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JOINT COMMITTEE ON TREATIES

Monday, 26 August 2002

Members: Ms Julie Bishop *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Barnett, Bartlett, Kirk, Marshall, Mason, Stephens and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Evans, Mr Hunt, Mr Peter King and Mr Scott

Senators and members in attendance: Senators Barnett, Kirk, Marshall, Stephens, Tchen, Ms Julie Bishop, Mr Bartlett, Mr Ciobo, Mr Evans, Mr Hunt, Mr King,

Terms of reference for the inquiry:

Timor Sea treaties

WITNESSES

Committee met at 10.13 a.m.

BRAZIL, Mr Patrick, Special Counsel, Phillips Fox

CHAIR—Welcome. I declare open this public hearing of the Joint Standing Committee on Treaties. The Exchange of Notes Constituting an Agreement between the Government of the Democratic Republic Of East Timor and the Government of Australia Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor; and the proposed Timor Sea Treaty between the Government of East Timor and the Government of Australia were tabled on 25 June 2002. This afternoon the committee will also present its report on nine other treaty actions tabled in June, but the treaties relating to the Timor Sea were deemed to warrant further investigation. While some preliminary evidence was taken on 12 July, today marks the first hearing of the Timor Sea treaties inquiry. To date, over 50 submissions have been received by the committee. The committee intends to take evidence in Melbourne, Perth and Darwin, as well as here in Canberra today and at a later stage in the inquiry.

Today we will hold a short hearing to take evidence from Mr Patrick Brazil on the principles involved in seabed delimitation and negotiating joint development zones. Mr Brazil, although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make some introductory remarks before we proceed to questions?

Mr Brazil—The first introductory remark that I would like to make relates to something that comes out in my quite short submission: that is that the purpose of my submission and of my presence here is to help the committee in any way I can on issues of public international law that really permeate and form the basis of this kind of agreement. I do that against a background of having been personally involved over the years in significant negotiations on treaties of this kind—or treaties very closely related to it, namely maritime boundary delimitation treaties. For example, as I mentioned in my submission, I was a member of the Australian delegation that went to Jakarta in 1972 to see whether or not we could negotiate a seabed boundary treaty with Indonesia in relation to areas that were of concern to Indonesia. I add that because, as you will know, at that time—way back in 1972—East Timor was administered by Portugal, and so the discussions that took place then in Jakarta had to stop south of East Timor.

Those discussions were really very accelerated. In maritime boundary delimitation terms, the amount of time between when we began those negotiations and when we had a treaty that was signed off by the respective ministers and then, in due course, ratified was pretty close to a world record, I would think. We went to Jakarta knowing that we had a formidable brief because Australia's 200-metre shelf marched almost to the shores, shall we say, of Timor, the western end of which was Indonesian territory. Nevertheless, after about two or three days of discussions, we found that we were looking at an agreement—which, I add once again, was limited to those parts that were then within the sphere of responsibility of Indonesia, which included only the western end of East Timor and further out in a westerly direction into the Indian Ocean.

Normally, once a delegation had established agreement in principle, it would have initialled the treaty to say that it was the authentic text of what the people who had been negotiating had come up with, and then that would have had to come back to the respective governments, and the next step would have been the signing of the treaty by the respective ministers for foreign affairs. That would normally have been the second step along the way, and there would then still have been the third step of ratification. Those sorts of steps are set out in the Timor Sea Treaty that is before you at the moment. But, lo and behold, we moved so quickly that the leader of our delegation, Robert Ellicott, who was then Solicitor-General of the Commonwealth—he has subsequently done many other things—got on the phone to the then foreign minister and said, 'I think you ought to hop on a plane and come up here to sign this treaty straight away.' I think I can say that on the record.

So in that week we moved very quickly. We not only got agreement in principle, we not only got agreement on a text, but the respective foreign ministers signed the treaty in Jakarta that same week. We did note at that time that there was the question of the area south of East Timor, then administered by the Portuguese. I forget who was the first person to pronounce the phrase 'Timor Gap', but we knew we had created a gap because, as you will know, earlier on in 1971 another treaty had been signed between Australia and Indonesia, once again about a permanent delimitation of seabed boundaries covering the Arafura Sea coming over from West Irian but, once again, stopping short on the eastern side of East Timor. That had been put in place and, of course, in drawing up our treaty in 1972, we were very conscious of that as well. We took note of it in terms of what we did and what we could not do. That, in effect, created the Timor Gap.

