

TO: Members of the Legislative Assembly
The Republic of East Timor

RE: MARITIME BOUNDARIES DELIMITATION STRATEGY

We have prepared a strategy analysis that outlines **the immediate actions** that should be taken by East Timor with a view to protecting its entitlement to the oil and gas resources within its Exclusive Economic Zone.

The Legal Entitlement of East Timor

The Joint Opinion of Lowe, Carleton and Ward dated 11 April 2002 outlined the legal basis upon which:

- East Timor is, through the application of modern principles of customary international law, entitled to most or all of the seabed within which the Greater Sunrise and Laminaria oil and gas fields are located;
- East Timor would be entitled to all of the seabed north of the median line between Australia and East Timor which would encompass 100% of the Bayu-Undan oil and gas field.

The Impact of the Timor Gap Treaty of 20 May 2002

- The Timor Gap Treaty between Australia and East Timor (which is yet to be ratified) is inconsistent with the preservation of the rights of East Timor as described above.
- Although the Treaty of 20 May 2002 is said to be “without prejudice” to the right of East Timor to a seabed delimitation with Australia, there is no certainty that the Treaty would enable East Timor to change the unitisation of the Greater Sunrise oil and gas field in the event that any delimitation with Australia took place.
- Article 9 and Annex E of the Treaty are the relevant provisions. **They may not place an obligation on either Australia or East Timor to agree to a revision of the unitisation.** It is possible that Australia and East Timor could delimit the seabed boundary between them in accordance with modern principles of international law and yet not mutually agree between them that the unitisation set out in Article 9A be varied.
- **Accordingly, it may be open to Australia, even if a boundary delimitation gave all or most of the seabed within which Greater Sunrise was located to East Timor’s sovereign jurisdiction, to refuse to vary the unitisation set out in Article 9 (being 20.1%:79.9%).**
- In any event, as described by Lowe, Carleton & Ward in the Joint Opinion, it is probable that an international court or tribunal may consider the ratification of the 20 May 2002 Timor Gap Treaty (with its use of the validity of the Joint Development Zone boundaries for unitisation purposes) to constitute a matter that affected the equities between Australia and East Timor in any subsequent boundary delimitation (notwithstanding the “without prejudice” language of that treaty).

Consequences of the Timor Gap Treaty for East Timor

- **It follows that East Timor should not ratify the Timor Gap Treaty.**

To do so may prevent East Timor from claiming its seabed entitlements and might increase the risk that the unitisation set out in Article 9 would prevail **even if a seabed delimitation took place** whether by negotiation and agreement with Australia, or through the intervention of an international tribunal such as the ICJ.

- **In order to preserve East Timor's potential entitlements, the following steps should now be taken as a matter of urgency:**

- (a) As an immediate priority, **ratification of the United Nations Charter and the Statute of the International Court of Justice**. This involves adoption by East Timor of a national law of succession and depositing it as an instrument of accession of ratification with the Secretary General of the United Nations at the United Nations' Headquarters in New York and acceptance of that ratification by the General Assembly and the Security Council in accordance with Article 4(2) of the United Nations Charter. Acceptance of the UN Charter is itself an expression of consent to be bound by the Statute of the ICJ.
- (b) Depositing with the Registrar of the ICJ, **an acceptance of the Court's jurisdiction** pursuant to Article 36, Paragraph 2 of the Statute of the Court. The formal steps to do this are:
 - i. Preparing a statement of the terms upon which East Timor is prepared to accept the jurisdiction of the Court; and
 - ii. Transmission of that document to the Registrar of the Court in the Hague.
- (c) **Preparing and lodging a claim** or notification of dispute with the **ICJ** as a matter of urgency. The urgency arises from the fact of Australia's purported withdrawal from the Court's jurisdiction. In order to overcome that purported withdrawal, East Timor must act swiftly to take advantage of the fact that the notice given by Australia of its withdrawal might not be considered by the ICJ as a reasonable period of notice.
- (d) PetroTimor Companhia De Petroleos SARL and Oceanic Exploration Company have instructed us that they will be prepared to fund East Timor's application to the ICJ to a limit of US\$5 million

