicated that an appropriate level of consultation on the part of the Commonwealth existed at all times during the negotiations, and that he was fully informed and involved in the negotiation process.¹¹ He emphasised that he viewed his role throughout the negotiation process as being a representative of the States and Territories interests.¹²

6.11 Mr Meadows also stated that it was part of his function to consult with the relevant departments and agencies of the State following each round of the negotiations, including the Ministry of the Premier and Cabinet, the Department of Minerals and Energy, the Fisheries Department and others.¹³

6.12 The Western Australian Department of Minerals and Energy and the Fisheries Department of Western Australia both indicated that they had departmental advisory processes which had informed commercial fishers and operators of the ongoing negotiations with respect to the Treaty. In the case of Minerals and Energy, this consultation was achieved through an industry liaison group, while in the case of the Fisheries Department, management advisory committees were utilised.¹⁴

6.13 The Northern Territory Department of Mines and Energy, however, suggested that the consultative process had been unsatisfactory. Dr Eric Nunn stated that the Department had not been involved in the process until the round of consultations conducted by DFAT and AG's that occurred following signature of the Treaty.¹⁵

6.14 When asked about the involvement of the Northern Territory Department of Primary Industry and Fisheries in the development of a joint State and Territory submission to the Commonwealth Government regarding the Treaty, Dr Pyne stated that he had no recollection of any recent discussions from a fisheries perspective.¹⁶

11 Transcript, 15 September 1997, p. 19.

12 *ibid*, p. 20.

13 *ibid*, p. 19.

14 *ibid*, p. 26.

15 Transcript, 8 October 1997, pp. 80-81 and p. 88.

16 *ibid*, p. 123.

6.15 AG's confirmed that in relation to the representation of the States and Territories throughout the negotiation process, the practice adopted in this case, where the Solicitor-General of Western Australia acted as their representative, was consistent with the practice which is adopted in relation to treaties in general.¹⁷

6.16 DFAT also confirmed that the Solicitor-General was commissioned to be the States and Territories representative via the Standing Committee on Treaties (SCOT) nomination process, which involved the various Premiers' and Chief Ministers' Departments. Additionally, they indicated that:

Each of those Premiers' and Chief Ministers' representatives circulates the full list of treaty action to their own jurisdiction, to all of the agencies and departments of the State and Territory Governments, and receives back from the subsidiary agencies the request for further information and involvement. This is principally how information is circulated down to the operating level in the State and Territory administrations. That is also the way that the Western Australian Solicitor-General's role was endorsed.¹⁸

Christmas Island

6.17 The Shire of Christmas Island stated that it was dismayed at its September ordinary meeting to realise that the Treaty had been signed in March 1997 with no consultation having occurred with local community or interest groups.¹⁹ The Shire President, Mr Andrew Smolders, argued that the consultation process was flawed whereby the Australian community most directly affected by the physical proximity of the boundary did not have an input into the negotiation process.²⁰

6.18 The Shire indicated that no consultation occurred between it and either the Commonwealth or Western Australian Governments. Mr Paul Maberly, the Shire's Chief Executive Officer, explained the Shire's interpretation of effective consultation when he stated:

Too often on Christmas island, as in other small remote areas of Australia, people are said to be consulted without any formality being attached to it. The council cannot be consulted unless a letter is written to council and it is placed before the elected members of council. It is no good walking past the

17 Transcript, 28 October 1997, p. 218.

18 *ibid*, p. 237.

19 Transcript, 9 October 1997, p. 141.

20 *ibid*, p. 147 and p. 148.

supermarket and saying, 'This is what is going to happen'...It is important that there be a clear understanding of what we are talking about with consultation.²¹

6.19 The Union of Christmas Island Workers (UCIW) also stated that it was shocked that a treaty had been entered into so close to the border of Christmas Island, and indeed to do with the border of Christmas Island, with no community consultation whatsoever. Mr Tony Mockeridge, The Union's Acting General Secretary, indicated that he was at a loss to understand why the local community were not given an opportunity, before the Treaty was signed, to make comment and have some input into the process.²²

6.20 Mr Mockeridge agreed that the Treaty was seen by the local community as a further example of ignorance about Christmas Island and that decisions will continue to be made without any regard to citizens of Christmas Island being citizens of Australia.²³ He emphasised that the Union was not necessarily 'opposed' to the Treaty, but that what the Union membership wanted was clarification of the issues and what those issues mean for life on Christmas Island.²⁴