CHAIR—Mr Brazil, at that point what did you, as a member of the delegation, anticipate would happen in relation to the gap? At the time the treaty was signed in 1972, what was your understanding of the future of the delimitation of the Timor Gap?

Mr Brazil—At that time, to the extent that we talked about it, and we did think about it in general terms, we thought that the acceptance by Indonesia of the significance of the Timor trough as being an enormous geomorphological feature—and there is a statement by Judge Sette-Camara in the International Court in the Libya-Malta case saying it is unique—would justify a carving up of seabed in a way that gave enormous preponderance, or significant preponderance, to one of the parties. The fact that Indonesia had accepted that seemed to be something that would strengthen our hand in any future negotiations with Portugal or, as it has turned out, Indonesia.

As far as thinking at the time is concerned and as far as I am concerned, I think we thought that. I can remember there was one young diplomat at Australia's embassy at Jakarta who was very sceptical about that. It turned out that he was pretty right because, as you will know, and I will not go on about this, what happened at the great United Nations Conference on the Law of the Sea, was that distance assumed greater significance, particularly with the setting up of the 200 nautical mile economic zones. That gave enormous strength to the proposition that distance is what matters. Therefore, in a situation like this, the major rule must be the median line or the equidistant line. Since then, there has been that great development that really has pushed things. Just how far it has pushed them is, of course, a nice question that lawyers would like to argue about.

There is an esoteric doctrine of international law that has always intrigued me called the problem of intertemporal law. It relates to the question of rights where property is acquired lawfully under the rules of international law that apply at the time that property is acquired. The main case on this goes back to the days when someone like Captain Cook could suddenly go ashore on Cape York Peninsula, put up a flag and say, 'I claim all this land for the British Crown': changes in law over a period—over centuries—have brought more rigorous rules, and the question is whether those changes mean that a title that was originally valid can become invalid. This is a thing about which people write doctoral theses, it is a matter upon which some very distinguished international lawyers have written, and it is the sort of problem we have here.

CHAIR—How would you apply the intertemporal doctrine to the scenario we are facing here?

Mr Brazil—The law as it has developed on that is fairly sparse, but it certainly seems to me that it does provide an argument—and I suppose you have to put the emphasis on the word 'argument'. It provides an argument that rests on the fact that the law was thought to be fairly clear when we initially claimed the continental shelf out to the Timor Sea. That claim goes back, ultimately, to 1953, and the vision of the law that lay behind it was confirmed a few years later by the Geneva Convention on the Continental Shelf of 1958. That convention confirmed that the continental shelf belonged to you automatically; you did not have to declare it; it was an intrinsic right that inhered in you as a coastal state. Certainly, in that day and age, it was thought that it went out to your 200-metre line at least. In the case of the Timor Sea, our 200-metre line is literally out there, south of East Timor and not very far from it. So, at the time the claim was made, it was a very defensible claim, and Australia did act on that. It proceeded, and when it finally got around to having legislation on the matter, with the then joint Commonwealth-state legislation on Petroleum (Submerged Lands) Act, permits were let in that area. Australia had claimed it.

CHAIR—You will obviously be well aware of the terms—although I do not suggest that you have a copy of it with you—of the 1972 seabed agreement?

Mr Brazil—Yes.

CHAIR—In it, article 3 states:

...the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia shall consult each other with a view to agreeing on such adjustment or adjustments, if any, as may be necessary in those portions of the boundary lines between Points A15 and A16 and between Points A17 and A18.

I understand that Points A16 and A17 delimit the Timor Gap. As a member of the Australian delegation in 1972, what is your view on whether Australia is obliged to enter into negotiations with Indonesia over the 1972 seabed boundary as a result of future maritime negotiations between Australia and East Timor, as per article 3 of that agreement?

Mr Brazil—Let me be very careful on this. I cannot remember us discussing that at great length. Certainly my impression at the time—and I was very much part of the drafting of this treaty—was that at that stage we were having some difficulties nailing down some of the points that we could go on and regard as being points that we could define and rely on in the treaty and there was acceptance on both sides that there might need to be some adjustment. The wording

that you just read out bears that out. It agrees to talk about adjustment, if it is needed, or words to that effect. In other words—once again I can only speak for myself—it certainly never entered my mind that that particular clause imposed on us an obligation to go right back to the negotiating table in a positive way and say, 'All bets are off, let's start again.'

