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Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

By email

20 April 2018

Dear Committee Secretary,

2018 Timor Treaty

I attach my submission to the Joint Standing Committee on Treaties with respect to the 2018 Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea (Timor Treaty) (New York, 6 March 2018).

I am Professor of International Law at the ANU College of Law, Australian National University where I have taught since July 2006. My research has a specific focus on law of the sea, international polar law, and implementation of international law within Australia. Recent authored, co-authored or edited books include *International Law in Australia* 3rd (Thomson Reuters, 2017) edited with Crawford; and *The International Law of the Sea* 2nd (Bloomsbury, 2016) with Stephens. Major career works include *The Polar Regions and the Development of International Law* (CUP, 1996), and *International Law: Cases and Materials with Australian Perspectives* 3rd (CUP: IN PRESS) with Kaye, Akhtarkhavari, Davis and Saunders.

I am also Co-Editor of the *Australian Year Book of International Law* and Editor-in-Chief of the *Brill Research Perspectives in Law of the Sea*. Since 2012 I have been Rapporteur of the International Law Association (ILA) Committee on 'Baselines under the International Law of the Sea'. I previously served as Challis Professor of International Law and Director of the Sydney Centre for International and Global Law, University of Sydney (2004-2006). In 2012 I was appointed an inaugural ANU Public Policy Fellow, and in 2015 elected as a Fellow to the Australian Academy of Law (FAAL).

Yours sincerely,

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Executive Summary

The 2018 Timor Treaty has a number of innovative provisions and represents a significant breakthrough in the maritime boundary arrangements between Australia and Timor Leste in the Timor Sea. It has been concluded through a process that is consistent with international law, and particularly the law of the sea. The Treaty has the potential to repair a bilateral relationship that has been damaged in recent years as a result of a number of issues arising from the 2002 Timor Sea Treaty and associated agreements, and international litigation before courts and tribunals. While the Treaty has the potential to provide much needed legal certainty a number of critical issues remain to be resolved before the Australia/Timor-Leste Timor Sea maritime boundary and the associated legal regime is finally settled.

Introduction

1. The 2018 Timor Treaty¹ signed in New York between Australia and Timor Leste on 6 March 2018 is a landmark agreement between the two countries and provides a pathway for the final settlement of their continental shelf and exclusive economic zone (EEZ) maritime boundaries. This is the latest maritime boundary treaty negotiated with respect to the Timor Sea, which has been contested for over 45 years by Australia, Portugal, Indonesia and Timor Leste. At the centre of the dispute has been ownership and control of significant oil and gas reserves, including the Greater Sunrise field that has been valued at between \$AUD40-50 billion. This partly explains why despite previous treaties there has never been a conclusive settlement of the maritime boundary.

Background 1971-2015

2. Since the 1970s Australia has been engaged in negotiations first with Portugal (1971-1975), then Indonesia (1975-1999), the United Nations Transitional Administration in East Timor (UNTAET) (1999-2001) and finally Timor Leste (2002-2018) over the Timor Sea maritime boundary. Australia argued in those negotiations that the limits of the Australian continental shelf should be determined on the basis of 'natural prolongation', a principle endorsed by the International Court of Justice in the 1969 *North Sea Continental Shelf* case.² The 1982 United Nations Convention on the Law of the Sea (UNCLOS)³ also refers to the principle of

¹ Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea [2018] Australian Treaties Not in Force 4 (Timor Treaty).

² *North Sea Continental Shelf* (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] ICJ Reports 3 [19].

³ [1994] Australian Treaty Series No. 31.

‘natural prolongation’ in the context of the continental shelf of a coastal State extending to the edge of the continental margin. Reliance upon the principle of natural prolongation would have seen the Australian continental shelf extend far into the Timor Sea ending as close as 50 nautical miles (nm) from Timor.

