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Reviewing Timor-Leste's Obligations under Article 2 and 3 of the Timor Sea Treaty 2018 Based on the Principle of Pacta Sunt Servanda

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ABSTRACT

This research is based on an analysis of the obligations of Timor-Leste under Article 2 and 3 of the Timor Sea Treaty 2018 between them and Australia regarding the establishment of the maritime boundary between the two states in the Timor Sea. This research was made by studying various doctrines and jurisprudence related to the pacta sunt servanda principle as well as reviewing Timor-Leste's obligation in the Timor Sea Treaty 2018. Based on this research, we concluded that there were a couple of issues regarding the performance of Article 2 and 3 of the Timor Sea Treaty 2018 by Timor-Leste which need to be addressed when Timor-Leste considers their next step regarding maritime boundary negotiations in the Timor Sea.

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Introduction

As one of the youngest state, it is important for Timor-Leste to create international relations with other states and the general international community, especially since Timor-Leste is located between two regional powers in Indonesia and Australia while also being in the scope of ASEAN. Since Timor-Leste cannot sustain itself with the resources it currently has, collaborating with other states is a key policy to reach its national goals.

This led to the year of which marked a historic moment in the history of Timor-Leste because on the 6th of March, Timor-Leste signed an agreement with Australia regarding their maritime boundary in the Timor Sea, marking an end of a long dispute between the two states over the ownership of the Timor Sea [1]. This historical moment also means that for the first time since gaining its independence back from Indonesia, Timor-Leste gained its territorial boundary. While the treaty has been concluded, it has not entered into force since there are a few obligations that need to be performed by Timor-Leste, mainly regarding its maritime boundary with Indonesia in the Timor Sea.

Methodology

This article used literature research as its main method of research, in order to collect information relevant to this article. These literature research were then used to analyze the Timor Sea Treaty between the Government of Timor-Leste and Australia, specifically about Timor-Leste's obligation under Article 2 and 3 of the agreement based on the pacta sunt servanda principle.

Result and Discussion

General Principles on Maritime Delimitation

In general, a Coastal state is allowed to declare its claim over a maritime area adjacent to its coasts, and if there are no other claims made by other coastal states, the Coastal state may establish its claims unilaterally over the maritime area in question or when its continental margin stretched further than 200 nm from their baselines. Problems usually arises when there are multiple claims over a maritime area, therefore creating overlaps of claims within the maritime area, does not matter if the contesting states are adjacent or opposite from each other.

To provide solution to this issue, international law provides some provisions and principles to resolve this overlapping boundary claims, which are mostly based on geographical factors, such as coastal geography. UNCLOS, the international treaty that established provisions related to maritime delimitation, stated 3 ways to establish maritime boundary between two coastal states: Article 15 for delimitation of the Territorial Sea and Article 74(1) and Article 83(1) for delimitation of the EEZ and Continental Shelf.

For the delimitation of the Territorial Sea, UNCLOS stated that when two contesting coastal states could not agree on a maritime boundary between them, an equidistant line from the nearest point of the baseline shall be the preferred method to draw the maritime boundary between them, except when there are other agreement, historical claims or special circumstances that make this provision impossible to enforce. Here, we could see that UNCLOS specifically stated that median line shall be used as the most preferred method in the delimitation of the territorial sea. Although, UNCLOS under this provision also stated that the median line would not be applied and be disregarded if the contesting states agreed not to use it and preferred other methods in their final agreement. This can be explained by the fact that there are many different methods of maritime delimitation used to draw a maritime boundary, therefore coastal states may choose to use any methods that suit the needs of the delimitations. On

the other way, the contesting states may also disregard the use of median line if there are proven historical claims that shall be put forward, or if there are special circumstances that hinder the use of median line.

In a similar way but with different outcomes, UNCLOS stated that for the delimitation of the EEZ and the Continental Shelf, the contesting states may use any methods of maritime delimitation accepted under Article 38(1) of the ICJ Statute, provided that the delimitation shall achieve an "equitable solution" towards the contesting states. This means that the contesting states may use any methods of maritime delimitation that are accepted under an international treaty, customary international law, accepted legal principles and legal doctrines or jurisprudences [2], meaning that UNCLOS provides freedom for the contesting states to come up with their own solutions, as long as the solutions agreed upon produce an equitable solutions to both sides.

