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**SUBMISSION ON BEHALF OF OCEANIC EXPLORATION COMPANY
LIMITED AND PETROTIMOR COMPANHIA DE PETROLEOS SARL**

TO JOINT STANDING COMMITTEE ON TREATIES

ON

**PROPOSED TIMOR SEA TREATY BETWEEN
THE GOVERNMENT OF AUSTRALIA AND
THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC
OF EAST TIMOR**

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On behalf of Oceanic Exploration Company Ltd ("Oceanic Exploration") and Petrotimor Companhia de Petroleos ("Petrotimor") we make the following submission to the Joint Standing Committee on Treaties Inquiry into the Timor Sea Treaties.

This submission has been prepared with the assistance of Dr Christopher Ward of the New South Wales Bar. We would welcome the opportunity to expand upon these Submissions in oral evidence before the Committee.

1. BACKGROUND

- 1.1 Oceanic Exploration and its subsidiary Petrotimor stand in a unique position in the present uncertain arrangements surrounding the control and exploitation of the Timor Sea oil and gas resources.
- 1.2 On 1 December 1974 Oceanic was issued, by Decree of the Government of Portugal, on behalf of the Province of Portuguese Timor, with an exclusive Concession for the exploration and exploitation of hydrocarbon resources in an area defined in accordance with the map that forms Schedule 1 to these Submissions ("the Concession Area"). At the time the Concession was awarded in 1974, Australia maintained that the continental shelf of Australia extended to the Timor Trough, whilst Portugal contended on behalf of Portuguese Timor that the continental shelves intersected at the "median line" between Australia and Portuguese Timor. The Concession Area represented the entitlement of Portuguese Timor to the north and south median line as consistently claimed by Portugal.
- 1.3 The grant of the Concession by Portugal on behalf of Portuguese Timor is a central tenet upon which East Timor is entitled to rely in support of its potential maritime entitlements as the successor state to Portuguese Timor.
- 1.4 Pursuant to the Concession, Oceanic Exploration and Petrotimor undertook seismic and exploratory work and analyses, opened an office in Dili and identified a number of prospective oil and gas sites. Following the civil unrest in late 1975, performance of the Concession was suspended by exchange of letters between Oceanic Exploration and Portugal on the grounds of temporary force majeure.
- 1.5 The grant of exploration licences pursuant to the 1969 Timor Gap Treaty between Australia and Indonesia was in breach of Oceanic Exploration's continuing entitlements at international law and Australian law. Oceanic Exploration and Petrotimor have commenced litigation in the Federal Court of Australia seeking recompense for the wrongful interference with and acquisition of their Concession rights.

2. EAST TIMOR'S LEGAL ENTITLEMENTS: THE IRRELEVANCE OF THE TIMOR TROUGH

- 2.1 Oceanic Exploration in April 2002 commissioned a legal opinion from Professor Vaughan Lowe of Oxford University, Mr Christopher Carleton of the United Kingdom Hydrographic Office and Christopher Ward of the Australian Bar, a copy of which forms Schedule 2 to these Submissions ("the Opinion"). We note that a number of

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submissions made to the Committee have cited the Opinion. The Opinion demonstrates that the legal entitlements of East Timor to the Timor Sea area extend significantly beyond the boundaries of the proposed Joint Petroleum Development Area ("JPDA") and the former Zone of Co-operation. It is critical to note that the legal entitlements of East Timor arise pursuant to the entitlement of all coastal states, both at customary international law and pursuant to the 1982 United Nations Convention on the Law of the Sea, to an Exclusive Economic Zone extending up to 200 nautical miles from the coast. East Timor's entitlements are in no way dependant upon historical doctrines of continental shelf rights.

2.2 It follows, for the reasons given in the Opinion, that the entitlement of East Timor to the seabed resources of the Timor Sea is not limited in any way by the existence of the Timor Trough as a geomorphological feature. Only where the point of north/south intersection between Australia and East Timor lay more than 200 nautical miles from East Timor could the Timor Trough have any relevance to a north/south delimitation.

2.3 We are aware that the Australian Government continues to assert that the Timor Trough retains some relevance in the north/south delimitation. Similarly, Mr Brazil in oral evidence to the Committee on 26 August 2002 said

"This situation would present the strongest case there would be that geomorphological factors such as those that exist here could possibly prevail over distance factors, notwithstanding that, in the UNCLOS treaty, distance was given enormous importance in defining the exclusive economic zone."

