



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled 8 February 2005

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**JOINT STANDING COMMITTEE ON
TREATIES**

Monday, 14 March 2005

Members: Dr Southcott (*Chair*), Senators Bartlett, Jacinta Collins, Mackay, Mason, Santoro, Stephens and Tchen and Mr Adams, Mr Johnson, Mrs May, Ms Panopoulos, Mr Ripoll, Mr Bruce Scott, Mr Turnbull and Mr Wilkie

Members in attendance: Senators Mackay, Santoro, Stephens and Tchen and Mr Johnson, Mrs May, Dr Southcott, Mr Turnbull and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled 8 February 2005

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Committee met at 10.04 a.m.

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will today, firstly, review the Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries. This hearing was scheduled for last week but, owing to time constraints, had to be deferred until today. We will then consider three treaties tabled in parliament on 8 February, 2005. Finally, we will return to the committee's review of the International Treaty on Plant Genetic Resources for Food and Agriculture. I understand that witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for today's proceedings, with witnesses from other departments and industry representatives joining us for discussion of the specific treaties for which they are responsible or have an interest in. I should remind witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if they would raise this issue now. To begin our hearing we will take evidence on the Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries, done at Adelaide on 25 July 2004.

[10.06 a.m.]

CAMPBELL, Mr William McFadyen, General Counsel (International Law), Attorney-General's Department

MANNING, Mr Greg, Principal Legal Officer, Public International Law Branch, Office of International Law, Attorney-General's Department

LARSEN, Mr James Martin, Assistant Secretary and Legal Adviser, Legal Branch, Department of Agriculture, Fisheries and Forestry

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Agriculture, Fisheries and Forestry

HOLMES, Ms Patricia Ann, Director, New Zealand Section, Department of Foreign Affairs and Trade

TSIRBAS, Ms Marina, Director, Sea Law, Environmental Law and Antarctic Policy Section, Legal Branch, Department of Foreign Affairs and Trade

HIRST, Mr William Gordon, Project Manager, Maritime Boundaries and Advice, Geoscience Australia

SYMONDS, Mr Philip Alexander, Senior Adviser Law of the Sea, Petroleum and Marine Division, Geoscience Australia

Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (Adelaide, 25 July 2004)

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. At the conclusion of your evidence, would you please ensure that Hansard has had the opportunity to clarify any matters with you. Thank you very much for coming this morning. The committee has received a letter from the Department of Agriculture, Fisheries and Forestry informing us that the text before the committee is subject to rectification of the coordinates of five turning points of the Macquarie Island and Campbell and Auckland islands boundary set out in article 3 of the treaty. It is moved by Mr Wilkie and seconded by Mrs May that this committee accepts as evidence and authorises publication of the letter dated 8 March 2005 from the Department of Agriculture, Fisheries and Forestry. Would you now like to make some introductory remarks before we proceed to questions?

Mr Larsen—Marina Tsirbas did not introduce herself earlier, but she is available both to identify the various parts of the boundary as per the map before you and to answer questions on the substance of the treaty. With respect to the letter which the committee has received, thank you, Chairman, for accepting that as evidence. I would point out that the amount of territory actually affected by the rectification process is extremely small—some 100 square metres. Accordingly, it is of a very minor nature. An exchange of notes has taken place between the Australian and New Zealand governments in relation to that. We have New Zealand's acceptance to that rectification.

By way of broader background, the idea of a maritime delimitation treaty between Australia and New Zealand was first suggested in 1978. In essence, the treaty delimits the maritime boundary in six areas, and I will invite Marina to identify those areas as I go through them: firstly, the EEZ between Norfolk Island and Three Kings Island; the EEZ between Macquarie Island and Campbell and Auckland islands; the small area of extended continental shelf north of Macquarie Island and west of Auckland Island; another small area of extended continental shelf south-east of Macquarie Island and south-west of Auckland island; the extended continental shelf between Lord Howe Island and New Zealand, including the area of extended shelf associated with West Norfolk Ridge to the south of Norfolk Island; and the extended continental shelf on Three Kings Ridge east of Norfolk Island.