Mr KING—All the same, it says, 'shall consult'.

Mr Brazil—Yes, I know.

Mr KING—It does create an obligation.

Mr Brazil—It creates an obligation to consult.

Mr KING—It does not say 'to consult' but 'shall consult'. Those words imply obligation; that is the opposite of what you are saying.

Mr Brazil—I am trying to explain what was in our minds at the time; I am not putting it higher than that. I agree with the words. I have not got the text in front of me—could you read it out again.

Mr KING—I will read it to you. It says:

... the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia shall consult each other with a view to agreeing on such adjustment or adjustment, if any—

and so on.

Mr Brazil—But how does it end up? What are the concluding words?

Mr KING—It keeps going, but those are the relevant words. It goes on to say:

... as may be necessary in those portions of the boundary lines between points A15 and A16 between Points A17 and A18—

as was mentioned by the chair.

Mr Brazil—But the phrase you have not mentioned, which is in there, is 'if any.'

Mr KING—I did mention that.

Mr Brazil—I am sorry. All I am trying to convey is my understanding at the time, as one of the people there. Certainly, it was not in our minds that there was an obligation for us to sit down again and look at the whole thing once more. There certainly was an obligation to consult but not to undo the whole of the work, as it were.

CHAIR—Sitting here in 2002, can you offer your expert opinion as to whether Indonesia ought to be included in any discussions, consultations or negotiations involving the redefinition of the boundaries of the Timor Gap?

Mr Brazil—As to the edges of the Timor Gap, my understanding was that this particular clause was saying, 'These are the actual points we have used—A15 and A16—but maybe we need to move them around a bit.' That was really, I thought, what we had in mind. To answer your question: yes, we contemplated that Indonesia would be party to such discussions. But I add the footnote that, to be really effective, it might turn out that those discussions ought to be tripartite discussions involving the country that is responsible for East Timor.

CHAIR—So are you saying that a provisional delimitation between Australia and East Timor such as the Joint Petroleum Development Area could impose on Australia an obligation to re-negotiate the 1972 Seabed Agreement? Are you going that far?

Mr Brazil—I accept the clause that has been referred to; it is there, and whatever is covered by that is what we are committed to.

Mr MARTYN EVANS—You are saying it is more at the margin; where it meets at the Timor Gap is where it would involve negotiation with Indonesia, rather than the totality of the program?

Mr Brazil—Our focus at that time was that this was an area we could not deal with, and we had to be a little diffident about adopting terminal points and what have you. These are the points we adopted, but we recognised that there might need to be some adjustment. I understand the thrust of your question, which is asking whether Indonesia ought to be involved here. I think it comes down to the fact that what it is is on the table.

CHAIR—What is on the table?

Mr Brazil—I would be the first one to say that you might very quickly get to a situation where Indonesia would certainly be a very necessary party to any useful discussions that might take place.

CHAIR—What is on the table is a provisional delimitation between Australia and East Timor. My question is: does that therefore involve Indonesia, per se?

Mr Brazil—In my view, no, not in the present context.

Mr MARTYN EVANS—Could I get your opinion about the relative significance of some of the factors that we take into account these days? You mentioned the original argument in the early days of the negotiation of the treaty, all those years ago, about the importance of the continental shelf versus the subsequent determination of the Law of the Sea Conference about distance becoming more significant. What do you now see, in the 2002 context, as the importance of the relatively massive geological feature of the Timor Trench? Where the two plates meet is a major global subduction zone. It would have to be regarded as almost a global geological feature, if you like. How do you see that rating in terms of distance and continental shelf subduction zones? How do these things stack up in international law these days? Could I get your general overview of that?

Mr Brazil—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. We have what is, possibly, a unique situation. This has been observed in the International Court of Justice already, namely by Judge Sette-Camara in his separate judgment in the Libya-Malta case, in which he mentions the Timor Trough as being probably a unique phenomenon. Then he mentions some other features which were not regarded as being nearly as significant—features in the Mediterranean, for example, that had been before the court.