Treaties in International Law

The Vienna Convention on the Law of Treaties (VCLT) [3] defines that a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Based on this definition, we can deduce that to be considered as a treaty, an agreement shall possess 5 key distinctions in order to separate them from other types of agreement, such as a) international element; b) concluded between states; c) in written form; d) governed by international law; and e) embodied into a single or multiple instruments.

In order for an agreement to be a treaty under international law, the agreement must possess an international character. This is in part because when we talked about "treaties," we usually talked about agreements between subjects of international law. This in turn limits the scope of what is considered a "treaty," in order to not to be confused with agreement under private international law. Treaties can take form as bilateral or multilateral, depending on the parties involved in it.

To conclude a treaty, the parties involved must be subject of international law. But, not every subject of international law can conclude a treaty, therefore limits the scope of subjects allowed to perform such acts. A treaty can be concluded between states, or between state and an international organization, or between international organizations. This in turn excluded treaties made with non-governmental organizations (NGOs) and multinational corporations (MNCs). Not only that, this definition also exclude treaties made between state and individuals or legal person, as they does not possess the same rights and obligations under international law.

A treaty shall also consists of a formal text that determine the authenticity of the treaty. This therefore eliminates oral agreements from the scope of a treaty, as it is hard to prove the legality of an oral agreement or its substance. The absence of a legal document containing the texts of the treaty is not an issue, as long as there is a means of authenticating the signatures, and that the texts of the agreement are stored in other ways of communications such as telegram, telex, fax, e-mail, and can be reduced into a permanent and readable form.

Similar to a regular contract under a national law, a treaty in the international level embrace the "intention to create obligations under international law." States that becomes parties to an agreement must show that they are ready to be bound by the terms in the agreement. These intentions must then be put together from the terms of the agreement and the circumstances of the conclusion, not from the discussions after the conclusion of the agreement.

Lastly, an agreement that would later become treaty may be take in the form of a single instrument that covers all rights and obligations, or in the form of multiple instruments where each instrument may govern the same thing or that each new instrument establish further provisions from what have been agreed in the previous instrument. A set of treaties may also consist of one main instrument that is supplemented by one or more instruments.

Principle of Pacta Sunt Servanda in the International Law of Treaties

When an international treaty has been agreed and finalised to enter into force, there is a need from state parties of the treaty to then respect and implement every single provision agreed in the spirit of achieving their means and objectives, as stated in the treaty itself. After all, it is illogical to sign a treaty but then choose not to implement them. In this instance, state parties shall adhere to certain principles that govern the implementation of an international treaty, such as the free consent, good faith, pacta sunt servanda, pacta tertiis nec nocent nec prosunt, non-retroactive and jus cogens. These principles are some of the most important norms that govern the international law related to the laws of treaties and in practice, interconnected with each other.

Pacta sunt servanda is a principle of the international law of treaties which states that any kinds of agreement that has been reached become binding only to the states that agreed upon it. The key point here is the use of the term "binding", meaning that the existence and continuation of a treaty relies on the willingness from the state parties to perform provisions that have been agreed in said treaty, no matter how harsh the terms are inside the treaty itself. The reason for that could be described by its moral and legal origins. In a moral sense, pacta sunt servanda could be described as an ethical act such as "any kind of promises made must be respected," as explained by some philosophers. Confucius described the idea as a "rule of absolute justice," meanwhile Cicero expanded it by saying that "acts such as good faith, truth and fidelity towards promises is the foundation of justice," and Puffendorf later affirmed it by saying that the principle all order, beauty, and the fruition of human life. So in a way, this principle is basically a manifestation of one's moral and ethical aspect of life in his or her way of living in society.