The 1982 United Nations Convention on the Law of the Sea, UNCLOS, provides the legal framework for this treaty. Under UNCLOS, coastal states are entitled to a continental shelf and exclusive economic zone extending up to 200 nautical miles from the baselines from which the breadth of their territorial sea is measured. Where the natural prolongation of a coastal state's landmass in the form of a continental shelf extends beyond 200 nautical miles, that state may assert sovereign rights over the extended area of continental shelf within limits established by UNCLOS.

Under UNCLOS, a coastal state exercises certain sovereign rights, but not full sovereignty, over the continental shelf and EEZ. This includes the right to explore, exploit, conserve and manage the natural resources. A coastal state also has jurisdiction to protect and preserve the marine environment and to undertake marine scientific research. Where the entitlements of opposite states overlap, it becomes necessary to delimit maritime boundaries. This can occur either because their baselines are less than 400 miles apart—and Marina can show that this is the case between some Australian and New Zealand islands, Campbell and Macquarie—or because the same area of seabed is more than 200 miles from either state and forms part of the continental shelf of both under the UNCLOS rules. This is the case in relation to the Lord Howe Rise, the Three Kings Ridge and the Macquarie Ridge, as identified on the map.

Under articles 74 and 83 of UNCLOS, delimitation shall be effected by agreement on the basis of international law in order to achieve an equitable solution. This is what this treaty has achieved. The overlap of water column entitlements of Australia and New Zealand dates from 1979 when Australia declared the Australian fishing zone with an outer limit of 200 nautical miles from the baseline, New Zealand having declared a 200-nautical mile EEZ in 1977.

It is rather more difficult to pinpoint when exactly the overlap of continental shelf entitlements arose because of the change in the basis of that entitlement at international law, from depth and exploitability in the 1958 Convention on the Continental Shelf to distance and geomorphology

as reflected in the formula in article 76 of UNCLOS. But at the latest, by the time New Zealand ratified UNCLOS in 1996, the Lord Howe Rise and Challenger Plateau, a prominent elevation in the Tasman Sea, became a continental shelf common to both countries, with a consequent need to delimit it.

As the national interest analysis says, maritime boundary delimitation was required in several areas but, in effect, it was possible to do this by just two lines, which you can see on the map before you. These are maritime boundaries dividing both the EEZ and the continental shelf of the two countries. Because the boundary runs no closer than 200 nautical miles to any Australian island, Lord Howe Island will continue to enjoy its full EEZ, as demonstrated on the map, as do Norfolk Island and Macquarie Island, except where they are within 400 miles of the nearest New Zealand islands.

Not all of the boundary in its application to the continental shelf beyond 200 nautical miles runs along the line of equidistance between the nearest points of Australian and New Zealand land territory. In this respect it is consistent with international law and practice for isolated islands that lie between the mainland coastlines of the countries involved in a delimitation to be given reduced effect. This reduction of effect in relation to isolated islands came into play in relation to the continental shelf adjacent to Lord Howe and Norfolk islands and, as the maps annexed to the treaty show, Norfolk Island lies closer to New Zealand than to the Australian mainland.

In a nutshell, the EEZ boundaries are delimited along the line of equidistance. The small area of extended continental shelf north of Macquarie Island is placed under New Zealand jurisdiction. This is an area of no known resource potential. The extended continental shelf between Lord Howe Island and New Zealand is divided in such a way as to give some weight to Lord Howe Island, although less than the full weight the line of equidistance between the nearest points of Australian and New Zealand territory would have represented. Even so, this is an equitable result for Australia, given that the international law on maritime delimitation gives less weight to small isolated islands than to mainland territory.

Finally, the extended continental shelf boundary on Three Kings Ridge, east of Norfolk Island, is drawn so as to leave most of the physical feature of that name under New Zealand jurisdiction, as demonstrated on the map, given that there was a more straightforward technical case for seeing it as the natural prolongation of New Zealand's North Island than of Norfolk Island. At New Zealand's request, this treaty does not delimit the territorial sea and EEZ between the Australian Antarctic territory and New Zealand's Ross Dependency, which remains a task for another day, but it does comprehensively settle the remainder of the overlapping entitlements shared between Australia and New Zealand.