3. Natural prolongation was the basis for the 1972 Seabed Boundary treaty Australia concluded with Indonesia⁴ which runs through the Timor Sea and parts of the Arafura Sea, terminating either side of the limits of a potential East Timor continental shelf, and thereby creating what became known as the ‘Timor Gap’. However by the 1970s when UNCLOS negotiations commenced, natural prolongation was losing support in favour of a more equitable approach in which all coastal States were recognised as entitled to a minimum 200 nm continental shelf. This ‘juridical’ continental shelf approach was eventually confirmed in Article 76 of UNCLOS concluded in 1982.
4. Australia’s initial efforts to negotiate a maritime boundary in the ‘Timor Gap’ were rebuffed by Portugal due to developments taking place in the UNCLOS negotiations and Portugal’s own internal political unrest which eventually saw it abandon Timor in 1975. Indonesia, which occupied Timor from 1975 and had already concluded the 1972 Seabed Boundary treaty with Australia, was more willing to negotiate especially as in doing so Australia would need to recognise Indonesian sovereignty over East Timor. By the time these negotiations commenced in the early 1980s there was a much better appreciation of the potential oil and gas reserves in the seabed which inevitably made both sides reluctant to agree upon a permanent maritime boundary because of the potential loss of access to resources revenue.
5. The outcome was the 1989 Timor Gap Treaty⁵ which provided for an innovative joint development zone that shared oil and gas revenue on a 50/50 basis in a central area, and a 90/10 revenue split in favour of Indonesia to the north and Australia to the south of the central area. That arrangement, which survived a 1995 challenge by Portugal in the International Court of Justice,⁶ collapsed following Indonesia’s 1999 withdrawal from Timor and the Australian-led INTERFET military intervention, after which UNTAET exercised administration over East Timor from 1999-2002.

⁴ 1972 Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 [1973] Australian Treaty Series No 32.

⁵ 1989 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] [1991] Australian Treaty Series No 9.

⁶ *Case Concerning East Timor* (Portugal v Australia) (Judgment) [1995] ICJ Reports 90.

6. Australia then negotiated the 2002 Timor Sea Treaty⁷ with the UN and Timorese officials, which was signed in Dili on 20 May 2002 upon Timor's independence. However, that Treaty was again based on a joint development regime, though this time with a 90/10 revenue split in favour of Timor.⁸ The Treaty was to remain in force until such time as a permanent maritime boundary was agreed upon, or for a period of 30 years, whichever was sooner.⁹
7. The 2002 Timor Sea Treaty also did not satisfactorily deal with the Greater Sunrise oil and gas field in the north east quadrant and while a subsequent 2003 Unitisation Agreement¹⁰ sought to provide some commercial certainty for the oil and gas companies wanting to develop the field, Timor-Leste was of the view that these maritime boundary arrangements were not favourable to its interests. In particular, the generation of Timor's leaders who led the independence movement, including founding President Xanana Gusmao, placed great importance on the new country having settled land and maritime borders.

Conciliation 2016-2018

8. After Australia repeatedly rejected Timor's requests to renegotiate the 2002 Timor Sea Treaty and the associated 2006 CMATS¹¹ to reach settlement upon a permanent maritime boundary, Timor commenced compulsory conciliation against Australia under the UNCLOS in April 2016. Australia mounted an unsuccessful challenge against the competence of the Commission,¹² after which nearly 18 months of Commission facilitated discussions occurred between the parties from October 2016 to March 2018. During that time the Commission's one year mandate¹³ was extended by agreement, and in the final months there was also engagement with the Timor Sea oil and gas joint venturers who had existing commercial interests. That the Commission was able to broker a treaty, which was not a certainty at the outset, is a vindication of the process and sets a precedent for conciliation be utilised to settle other law of the sea disputes.

⁷ 2002 Timor Sea Treaty between the Government of East Timor and the Government of Australia [2003] Australian Treaty Series 13 (2002 Timor Sea Treaty).

⁸ Article 4, 2002 Timor Sea Treaty.

⁹ Article 22, 2002 Timor Sea Treaty.

¹⁰ 2003 Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubador Fields [2007] Australian Treaty Series 11.

¹¹ 2006 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea [CMATS] [2007] Australian Treaty Series 12.

¹² *In the Matter of a Conciliation before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Case No 2016-10, Decision on Australia's Objections to Competence of 19 September 2016.

¹³ Annex V, Article 7, UNCLOS.

