

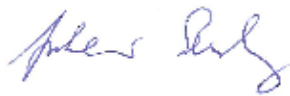
Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

13 April 2018

Dear Sir/Madam

Please find on the following pages a submission to the Committee in relation to its inquiry into the Treaty between the Government of Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (New York, 6 March 2018).

Yours sincerely



A.L. Serdy
Professor of Public International Law and Ocean Governance

Direct tel: +44 (0)2380593402
e-mail: A.L.Serdy@soton.ac.uk

Submission to the Joint Standing Committee on Treaties
Treaty between the Government of Australia and the Democratic Republic of Timor-Leste
Establishing their Maritime Boundaries in the Timor Sea
(New York, 6 March 2018)

Andrew Serdy
Institute of Maritime Law
University of Southampton
United Kingdom

Summary: While the resolution of the long-running dispute between Australia and Timor-Leste about their maritime boundaries is to be welcomed, and this submission does not dispute that the Treaty and its entry into force are in Australia's interests, the National Interest Analysis is regrettably a disingenuous document significant as much for what it does not say as for what it does. In particular, it makes no attempt at all to explain either the radical evolution in Australia's position since the beginning of the conciliation process under the UN Convention on the Law of the Sea, without which the Treaty could not have come about, or why the newly agreed boundaries run where they do. Some lines of inquiry are suggested for the Committee to pursue with Government witnesses, to ensure that the Committee and through it the Australian public are not denied the full picture. The timing of the Treaty's tabling is also an issue, as the Conciliation Commission is not due to publish its report until mid-April, and this and other submissions have accordingly been formulated without the benefit of knowing its contents, which are likely to prove crucial to a proper understanding of the Treaty and the conciliation process which led to it.

1. This submission does not oppose the Treaty as such, as the resolution of the long-running dispute between Australia and Timor-Leste about their maritime boundaries is to be welcomed. Rather, it is prompted by the disingenuousness of the National Interest Analysis (NIA), which is far less useful than it might have been, because of a number of serious omissions, from which it can be surmised that significant information is being withheld from the document's readership, not least the Committee. In particular, the NIA does not even acknowledge, let alone make any attempt to explain, either the radical evolution in Australia's position since the beginning of the conciliation process under the United Nations Convention on the Law of the Sea (UNCLOS), without which the Treaty could not have come about, or why the newly agreed boundaries run where they do. Hence, even though the entry into force of the Treaty is probably in Australia's interests, the NIA because of its shortcomings signally fails to make that case. The submission therefore argues that the Committee should treat with scepticism large parts of the NIA and insist on amendments to the latter that make good the identified omissions, and only then proceed to recommend binding treaty action.

2. Paragraphs 12 to 14 of the NIA stress the importance of the UNCLOS dispute settlement system under which the conciliation took place and especially (in paragraph 13) the need to

abide by decisions duly arrived at by those means. This is laudable, but it is unsatisfactory that one is forced to read between the lines to see the reason for the inclusion of these passages: had the decision of the Conciliation Commission on its own competence, which Australia unsuccessfully challenged in 2016, gone the other way, it would have put a stop to the conciliation altogether, and this was what Australia initially tried and failed to achieve. One can readily applaud those paragraphs urging that legal setbacks for national policy of this kind should be accepted with good grace, yet one would never know from reading the NIA that this important 2016 decision went against Australia and to that extent must be regarded as a defeat for Australian policy up to that point. As few would disagree with the sentiment of paragraphs 12 to 14, it is hard to fathom why the NIA does not openly acknowledge the blow that Australia's position in the dispute suffered in the 2016 decision on competence.¹ To do so would not detract from the force of the argument in the NIA that the overall outcome as embodied in the Treaty is in Australia's interest; to the contrary, it would add substance to the rather abstract pronouncements of the paragraphs in question.