In summary, the treaty settles Australia's longest remaining undelimited maritime boundary. It is evidence of the good relations that we have with one of our most important neighbours and highlights the importance the government attaches to its relations with New Zealand. It also exemplifies the way in which we can work together. It demonstrates that complex maritime boundaries can be delimited by negotiation. The boundaries in the treaty were negotiated as a package and, in our view, represent a good outcome for Australia. The various resources industries and the relevant state and territory governments, which had interests at stake, have expressed satisfaction with the outcome as set out in the National Interest Analysis. The treaty

brings certainty of jurisdiction over the area between Australia and New Zealand—a certainty that is crucial to promoting development.

My last point relates to the question of how the principles of this delimitation relate to those in the one we are negotiating with East Timor. In addressing this issue, I am conscious that the negotiations with East Timor are ongoing and am therefore not in a position to canvass in any detail the matters being discussed in those negotiations. I can say, however, that it is well recognised that each delimitation has its own unique circumstances so that what is agreed in one will not necessarily apply in the other. That said, the principles underpinning our New Zealand boundaries and those we are advancing vis-a-vis East Timor are consistent. The position of much of the agreed continental shelf boundary with New Zealand has regard to principles of the natural prolongation of the continental shelf, the effect of isolated islands and the length of facing coastlines. For a combination of these reasons, the position of the boundary departs from the line of equidistance for much of its length. That brings me to the end of my prepared remarks. Thank you.

CHAIR—Thank you very much. When did discussions begin with Australia and New Zealand on the delimitation of the maritime boundary?

Mr Campbell—I think they began in 1999 in earnest.

CHAIR—I think you mentioned that New Zealand had ratified only in 1996?

Mr Larsen—UNCLOS? Yes, that is correct.

CHAIR—And it is a 1982 convention?

Mr Larsen—Yes.

CHAIR—Was there any reason for the 14 years that they took to ratify it?

Mr Larsen—I am not aware of the reason. Perhaps Mr Campbell might know.

Mr Campbell—I do not think there was any reason behind it. The 1982 Convention on the Law of the Sea did not come into force until 1994.

CHAIR—Could I also ask you for some more information about the discussions and the consultations with the petroleum and fisheries industries. What matters did they raise with the delegation? In the NIA it says the delegation took due account of the matters that they had raised. What sort of things did they raise?

Ms Tsirbas—In maritime boundary negotiations it is not usual for persons outside government to participate in the negotiations themselves. The various resources industries and the relevant state and territory governments, which had interests at stake, have all expressed satisfaction with the outcome through the relevant departments as set out in the NIA. So, in a sense, the stakeholder interests were taken into account through our consultations with the relevant departments such as the Department of Agriculture, Fisheries and Forestry and the Department of Industry, Tourism and Resources as well.

CHAIR—What matters did they raise?

Mr Campbell—In relation to petroleum I think it is fair to say that it is an area of fairly low petroleum potential, so I am not sure that there was a great deal of concern about that particular industry.

CHAIR—I am just reading from the NIA, which says:

The Department of Industry, Tourism and Resources and the Department of Agriculture, Fisheries and Forestry brought to the delegation's attention matters relating to the petroleum and fisheries industries that arose in the negotiations, of which the delegation took due account.

Mr Symonds—I would like to make a brief comment on that one. I think the types of things that are being referred to there are matters of general interest with respect to Lord Howe Rise in particular, which is the big underwater feature you saw on the map before, where there is no current exploration for petroleum but which has always been felt to have some long-term petroleum potential. I think the industry interest would be more from the point of view of gaining certainty of jurisdiction, if you like, by having a boundary between Australia and New Zealand over this area so that in the future leases and petroleum exploration could occur through that region. It would be very much a general interest in this region because there is no current exploration. We do not know a great deal about the petroleum potential of Lord Howe Rise, but what we do know suggests that it does have some potential but it is not high. So it would be based on a general consideration by companies to our Department of Industry, Tourism and Resources.