Treaty Constraints

9. Treaty negotiations were challenging because of some critical constraints. The first was the legacy of the 2002 Timor Sea Treaty, the 2003 Unitisation Agreement and the 2006 CMATS. Under these arrangements a legal framework existed for the development of oil and gas fields in the Timor Sea, and the Greater Sunrise field in the north east. Four Greater Sunrise Joint Venturers had legal interests which needed to be accommodated in the new treaty: Woodside, Shell, Conoco Phillips, and Osaka Gas. The agreement in January 2017 to terminate the 2006 CMATS¹⁴ removed a number of legal impediments that Australia and Timor-Leste faced in reaching a new agreement for the Timor Sea.
10. Second, the 2018 boundary had to be shoehorned around the existing maritime boundaries Australia had settled with Indonesia including the 1972 Seabed Boundary treaty, and the 1997 Perth Treaty between Australia and Indonesia¹⁵ governing the continental shelf and EEZ to the south of Java and west into the Indian Ocean.

Treaty Provisions

11. The 2018 Timor Treaty is relatively short at only 14 articles, however five accompanying Annexes (one of which is a map) flesh out the content of the Treaty in more detail. The Treaty provides for a flexible maritime boundary between Australia and Timor Leste in the Timor Sea encompassing both the continental shelf and EEZ and encompassing all of the maritime area that has been the subject of dispute. The boundary is drawn along a median line between the opposite Australian and Timorese coasts which is consistent with international law and practice.¹⁶
12. There are two connecting lateral lines to the east and west that run north from the median line to intersect with the 1972 Seabed Boundary treaty lines. In a novel departure from traditional maritime boundary practice the outer limits of the continental shelf lateral lines may be adjusted pending the outcome of future maritime boundary negotiations between Timor and Indonesia.¹⁷ Such an adjustment would only occur on the latter of the finalisation of the Timor/Indonesia boundaries or depletion of the oil and gas deposits in the relevant area.

¹⁴ [2017] Australian Treaty Series 5.

¹⁵ 1997 Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries [Perth Treaty] [1997] Australian Treaties Not in Force 4

¹⁶ Articles 2 and 4, 2018 Timor Treaty.

¹⁷ Article 3, 2018 Timor Treaty.

13. Timor gains exclusive jurisdiction over the existing oil and gas fields operating within the boundaries of the previous Joint Petroleum Development Area created under the 2002 Timor Sea Treaty, excepting Greater Sunrise which is subject to separate arrangements. These fields include:

- the Bayu/Undan gas condensate field operated by ConocoPhillips; and
- the Kitan field.

Timor will derive 100 percent of upstream revenue over these fields once the treaty enters into force.

14. The effect of these arrangements is that Timor's previous 90 per cent share of the revenue from these fields is now increased by a further 10 per cent. However, the treaty makes clear that no claims for compensation with respect to petroleum activities conducted in the Timor Sea under the previous arrangements will be permitted,¹⁸ indicating Timor was prepared to waive any such rights as part of the conciliation.

Greater Sunrise

15. The treaty establishes a framework for a Greater Sunrise Special Regime¹⁹ which remains under development and is subject to certain variables. Dealing with the Greater Sunrise field has been the most challenging. While the eastern lateral boundary has now been redrawn such that approximately 70 per cent of the field is on the Timor side of the boundary, because the field will draw from a common pool a unitisation approach has been adopted until such time as it is depleted.²⁰ A revenue split favouring Timor 70/30 applies in the case of an onshore LNG plant in Timor, and 80/20 in the case of an Australian onshore LNG plant.²¹

16. A 'Designated Authority' located in Timor will be established to carry out the day-to-day regulation and management of the petroleum activities in Greater Sunrise.²² The Authority will report to a Governance Board comprising one Australian and two Timorese representatives.²³

17. Ultimate development of the Greater Sunrise field is contingent upon the approval of a 'Development Plan' to be submitted by the Greater Sunrise Joint Venturers.²⁴ Additional

¹⁸ Article 10, 2018 Timor Treaty.

¹⁹ Article 7, 2018 Timor Treaty.