3. The severity of the blow stems primarily from the fact that Timor-Leste was thus able to circumvent Australia's aversion to having its outstanding maritime boundaries subjected to the compulsory dispute settlement procedures set out in Part XV of UNCLOS. This position not only led Australia to invoke the optional exception under Article 298(1)(a) of UNCLOS to avoid that possibility, but can also be seen in the absence from the Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS, Sydney, 12 January 2006, [2007] ATS 12) of a compulsory dispute settlement clause. Although the CMATS treaty has been terminated by Timor-Leste, as the NIA notes, it was still in force at the time the conciliation proceedings were launched, and it is clear that initiation of those proceedings could only occur in breach of Article 4 of that treaty. This was a point correctly made by Australia in objecting to the Conciliation Commission's competence, although it did not prove to be decisive.²

4. This same curious reluctance to admit the consequences of a change of position or policy has led to an apparent contradiction within the NIA. Paragraph 10 asserts that "the settlement contained in this Treaty is based on a mutual accommodation between the Parties without prejudice to their respective legal positions." Without the last seven words this would simply have been a statement of the obvious, but those extra words are exceedingly difficult to understand. The Treaty provides in Article 11, as mirrored in paragraph 32 of the NIA, that the

¹ Permanent Court of Arbitration, Case N° 2016-10, In the Matter of a Conciliation before a Conciliation Commission constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Decision on Australia's Objections to Competence, 19 September 2016, <<https://pcacases.com/web/sendAttach/1921>>.

² While the Commission upheld its own competence, that conclusion ultimately rested solely on its interpretation of Articles 280 and 281 of UNCLOS, which was not affected by any breach of another treaty in bringing the proceedings, so that it did not need to decide whether or not Timor-Leste had committed such a breach. The result, however, is that the terms of Article 4 of the CMATS Treaty precluding the initiation of conciliation or any other proceedings under UNCLOS could only be enforced by Australia through separate proceedings under the CMATS Treaty itself, which for lack of an effective dispute settlement clause was impossible without Timor-Leste's concurrence.

settlement is permanent, that is, one in which the boundaries it creates are subject to change only in specifically foreseen ways to take account of a future maritime boundary delimitation between Indonesia and Timor-Leste. While parties are negotiating to settle a dispute between them, it is natural for the compromises either side puts forward, conditional on concessions from the other side, to be made without prejudice, in case no agreement is ultimately reached. But once agreement is reached, the need for such caution disappears, as the very notion of the dispute being definitively settled imports that the outcome irrevocably displaces the positions taken by each of the parties at the outset. In this instance, while the boundaries in the Treaty have more in common with the initial position of Timor-Leste than that of Australia, both parties have made concessions. Australia formerly maintained the legal position that it had an entitlement, superior to Timor-Leste's, to a continental shelf encompassing not just the whole Joint Petroleum Development Area (JPDA) established by the Timor Sea Treaty ([2003] ATS 13), but also an area north of it as far as the bathymetric axis of the Timor Trough. It inevitably follows from the very essence of this Treaty, creating by way of political compromise a permanent boundary south of that axis, that once it is in force, Australia can no longer maintain that position, just as Timor-Leste can no longer maintain any argument that it has maritime zone entitlements extending south of the new boundary in the area where it runs north of the median line equidistant from the nearest points of land territory of each party. The Treaty thus cannot avoid prejudicing these former positions; that is its entire purpose. To insist otherwise would contradict the permanent nature of the settlement, so the Committee may wish to ask Government witnesses what the intent behind this phrase is.

5. One statement in the NIA – consonant, it should be conceded, with a provision in the Treaty itself – is remarkable. Paragraph 7 states that the Treaty is without prejudice to Indonesia's interests, and this is reinforced by paragraph 25 which notes that it “respects third states’ interests and does not prejudice future negotiations between Indonesia and Timor-Leste”, as well as paragraph 30 summarising the effect of Article 6 of the Treaty in the following way: it “does not prejudice negotiations between Timor-Leste and Indonesia on their maritime boundaries in the Timor Sea. It explicitly protects the rights and freedoms of other states under UNCLOS.” This is noteworthy for two reasons.