The factor that makes the East Timor case possibly the strongest case in which to argue this point of view is the simple one of depth—as well as the important geological foundations that underlie the significance of that line, at least in geological terms. For example, in the Lowe opinion, which has been given in recent times and which I think you will all be familiar with, reference is made to the fact that similar depths, like the Tripolitanian furrow—which came into contest between Libya on the one hand and Tunisia on the other—and other similar features of that kind have been put aside by the international court. But what the Lowe opinion does not take note of or comment on in that regard is that the Tripolitanian furrow is about 600 metres deep and the Timor Trough is 3,000 to 3,500 metres deep.

Mr MARTYN EVANS—And it is a joining of plates and a subduction zone.

Mr Brazil—Yes, there are all those platonic aspects as well, if I can put it that way. So, to repeat myself, this would probably be the strongest case in the world for arguing that. That is not to say that the argument for distance is not a very strong one indeed; it obviously is. The jurisprudence on this has gone backwards and forwards a little bit. Interestingly enough, there was one argument in relation to the North Sea continental shelf cases that distance was what mattered in the competing claims between those countries that bordered on the North Sea and that all you had to do was apply an equidistant or median rhumb line—distance was now the main thing. The International Court, being quite aware of what had been decided in UNCLOS in terms of distance, said, 'No, distance isn't necessarily the end of the matter. You can take other matters into account.'

Summing that up, this case would be the strongest case there is in the world for that point of view. If it were to come to the international court—which seems unlikely—what some cynics call the 'random judicial factor' would interact in the matter. Obviously, the case based on distance would be very strong.

Mr HUNT—I have two questions: the first is procedural and the second is substantive. In 1996 we negotiated a maritime boundaries agreement with Indonesia that runs up to the edge of the area covered in the Timor Gap agreement. Has that any impact on our saying that, effectively, we have already negotiated a lot of the details with Indonesia? As an overview, do you think the provisional boundaries which have been negotiated are fair, overly favourable to East Timor or overly favourable to Australia? What do you believe to be the substantive impact? The first question is procedural—whether the maritime boundaries have had any impact and whether that moves on from what occurred in 1972. The second question is the substantive one about your assessment of what has been negotiated.

Mr Brazil—Please correct me if I am wrong, but my understanding is that that subsequent treaty has not yet come into force. It has not been ratified; it has been signed. I think that is the

situation. It is part of the context; it is one of the things that need to be looked at. It looks at matters other than seabed jurisdiction. If your problem is basically seabed and is focused on seabed, it has not got that much significance. When you look at the treaty and at the parties and at the state of play between them, they accepted what other countries in similar situations have accepted—that is, you can have different maritime boundaries for different purposes. That, to my mind, lessens the significance of that. What was your next question?

Mr HUNT—At a high level, do you see the provisional boundaries negotiated under the agreement with East Timor as being a fair assessment between the two states; overly favourable to East Timor; or overly favourable to Australia? I am after your judgement and analysis.

Mr Brazil—I think it is a reasonable outcome—namely, it is a purely provisional arrangement and it does not prejudice your claims to a permanent boundary. I think it is quite a reasonable definition of the area. In a sense, I think it is the fruit of the labours that have taken place over the years, first of all with Indonesia, to define the joint area there, area A—that joint development treaty with Indonesia. Rightly or wrongly, I get a bit of confirmation in my mind for the general validity of that as a provisional area by noting that the area covered by the Portuguese permit that was let in 1974 to Petrotimor—and in which Oceanic Exploration shares—more or less corresponds to the area of the Joint Petroleum Development Area, the JPDA, under this treaty. In attachment 3 to my submission there is a map which, in fact, comes from Oceanic Exploration resources and which shows the area of that treaty with reference to the present JPDA. They more or less correspond. I see that as a measure of confirmation that, in terms of a fair drawing of lines for a provisional area to be provisionally administered on this basis without any prejudice at all to permanent claims, it is quite a reasonable—

CHAIR—Mr Brazil, is your evidence that, based on article 83.3 of UNCLOS and given the history of the JPDA, the boundaries of the JPDA, including the lateral boundaries, constitute the best way of giving effect to the obligations of Australia and East Timor under UNCLOS?

Mr Brazil—Yes, that sums it up.