6.21 Dr Allan Walley commented that although more than half of Christmas Island's population is of Asian extraction, the information that was supplied to the local community regarding the provisions of the Treaty was done so only in the English language. He stressed that this limitation made it very difficult for people of a non-English background to be involved in the process.²⁵

6.22 Both DFAT and AG's claimed, however, that both Mr Smolders and Mr David Murray, the Government Conservator, were invited in mid to late June 1997 to attend the round of consultations conducted in Darwin.²⁶ DFAT was unable to provide to the Committee a copy of any signed letter to either the Shire or Parks Australia (North) to substantiate this statement. The Department provided a list of contact addresses that letters were sent to and an example form letter.²⁷ In the evidence presented to us there was a degree of ambiguity

21 *ibid*, p. 146.

22 *ibid*, p. 150.

23 *ibid*, p. 153.

24 *ibid*, p. 154.

25 *ibid*, p. 180.

26 Transcript, 28 October 1997, p. 215.

27 Submissions, p. 91 and p. 96.

over this matter. We were particularly concerned, however, that there appeared to be no follow-up to these initial invitations, especially in relation to Christmas Island. We make further comment in relation to this matter in the next chapter.²⁸

6.23 While AG's acknowledged that Christmas Island was a major stakeholder in the Treaty²⁹, DFAT confirmed that there was no discussion in relation to the Treaty with either the local population or the Shire before the Treaty was signed.³⁰

6.24 In establishing a negotiating position in relation to Christmas Island, AG's indicated that the issues were discussed with the relevant Canberra based Department responsible for the Territories, and they re-emphasised the confidential nature of the negotiations of a bilateral Treaty with Indonesia.³¹

6.25 The Department of Transport and Regional Development confirmed that the Administrator of Christmas Island was aware of the nature of the negotiations, in the most general terms, but was not in any sense a party to the process.³²

East Timor interest groups

6.26 During the DFAT and AG's consultations in Darwin, a separate meeting was held with East Timor interest groups.³³ One of these groups, Australians for a Free East Timor, acknowledged that while the meeting did not represent consultation in advance, it was nonetheless a step forward.³⁴

6.27 The East Timor Relief Association (ETRA), however, was critical of the level of consultation. Mr Kieran Dwyer, National Board Member of ETRA, stated that ETRA was not consulted at all before or during the negotiation of Treaty, or during the preparation of the NIA. The first notice that ETRA received of the process was when this Inquiry was advertised.³⁵

28 Transcript, 28 October 1997, p. 221.

29 *ibid*, p. 224.

30 *ibid*, p. 233.

31 *ibid*, p. 221.

32 *ibid*, pp. 221-222.

33 *ibid*, p. 217.

34 Transcript, 8 October 1997, p. 99.

35 Submissions, p. 40c-40d.

6.28 ETRA was also critical of a process that excluded consultation with recognised East Timorese leaders, either inside East Timor, throughout the world, or inside Australia. The Association described this situation as a significant lack of consultation.³⁶ Moreover, ETRA reiterated that if the Australian Government and the Australian Parliament considers that the only way to consult with the East Timorese people is through the Indonesian Government, then this is also not adequate consultation.³⁷

36 Transcript, 20 October 1997, pp. 192-193.

37 *ibid*, p. 201.

CHAPTER 7

COMMITTEE VIEWS

Indonesian traditional fishers

7.1 The issue of Indonesian traditional fisher access to the area prescribed by the 1974 MOU was raised as a matter requiring clarification. We agree that, while moving the boundary a further 12 nm to the north of the Ashmore Islands is a significant gain for Australia, it does nevertheless create an anomaly with the current MOU boundary which impacts on the issue of boundary enforcement.

7.2 In light of this change to the boundary, we support the suggestion made by Parks Australia that the 1974 MOU with Indonesia be reviewed. This review should include such matters as traditional fisher access and the extension of the northern boundary to coincide with the EEZ boundary established by the Treaty.

