

Dear Committee Members,

## **Joint Standing Committee on Treaties**

### **2023 Australia-Tuvalu Falepili Union**

1. We refer to the reference of an inquiry on 26 March 2024 to the Joint Standing Committee on Treaties into the 2023 Australia-Tuvalu Falepili Union. This submission will review the notable elements of the proposed Union that set it apart from previous bilateral arrangements in the Pacific; its potential implications for the international legal personality of Tuvalu; and the possibility for the Union to set a precedent for future relations in the region. These matters noted in our submission are within our academic areas of expertise.

#### **Title of the Treaty**

2. The Australia-Tuvalu Falepili Union has a distinctive title which merits some initial comment. The first is that the instrument is referred to as a 'Union'. This may have certain connotations with respect to the relationship envisaged between Australia and Tuvalu, especially given the history of the usage of the term 'Union' between various aligned state and sub-state entities such as the 'Union of the Soviet Social Republics', or as members of a regional organization as in the case of the 'European Union' and 'African Union'. There does not appear to be any modern example of Australia having previously entered into a 'Union' with another State, though Australia has membership of the International Postal Union and International Telecommunications Union respectively, both of which are specialised international organizations.
3. The second is that the instrument is not referred to by one of the more common terms used to describe a bilateral instrument of treaty status. Australian practice in this respect, as reflected by the Australian Treaty Series, almost exclusively uses the term 'Treaty' or 'Agreement' to refer to such bilateral instruments, and state practice where the term 'Union' is used to describe a bilateral instrument would appear to be rare.
4. Some confusion arises in this respect from the National Interest Analysis which refers to the proposed instrument as an 'Agreement'. No explanation is given as to why such a distinctive title was given to the Australia-Tuvalu Falepili Union. The Preamble

makes clear that the instrument is ‘UNDERPINNED by the concept of Falepili which connotes the traditional values of good neighbourliness, duty of care and mutual respect’. This explains the use of the distinctive term ‘Falepili’.

5. There is, however, no doubt that the intention of Australia and Tuvalu is to conclude an instrument that is a treaty as recognised by the Vienna Convention on the Law of Treaties, and for the purposes of international law.
6. As discussed below, the instrument is bespoke and reflects a very particular and distinctive set of arrangements between Australia and Tuvalu. A close reading of the instrument does, however, make clear that there is no political union envisaged between Australian and Tuvalu similar to a federation, or a form of free association. A relationship is certainly envisaged, and this is also reflected in the Preamble which states that “the Parties’ interests are intertwined and decisions taken by one Party affect the interests of the other.”

### **History of bilateral arrangements in the Pacific**

7. The history of governance relationships in the Pacific is relevant to an understanding of the Falepili Union, which needs to be understood in the context of these preceding partnerships. Under the League of Nations mandate system, Australia was first placed in a multilateral governance arrangement with Nauru (and the United Kingdom). This transitioned to a trusteeship between Australia and Nauru under the United Nations, prior to Nauru’s independence in 1968.<sup>1</sup> Australia also participated in similar governance arrangements with Papua, New Guinea, and subsequently Papua New Guinea, before the latter’s independence in 1975.<sup>2</sup>
8. The decolonisation of the Pacific in the latter half of the Twentieth century led to a wave of independence and newly recognised states throughout the region. During this time, a number of strategic partnerships were formed between new island states and their larger regional neighbours.
9. The governance model of ‘Free Association’ emerged during this period and continues to persist in the region.<sup>3</sup> The Cook Islands entered into a Free Association

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<sup>1</sup> *Nauru Independence Act 1967* (Cth).

<sup>2</sup> *Papua New Guinea Independence Act 1975* (Cth).

<sup>3</sup> Donald R. Rothwell, *Islands and International Law* (Hart, 2022) 88-90.

arrangement with New Zealand in 1965,<sup>4</sup> while Niue entered into a similar partnership in 1974.<sup>5</sup> Both of these arrangements remain in place.

10. Similarly, Palau entered into a Compact of Free Association with the United States (US) in 1982.<sup>6</sup> Both the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) entered into like arrangements in 1986.<sup>7</sup>

11. These various arrangements have differing legal implications. While the FSM and RMI rely on the US for specific aspects of their defence and security, both are member states of the United Nations (UN); possess distinct citizenship; and are internationally accepted as independent, sovereign states with full international legal personality (ILP). Comparatively, the Cook Islands and Niue do not enjoy widespread recognition as sovereign states.<sup>8</sup> While they are still international persons, neither nation boasts membership of the UN; both rely on New Zealand for defence and some elements of their foreign affairs; and neither the Cook Islands nor Niue possess distinct citizenship.

12. While the Union does not replicate any of these relationships exactly, it does build upon the style of Free Association models. These former and existing partnerships therefore provide a useful benchmark against which to consider the proposed Union between Australia and Tuvalu, and its potential legal implications.

### **Notable elements of the Falepili Union**

13. We note that the Union is based on three primary tenets. These will each be considered in turn.

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<sup>4</sup> 'About Cook Islands' at <<https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/cook-islands/new-zealand-high-commission-to-the-cook-islands/about-cook-islands/>> (accessed 14 April 2024).

<sup>5</sup> 'About Niue' at <<https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/niue/#bookmark2>> (accessed 14 April 2024).