Mr KING—Mr Brazil, I just want to ask you about article 3. Thinking back to 1972, perhaps the real problem with article 3 is that both Indonesia and Australia thought that, if there was going to be any delimitation agreement, it would have been Indonesia taking over East Timor and, therefore, the problem of the Portuguese intervening in the process would have been resolved and they would complete the line when Indonesia had sovereignty. That is perhaps reflected in some other policies of governments at that time. I will not ask you to comment on that. I am afraid that I do not agree with you when you say that this does not give rise to any obligations on the Australian government to consult with Indonesia. Mr Hassan Wirajuda, the Foreign Minister of Indonesia, does not think so and, looking at the words of article 3, I have to say that I agree with him. What do you say about that?

Mr Brazil—My answer will be the answer that I have been endeavouring to give. Undoubtedly, there is an obligation to consult.

Mr KING—So you do agree that there is an obligation to consult?

Mr Brazil—Yes, with Indonesia. As to the width of the consultation, that was certainly in mind at the time. Speaking as a person who was involved in the negotiation, the sort of consultation I had in mind—speaking for myself—was that those points were chosen very carefully on either side of what we then came to call the Timor Gap. They could have been a little further this way or a little further that way. There was a third party involved and all that sort of thing. Adjustments relating to that, in my recollection of what we were thinking at the time, are what were in mind.

Mr KING—I want to ask a question about the Greater Sunrise field. Is that part of this aspect of debate, Chair, or do you want to deal with that separately?

CHAIR—We will deal with that under unitisation. As there no other questions on boundaries, Mr Brazil, we will move to the question of unitisation. In your submission. you state:

> It is not going too far to say that the practical, if not the legal, effect of an agreed unitisation arrangement for sunrise would be a condition precedent to bringing the proposed treaty into force.

Can you expand on your view of the relationship between the unitisation agreement and the treaty?

Mr Brazil—In a situation where you have a got a field that straddles the area of an agreement like this, there really is an obligation on the parties concerned to seriously address the question of unitisation. It is not a situation you can just leave undone. If we jump from the international area, where there are international boundaries—either permanent, provisional or both—and look at domestic oil and gas legislation, in the United States, there was a field that was common to two permitees. When this question arose in the 19th century in the United States, in the state of Okalahoma, the law that prevailed was the law of capture. You put down your wells and, if you could suck oil from underneath the permit area next door, good luck to you. If you look at our own Petroleum (Submerged Lands) Act, it does not spell out a law of capture. On the other hand, it does not completely negate it.

It seems to me that whatever may be tolerable within domestic legislation in that area is certainly not acceptable where the resourcing question straddles an international boundary, whether it is a permanent boundary or, in this case, a boundary between a provisional joint development area and a national area. To go back to the previous question, I think in those situations there really is an obligation on the parties concerned to make the best endeavours to sort that out as soon as possible. On this particular topic, I would put it as high as I put it in my submission: I think there is an obligation to do this. I think that is borne out by international practice in this area.

When countries have been looking at treaties of this kind, they normally have a provision in the treaty to the effect that, if it turns out that there is a field that straddles the boundary, there have to be negotiations to sort out the matter. All those international legal considerations do not mandate a unitisation agreement but to my mind they certainly indicate in strong legal terms that that is what the parties have to address and achieve in good faith. Hopefully, they will do that.

That is one aspect of the view I have taken. The other basis of the view I have taken is in respect of the Sunrise field. Members of the committee will be as aware as I am—or probably more aware—of what is involved in the development of that field. A large amount of money has been spent already, but there are still great steps to be taken. I think it is clear, and I think you have already got views before you on this particular topic. As a matter of fact, that development will not take place unless there is a unitisation agreement that gives the people the sound footing to go ahead with major development in that area. So that is the sense in which I say that I think, in practical terms, unitisation is a kind of condition precedent in this case. I am not putting that in legal terms.

CHAIR—I understand. What is exercising our mind is how the unitisation agreement can precede the treaty, given that the treaty establishes the boundary between the JPDA and Australian jurisdiction, which the Sunrise field straddles.

Mr Brazil—Yes, I see the point. Maybe the answer is to have them happening at the same time.

Mr KING—So far as you are aware, what prospects are there for obtaining a unitisation agreement with both Indonesia and East Timor?

Mr Brazil—Do you mean in relation to joint areas?