7.3 **The Joint Standing Committee on Treaties recommends that:**

the Australian Government, in consultation with the relevant State and Territory governments, review the 1974 traditional fisher Memorandum of Understanding with Indonesia in light of the changes to the Exclusive Economic Zone boundary in the vicinity of the Ashmore Islands, and

the Australian Government, in consultation with the relevant State and Territory governments, review the issue of ongoing Indonesian traditional fisher access to Australian waters and its impact on the sustained management of Australian fish resources.

Resource management issues

7.4 We accept that the boundaries established by the Treaty will assist in the management of natural resources. We also believe, however, that the management of resources in the areas of overlapping seabed and water column jurisdiction will require careful coordination and cooperation on the part of Australian and Indonesian authorities.

7.5 Careful management will be necessary, particularly in relation to the matter of managing shared fish resources. We note the suggestion by the Fisheries Department of Western Australia that one solution to this problem would be the establishment of a 'zone of fisheries cooperation'.

7.6 We heard evidence regarding the management of oil and gas exploration and exploitation in the area of overlapping jurisdiction which suggests to us that a degree of confusion exists over the provisions in the Treaty that affect these activities. We note that DPIE has already commenced to clarify these provisions, particularly in relation to the degree of notice required by Indonesia for certain activities with both State and Territory Governments and peak industry bodies. This clarification is to be encouraged.

7.7 The Joint Standing Committee on Treaties recommends that:

the Australian Government, in consultation with the relevant State and Territory governments, review existing Memorandum of Understanding and agreements with Indonesia, such as the *1992 Agreement relating to Cooperation in Fisheries*, to ensure that they adequately address the issue of managing shared fish resources.

7.8 The Joint Standing Committee on Treaties recommends that:

the Australian Government identify, and advertise widely to the State and Territory governments, the points of contact within the relevant Commonwealth departments/agencies which will have responsibility for coordinating dispute resolution in any areas of overlapping jurisdiction between Australia and Indonesia.

Christmas Island

7.9 Conserving the Abbott's Booby is a matter of significant importance. It was obvious to us that one of the critical issues in achieving this outcome was that scientific research was needed to determine the bird's marine foraging habits once it leaves the Island. To conduct this research, it will be necessary to have access to the waters to the north of Christmas Island which will be under Indonesian jurisdiction following ratification of the Treaty. This access will also facilitate other marine research such as that already being conducted by the CSIRO.

7.10 We commend the Government Conservator and his staff on their efforts in managing the unique fauna and flora on the Island and for raising these important issues with us. Without this valuable information our deliberations would have been incomplete.

7.11 We agree, therefore, with the suggestion by Parks Australia that reciprocal arrangements be negotiated with Indonesia allowing Australian researchers access to the waters north of the agreed EEZ boundary.

7.12 The issues of illegal immigration and marine pollution were also raised with us on Christmas Island. While both of these activities are cause for concern, we note AG's evidence which indicated this Treaty was not intended to resolve all maritime related concerns in the areas subject to delimitation. We note also that issues such as illegal immigration are not capable of being addressed by a maritime delimitation agreement. Notwithstanding this fact, we believe that both these issues need to be reviewed, and addressed as necessary by other Government initiatives.

7.13 **The Joint Standing Committee on Treaties recommends that:**

the Government review existing, or establish as a matter of urgency, reciprocal maritime scientific research arrangements with Indonesia to facilitate cross-border access for Australian researchers in the vicinity of Christmas Island.

7.14 **The Joint Standing Committee on Treaties recommends that:**

the Government review the issues of illegal immigration and maritime pollution on Christmas Island.

7.15 We consider that the lack of consultation afforded the residents of Christmas Island meant that these issues were not given due emphasis during the negotiation of the Treaty. We strongly believe that all the issues affecting Australia's national interest must be included in the development of a negotiation position.

Consultation

7.16 Consultation was a central component of the reforms to the treaty-making process announced by the Minister for Foreign Affairs on 2 May 1996. The Minister emphasised that:

Consultation will be the key word, and the Government will not act to ratify a treaty unless it is able to assure itself that the treaty action proposed is supported by national interest considerations'.¹

7.17 We agree with the Minister on this point. Consultation is not simply a word, however, but a meaningful process that must give every interested Australian the opportunity to be heard.

