Australian Government

Department of Foreign Affairs and Trade

4 June 2004

Mr Andrew Hewett
Executive Director
Oxfam Community Aid Abroad
156 George St
Fitzroy VIC 3065

Dear Mr Hewett

I am writing in respect of your email of 19 May 2004 to the Minister for Foreign Affairs, the recent release of Oxfam's report 'Two years on...What future for an independent East Timor?', and Oxfam's recent public claims that Australia is 'pushing East Timor to the brink of becoming a failed state' (Oxfam Press Release, 20 May 2004).

It is the view of the Government that Oxfam's report lacks balance and accuracy. The report appears to adopt in full and uncritically East Timor's position and ambit claims in respect of maritime boundaries in the Timor Sea. In particular, the report's underlying premise that 'most, if not all' of the resources in the Timor Sea belong to East Timor is simply wrong and ignores completely Australia's established sovereign rights and valid claims under international law.

I will not in this letter address all of the errors of fact and law and the incorrect conclusions drawn in the report, but I will highlight enough to demonstrate that the report is fundamentally flawed and genuinely unhelpful to the process in train between Australia and East Timor to negotiate a permanent maritime boundary. To the extent that it will mislead the Australian public and media as to the facts and applicable legal principles relevant to those maritime boundary negotiations, it will not assist at all in resolving the boundary. Indeed, it will work against your avowed aim of finding a solution that is fair to all parties and consistent with international law.

Australia's seabed claim is not, as Oxfam has asserted, based on principles contained in the 1958 Geneva Convention on the Continental Shelf. Article 76 of the 1982 UN Convention on the Law of the Sea (the 1982 Convention) and customary law retain natural prolongation as the primary source of seabed jurisdiction. In this respect, it is relevant to note that

Australia has ratified the 1982 Convention, which expressly supersedes the 1958 Convention. East Timor has not.

The Timor Trough is not, as Oxfam claims, a 'dip' in the continental shelf. It is a significant bathymetric feature that descends in parts to more than 3000 metres, marking a clear physical discontinuity in the seabed between Australia and East Timor. A geomorphological feature of the significance of the Timor Trough is clearly relevant to any seabed delimitation in the Timor Sea.

It is not correct to assert that international law and the 1982 Convention require delimitation to be effected in all cases through the application of a 'median' line. International law requires that the parties reach an 'equitable solution', and this will always vary according to the particular circumstances of the delimitation. For example, even assuming one was to utilise the so-called 'equidistance/relevant circumstances' method (and this is not the Australian preference), a median line modified to take into account the significance of the Timor Trough, as well as Australia's broader frontal coastline, could well leave East Timor without any share of the Bayu-Undan gas field, rather than the generous 90 per cent share of the revenues that East Timor currently enjoys.

It is also incorrect to claim that an 'equidistant boundary' would give East Timor sovereign rights over areas to the east and west of the Timor Sea Treaty's Joint Petroleum Development Area (JPDA), including petroleum resources at the Laminaria-Corallina fields and the whole of the Greater Sunrise reservoirs. The lateral boundaries of the JPDA reflect simplified lines of equidistance between East Timor and Indonesia and are entirely consistent with international law. Laminaria-Corallina and the bulk of Greater Sunrise lie closer to Indonesia than to East Timor, and fall under Australian jurisdiction pursuant to the 1972 Australia-Indonesia Seabed Agreement.

There is no 'right to independent arbitration', as the Oxfam report puts it. It is a fundamental principle of international law that any form of third party dispute settlement between two States, including arbitration, can only take place with the consent of both States. Australia remains among approximately one-third of United Nations members that voluntarily accept the compulsory jurisdiction of the International Court of Justice (ICJ) under the so-called 'optional clause' of the Statute of the ICJ, albeit with certain qualifications to that acceptance. Contrary to your assertion, maritime delimitation is not the single purpose for which Australia has qualified its acceptance of the ICJ's compulsory jurisdiction. In accepting the ICJ's compulsory jurisdiction, many countries have made reservations, including reservations similar to those made by Australia.

Suggestions that Australia's declarations in March 2002 to remove maritime delimitation from the ambit of its consent to the jurisdiction of the international courts and tribunals were motivated by a lack of confidence in its legal arguments are again wrong. The Government's clear and unambiguous view is that maritime boundaries are best settled by negotiation, not arbitration. Australia has settled all its other maritime boundaries by negotiation. A negotiated outcome is by definition acceptable to both sides, whereas arbitration can result in an outcome satisfactory to neither. Australia's declarations are entirely consistent with international law, and are not aimed at any particular country. The reservations affect all of Australia's neighbours equally.