CHAIR—It would just be my guess, but I would have thought, given what you said, that they would have preferred the line to have been a little bit more to the south-east than it is on the Lord Howe Rise.

Mr Symonds—I have not heard that, and I think the issue with companies would be to have a certainty of jurisdiction.

CHAIR—Certainty.

Mr Symonds—That is the big issue for exploration companies. They want to know that, when they explore there, the leases they get access to in the future will be certain. I think that is the main concern in this case, because there is no detailed understanding of where the areas of highest potential are. If there are any, they will be on Lord Howe Rise. So it is more about area.

CHAIR—And fisheries industries?

Mr Larsen—My understanding is that the fisheries industries are satisfied. We relied on advice from the Department of Agriculture, Fisheries and Forestry and we are not aware of any concerns expressed by those industries.

Senator TCHEN—Mr Larsen, in point 13 of your NIA you stated that the Australia-New Zealand maritime boundary treaty will potentially assist Australia in setting a precedence for future negotiations for other treaties. I do not have any real problem with the presentation you

made earlier, but as I look at this map of the boundaries, one of the things that jump out at me is the way the distance of offshore islands carries less weight than the distance of the continental coastal boundaries. In the case of Lord Howe Island or Norfolk Island, but particularly in the case of Macquarie Island, it seems that, whenever there is a common boundary drawn between two exclusive economic zones which do not actually intercept, the boundaries are drawn along the Australian EEZ. We tend not to go beyond that 200 nautical miles, whereas the other treaty nations extend outward. Would that set a precedent for Australia in our negotiation with other countries—the fact that we always seem to pull back to our boundary of 200 nautical miles? It weakens our position, doesn't it?

Mr Campbell—We are dealing here with two different sorts of zones that are covered in this treaty. One is the exclusive economic zone, which cannot go beyond 200 nautical miles. In the case of this particular treaty, those zones were delimited on the basis of equidistance between the two countries. But there is another zone: the continental shelf, where there is a delimitation of area beyond 200 nautical miles from the continental shelf. That is mainly where these principles that we referred to earlier come into play. There is not only the fact that, under international law, if there is an isolated island that lies between two countries, there is something that is sometimes referred to as 'discounting' of the effect of those islands, and that has occurred in this particular case.

There is another principle of international law which also applies, and that is to do with the relative length of the facing coastlines. The relative lengths of the facing coastlines here are those of Norfolk Island, Lord Howe Island and New Zealand. So there is some disparity in length there as well. But there are cases, particularly on the Lord Howe Rise and also around the Three Kings Ridge, where areas beyond 200 nautical miles are attributed to Australia.

Senator TCHEN—Yes, I appreciate the point about Norfolk and Lord Howe islands. Lord Howe and Norfolk islands are both distant offshore islands. I suppose the comparison is between Macquarie Island, Campbell Island and Auckland Island. All three islands are offshore islands. Macquarie Island is Australian. Campbell Island and Auckland Island are New Zealand's. Yet, if you look at the actual treaty boundaries, once you go past where the EEZs intercept, the agreed treaty boundary is pulled back along Australia's EEZ.

Mr Campbell—You will see that, in relation to New Zealand, as you go down to the bottom of the South Island there is a large area of shelf that actually extends out from New Zealand. It does not actually extend out from Macquarie Island. This is where the issue of natural prolongation of the continental shelf comes in. It would be very difficult in that circumstance—and I do not have the map here—

Senator TCHEN—I can see it here.