7.18 While both AG's and DFAT undertook a significant briefing and consultation program after the Treaty was signed, it still gives us cause for concern that organisations with significant membership and concerns, such as some of those representing the interests of the East Timorese people, were not involved in the process.²

7.19 Of more fundamental concern, however, was the fact that at no stage in the process, either before signature or as part of the preparation of the NIA, was the community on Christmas Island consulted. The Island is a remote and isolated part of Australia and the boundary set in place by this Treaty will be only 38.75 nm to its north. We believe that, at the very least, the Island community should have been given the opportunity in the NIA to put forward their views regarding the impact of this Treaty. We have particular concerns about the ambiguity referred to in Chapter 6 at paragraph 6.22 over whether or not written communication was received by Christmas Island. In the end, having regard to the evidence of Mr Smolders and Mr Maberly³, the evidence presented by the Departments fell short of demonstrating conclusively to us that the Shire of Christmas Island received the relevant information and that appropriate departmental administrative follow-up ensued.⁴

7.20 The Joint Standing Committee on Treaties finds that:

the consultation process in relation to Christmas Island was inadequate and re-emphasises the importance of involving all Australians, no matter how remote, in the consultation process as part of the treaty-making process.

1 Ministerial Statement, House of Representatives, *Hansard*, 2 May 1996, p. 231.

2 Consultation could also have occurred with recognised community leaders such as Jose Ramos Horta.

3 See Transcript, 9 October 1997, p. 146 and pp. 147-148.

4 See Transcript, 28 October 1997, p. 212, pp. 213-214, p. 215 and pp. 219-220.

7.21 The Joint Standing Committee on Treaties recommends that:

Commonwealth departmental officials conduct a thorough consultation process on Christmas Island with officials and the local community, prior to ratification, to explain to them the provisions of the Treaty.

7.22 In our 4th Report, we highlighted concerns about the quantity and quality of the consultation that had taken place between the Commonwealth and the States and Territories in the processes which led to the tabling of treaties and the accompanying NIAs.⁵

7.23 Throughout this Inquiry we were not convinced that this issue has been resolved. We heard conflicting statements from Western Australian and Northern Territory departments over the level and adequacy of consultation throughout the process. It has not been possible, however, to ascertain definitively whether this was a breakdown of the Commonwealth and State/Territory consultative process, or a breakdown in consultation between the States and Territories. Moreover, we are unable to comment as to whether the breakdown in consultation occurred within a particular government's bureaucracy.

7.24 The Joint Standing Committee on Treaties recommends that:

the Government clarify with State and Territory Governments the process of their representation and participation throughout the negotiation of an agreement of treaty status.

7.25 A number of our reports have made specific comments in relation to the information regarding consultation contained in National Interest Analyses (NIA). In our First Report we recommended that:

National Interest Analyses include specific details of organisations and individuals consulted and how such consultation occurred...⁶

7.26 This issue caused some uncertainty in relation to this Treaty, particularly in differentiating between those individuals and groups which were invited to attend consultations and those who were actually consulted. We acknowledge the comments made by the Government in response to our First Report. We argue, however, that it is an issue that still needs final resolution.

5 Paragraph 3.7, p. 32.

6 Paragraph 1.17, p. 4.

7.27 The Joint Standing Committee on Treaties recommends that:

the Government provide to the Committee, following the tabling of an agreement or National Interest Analysis, a complete list of those individuals, organisations and interest groups consulted both before signature, and during the preparation of the National Interest Analysis.

Location of the boundaries

7.28 We agree that the boundaries established by the Treaty represent a satisfactory outcome for Australia.

7.29 We also accept the arguments put forward by AG's, DFAT and Professor Prescott that Indonesia would not have accepted a water column boundary being located in the same place as seabed boundaries established by the 1971 and 1972 Agreements. We acknowledge that any solution was going to involve separate boundaries for the water column and the seabed.

7.30 Mr Kaye stated that the separation of jurisdictions has the great advantage of permitting both States to retain some elements of their negotiating position, and yet reach a mutually acceptable solution. We agree with Mr Kaye's statement and also Professor Prescott's conclusion that the teams representing each country achieved a set of compromises which were fair and equitable to both countries.

7.31 We are convinced also that the establishment of the seabed and water column boundaries by the Treaty will create certainty regarding the matter of resource exploration and exploitation. This situation will facilitate oil and gas exploration in previously restricted areas.

7.32 In relation to the issue of overlapping jurisdiction raised throughout the Inquiry, we acknowledge the points raised by AG's, industry groups, and Professor Tsamenyi and Mr Herriman. We accept that the operation of this area will require a degree of goodwill and cooperation from both Australia and Indonesia.