Mr KING—I mean in respect of Sunrise.

Mr Brazil—Isn't Sunrise to a great extent south of the seabed boundary that has already been negotiated?

Mr KING—It is just north of the exclusive economic zone and south of the agreed treaty line, but it does appear to extend partly into Indonesian territory immediately below Moa and Lakor.

Mr Brazil—I will answer that by referring you to the map which is attachment 2 to my submission, presented here this morning. On that map, have a look at the purple line in the legend down the bottom, 'Agreed seabed boundary Australia and Indonesia.' If you then look at the Sunrise field, you will see that that seabed agreement takes you to point A15. Sunrise is south of that.

Mr KING—Is it? What is that other dotted line that you have there? I thought that was the seabed extremity.

Mr Brazil—Nine degrees south latitude is shown as a dotted line.

Mr BARTLETT—The line on A15 and A16 is subject to further negotiations if another sovereign country is involved.

Mr MARTYN EVANS—There is a black dotted line called Sunrise High. What is that?

Mr Brazil—My information is that that is on the eastern side. Let me have a look at something I have here.

Mr MARTYN EVANS—There are several black dotted lines called Sunrise High, Kelp High, Laminaria High and Flamingo High, but they do not seem to have an explanation.

Mr Brazil—I cannot help you on that point.

Mr KING—That is what I am asking. There may be a unitisation issue with Indonesia; I do not know. I am just going on what you are telling us. You raised the 'Lowe opinion'. What is the Lowe opinion? Do you have a copy of it for us?

Mr Brazil—Yes, I would be happy to leave a copy with you. I am surprised that you do not have one.

CHAIR—I have just now received it. I will let Mr King have a look at it, and we might come back to ask you some questions about the Lowe opinion.

Mr Brazil—Just to sum that up, certainly for most of Sunrise—and I am including Higher Sunrise in that—it is difficult to see what standing Indonesia has, because most, if not all, of that, is south of a permanent seabed boundary line to which they have agreed.

Mr MARTYN EVANS—And it is all south of the trench?

Mr Brazil—Yes, exactly.

Mr MARTYN EVANS—The trouble is that everything is south of the trench, and you cannot really have that.

CHAIR—Regarding the joint development zones—and this is obviously where the Lowe opinion comes into things—you stated that the discussions at the United Nations Conference on the Law of the Sea on Article 83 of UNCLOS rejected the suggestion that provisional arrangements pending delimitation should take the form of refraining from exercising jurisdiction beyond the median line. Could you expand on that?

Mr Brazil—Yes. This gets us into the area that arises in relation to acts of parliament and whether you can look at parliamentary debates leading up to the legislation—

CHAIR—Speeches in second reading debates.

Mr Brazil—from the point of view of doing it? Certainly in the international area, in relation to the comparable question or problem of whether you can look at the negotiations and what have you at, for example, the diplomatic conference that drew up the treaty, international law has a black letter approach to interpretation, on the whole. That is another story in itself. Nevertheless, it does admit that in cases of ambiguity you can look at this sort of thing—as we do now in our law, under the Acts Interpretation Act. So you can have a look at that material

from the point of view of interpreting UNCLOS itself—not only the provision directly involved but also other provisions to which considerations mentioned there might be relevant.

It is interesting to find that a proposition that was discussed at one stage is that, in relation to provisional arrangements, we ought to say, 'You cannot go beyond the median line.' It sounds like a very reasonable idea, but the politics of UNCLOS were such that that definitely did not get up. I have given a reference to that article by Mr Lagoni, and I can give you a copy of the article. He gives footnotes referring to the travaux preparatoires of UNCLOS at that moment, where you can see the chapter and verse. I was unaware of that.

CHAIR—Of the article?

Mr Brazil—I was aware of the article. It is in my collection—in advising the government of Cambodia on Thailand I have quite a library on this sort of thing. I had not quite focused on the footnote in which he deals with the point that a median line as a provisional line was proposed but rejected.

CHAIR—This inquiry has received a number of submissions proposing that Australia ought to reserve revenues gained north of the median line between Australia and East Timor until a boundary has been concluded, after which delimitation revenues from the northern petroleum reserves ought to be shared accordingly. Given what you have said about the discussions preceding UNCLOS, what do you say about that proposition?