Meanwhile, in the legal sense, pacta sunt servanda could be described as an application of the general system of law regarding the necessity to perform a treaty that is implemented in the international scene. This way, a treaty is viewed in the same realm as a contract, which means that a good faith in performing a treaty/contract must be adhered to every single time. Think of it in this way: when there are two states that want to settle their dispute, let's just say a maritime boundary, those two states must come up with a solution that will benefit their national interests. This solution would then be formulated in a maritime boundary agreement, in which this "contract" then becomes the law that governs the maritime border between the two states. The two states shall then be obliged with the provisions set in this agreement with good faith regardless of their own stance on the issue.

In the international law field, pacta sunt servanda is an important key to ensure the continuity of international treaty as a source of international law. Unlike with domestic law where there is a clear stability in the legal system (i.e.: clear relationship between laws), international law is based upon cooperation between states, which means there is no clear centralized law enforcement institution and any form to keep the stability of a treaty is heavily relied upon the willingness of the state parties to commit to said treaty. This is also true since treaties, whether individually binding or generally binding, are highly decentralized, meaning that the scope or reach of a treaty is limited to a certain number of parties, creating a need to ensure the validity of a treaty.

With the advent of the signing of the VCLT 1969, the principle of pacta sunt servanda entered into the international scene as a codified norm of international law as opposed to previously being a part of the general customary international law. Article 26 of the VCLT states that "every treaty in force is binding upon the parties to it must be performed by them in good faith." This provision means that whenever a state becomes a party to an international treaty, they are obligated to perform the agreed terms of the said treaty into practice with good faith. This provision means that the binding nature of a treaty only applies strictly to the states that become the party of said treaty, effectively creating an exclusive rights and obligation towards the state parties. Subsequently, the right and obligation of that said treaty cannot be given towards and performed by any third state without their consent, as stated in Article 34 of the VCLT.

Throughout the years, pacta sunt servanda has been developed and clarified over the years since its incorporation inside the VCLT, mainly throughout various case laws and other international treaties. The first instance in which pacta sunt servanda principle had been questioned was during the ICJ Judgement regarding the dispute of the Project and its Treaty between Hungary and Slovakia, where Hungary had abandoned the project and, subsequently, terminated the treaty while Czechoslovakia, before their break up, decided to continue the operation of the project unilaterally, creating an uncertainty towards the continuation of the treaty. The Court noted that while both states failed to comply with their obligations, this failure to comply did not mean that a treaty should be terminated, and that doing so would create a bad precedent towards the pacta sunt servanda principle.To combat this, The Court strongly asserted the need to enforce pacta sunt servanda principle of Article 26 of the VCLT towards this dispute, stating that "the Parties find an agreed solution within the co-operative context of the [4] Treaty." Here, The Court noted that the two core element of Article 26 of the VCLT –the binding force of the treaty and performance in good faith– are both important and interconnected and that "good faith" in performance shall constitute the intention of the state parties and the purpose of the treaty, rather than the how the treaty is applied.

With this jurisprudence, there is a more clear application of the pacta sunt servanda principle towards the validity of a treaty, which primarily relies on 2 main aspects: the consent to bind by the parties and the good faith in performance from the parties. Like mentioned previously, a treaty could be seen in the same essence as a contract. This means that a state has the freedom of consent to bind themselves into an international treaty if they choose to do so, much like when a person is free to consent to a contract if they choose to do so. It is also recognized as an important principle of a treaty creation, as noted in the preamble of the VCLT.

Not only that consent to bind by the parties is important towards a treaty, but also that the state parties also must perform their rights and obligations from the treaty they signed for with good faith. Schwarzenberger and E.D Brown stated that good faith is of such an importance since it ensures the creation and performance of the obligation that arises in international law. Universally, it has been codified under Article 2(2) of the Charter of the United Nation which stated that good faith must be fulfilled in performance of the obligation of the state parties and shall be carried out when interpreting the provisions inside the treaty in accordance with the ordinary meaning to be given in their context and in light of its object and purpose [5].

Timor-Leste's Obligation in The Timor Sea Treaty 2018

Now that we explained the basic application of the pacta sunt servanda principle, we now move on towards explaining what are the obligations of Timor-Leste that arose by signing the Timor Sea Treaty with Australia regarding their maritime boundary in the Timor Sea.