7.33 Although sympathetic to the position put forward by the residents of Christmas Island, we acknowledge that the outcome was consistent with international precedent.⁷

⁷ Such as in the international arbitration relating to *St Pierre and Miquelon* and the ICJ case between Denmark and Norway over the island of *Jan Mayen*, see Transcript, 28 October 1997, p. 208.

7.34 We acknowledge the position put forward by Mr Forbes that, had Christmas Island been a sovereign state, its claims to another boundary location would have been stronger. This is not the case, however, and we note that the precedents discussed by Professor Prescott clearly suggest that, based on international jurisprudence, the location of the boundary represents an equitable outcome.

7.35 We also note that the boundary negotiated between Australia and Indonesia in the vicinity of the Timor Gap region is equidistant between the two countries.

7.36 On the issue of East Timor, we note the fact that this, and previous Australian Governments, have accepted Indonesia as the sovereign power over East Timor. From this perspective, Indonesia is the appropriate government with which to negotiate the extent of Australian seas. This does not mean, however, that we endorse the manner in which East Timor was incorporated into Indonesia, nor that reported continuing human rights violations being perpetrated against the East Timorese people should be ignored.

7.37 We acknowledge the force of submissions by East Timorese groups that they did not have an opportunity to participate in the process. We thank these groups for their involvement in this Inquiry.

7.38 This inquiry has been an interesting and challenging task, dealing with a relationship of fundamental importance to Australia. The Treaty itself resolves our maritime boundary with Indonesia and serves as a model of bilateral cooperation in the region. Although many of the matters involved in the Treaty itself are technical, this Report has identified a number of issues which, when addressed, will further enhance the strength of the broadly-based relationship between Australia and Indonesia.

7.39 **The Joint Standing Committee on Treaties recommends that:**

the Australia-Indonesia Maritime Delimitation Treaty be ratified.

W L Taylor MP
Chairman

APPENDIX 1

LIST OF SUBMISSIONS

1. East Timor Relief Association
2. Attorney-General's Department
- 2a.
3. Mr G.D. Pike
4. Fisheries Department of Western Australia
5. Mr V.L. Forbes
- 5a.
6. Shire of Christmas Island
7. Mr S.B. Kaye
8. East Timor Relief Association
- 8a.
9. Ms Natasha Stacey
10. Santos Ltd
- 10a.
11. Dr I. Walters
12. Australians for a Free East Timor
13. Union of Christmas Island Workers
14. PGS Exploration
15. Mr P. Maberly
16. Christmas Island Chamber of Commerce (Inc)
17. Dr A. Walley

18. Mr P. Clark
19. Australian Geological Survey Organisation
20. Australian Customs Service
21. Department of Foreign Affairs and Trade
22. Parks Australia
23. Mr E. Gray
24. Mr M. Herriman and Professor M. Tsamenyi

APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

Canberra, 2 September 1997

Attorney-General's Department

Mr Bill Campbell, First Assistant Secretary, Office of International Law

Australian Customs Service

Mr Peter Naylor, National Manager, Coastwatch Branch

Mr Michael Van Wanrooy, Assistant Director, Border Legislation, Boarder Management Division

Australian Fisheries Management Authority

Mr Leonard Gleeson, Senior Operations Officer, Monitoring and Compliance Section

Mr Geoff Rohan, General Manager Operations

Australian Geological Survey Organisation

Mr Philip Symonds, Principal Research Scientist, Petroleum and Marine Division

Australian Surveying and Land Information Management Group

Mr Brian Murphy, Manager, Maritime Boundaries Program

Department of Defence

Commander Robin Warner, Director of International Law

Department of Foreign Affairs and Trade

Mr Ian Biggs, Executive Director, Treaties Secretariat

Ms Gillian Bird, First Assistant Secretary, International Organisations and Legal Section

Mr Allaster Cox, Director, Indonesia Section, South and South East Asia Division

Mr Greg Polson, Director, Sea Law and Ocean Policy Group, International Organisations and Legal Division

Mr Andrew Serdy, Desk Officer, Sea Law and Ocean Policy Group

Department of Primary Industries and Energy

Mr Peter Smith, Director, Legislation and Environment Section, Petroleum and Fisheries Division

