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Ms Serica Mackay
Inquiry Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

Dear Ms Mackay

Please find on the following pages a submission to the Committee in relation to its inquiry into the Treaty with East Timor on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006).

In view of the Treaty's cognate relationship with the Timor Sea Treaty ([2003] ATS 13) and the Agreement between the Govemment of Australia and the Government of the Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise and Troubadour Fields, both of which are amended by this Treaty, I should disclose that in my former capacity as an Executive Officer in the Sea Law, Environmental Law and Antarctic Policy Section of the Department of Foreign Affairs and Trade I was a member of the Australian team that negotiated the latter Agreement. I played no part, however, in the negotiation either of the Timor Sea Treaty or of the Treaty now before the Committee.

Yours sincerely

A.L. (Andrew) Serdy
Lecturer in Law

Submission to the Joint Standing Committee on Treaties
Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006)

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Summary
The Treaty is well crafted, although incomplete in that it fails to deal adequately with resources other than petroleum in the area of the two countries' overlapping claims. The National Interest Analysis (NIA) omits an important part of the context in which the Treaty should be seen, as it does not mention the abandoned permanent maritime delimitation that this Treaty was originally to have been. Nor does it offer any explanation of why Australia has departed from its usual and hitherto fruitful policy of settling its maritime boundaries on a permanent basis. An incidental effect of the ultimately negotiated outcome is to highlight the price Australia has paid for denying the International Court of Justice and other tribunals jurisdiction over disputes concerning maritime boundaries.

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1. As well as its connection with the Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise and Troubadour Fields (the Sunrise Unitisation Agreement), this Treaty needs to be viewed in the context of the previous treaties concerning maritime matters with East Timor entered into since 2002, namely the Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for the Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor ([2002] ATS 11) and the Timor Sea Treaty ([2003] ATS 13). The significance of this is that the Treaty now before the Committee represents a substantial departure from Australia's longstanding policy of establishing permanent maritime boundaries with its neighbours in a way that neither of the two last-mentioned instruments does. Apart from the 1997 treaty with Indonesia,[1] which is not yet in force, and the special position of the lateral boundaries of the zones generated by the two sectors of the Australian Antarctic Territory, Australia has now finalised its maritime boundaries with all its neighbours but East Timor. The benefits of having settled maritime boundaries have been well described in NIAs for the 1997 treaty and the 2004 treaty with New Zealand,[2] and there is no need to repeat them here. It would be fair to say, however, that the particular

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[1] 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).
[2] 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).

difficulties encountered over the years in a series of negotiations with East Timor and the transitional United Nations administration that preceded it have caused Australian policymakers to lose sight of this goal.

2. This may be the reason why the NIA omits to mention that the present Treaty is not the treaty that the two countries set out to negotiate in 2004. In the wake of the controversy surrounding the Sunrise Unitisation Agreement, it was at East Timor's insistence – as was its right under the law relating to maritime boundaries as reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS, to which East Timor is not yet party) – that negotiations began on a permanent maritime delimitation, a course of action to which Australia agreed with markedly less enthusiasm than its previous practice would have led one to expect. Statements on the public record in 2004 nonetheless clearly characterise these negotiations as being for a permanent maritime boundary. Later East Timor evidently decided that a temporary solution of the kind now embodied in the present Treaty better suited its interests, and Australia was not averse to such a change of plan.

3. Accordingly, this Treaty is now the third in a series of interim instruments between Australia and East Timor pending a final delimitation of their maritime boundaries. While there is nothing inherently wrong with this – indeed Article 83(3) of UNCLOS specifically provides for such "provisional arrangements of a practical nature" – it does appear that the concentration on tying up the loose ends regarding the petroleum regime has led to the missing of an opportunity to attend to the other matters which remain unresolved. The reason for this is that seabed or continental shelf jurisdiction covers not just petroleum resources, nor even mineral resources generally, but also sedentary living species (defined by UNCLOS Article 77(4) as those which "at the harvestable stage [of their life cycle], either are immobile on or under the sea-bed or unable to move except in constant physical contact with the sea-bed or the subsoil"). As the respective seabed claims of Australia and East Timor are unaffected by this Treaty, it follows that there is still ample room for disagreement and dispute between the two countries over any non-petroleum deposits that might subsequently be found on or under the seabed in the area of overlapping claims, particularly in the Joint Petroleum Development Area (JPDA) established by the Timor Sea Treaty.[3] Should the Committee intend to hold further hearings on this Treaty, it would be appropriate to put some searching questions to Government witnesses as to how such disputes are to be prevented from arising – or, once arisen, how they are to be solved without reopening, ahead of the time contemplated in the Treaty, the question of a permanent maritime boundary.

