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**SUBMISSION ON BEHALF OF OCEANIC EXPLORATION COMPANY
LIMITED AND PETROTIMOR COMPANHIA DE PETROLEOS SARL
BY PROFESSOR VAUGHAN LOWE, COMMANDER CHRIS
CARLETON AND DR CHRISTOPHER WARD IN REPLY TO THE
CRITIQUE OF THE LOWE OPINION OF 11 APRIL 2002 BY
MR PATRICK BRAZIL**

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 17 September 2002, Mr Patrick Brazil lodged supplementary written submissions with the Committee entitled "*Critique of the Lowe Opinion of 11 April 2002*". As the authors of that Opinion, we make the following submissions in reply on behalf of our client, Oceanic Exploration Company, Inc. [Paragraph references are to the Critique.]

1. **[Paragraph 2]** It is said that the Opinion "*merges two issues,*" being the question of East Timor's maritime boundaries and the effect on East Timor's potential rights of the ratification by Australia and East Timor of the Timor Sea Treaty of 20 May 2002. The Opinion does deal, distinctly and explicitly, with those two issues; but it does not "merge" them. They are of equal significance to the future of East Timor.
2. **[Paragraph 2.3]** A number of 'preliminary comments' are made concerning the use of technical nomenclature and historical basis of certain lines that formed the basis of the 1989 Zone of Co-operation between Australia and Indonesia. We do not wish to take issue here with those points, which have no effect upon the actual subject-matter of the Opinion, which is the geographical extent of the legal entitlement of East Timor to control seabed resources in the Timor Sea.
3. **[Paragraph 2.6]** We note that it is common ground that the lateral lines were drawn so as to avoid inconsistency with the seabed boundaries agreed between Australia and Indonesia in 1971/72.
4. **[Paragraph 2.8]** The correct technical description of the Indonesian straight base lines is indeed "*archipelagic base lines*" rather than "*straight base lines*". This is a matter of nomenclature only. The archipelagic nature of a State is relevant to the right to establish such straight base lines, from which territorial sea and other maritime zones are drawn; but it is not correct to suggest as Mr Brazil infers that because a State is an archipelagic State, full effect must be given to islands of that State even if they have a disproportionate or inequitable effect on boundary delimitations with a neighbouring State. The three islands that form the Leti group of islands have such a disproportionate effect. It is for that reason that they would be unlikely to be given full effect in international law.

5. **[Paragraph 2.8]** Contrary to what Mr Brazil suggests, the treatment of seabed boundaries in Indonesian legislation cannot be determinative of the location of the seabed boundary between Australia and East Timor. Treatment of such issues in domestic legislation of one of the States concerned cannot determine the boundary as a matter of international law.

6. **[Paragraph 3.7(a)]** The question whether, as a matter of international law, the Timor Trough counts as a discontinuity between the continental plates of Australia and East Timor is not question of “fact” but a question of law. As Professor Triggs and Mr Bialek have noted, “*Most bilateral agreements on continental shelf delimitation have disregarded geological features, some involving troughs and trenches equivalent to, or even deeper than, the Timor Trough*”, among them the 6200 metre Cayman Trench. [3 *Melbourne Jo. Int’l Law* 1, at 32 (2002)] Moreover, regardless of the depth or configuration of the seabed, as a matter of law every coastal State has, subject to delimitation with neighbouring States, a right to a continental shelf that extends to a distance of 200 nautical miles from the territorial sea baselines. [UNCLOS Art 76.1]

7. In no international decision has a depression, deep or otherwise, been treated as a feature determining the location of a maritime boundary. The Critique refers to the Separate Opinion of Judge Sette-Camara in the case of *Libya v Malta*. Mr Brazil fails to state that the majority of the Court disagreed with Judge Sette-Camara; nor does it explain that his view was based upon an appraisal of customary international law as it stood almost twenty years ago. The suggestion that the Timor Trough is a “governing” feature was inconsistent with the views of the majority of the International Court of Justice in that, and other, cases. As Judge Sette-Camara himself noted, quoting the words of an earlier ICJ decision: “*It must, however, be emphasized that a delimitation, whether of a maritime boundary or of a land boundary, is a legal-political operation, and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line.*” [ICJ Reports 1985, p. 13 at p. 66]. Any such feature is merely a factor eligible to be taken into account in arriving at an equitable delimitation. [See ICJ Reports 1982, p. 18 at p. 64] Moreover, it is not apparent (and the Critique does not assert) that a seabed trough may operate as

a factor in the delimitation of overlapping EEZ, as opposed to overlapping continental shelf, claims. The Opinion is based upon the hypothesis, since realised, that Timor will claim an EEZ.