(a) Firstly, as a matter of law, Article 6 and thus the statements made about it seem to be completely unnecessary, though it may be admitted that they do no harm. This is because Article 34 of the Vienna Convention on the Law of Treaties, generally taken to be a codification of the underlying customary international law, specifies that treaties create neither rights nor obligations for third States that are not party to them. Neither Indonesia nor any other third State is bound by the terms of a bilateral treaty between Australia and Timor-Leste, such as the Treaty before the Committee. An unusual feature of the course of parts of the seabed boundary in the Treaty is that it leaves on Timor-Leste's side of it large areas that are closer to Indonesia than to Timor-Leste. Yet, even though it is implicit from this that Australia has been prepared to acquiesce in Timor-Leste's view that it is at a geographical disadvantage *vis-à-vis* Indonesia that entitles it to a boundary with Indonesia more favourable to Timor-Leste than the equidistance line, Indonesia thanks to the Vienna Convention rule remains free to adhere to the opposite view and resist any such boundary.

As it did not need Article 6 of the Treaty to achieve this, however, that provision purports to solve a problem that does not in fact exist.³

(b) The second reason, however, is more disturbing. The heading to paragraph 25 of the NIA, “*Supporting Australia’s existing maritime boundaries*”, is thoroughly misleading. While it is true that the end points of the seabed boundary in the Treaty coincide with Points A16 and A17 of the 1972 treaty boundary with Indonesia⁴ so as to produce a single continuous line constituting the outer limit of Australia’s continental shelf, the Treaty expressly contemplates (in Article 3; NIA paragraph 29) that the new boundaries may have to be moved to take account of the future boundary between Indonesia and Timor-Leste. The highly irregular course of that line, however, almost doubling back on itself so as to leave the majority of the Sunrise hydrocarbon reservoir on Timor-Leste’s side of the boundary, calls for an explanation of why this has been done. Yet none is contained in the NIA, which in this respect ought to have followed the useful precedents of the much fuller description of the boundaries in paragraphs 15 to 18 of the NIA for the 2004 maritime boundaries treaty with New Zealand,⁵ and the parallel unnumbered paragraphs in the NIA for the 1997 treaty with Indonesia.⁶ It is not evident why the equivalent is not provided here. The new boundary divides that reservoir in a way that appears roughly to match the 70/30 or 80/20 division of the upstream revenues from the deposit, and if this is the reason, it is not obvious why the NIA did not simply say so.⁷

³ On the other hand, in one practical respect a maritime boundary delimitation treaty does create new facts that neighbouring third States are obliged to accept, but it occurs in a way that a provision like Article 6 is powerless to alter, so it does not provide a reason for Article 6’s presence. In a three-State situation, such as exists in the Timor Sea, the effect of a maritime boundary between States A and B resolving the overlap of their entitlements is to dictate to State C with which of A and B it must negotiate any given part of its boundaries. Thus, even though for various reasons C may prefer to negotiate with one rather than the other because it thinks it would secure a more favourable boundary from that neighbour, it has no choice. Accordingly, in the light of the 1972 seabed boundary treaty between Australia and Indonesia, *Agreement between the Commonwealth of Australia and the Republic of Indonesia on Seabed Boundaries in the Area of the Timor and Arafura Seas* ([1973] ATS 32), it is Australia rather than Indonesia with which Timor-Leste has had to negotiate its boundary south of the 1972 treaty line. Conversely, the very fact that the Australia-Indonesia seabed boundary in the area is already complete means that it is only Timor-Leste with which Indonesia still has to settle its maritime boundaries. Under any conceivable seabed boundary between Australia and Timor-Leste, even one much less generous to Timor-Leste than that found in the Treaty, it is not clear how Indonesia could have expected to be negotiating with Australia rather than with Timor-Leste, hence prejudice even of this indirect kind is also absent.

⁴ Mentioned in the previous footnote.

⁵ Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries ([2006] ATS 4; [2004] ATNIA 8).

⁶ Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries ([1997] ATNIF 4; [1997] ATNIA 18).

⁷ One suspects here that the tail has been allowed to wag the dog. Commonly the proportions in which the revenues from a transboundary deposit are shared follow the proportions of the deposit located on either side, rather than a pre-agreed division driving the location of the boundary; this is the reason for the 79.9/20.1 split in the Timor Sea Treaty. If the parties then wish to reallocate the benefits, they can do so without shifting the boundary, as for example occurred in the CMATS Treaty to produce a 50/50 split, and the same would have been possible here to yield the 70/30 or 80/20 outcome.