Perth, 15 September 1997

Interested Individuals

Mr Edward Gray

Department of Minerals and Energy

Mr William Mason, Manager, Legislation and Titles, Petroleum Operations Division

Mr Allan Teede, Manager, Policy Branch

Fisheries Department of Western Australia

Mr John Looby, Manager, Central Support Services

Mr Neil Sarti, Manager, Compliance Programs

Government of Western Australia

Mr Robert Meadows QC, Solicitor General

University of Western Australia

Mr Vivian Forbes, Map Curator, Centre for Political Geography

Canberra, 29 September 1997

Interested Individual

Mr Stuart Kaye, Lecturer in Law, Faculty of Law, University of Tasmania

Darwin, 8 October 1997**Interested Individuals**

Ms Natasha Stacey

Mr Paul Clark

Australians for a Free East Timor

Mr Rob Wesley-Smith, Spokesperson

Department of Primary Industry and Fisheries

Dr Rex Pyne, Acting Deputy Director Fisheries, Fisheries Division

Dr David Ffoulkes, Asian Links Coordinator

Mr Colin Mellon, Officer in Charge, Foreign Fisheries Operations

Northern Territory Department of Mines and Energy

Dr Eric Nunn, Director of Energy

PGS Exploration Pty Ltd

Mr David Jones, Business Development Manager

Santos

Mr Alexander Wood, Head, Operations Support - NT

Christmas Island, 9 October 1997**Interested Individuals**

Mr Ture Sjolander

Dr Allan Walley

Mr John Ferguson

Shire of Christmas Island

Mr Andrew Smolders, Shire President

Mr Paul Maberly, Chief Executive Officer

Union of Christmas Island Workers

Mr Anthony Mockridge, Acting General Secretary

Australian Federal Police

Superintendent Philip Spence, Officer in Charge

Christmas Island Chamber of Commerce

Mr Russell Dawson, President

Parks Australia (North)

Mr Julian Barry, Programs Director

Mr David Murray, Government Conservator

Mr Roger Hart, Project Officer

Mr Paul Meek, Natural Resources Manager, Environment Australia

Dr Holger Rumpff, Project Officer, Natural Resources Department,
Environment Australia, Biodiversity Group

Canberra, 20 October 1997

East Timor Relief Association

Mr Kieran Dwyer, National Board Member

Canberra, 28 October 1997

Attorney-General's Department

Mr Bill Campbell, First Assistant Secretary

Australian Customs Service

Mr John Howard, National Manager, Border Operations

Mr Michael Roche, Deputy Chief Executive Officer

Mr Michael Van Wanrooy, Assistant Director, Border Legislation, Border Management Division

Mr Graham Giles, Director, Marine Acquisition

Mr Rodney Stone, Director, Surveillance Operations

Australian Fisheries Management Authority

Mr Richard Stevens, Managing Director

Mr Peter Venslovas, Manager Compliance and Monitoring

Australian Geological Survey Organisation

Mr Philip Symonds, Principal Research Scientist, Petroleum and Marine Division

Australian Surveying and Land Information Management Group

Mr Brian Murphy, Manager, Maritime Boundaries Program

Department of the Environment, Environment Australia

Mr Anthony Smart, Assistant Director, Strategic Policy and Coordination

Ms Kathy Colgan

Department of Defence

Captain Rowan Moffitt, RAN

Department of Foreign Affairs

Mr Ian Biggs, Executive Director, Treaties Secretariat

Ms Gillian Bird, First Assistant Secretary, International Organisations and Legal Section

Mr Allaster Cox, Director, Indonesia Section, South and South East Asia Division

Mr Richard Rowe, Legal Adviser

Mr Andrew Serdy, Desk Officer, Sea Law and Ocean Policy Group

Department of Transport and Regional Development

Dr Andy Turner, Assistant Secretary - Territories Office

Mr John Hunt, Territories Office

Department of Primary Industries and Energy

Mr Peter Smith, Director, Legislation & Environment Section, Petroleum & Fisheries Division