Claims that Australia is seeking to delay maritime boundary negotiations and thereby 'pushing East Timor to the brink of becoming a failed state' are highly emotive and untrue. Australia has not set an end date for the negotiations, nor is it appropriate to do so, considering the complexities involved and the nature of the subject matter. Contrary to the suggestion in your report that 'the Australian Government could not provide a rationale for its preference for six-monthly meetings', in response to questioning by the Senate Economic Committee on 29 March 2004, this point was taken on notice, and a response to the Committee was provided the following day. As that response indicated, a review of our practice in maritime delimitation with other countries revealed an average frequency of meetings of around five months in one case, and about nine months in another. The response also pointed out that the period between rounds tended to be longer at the commencement of the negotiation process.

While negotiations on permanent maritime boundaries continue, a legal framework for developing petroleum resources in the Timor Sea for the benefit of both Australia and East Timor is already in place. The Timor Sea Treaty and the Greater Sunrise International Unitisation Agreement (IUA) are a mutually beneficial package for both countries, and a fair basis for developing the resources of the Timor Sea. Both agreements were welcomed and endorsed by East Timor's leaders as positive interim arrangements pending the settlement of permanent maritime boundaries.

The claim in Section 2 of the report, 'Poverty and the Timor budget gap', that current arrangements in the Timor Sea 'favour Australia' is manifestly incorrect. The Timor Sea Treaty's 90:10 split in favour of East Timor is very generous when compared with the previous 50:50 split under previous arrangements with Indonesia. Furthermore, Australia maintains and will continue to pursue its valid claim under international law to the full extent of its continental shelf northward to the Timor Trough.

The Greater Sunrise International Unitisation Agreement (IUA) does not, as you have claimed, make revenue-sharing subject to a final agreement on maritime boundaries. The IUA is stated to be without prejudice to the position of either Australia or East Timor with regard to their respective maritime boundaries or claims. Ongoing negotiations on permanent maritime boundaries are in no way an impediment to the early entry into force of the IUA. Indeed, East Timor had late last year argued that such negotiations were a pre-condition for its ratification of the IUA.

Australia passed legislation to implement the IUA in March 2004, and now looks to East Timor to follow suit. The claim in your report that the IUA is 'legally unrelated' to the Timor Sea Treaty is patently false, given that the Timor Sea Treaty foreshadows the IUA. The IUA is expressly intended to elaborate and implement the agreement in the Timor Sea Treaty that Australia and East Timor would unitise the Greater Sunrise reservoirs. The apportionment agreed in the Timor Sea Treaty and repeated in the IUA reflects the geographic location of the Greater Sunrise reservoirs, that is, 20.1 per cent of Greater Sunrise lies in the JPDA, while the remaining 79.9 per cent lies outside the JPDA in an area of exclusive Australian jurisdiction. Once again, this ratio of apportionment appears in both the Timor Sea Treaty (as signed and ratified by both Australia and East Timor, and in force since April 2003) and the Greater Sunrise IUA.

Australia has never, as your report suggests, sought to link the outcome of maritime boundary negotiations with our bilateral aid program. On the contrary, the 90:10 split under the Timor

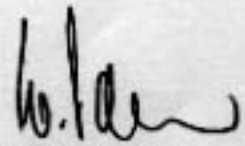
Sea Treaty was intended to provide East Timor with a stable economic base. Australia has been at the forefront of international assistance to East Timor, and has provided over $400 million in official development assistance since 1999.

There is little prospect of Australia and the international community allowing East Timor to become a 'failed state'. Australia is in continual contact with the Government of East Timor about its development assistance needs and priorities. A senior delegation of AusAID officials and our Ambassador participated in an international development partners meeting in Dili in mid-May. The Australian Government has undertaken to provide around $40 million in development assistance annually over the next three years.

Maritime boundary negotiations are but one facet of the broader bilateral relationship between Australia and East Timor. No country has done more than Australia to assist the people of East Timor to realise their aspirations and to help bring peace, stability and economic development to the new state. Australia led and made the largest contribution to the INTERFET operation, which restored peace and stability to the territory, and we have made major contributions of military, police and civilian personnel to successive UN missions there. This support will continue under the extended UN mission. We look forward to ongoing and constructive engagement with East Timor in the future.

Given the above, we consider that it would have been productive to have had the opportunity to provide this information to you, and for you to have taken it into account, prior to the finalisation of your report.

Yours sincerely



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