Mr Campbell—That larger area is obviously an extension of New Zealand or a natural prolongation. It would be very difficult for Australia to argue—in fact, it cannot argue—that that is the natural prolongation of Macquarie Island, because it does not actually have any connection with it. That is the reason why, for that particular area, Australia would not get a larger part of that area. I suppose the other point I would make, and I think this was mentioned earlier, is that there are two small areas of extended continental shelf with a connection to Macquarie Island that were the subject of delimitation under that treaty. One was in the corner where the EEZs

meet to the north of Macquarie Island. There is a very small pocket of continental shelf in there without, as I understand it, any petroleum potential. It is very small. That was attributed to New Zealand. There was one down the bottom where the line kicks out from the exclusive economic zone boundary below Macquarie Island. There is very small area of extended shelf in there which did have a connection with Australia. That has been divided equally, as I understand it. I would make one further point. There is quite a large area of extended continental shelf that belongs to Australia—you can see it on the map, but there is no line drawn around it—and it is divided under this treaty. That is below the exclusive economic zone near Macquarie Island. You will see quite a large area of continental shelf extending out below. That is attributed to Australia under this treaty.

Senator TCHEN—Thank you, Mr Campbell. I am reassured that there are good reasons for where the treaty boundaries are drawn—they are not just simply pulling back along Australia's zones.

Mr Campbell—No.

Mr WILKIE—My question is really along similar lines. It has been argued that, given that median line resolutions have been applied in these cases for Macquarie Island and Norfolk Island and there were these overlapping claims of exclusive economic zones, we are actually applying double standards here. We are saying that we will use this method to determine boundaries in the case of New Zealand—and I alluded to this last week—but in the case of East Timor we have refused to even consider a median line as the starting point for negotiations. Why is that?

Mr Campbell—As mentioned by my colleague, I hesitate to get into the detail of the negotiations with Timor Leste. That is because those negotiations are ongoing. In fact, the last round of those negotiations commenced last Monday afternoon and went for two days after that. The parties are discussing the relevant issues in some detail and it is likely there will be another negotiation quite soon.

Mr WILKIE—I can appreciate—

Mr Campbell—I can answer—

Mr WILKIE—This committee considered in detail the Timor Sea Treaty, where the boundaries were of some issue. We were told that we were not going to apply that particular method because of certain reasons which were outlined at the time. Now we are being told that, in the case of New Zealand, we have applied those same sorts of conditions in determining those boundaries. What I am saying is that you cannot have it both ways. Why have we been able to do it in one case and yet have ongoing debates with East Timor about using that method for them?

Mr Campbell—If I can answer the question generally, Australia does have a claim to an extended continental shelf as a natural prolongation of its land territory in the area between Timor Leste and Australia. The other significant difference—and I am starting to get into a bit of detail here—is that in that case there is, of course, the so-called Timor Trough, which in our view divides the continental shelf. In other words, there are two continental shelves. That is not the case in relation to the boundary between New Zealand and Australia. So there is that difference

as well. These considerations of natural prolongation of land territory were taken into account in the New Zealand treaty.

Mr TURNBULL—I have a question about the map, Mr Campbell. Can you give a rough indication of the depths suggested by this colour coding?

Mr Campbell—I will have to defer to my colleague from Geoscience Australia.

Mr Symonds—I can give you a rough idea. The blue areas are mainly deeper than, say, 4,000 metres. The yellowy-orange area would usually range from between about 3,500 to just less than 1,000 metres. Obviously in the area around the island of New Zealand it goes right up to zero, so basically it means more shallow than 3,500 metres.

Mr TURNBULL—And orange is more shallow than yellow.

Mr Symonds—That is right: it goes orange, yellow, lime green and blue. In the Lord Howe Rise itself, the area of continental shelf beyond 200 miles that has been delimited by this treaty ranges in depth from about 3,500 to about 1,000 metres or slightly less.

Mr TURNBULL—Then there are the outcrops at Middleton Reef and Elizabeth Reef.

Mr Symonds—That is right.

Mr TURNBULL—Middleton Reef is the one the Americans blasted a hole in, isn't it?

Mr Symonds—I am not sure about that.

Mr TURNBULL—I think one of those reefs was used to shelter shipping during the war—I may be wrong—and there was a hole blasted in it to enable them to pass through.

Mr Symonds—There was certainly shipping there, but was it there for unfortunate reasons? I am not sure that there has been any blasting there, but perhaps there was.

CHAIR—We have one last question from Mr Wilkie.

Mr WILKIE—Going back to those two islands—Norfolk and Macquarie—were the geographical factors taken into consideration or was it purely the equidistance factor in terms of trenches and continental shelves?