2.4 For the reasons given in the Opinion, the better view is that geomorphological features have no role to play in the delimitation of Exclusive Economic Zones within 400 nautical miles of each other. The issue, for the purposes of international law, between Australia and East Timor is not the delimitation of a continental shelf, but is the delimitation of two Exclusive Economic Zones that intersect within a total of 400 nautical miles. In those circumstances geomorphological features, however deep, play no part.

2.5 In passing, we note that in any event, in no case before an international tribunal has a geomorphological feature been considered a significant or decisive consideration in continental shelf delimitations. That is particularly the case where exploratory activities had been conducted by the relevant states, as discussed below. We also note that, contrary to the assumptions underlying the discussion between Mr Evans and Mr Brazil on 26 August 2002, geological evidence in fact suggests that the continental shelf between Australia and East Timor, including the Timor Trough, is one continental shelf, with the plate division occurring within the land mass of East Timor itself. In that regard, we draw the attention of the Committee to the report of Professor T Charlton which forms Schedule 3 to this submission.

3. EAST TIMOR' LEGAL ENTITLEMENTS: LATERAL (EAST/WEST) BOUNDARIES

3.1 The Opinion also demonstrates that East Timor's entitlements at international law extend to the east and west of the former Zone of Co-operation and proposed JPDA. The entitlements of East Timor to the east of the proposed JPDA include all or most of the "Greater Sunrise" resource fields.

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3.2 The lateral boundaries of the proposed JPDA follow the boundaries of the former 1989 Timor Gap Treaty Zone of Co-operation between Australia and Indonesia. The development of those boundaries was, in turn, predicated on the validity of two geographic points known as A16 and A17. For the reasons given in the Opinion, the true lateral boundaries of East Timor are not limited in any way by the existence of points, negotiated in 1972 between Australia and Indonesia. Indeed, we note that the October 1972 Agreement between Australia and Indonesia on the seabed boundaries, contains in Article 3, an express acknowledgment of the potential rights of East Timor in the region of A16 and A17 that allows both the Western and Eastern lateral lines to be adjusted.

3.3 The Opinion relies on the accepted doctrine of international law which gives "partial effect" to islands in relation to the eastern lateral line. Annexed to the Opinion is a map which demonstrates the potential lateral lines formed by taking a median line and revising to give various "partial effect" weights to the Indonesian island of Leti.

We note that Mr Brazil suggested in oral evidence to the Committee on 26 August 2002 that a "true" median line follows closely the proposed lateral boundary of the JPDA. In doing so, Mr Brazil acknowledged that the generation of such a line requires "equal weight" to be given to all features. For the reasons given in the Opinion, international law would not accord full weight to the island of Leti, being an island that lies disproportionately close to the land mass of East Timor, thus forming an "enclave". The nature of Indonesia as an archipelagic land mass does not affect that position.

4. THE INTERESTS OF INDONESIA

4.1 We also note that there have been some suggestions to the effect that the interests of Indonesia would necessarily be affected by any assertion by East Timor of its entitlements at international law. In relation to points north of the 1972 seabed boundary between Australia and Indonesia, that is true, and presumably the issues between East Timor and Indonesia would be the subject of negotiation in accordance with international law.

4.2 However, the delimitation of a seabed boundary between Australia and East Timor in relation to points south of the 1972 seabed boundary between Australia and Indonesia does not involve, in any way, the interests of Indonesia. The Agreement between Australia and Indonesia of 1972 set an absolute boundary, freely negotiated. The terms of that Agreement now govern seabed rights between Australia and Indonesia, and the respective entitlements of Australia and Indonesia may only be varied by subsequent agreement or in accordance with the terms of that treaty. It is incorrect to suggest, as Foreign Minister Downer has, that any assertion of rights by East Timor could have the effect of "unravelling" the 1972 treaty between Australia and Indonesia.