<sup>6</sup> 'Palau – US Relationship' at <<https://www.state.gov/countries-areas/palau/>> (accessed 13 April 2024).

<sup>7</sup> 'U.S. Relations with the Federated States of Micronesia' at <<https://www.state.gov/u-s-relations-with-the-federated-states-of-micronesia>> (accessed 13 April 2024); 'U.S. Relationship – Marshall Islands' at <<https://www.state.gov/countries-areas/marshall-islands/>> (accessed 13 April 2024).

<sup>8</sup> For example, the US recognised the statehood of Cook Islands in 2023: 'Statement by President Biden on the Recognition of the Cook Islands and the Establishment of Diplomatic Relations' (25 September 2023) at <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/25/statement-by-president-biden-on-the-recognition-of-the-cook-islands-and-the-establishment-of-diplomatic-relations/>>.

14. Firstly, the Union is founded on the ‘values of good neighbourliness, care and mutual respect’.<sup>9</sup> Given the physical distance between Australia and Tuvalu – almost 3500 kilometres apart – the use of the phrase ‘good neighbourliness’ is interesting. In international environmental law, the term refers to an obligation owed to neighbouring states to prevent the occurrence of transboundary environmental harm.<sup>10</sup> It is assumed that use of this term within the treaty was intentional, particularly given the second tenet of the Union.
15. Secondly, the parties commit to climate cooperation in response to the ongoing threat of territorial inundation due to sea level rise. It is notable that article 2 specifically emphasises Tuvalu’s cultural connections to both sea and land territory. While it is unsettled in international law whether a state inundated due to sea level rise could retain existing maritime boundaries,<sup>11</sup> it is potentially meaningful to emphasise the importance of both types of territory here. Closely linked to this climate cooperation, is the treaty’s pathway for annual resettlement of Tuvaluans in Australia and the notion of ‘human mobility with dignity’.<sup>12</sup> In order for this to go into effect, Australia would need to establish a new visa category to facilitate this pathway. Additionally, it is noteworthy that the treaty provides only for residency and does not include citizenship pathways.
16. Finally, the treaty provides for Australia to assist Tuvalu in instances of military aggression, natural disaster, or public health emergency.<sup>13</sup> This is reminiscent of the Free Association arrangements discussed above. Australia has a long history of providing assistance and aid to Pacific Island States following natural disaster, at the request and invitation of the impacted State. However, the requirement for Tuvalu to mutually agree with Australia regarding any defence or security partnerships is distinct. This may have implications for Tuvalu’s ongoing sovereignty, which will be discussed below.

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<sup>9</sup> *Australia-Tuvalu Falepili Union Treaty* art 1.

<sup>10</sup> Donald Rothwell, ‘A Pacific union: Australia-Tuvalu deal goes well beyond climate’ *The Interpreter* (14 November 2023) at <<https://www.lowyinstitute.org/the-interpreter/pacific-union-australia-tuvalu-deal-goes-well-beyond-climate>>.

<sup>11</sup> Donald R. Rothwell, *Islands and International Law* (Hart, 2022) 239-252.

<sup>12</sup> *Australia-Tuvalu Falepili Union Treaty* art 3.

<sup>13</sup> *Australia-Tuvalu Falepili Union Treaty* art 4.

## **The Falepili Union and international legal personality**

17. The particulars of the Union give rise to two main implications for Tuvalu's ongoing status as an independent state and possessor of full ILP.
18. Firstly, the treaty's framework for security and stability cooperation (outlined in article 4) could allow for considerable intervention into the domestic affairs of Tuvalu. Article 4(3) requires Tuvalu to grant Australia access to its territory in some instances without prior approval, while article 4(4) provides Australia with potential veto powers in relation to Tuvalu's security and defence. While these are far reaching powers with the potential to erode Tuvalu's status as a sovereign entity, whether this potential is realised will depend on Australian and Tuvalu's interpretation, practice, and activation of this provision.
19. On balance, the proposed arrangement appears to more closely resemble the circumstances of the FSM and RMI, and it is likely that Tuvalu's sovereignty and personality will continue unimpeded. Additionally, political factors would strongly support the continuation of Tuvalu's existing status as a UN member state with established diplomatic connections. Climate justice would also strongly support such an outcome.
20. Secondly, article 2(2)(b) of the Treaty has particular implications for state continuity. It stipulates that the Parties recognise 'the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise'. State continuity is an accepted principle of international law but its application in the instance imagined here – with the potential loss or inhabitability of total land territory – has, as yet, only been applied theoretically by scholars and not in practice.<sup>14</sup> It is therefore meaningful that Australia has pledged its support for ongoing Tuvaluan statehood – and the rights and duties that attach to that status – even if Tuvalu was to be significantly impacted by sea-level with the resulting loss of significant territory or even being completely inundated.

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<sup>14</sup> Michael Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?' (2021) 22(2) *Melbourne Journal of International Law* 357, 360.

## **The Falepili Union as a precedent for the Pacific**

21. What, if any, impacts the Union will have on Australia's relationships with other Pacific neighbours is as yet unclear. However, there is the potential for this bespoke treaty to set a precedent and encourage negotiation of similar instruments with other regional partners.
22. Of particular significance is the potential impact of the treaty's support for state continuity and retention of ILP in the context of climate change. For those island states under threat from climate change, both in the Pacific and elsewhere, this appears to be a positive step to ensure their legal longevity.

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