Mr Campbell—In Australia's view, both Lord Howe and Norfolk islands lie on a common continental shelf with New Zealand.

Mr WILKIE—What about Macquarie?

Mr Campbell—As you will see, there is a ridge called the Macquarie Ridge which extends down from New Zealand to Macquarie Island, and we would say that they are part of a common feature.

CHAIR—So you are saying that all three islands—Norfolk, Lord Howe, and Macquarie—are on the New Zealand continental shelf?

Mr Campbell—No, we would say they are on a common continental shelf and that they in fact emanate from both—the shelf between New Zealand and Lord Howe Island is the natural prolongation of both Lord Howe Island and New Zealand. Likewise with Norfolk Island, both the Norfolk Ridge and the Three Kings Ridge are natural prolongations of Norfolk Island and New Zealand, though it must be said in relation to the Three Kings Ridge that there is a much greater prolongation from New Zealand than from Norfolk Island.

Mr WILKIE—You mentioned the Timor Trough, but many would argue that that trough does not mark the boundary for the continental shelf—it is merely a feature of the shelf—and that we share the same continental shelf. Have there been any rulings on that?

Mr Campbell—I think we are getting into the realm of negotiations; but, if you are talking about rulings, my understanding is that the International Court of Justice, for example, has not considered a discontinuity—or, as we would say, a break in the shelf—of the same order as we are looking at in the relation to the Timor Trough.

Senator MACKAY—Chair, I am a new member of this committee and I am unsure why we cannot ask questions that go to matters that are subject to negotiation.

Mr WILKIE—I think we can.

Senator MACKAY—Chair, perhaps you could clarify that.

CHAIR—We are considering the treaty that is before us at the moment. Mr Wilkie has asked some questions, and they have been answered in a general nature. But it has not been the practice to diverge from that. Given that we have been advised that there are ongoing negotiations, I do not see any need to push the point.

Senator MACKAY—Please do not. This is an ingenué question. Mr Wilkie referred last week and again this week to the Timor Gap negotiations and was given an adequate response. But the response was essentially that this matter is under consideration and negotiation, and therefore it would be improper et cetera. How can we get answers if this is the type of response that is given? I am not having a go at anybody—it is just that I am new to the committee.

CHAIR—I think this is a discussion we should have after the public hearing.

Mr Campbell—I would just like to make the point that bilateral negotiations are generally regarded as being confidential to the parties while the negotiations are going ahead. In other words, there is an obligation of confidentiality not to reveal the content of the negotiations while they are going on. That is on the international level.

Senator MACKAY—So at what point does the parliament get to ask questions about why certain aspects of treaties have been negotiated?

Mr Campbell—I think that is when the treaty is presented to the parliament.

Senator MACKAY—That comes back to Mr Wilkie's point.

Mr WILKIE—I ask my question on what has been happening with regard to Timor Leste because the Timor Sea Treaty came before this committee and the maritime boundary was one of the key components of that treaty. We were told certain things about how the maritime boundary could or could not be negotiated and what would be negotiated in the future. I am trying to point out that there appears to be an anomaly between what was negotiated on our maritime boundary with New Zealand and what we were told would be negotiated on our maritime boundary with Timor Leste. That is why I seek clarification that, in dealing with both countries, we are dealing with apples and oranges and not apples and pears. I think the same rules need to apply to the one as are applied to the other, and I would be very disappointed to think that that is not happening.

Mr Campbell—I suppose what I am saying—and I think it has been mentioned before—is that the circumstances of each maritime delimitation are unique for a number of reasons—geographical and geomorphological considerations are one aspect of it. Under international law we are required to come to an equitable solution by agreement, taking into account certain considerations—and there are some well established considerations, which have been mentioned today. Without going into the detail of it, we do not see a distinction between the considerations of a general nature that apply to maritime delimitations. We do not see a distinction between what we have done in relation to New Zealand and the way we are negotiating the treaty with Timor Leste.

CHAIR—Thank you very much for your evidence. That concludes the discussion on this treaty.