²⁰ Annex B, 2018 Timor Treaty.

²¹ Annex B, Article 2, 2018 Timor Treaty.

²² Annex B, Article 6, 2018 Timor Treaty.

²³ Annex B, Article 7, 2018 Timor Treaty.

²⁴ Annex B, Article 9, 2018 Timor Treaty.

mechanisms are put in place for the Greater Sunrise field dealing with the exercise of jurisdiction, customs and migration, quarantine, criminal jurisdiction, and decommissioning.²⁵

18. These development options for Greater Sunrise are another unique feature of the Treaty and highlights the commercial choices being considered by the Greater Sunrise Joint Venturers by way of a pipeline to an LNG plant in either Australia or Timor Leste. Australia has indicated that it is neutral as to the outcome, while Timor has a much larger stake in the decision due to the importance its negotiators have placed on the development of an onshore LNG plant on its south east coast and the significant downstream benefits that would flow to Timor from that development.

Dispute Settlement

19. Given Australia and Timor-Leste's history over the negotiation and settlement of the Timor Sea maritime boundary, it is appropriate to consider the dispute settlement mechanisms in the 2018 Timor Treaty. They take two forms.
20. First, Article 12 provides for the settlement of disputes that arise within the first five years of the treaty's operation where disputes can be settled either by negotiation, the Conciliation Commission members, or by way of Annex E arbitration. If such disputes are not settled by negotiation, then the parties are to refer the dispute for settlement to "one of more members of the Conciliation Commission."²⁶ The procedure for settlement by referral to Conciliation Commission members is broadly outlined,²⁷ and could be described as a modified conciliation process based upon Annex V, UNCLOS. Subject to the exemption of certain disputes,²⁸ if dispute settlement by way of negotiation fails then after six months one of the parties may refer the dispute to arbitration under Annex E. Dispute settlement by way of arbitration is detailed in Annex E under which a three member arbitral tribunal would be appointed, of which Australia and Timor-Leste each nominate one member with the third member appointed jointly as President. The proposed arbitration proceedings are not exceptional and are consistent with international practice. The award of the tribunal is to be final and with no appeal.²⁹ Unless otherwise decided, the expenses of the tribunal are to be shared equally between the parties.³⁰

²⁵ Annex B, Articles 16, 17, 18, 20, 21, 2018 Timor Treaty.

²⁶ Article 12 (1), 2018 Timor Treaty.

²⁷ Article 12 (2), 2018 Timor Treaty.

²⁸ Article 12 (4), 2018 Timor Treaty.

²⁹ Annex E, Article 10, 2018 Timor Treaty.

³⁰ Annex E, Article 6, 2018 Timor Treaty.

21. Second, a distinctive dispute settlement process is established under Annex B relating to the Greater Sunrise Special Regime under which competence is bestowed upon a ‘Dispute Resolution Committee’. Disputes arising with respect to certain aspects of the operation and mandate of the Governance Board established under Annex B for the Greater Sunrise Special Regime,³¹ and the Development Plan for the Greater Sunrise Fields,³² or as referred to the Committee by the Designated Authority and Greater Sunrise Contractor are within the jurisdiction of the Committee. The Committee is to be an independent body consisting of three members, with one appointed by each party and the Chair chosen from a list of approved experts selected and maintained by Australia and Timor-Leste.³³ Unless otherwise agreed, the Committee is to reach its decisions within 60 days.³⁴ Of note is that no reference is made to the applicable law the Committee is to refer to in making its decisions, default of appearance if one of the parties fails to appear before or engage with the Commission, and the expenses of the Commission.

Consistency with International Law and UNCLOS

22. The 2018 Timor Treaty has been negotiated consistently with international law and UNCLOS. First, with respect to the settlement of an international dispute between Australia and Timor-Leste over the Timor Sea maritime boundary the parties have relied upon conciliation and negotiation consistently with Article 33 of the Charter of the United Nations. The dispute settlement provisions of Part XV UNCLOS have also been utilised by the parties, including Article 298 (which was activated by Timor-Leste to commence the conciliation) and Annex V, Article 11 which provides for compulsory conciliation of a dispute. Both parties demonstrated flexibility throughout the conciliation and were prepared to cooperate with the Conciliation Commission in good faith, as is reflected by the fact that the Commission’s mandate was extended by the parties and that agreement was reached on the terms of the Treaty prior to the finalisation of the Commission’s report.