APPENDIX 3

LIST OF EXHIBITS

1. *Letter*, Embassy of Portugal, Canberra, 28 August 1997.
2. Professor V. Prescott, *The Completion of Marine Boundary Delimitation between Australia and Indonesia*, Unpublished Article, 3 September 1997 (Not for Publication).
3. Kaye S.B., *The Australia-Indonesia Maritime Boundary Treaty: a review*, in *Maritime Studies*, No 94, May/June 1997.
4. Gray E., *A Sequel to mabo: is mare nullius also a Fiction for Indonesian Fishermen in Australian Waters?*, in *Maritime Studies*, No 93, Mar/Apr 1997.
5. Tsamenyi M., *Managing Indonesian Traditional Fishing Activities in Australian Waters: an Australian perspective*, in *Maritime Studies*, No 86, Jan/Feb 1996.
6. Herriman M. and Tsamenyi M., *The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal regime for Offshore Resource Development?* Draft Unpublished Article.
7. *In the National Interest*, Australia's Foreign and Trade Policy, White Paper, National Capital Printers, Canberra, 1997.
8. *Australia's Relations with Indonesia*, Joint Standing Committee on Foreign Affairs, Defence and Trade, AGPS, Canberra, 1993.
9. *Fisheries Reviewed*, Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, Senate Printing Unit, Canberra, 1993.
10. *Managing Commonwealth Fisheries: The Last Frontier*, House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs, AGPS, Canberra, 1997.
11. *Commonwealth Fisheries Management*, Australian Fisheries Management Authority, Australian National Audit Office Performance Audit Report No. 32 1995-96, Vol 1, AGPS, Canberra, 1996.

12. *Commonwealth Fisheries Management*, Australian Fisheries Management Authority, Australian National Audit Office Performance Audit Report No. 32 1995-96, Vol 2, AGPS, Canberra, 1996.
13. *The Law of the Sea: United Nations Convention on the law of the Sea*, Final Act of the Third United Nations Conference on the Law of the Sea, United nations, New York, 1983.
14. *The Law of the Sea - Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989.
15. *Case Concerning East Timor*, Report of Judgements, Advisory Opinions and Orders, Portugal v. Australia, International Court of Justice, 30 June 1995.
16. Map, SANTOS Ltd, *Ashmore Cartier, ZOCA & Bonaparte Gulf*, November 1996.
17. EastTimor International Support Centre, *Human Rights Violations in East Timor*, Brochure.
18. Northern Territory Department of Primary Industries and Fisheries, Excerpt from Fishery Repoprt No 37, *Towards the Sustainable Use of Northern Territory Fisheries Resources: Review Workshop Led by Carl J. Walters*.
19. Australian Nature Conservation Agency, *Christmas Island National Park: Plan of Management*, Commonwealth of Australia, 1994.
20. Tony Stokes, Australian National Parks and Wildlife Service, *A Review of the Birds of Christmas Island, Indian Ocean*, Occasional Paper No. 16, 1988.
21. B.J. Reville, J.D. Tranter, H.D. Yorkston, Australian National Parks and Wildlife Service, *Conservation of the Endangered Seabird Abbott's Booby on Christmas Island, The Monitoring Program 1983-89*, Occasional Paper No. 20, 1990.
22. B.J. Reville, J.D. Tranter, H.D. Yorkston, Australian National Parks and Wildlife Service, *Monitoring the Endangered Abbott's Booby on Christmas Island 1983-1986*, Occasional Paper No. 11, 1987.

23. H.D. Yorkston & P.T. Green, *The Breeding Distribution and Status of Abbott's Booby (Sulidae: Papasula abbotti) on Christmas Island, Indian Ocean*, Elsevier, Revised Version 27 February 1996.
24. B.J. Reville, J.D. Tranter, H.D. Yorkston, *Oceanographic influences on breeding in the tropical seabird Sula abbotti*, Australian National Parks and Wildlife Service, Christmas Island, Indian Ocean, Draft, 1988.
25. J.N. Dunlop, C. Surman and R.D. Wooller, *Marine Distribution of Christmas Island Seabirds*, Seabird Research Group, Biological Sciences, Murdoch University, Western Australia.
26. *The Islander Newsletter*, No. 117, 16 May 1997.
27. *The Islander Newsletter*, No. 123, 8 August 1997.
28. Territory of Christmas Island, Christmas Island Administration Office, *Bulletin*, No. 47/97, 19 September 1997.
29. S. van Balen, *Short Communications, Notes on Observations of Abbott's Booby in the Banda Sea*, First Draft 18 October 1995, *Kukila* 8.