8. **[Paragraph 3.9]** The Critique refers to Australia's historical treatment of the Timor Sea area. The existence of Australian exploration concessions is a matter that may be considered in the determination of an equitable delimitation of intersecting Exclusive Economic Zones. So, too, is the existence of Portuguese exploration concessions. The Critique fails to note the grant by Portugal of an exploration Concession to Petrotimor in 1974. That demonstrates that Portugal considered the area in question to be Portuguese (Timorese), and not Australian, at that time. This would be as relevant as the Woodside drilling to any judicially determined or agreed equitable delimitation of the seabed.

9. **[Paragraph 4.2]** The Critique includes some remarks concerning the "thalweg" of the Moti Masin and the Western lateral boundary of East Timor's entitlement to an Exclusive Economic Zone. A thalweg is not just as Mr Brazil asserts the deepest part of a river, it is the deepest part of a valley or river. Whether or not a river flows through it is entirely irrelevant. The thalweg basepoint used in the Opinion, drawn from the 1904 boundary treaty, is the correct base point for the western lateral boundary. It lies on the boundary between East Timor and Indonesia as marked on relevant large-scale Indonesian government maps.

10. **[Paragraph 4.5]** It is asserted that the Opinion provides a "*contrived*" view of the "*facts*" when it comes to the effect of "*small islands*". It goes without saying that this assertion is rejected. Mr Brazil's submissions in this regard can be summarised as follows:
 - (a) the Indonesian island of Leti forms part of an archipelagic state and as such it is not proper to give it partial effect;

 - (b) the East Timorese island of Jaco is uninhabited and should not been taken into account; and

(c) a "properly drawn" median line gives a result that approximates the proposed eastern boundary of the JPDA.

11. This view may at first glance appear persuasive if the wider geographical location of the boundary is ignored. The Critique has taken a micro-geographical view of the delimitation problem, rather than the macro-geographical view that is a prerequisite in any maritime delimitation. If the overall geography of an area to be delimited produces an inequity, that inequity must be addressed. In this case the inequity is the squeezing effect of the Leti group of islands upon the eastern lateral boundary. Far from being "*contrived*," the lines described in the Opinion, by which partial effect is given to the Leti group of islands as a whole, represent a range within which the outcome of any boundary delimitation between Australia and Indonesia according to international law would be likely to fall. Had we not believed this to be correct as a matter of law, we would not have said so.

12. For the reasons given in the Opinion, international law partially discounts the effect of islands that are smaller than the land mass of a neighbouring State in a maritime boundary delimitation where the islands would have a disproportionate or inequitable effect upon the outcome of the delimitation. The Leti group of islands is in that position. It is those islands that control the course of the eastern lateral boundary. The group is a small geographic feature that has a disproportionate effect on the generation of a "*full effect*" median line. The Leti group of islands represent less than 1/5 of the area of the land mass of East Timor, and, as noted by Professor Victor Prescott, they cause the lateral lines of equidistance to converge, thus reducing what would otherwise be East Timor's entitlement to seabed resources (Prescott *The Question of East Timor's Maritime Boundaries* (1999-2000) IBRU Boundary & Security Bulletin 72 at p.80).

13. The fact that Indonesia is an archipelagic State does not alter the position. International law requires a solution that results in equity between states, whether or not one or more of those States is archipelagic. To give full effect to the islands of the Leti group is in conflict with that principle.

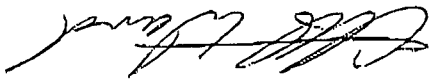
14. The island of Jaco lies only 0.5 nautical miles (nm) from the coast of East Timor. Its effect on a median line solution is minor. If Jaco is discounted, the full-weight median line would move only 1.75nm westward in the northern sector, increasing up to a maximum of 3.5nm westward as the line approaches the northern limit of the joint zone. The effect of Jaco then decreases quite rapidly, eventually disappearing as the line proceeds south.

15. It is tendentious to speak of a "*properly drawn*" median line. The lines that are shown on the map annexed to the Opinion represent the possible entitlements of East Timor in varying circumstances. If partial weight is given to Leti and its associated islands, as is likely in any judicial delimitation, the outcome will be as described on the map.

16. **[Paragraph 4.8]** Mr Brazil is incorrect in his suggestion that Indonesia must be a "*necessary party*" to any delimitation between Australia and East Timor. Australia and Indonesia have an agreed north/south seabed boundary that dates from 1972. That boundary is legally secure, and can be amended only by agreement of Australia and Indonesia. Indonesia accordingly cannot claim any legal interest in any delimitation between Australia and East Timor of the lateral boundary south of the 1972 seabed treaty line. It is, in law and in fact, perfectly possible to delimit that area without the involvement of Indonesia.

17. We note there is agreement as to the effect of Annex E of the Treaty. Nothing in the Timor Sea Treaty would require Australia to renegotiate the unitisation of Greater Sunrise, even if a boundary delimitation placed all or most of the Greater Sunrise field under the jurisdiction of East Timor. It follows that ratification of the Treaty by Australia and East Timor may well affect East Timor's rights to its potential seabed resources.

Christopher Ward



Chris Carleton



Professor Vaughan Lowe