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[3] Article 4(2) of the Treaty, read with the exchange of letters between the Foreign Ministers of the two countries, appears to leave jurisdiction over petroleum and other non-living resources with Australia in the areas east and west of the JPDA. It is likely that paragraphs 1 and 2 of Article 4 would prevent East Timor from authorising exploitation of sedentary living resources in these areas, but, since such resources are not mentioned in the exchange of letters, it is open to East Timor to argue that Australia also must not now do so. The reference to "new" activities would not necessarily cure this omission, as it could be read as a reference to exploitation of other non-living resource deposits in the areas, rather than of a completely different kind of resources.

4. While the areas outside the JPDA are arguably, if not unambiguously, covered, the beneficial effect of the pertinent provisions does not extend to the JPDA: Article 4(3). The NIA states in paragraph 5 that the creation of a long-term stable legal environment for the exploration and exploitation of petroleum resources in the Timor Sea, without prejudicing either country's maritime claims, is in Australia's interests. This is true, but it is equally true of the other resources subject under the law of the sea to the continental shelf regime. It may be objected that the Designated Authority created by the Timor Sea Treaty with the specific intent of administering a petroleum regime does not have the expertise to administer a regime for exploitation of other seabed minerals, but the capabilities required are sufficiently similar to those for petroleum for this to be relatively easily remedied should activity of this nature become a real prospect. Sedentary living resources would be more difficult to accommodate, in part because there is no need for them to be exploited as a single project, so that the revenue-splitting clause (and for that matter the whole notion of upstream and downstream revenues) is inapt to cover them. Since East Timor is left by Article 8 of the present Treaty to continue exercising water column jurisdiction within the JPDA, one solution might have been to expand that jurisdiction to cover living resources of the seabed. Paragraphs 2 and 3 of the Article, as well as the heading, make it clear that such resources are outside its scope. At all events, the Treaty regrettably leaves completely unresolved the question of the two countries' rights to resources in the JPDA other than petroleum.

5. The other salient point arising out of this Treaty is prompted by the observation in paragraph 15 of the NIA that the Sunrise project was stalled because the Sunrise Unitisation Agreement was not in force. If so, then in effect what has happened is that the Agreement has had to be renegotiated through the Treaty in order for East Timor to be willing to bring it into force. This illustrates the difficulty facing the development of any petroleum deposit that straddles an international boundary, where considerations of commercial risk appear to give a virtual veto over the development to each party on either side of the boundary, irrespective of the legal position. Legally, if agreement on unitisation of the Sunrise deposit had proved impossible, and the economics of the development were affected only marginally or not at all by having wells only on the Australian side of the boundary, Australia might have facilitated the development of the Sunrise deposit without any unitisation agreement by setting aside a proportion of the revenue equivalent to the proportion of the deposit located west of the boundary, to which the Timor Sea Treaty revenue-sharing provisions apply. This admittedly would not have been without risk, and would no doubt have required indemnifying the operator against any associated loss,[4] but such a step would have demonstrated that Australia had the courage of its convictions as to its entitlement to that share of the deposit.

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[4] Refusal by East Timor to bring the Sunrise Unitisation Agreement into force as originally negotiated could have been handled the same way: Article 18 of the Vienna Convention on the Law of Treaties, generally taken to be a codification of the underlying customary international law, obliges States that have signed a treaty to refrain from acts that would defeat its object and purpose – but it does not require them to refrain from acting in accordance with the treaty's terms before it has entered into force.

6. This is to be contrasted with the step in the opposite direction taken in 2002, namely to qualify Australia's acceptance of the jurisdiction of the International Court of Justice under Article 36(2) of its Statute and to invoke the optional exception to the otherwise compulsory jurisdiction of the various fora in Part XV of UNCLOS in relation to maritime boundaries. The equal division of the upstream revenues in this Treaty thus also has the incidental effect of highlighting just how high a price Australia has paid for its determination to avoid the jurisdiction of international courts and tribunals over the disputed boundary. For a number of reasons having as their common element the Indonesian dimension, it is inconceivable that any boundary produced by such adjudication would have placed 50% of the Sunrise-Troubadour deposit under East Timor's jurisdiction. Even under a worst-case scenario of a litigated boundary that left the entire JPDA in East Timor's hands, Australia would now be entitled to 79.9% of the Sunrise revenues, not 50% – though that would be partly offset by 100% of Bayu-Undan and other fields in the JPDA going to East Timor.

7. None of the foregoing is to suggest that the Treaty is not well crafted or that Australia was wrong to have made the substantial revenue concessions to East Timor that it has. The equal division of upstream revenues is perfectly defensible on political grounds in lieu of the physically based split in the Timor Sea Treaty carried into the original Sunrise Unitisation Agreement – but if East Timor has all along had an effective veto over the project, which it has subsequently translated into a 50% share of those revenues, it would have made more sense, and led to far less rancour in the interim, for Australia to have acknowledged this from the outset and conducted itself accordingly. That it took several years for this to become apparent, with the Government even now seemingly being unwilling to admit it expressly, is suggestive of a persistent policy failure meriting the Committee's further attention.