Mr Brazil—I do not think there is any legal basis for that proposition. I can understand that some people might think that might be the fair thing to do, but I cannot see any legal basis for it.

CHAIR—In terms of international law?

Mr Brazil—Yes. If anything, for what it is worth, those travaux preparatoires we just looked at point the other way. UNCLOS looked at the proposition but could not gain support for the idea that you should at least get out to the median line under provisional arrangements.

CHAIR—In a worst-case scenario of maritime delimitation negotiations—if they stalled or broke down—would there be any legal obstruction preventing East Timor granting exploration and development concessions within the 200 nautical mile exclusive economic zone to which it lays claim?

Mr Brazil—If it signs this treaty, then anything that cuts across this treaty would prevent it. If 200 nautical mile zone claims involved Indonesia giving rights over the seabed, that would obviously be contrary to the treaty obligations of East Timor.

CHAIR—So that would be the legal obstruction?

Mr Brazil—Yes. The basic rule is—in Latin—pacta sunt servanda. Agreements have to be kept.

CHAIR—Of course.

Mr Brazil—That is laid down in the Vienna Convention on the Law of Treaties, which is the authoritative international statement of what treaty obligations involve. I know all about this because I was there when we drew it up. When we got to this side of it, the conference agreed that the first article we must have was an article to say that international treaties must be obeyed and carried out—and carried out not just in the letter but in good faith as well. So, in the situation that is posed, clearly there would be claims.

CHAIR—We have mentioned in this hearing the opinion of Professor Lowe and others of 11 April 2002, which the secretariat has now provided to us. I do not think members of the committee have had an opportunity to see it. This is a fairly detailed opinion in the matter of East Timor's maritime boundaries. Are there aspects of it with which you disagree and that you have not brought to the attention of the committee? I am looking for a detailed response to Professor Lowe's opinion. It might not be fair to ask you to consider it now, but in due course can we have your response to the Lowe opinion in point form?

Mr Brazil—Yes, I am quite happy to do that.

CHAIR—Members of the committee would appreciate that. I do not want to give you homework to do, but it would assist the committee if we could have a response to the Lowe opinion at some point.

Mr Brazil—I am quite happy to undertake that.

CHAIR—I would appreciate that very much.

Mr Brazil—I have mentioned the work I am doing in the Gulf of Thailand and other work I have done. That has involved a lot of work in terms of looking at islands and all that sort of thing. Believe me, we have some magnificent arguments of that kind in the Gulf of Thailand. I add that those negotiations between Cambodia and Thailand began in 1995. We are only beginning to make real progress now, so—

CHAIR—I get your point.

Mr Brazil—that is taking a long while. There is one aspect of it that you might begin to think about, and that is the construction of the lateral line that the Lowe opinion pushes in the eastern area. Go to this map and look to the legend for 'Lowe Opinion (half effect)'. That is the line on the eastern side there.

CHAIR—That is the red line.

Mr Brazil—It is a line, two dots, and then another line, two dots.

CHAIR—It is a long line, three dots, isn't it?

Mr Brazil—Yes. I must go back to the man who did this and ask why he put three dots there. When you look at the line, he has actually only got two dots there.

CHAIR—I think we can follow, though.

Mr Brazil—I will speak to him. In the terms I am talking about, about drawing lines, we have been in the Gulf of Thailand and we have some interesting situations there. We have done a lot of this, but we are puzzled by how they have used only two points to justify that enormously long line. The two points they have used as the base for that line are: a point on the small Indonesian island of Leti; and a point on the small East Timor island of Jaco. Jaco is shown, in effect, as an island there. They are both very small features, yet they are used to dictate that line going that whole distance.

In relation to this, I have asked my man to do a median/equidistance line around East Timor that takes account of all relevant features. I move again to the legend. It is the first item in the middle group:

East Timor Median Line (all features equal weight)

The line goes right through the middle between Jaco and Leti and starts running south and then it jinks a little and goes down in the direction of Sunrise and cuts into the side of Sunrise—

CHAIR—Between A16 and A15.

Mr Brazil—Yes. Then it finishes up on that blue dotted line. In terms of a first exercise of drawing a line taking account and giving full weight to all relevant features, that is the line you arrive at. There is a stark contrast between that line and the half effect line that Lowe has given there.