23. The 2018 Timor Treaty has also been concluded consistently with Articles 74 and 83 of UNCLOS which in near identical terms respectively deal with the delimitation of the exclusive economic zone and the continental shelf. Articles 74(1) and 83(1) provide that states are to delimit their maritime boundaries “in order to achieve an equitable solution”. However, that obligation does not strictly apply once Part XV dispute settlement procedures have been resorted to. Rather, the Conciliation Commission is tasked with making “proposals

³¹ Annex B, Article 7(7), 8(1)(a), 2018 Timor Treaty.

³² Annex B, Article 8(1)(a), 9(2), 2018 Timor Treaty.

³³ Annex B, Article 8(1)(b), 2018 Timor Treaty.

³⁴ Annex B, Article 8(1)(d), 2018 Timor Treaty.

to the parties with a view to reaching an amicable settlement.”³⁵ On this occasion, which is the first instance of an Annex V Conciliation occurring under UNCLOS, both an amicable settlement and equitable solution has been reached which reflects the legal rights and interests of Australia and Timor-Leste, and the historical backdrop of maritime boundaries in the Timor Sea involving Australia, Indonesia and Timor-Leste.

24. The outcome of these processes is a set of complex maritime boundary arrangements that reflect:

- a) The differing entitlements to an exclusive economic zone (water column) and continental shelf (seabed);
- b) The legacy of the 1972 Seabed Boundary Treaty between Australia and Indonesia;
- c) The legacy of the 2002 Timor Sea Treaty between Australia and Timor-Leste;
- d) The expectation that Indonesia and Timor-Leste will seek to settle their maritime boundaries in the Timor Sea; and
- e) The interests of the Greater Sunrise Joint Venturers.

When assessed in its totality, the 2018 Timor Sea Treaty is one of the most innovative maritime boundary treaties concluded under UNCLOS.

Conclusions

25. The conciliation process has yielded a unique treaty and is the first of its type finalised under this mechanism which not only involved the two States but also in the latter stages the Greater Sunrise Joint Venture partners. Notwithstanding the conclusion of the Treaty on 6 March 2018, some matters remain unresolved including the location of the LNG processing plant. Whether the plant is located in Australia or Timor is ultimately a commercial decision but could become the source of tension given the significant downstream benefits at stake and implications for Timor’s economic future.

26. Notwithstanding the apparent success of the conciliation and the innovative aspects of the treaty, the Timor Sea still faces an uncertain future. Development of Greater Sunrise is critical to Timor and could yield revenue in the vicinity of \$US8-10 billion. Additional benefits flowing from an onshore LNG plant would be even greater. There have been strong indications however that the Greater Sunrise Joint Venturers favour a Darwin LNG plant,

³⁵ Annex V, Article 6, UNCLOS.

partly through technical reasons associated with piping the LNG across a significant seabed depression to Timor.

27. Indonesia has also indicated that it may seek to reopen negotiations with Australia over the terms of the Perth Treaty³⁶ which Indonesia has still yet to ratify. At present it is unclear just where those negotiations could lead and what Indonesia may be seeking from them. Australia, however, would be very wary of any request by Indonesia to renegotiate the 1972 Seabed Boundary Treaty which has been long settled. Likewise, renegotiation of the Perth Treaty, which is not in force and therefore subject to renegotiation, could be contentious. Nevertheless, given the significant concessions Australia made to Timor as a result of the conciliation Indonesia may be keen to press Australia for an equivalent set of boundary arrangements that reflect a more equitable outcome consistent with UNCLOS.

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20 April 2018

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³⁶ James Massola, 'Indonesia eyes change to maritime treaty after Timor-Australia deal' *Sydney Morning Herald* (7 March 2018) at <https://www.smh.com.au/world/asia/indonesia-eyes-change-to-maritime-treaty-after-timor-australia-deal-20180307-p4z39v.html>.