4.3 Article 3 of the 1972 Agreement requires Australia and Indonesia to "consult" in relation to any "necessary" variation of points A16 and A17. For the reasons given above, an assertion of rights by East Timor over territory south of those points (i.e. that portion of the seabed claimed by Australia) would not have any necessary impact on the existence of those points. In the event that East Timor and Australia were to agree on a shift eastwards of the lateral boundary of the proposed JPDA, Point A.17

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would simply cease to have any utility. Arguably, only if agreement were reached between East Timor and each of Indonesia and Australia as to the revision of the lateral lines generated by Indonesia and Australia during the period of Indonesia occupation of East Timor would it be "necessary" for Australia and Indonesia to revise the location of points A16 and A17.

5. UNITISATION

- 5.1 The unitisation of the area within the proposed JPDA (at 90%:10%) in favour of East Timor, although apparently generous, does not reflect the application of international law which would allow to East Timor 100% of the area to the north of the median line between Australia and East Timor.
- 5.2 The unitisation of the Great Sunrise field at 79.9%:20.1% takes no account of the application of the doctrine of partial effect which places all or most of the Great Sunrise field within East Timor's jurisdiction. It follows that the unitisation of Great Sunrise would, if the Timor Sea Treaty of May 2002 was ratified by each of East Timor and Australia, lead to an extremely significant loss of resources to East Timor. The economic impact of the proposed Timor Sea Treaties on East Timor and the feasibility of a deep water pipeline to East Timor are considered below.
- 5.3 Article 2 of the Timor Sea Treaty of May 2002 provides that the unitisation is without prejudice to a subsequent seabed delimitation between Australia and East Timor. Annex E (b) to the Timor Sea Treaty provides that:

"Either Australia or East Timor may request a review of the production sharing formula. Following such a review, the production sharing formula may be altered by agreement between Australia and East Timor."

It follows that there is no absolute obligation on either party to agree to a re-unitisation of the Greater Sunrise Field in the event that a seabed delimitation placed all or most of that resource under East Timor's jurisdiction. Annex E provides little or no protection to East Timor. In those circumstances, it would be open by Australia to undertake a review of the production sharing formula but decline to alter it in favour of East Timor. Annex E provides no protection to East Timor.

- 5.4 The modern delimitation of intersecting Exclusive Economic Zone boundaries has been held by International Tribunals to require a consideration of equitable principles (Tunisia-Libya ICJ Rep (1982) at Paragraph 118, Jan-Mayen ICJ Rep (1993) at Paragraphs 82 – 86). Two of the matters considered relevant to that question are the existence of oil and gas resources in the disputed area and the conduct of the parties in granting exploration licences in the disputed area.

6. THE PETROTIMOR CONCESSION

- 6.1 As described above, the Petrotimor Concession was granted by Portugal on behalf of Portuguese Timor. East Timor is the successor state to Portuguese Timor. It is clear that a successor state may take the benefit of public claims and rights of the predecessor state. East Timor is entitled to rely upon the acts of Portugal and Portuguese Timor in relation to the Petrotimor Concession in order to support its present maritime entitlements. Furthermore, pursuant to the Concession and in

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addition to other economic benefits specified therein, East Timor was granted an entitlement to 25% of the initial paid up capital (and pro-rata to subsequent increases) in Petrotimor Companhia de Petroleos SARL.

- 6.2 Ratification of the May 2002 Timor Sea Treaty would have the effect of depriving East Timor of the benefits of entitlements accruing to of Portuguese Timor prior to 1975.
- 6.3 With the exception of those who rely upon the irrelevant theories of continental shelf delimitation, the conclusions set out in the Opinion as to East Timor's present maritime entitlements have not seriously been questioned. Those conclusions represent the application of consistent and clear rules of modern international law to the circumstances of the Timor Gap.

7. CONCLUSION

- 7.1 The Timor Gap Treaty of May 2002 represents an encroachment by Australia upon the undoubted rights of East Timor to a very significant hydrocarbon resource. The detriment to East Timor that would result from ratification of the May 2002 Treaty, together with the absence of any long term, meaningful, delimitation with associated re-unitisation, is in no way set off by the relatively small aid and royalty flows that are presently contemplated from Australia and the Bayu-Undan resource field. The resulting detriment to East Timor is of such a size as to potentially cause a serious instability in the long and medium term relations between Australia and East Timor.
- 7.2 The economic ramifications of ratification of this Treaty for East Timor will continue into subsequent generations and will substantially prevent East Timor from developing a long term, secure, industrialised base. We therefore urge the Committee to recommend that the Timor Sea Treaty not be ratified by Australia.



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