The other interesting thing about that line—and I will not say any more about this but I will look at it again when I give you my piece of paper on the Lowe advice—is that no-one who is at UNCLOS, as I was in the early stages, would forget that Indonesia has a strong archipelagic claim. That means that they draw a line connecting all their islands. Once again, I take you to the legend here. It is in the first group, and it is the first one: 'Indonesian Archipelagic Baselines'. You can see how they have drawn all those islands.

CHAIR—That is the plain black lines?

Mr Brazil—Yes. What is at the heart of the Indonesian archipelagic claim is that you join all those lines and that is to be regarded as being as good as a continental landmass. I would be interested in knowing what the Indonesian expert response would be to the idea that suddenly an island of theirs be given only half effect and half effect in a way that takes the Indonesian claim right across and directly south of significant Indonesian territory. It would be interesting to know.

The question was properly raised a little while ago about discussions with Indonesia and whether East Timor has discussed this with Indonesia. Maybe they have. From the point of view of what would seem to be in Indonesia's interest, that half effect line does seem to raise a very interesting question. I will provide you with something in a couple of weeks time. Would that be time enough?

CHAIR—Yes, that would be fine; Mr Brazil; I really appreciate that. There are obviously a number of contentious aspects to the Lowe opinion, including whether or not East Timor will accept the accuracy of A16 and A17 and the like. It would not be fair to go through it line by line with you today. But if you were able to provide us with a response to the Lowe opinion, it would give us an opportunity to evaluate what is being said here, coolly and rationally, rather than in the middle of a public hearing.

Mr Brazil—I am happy to deal with that.

CHAIR—Are there any other questions for Mr Brazil before we close?

Senator TCHEN—Mr Brazil, referring to the Lowe opinion, half effects, three-quarter effects and such things, is that his terminology or your terminology?

Mr Brazil—It is the terminology that is used in international maritime boundary discussions. An example is two countries opposite each other, where one of the two countries has a little island very close to the mainland coastline of the other island. One of the things you would ask in such a situation would be: 'Does that island really have a continental shelf or should it be given a continental shelf or will we give it a reduced effect?' There are ways of doing that. One way is to do what was done in the English Channel in relation to the Channel Islands of England, which are very close to France: they limited their seabed to the 12-mile territorial sea.

Another way of taking into account that sort of situation in order to produce an equitable result is to give an island a half effect or a three-quarter effect. That jargon comes from attempts to provide an equitable outcome—not in the sense of a free-for-all mushy feeling of doing the right thing but in the sense of making the best effort, nevertheless, to come to an agreement that is equitable. That is where that comes from.

Senator TCHEN—Whether an island is to take a half effect or a three-quarter effect or whatever is by agreement of the parties?

Mr Brazil—It is by agreement of the parties. A second way, if they are in a situation where they can go to the international court, is by a ruling of the international court. A third way is by arbitration, where they set up an independent arbitration body to look at that. I was at a mining and petroleum law conference in Brisbane last week, and the Lowe opinion came up there. Reference was made to giving it only half effect or possibly one-third effect and all that sort of thing. The speaker, to my mind, presented the situation very badly. He said, 'It is a small island. Therefore, you can give it a reduced effect.'

CHAIR—Isn't that what Lowe is suggesting?

Mr Brazil—That is what he is saying, but this speaker was saying, 'That is the general rule.' It is not the general rule. You have to look at each case. That was what was wrong with what he was saying. He seemed to be assuming that it was just automatic—it is a small island and, therefore, you give it a small effect. I do not want to re-open the subject, but here we are in a very special situation. We are not dealing with a small isolated island; we are dealing with a part of the great archipelagic claim of Indonesia.

CHAIR—You are saying that it has to be looked at in that context?

Mr Brazil—Yes, it has to be looked at in that context. Now it is for the Indonesians if they want to say that they do not mind East Timor, having aligned the sweeps right across their southern seafront. They can do that; but I wonder.

CHAIR—Mr Brazil, thank you for appearing before the committee this morning and for providing your expert advice. We thank you, in anticipation, for your response to the Lowe opinion. We will appreciate receiving that in due course. Should we get desperate for it, we will give you a call and ask for it, but a couple of weeks would be fine.

Resolved (on motion by **Mr Hunt**, seconded by **Senator Kirk**):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 11.18 a.m.