Australia's Withdrawal from the ICJ

- The question as to whether the ICJ might consider Australia's withdrawal as reasonable will ultimately be determined by time. East Timor should act with **considerable urgency in order to preserve** the entitlements it may have before the ICJ.
- The Rules of the ICJ require that an Application be accompanied by an outline of the nature of the dispute and the legal rules and factual matters relied upon to support the Application.
- It would also be prudent for East Timor to ratify the United Nations Convention on the Law of the Sea. However, this would not be essential for East Timor's claim at this

stage. The entitlement of East Timor to the relevant areas of seabed rests on the doctrine of the Exclusive Economic Zone, which exists, independently of the Treaty, as a matter of customary international law and is enforceable as such.

Negotiation with Australia

Although the notification of a dispute to the International Court of Justice is crucial, it may not be the only avenue for East Timor to pursue its entitlements.

Whilst it is an imperative for East Timor to lodge an application with the International Court of Justice, East Timor's priority nonetheless should be:

- (a) to endeavour to negotiate an agreed settlement with Australia. Such negotiation should be undertaken with minimal delay and East Timor needs to be appropriately well advised in respect of the legal and commercial issues in order to be able to match the expertise and experience that Australia will call upon in such a negotiation. We can assist East Timor in this regard.
- (b) If such a negotiation does not result in a mutually acceptable agreement, it also remains open for both Australia and East Timor to propose to have the differences between them resolved by an independent international arbitrator/arbitration tribunal and to agree to abide by the outcome of such arbitration.

Both these steps could proceed **simultaneously** with the formal application and processes that are involved with an ICJ hearing, which even with the greatest degree of expedition will take in excess of twelve months to complete.

Commentary on Some Misconceptions

- **Prime Minister Alkatiri's view that as a consequence of Australia already having withdrawn from the ICJ that an Application to the ICJ is out of the question**

For the reasons noted above, **that is not the case** and East Timor remains free to make such an application with every prospect of Australia being forced to meet any case brought by East Timor.

- **That the Timor Gap Treaty is without prejudice to the rights of East Timor to seek a delimitation of its maritime boundaries**

In fact, the Timor Gap Treaty may significantly affect East Timor's rights to a delimitation of the areas outside the joint development zone, which would fall within East Timor's sovereign jurisdiction if modern international law was applied to the question.

Additionally, the Timor Gap Treaty for the reasons described above is likely to prevent any revision of the unitisation of the Greater Sunrise field no matter what happens to the underlying seabed delimitations.

- **The assertions by Alexander Downer to the effect that any negotiation with East Timor would adversely effect Australia's relationship with Indonesia**

This assertion is completely false.

The maritime boundaries between Australia and East Timor are **unrelated** to the maritime boundaries between Australia and Indonesia. Any negotiation, arbitration or

adjudication between East Timor and Australia (in relation to points South of the 1972 Australia/Indonesia treaty lines) **could not** and **would not** affect Australia's maritime boundaries with Indonesia.

The maritime boundaries between Australia and Indonesia are reflected in signed and ratified Treaties that have been in force since 1972. The seabed arrangement between those two States cannot now be changed **other than by mutual agreement** between Indonesia and Australia. There is **no prospect** of Indonesia being able to prevent Australia and East Timor as a matter of law from negotiating their seabed boundaries.

WHERE TO FROM HERE?

Together with international law experts Professor Vaughan Lowe from Oxford University, Christopher Carleton, Christopher Ward and other counsel, we would be happy to assist the Government of East Timor in respect of any of the above matters. Further, we would be happy to meet with you in order to assist in the clarification of any of these matters should you so require, or to discuss any aspect of this letter with you by telephone as a preliminary step.

Yours sincerely,

PetroTimor Companhia De Petroleos SARL
and Oceanic Exploration Company

Charles N. Haas
President