The first obligation, which coincidentally the most important, is regarding the adjustments over the "provisional" boundary lines that define the continental shelf boundary between Timor-Leste and Australia in the Timor Sea. Article 2(1) of the Timor Sea Treaty set the continental shelf boundary of Timor-Leste and Australia, comprising 13 coordinate points connected by geodesic lines from Point TA-1 in the western segment towards Point TA-13 in the eastern segment.Some part of these geodesic lines, however, are not fixed and still ruled out as "provisional," meaning that these lines are subject to adjustment based on a treaty between Timor-Leste and Indonesia regarding their continental shelf boundary [6-8].

To do these adjustments, Timor-Leste and Australia have agreed 3 different options to adjust these geodesic lines. In the western segment, Timor-Leste and Australia have agreed that the geodesic line connecting Point TA-1 and TA-2 shall be adjusted westward either towards a point between Point A17 and A18 of the Seabed Treaty or towards Point A18 of the same treaty, meanwhile in the eastern segment, both states have agreed that the geodesic lines connecting Point TA-11 until TA-13 shall be adjusted accordingly. It has to be said that these adjustments shall only be done once the commercial depletion of the oil and gas fields that are around the boundary lines and the entry into force of a maritime boundary agreement between Timor-Leste and Indonesia [9-11].

These provisions have created 2 main issues: the possibility of an overlapping maritime boundary and the uncertainty regarding the timeline to start the adjustments of the provisional boundary lines. Because of the way Article 3 of the Timor Sea Treaty have been written, it will allow the continental shelf boundary between Timor-Leste and Australia as well as the continental shelf boundary that will be agreed on between Timor-Leste and Indonesia to overlap with the continental shelf boundary between Indonesia and Australia, as as agreed in the Seabed Treaty of. This is a problem because for one, Indonesia was not involved in the consultation over the Timor Sea Treaty, therefore should not be bound by Article 3 of the Timor Sea Treaty. This problem is also further affected by the fact that Indonesia would likely try to keep their continental shelf boundary in the Seabed Treaty 1972 the same as it is, creating a complication over the possibility of adjustments over the provisional continental shelf boundary between Timor-Leste and Australia [12-13].

To tackle this issue, Timor-Leste shall apply the good faith in their negotiations with Indonesia by arguing that there is a fundamental change that shall affect enforcement of the Seabed Treaty 1972. The fundamental change in question is the existence of Timor-Leste itself, who broke off from Indonesia in 1999 with the UN-sponsored referendum. This fundamental change was also supported by the fact that Portugal, the ruler of Timor-Leste in the 1970s, was not a part of the negotiation of the Seabed Treaty 1972, which led to an unfavourable outcome for Timor-Leste [14-15].

With the second issue, however, it is not an issue from a legality standpoint, but it becomes an issue during the application of the provision in question. Article 3(2) and 3(4) strictly stated that the adjustments to the continental shelf boundary between Timor-Leste and Australia can only be done once the commercial depletion of the oil and gas fields that located near these provisional lines have been completed and the entry into force of a continental shelf boundary agreement between Timor-Leste and Indonesia. This in turn would create uncertainty in regards to when these adjustments will be made, because while Timor-Leste and Indonesia might have concluded their continental shelf boundary agreement in the near future, Article 3 of the Timor Sea Treaty would not be in effect until the commercial depletion of the oil and gas fields, mainly the Laminaria and Carolina Fields in the western segment and Greater Sunrise Fields in the eastern segment. Even though the Laminaria and Coralina Fields are almost out of production, the Greater Sunrise Fields has not even been explored, meaning that it will further delay the process of adjustments of the provisional lines [16-17].

Conclusion

Based on the review we have made above, we concluded that Timor-Leste shall put into practice the pacta sunt servanda principle in the performance of Article 2 and 3 of the Timor Sea Treaty 2018. This is an important task since treaties rely heavily on the good faith of the state parties to perform it without creating problems for other state parties and/or third party. This has become apparent with the two main issues that we have discussed above, which means that Timor-Leste might have to take its steps carefully in dealing with its maritime boundary in the Timor Sea.

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