6. The other unsatisfactory aspect of this statement is that it ignores the fact that the Australian approach up to 2016 of seeking to avoid a permanent delimitation was driven by the Government's fear that acceptance by it in a treaty of Timor-Leste's view of its continental shelf entitlements might lead Indonesia to seek to reopen the 1972 seabed boundary treaty.⁸ This approach was in many ways misguided, in part because the fear just described, though not entirely fanciful, was exaggerated. Another provision of the Vienna Convention on the Law of Treaties, Article 62(2)(a), stands firmly in the way of this: in the interest of preserving stability, treaties establishing boundaries are not at risk of termination even where there has been a fundamental change of circumstances that would justify termination of any other kind of treaty. Such leverage as Indonesia has on this matter derives from the fact that Australia's position is not secure for as long as the above-mentioned 1997 treaty with Indonesia is not brought into force, so as to settle permanently the remaining parts of the Australia-Indonesia maritime boundaries.⁹ Indonesia could thus tie the fate of the 1997 treaty to the renegotiation of the 1972 boundary which it would otherwise have no basis to demand. Yet nothing is more likely to prompt such an Indonesian demand than the conclusion by Australia of a treaty that results in a considerable area of continental shelf coming under Timor-Leste's jurisdiction that is closer to Indonesia than to either Timor-Leste or Australia. The Committee may therefore wish to ask Government witnesses why, if Australia was previously so concerned about Indonesia's reaction to a boundary running well south of the Timor Trough such as that created by the Treaty, it can now be confident that this will not lead to the outcome that it feared.

7. The NIA with its numerous inadequacies therefore leaves much to be desired. For a document whose whole purpose is to show how the Treaty advances Australia's national interest, it is astonishing that it fails even to acknowledge, let alone to justify, the radical evolution in what the Government sees as being compatible with the national interest. If this is true today of maritime boundaries running where the Treaty places them, it was unimaginable only 18 months ago when the position being defended by Australia in its opening statement to the Conciliation Commission was very different. Similarly, the political arguments made by the NIA in favour of the Treaty are valid in themselves, but they were equally valid throughout the whole period beginning with Indonesia's withdrawal in 1999 from what is now Timor-Leste's territory. A proper and full NIA would hence explain what has changed in the Government's thinking such that those arguments, for so long ignored, should now have won the day. The Committee should therefore insist on such an explanation from the Government.

8. Lastly, the timing of the Treaty's tabling is also an issue, as the Conciliation Commission is not due to publish its report until mid-April, and this and other submissions have accordingly been formulated without the benefit of knowing its contents, which are likely to prove crucial to a proper understanding of the Treaty and the conciliation process which led to it. It is possible that the Conciliation Commission's report will shed light on some of the questions raised earlier

⁸ Several media reports published in the wake of the signing of the Treaty refer to remarks to this effect by the then Minister for Foreign Affairs, Mr Downer, in 2002.

⁹ The 1997 treaty will need to be amended to remove the part of the EEZ boundary opposite Timor-Leste, but this could be done at any time and indeed could have been done at any time before now.

in this submission, but if that occurs, it merely underlines the point that it would have been preferable for the tabling of the Treaty, and by extension of the NIA (which shows signs of having been hastily written), to be delayed by a few weeks until the report is published. Had the NIA been able to draw on its contents, it might well have been far less vulnerable to some of the criticisms made above. As it is, one is left with the unfortunate impression that there is something about the genesis of the Treaty that the executive branch of government would prefer not to disclose to the legislature through the Committee. For this or some other reason, it has made a rushed job of the tabling, including omission from the NIA of any discussion of the historical context against which the wisdom or otherwise of the concessions the Treaty makes, in the light of their potential consequences, must be judged. It is no exaggeration to say that it would be a betrayal of the purpose of genuine parliamentary scrutiny of treaties that the Committee was created to serve in 1996 if it were content to leave these omissions unaddressed.