IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OCEANIC EXPLORATION COMPANY and PETROTIMOR COMPANHIA DE PETROLEOS, S.A.R.L.,	
Plaintiffs,	
v.	**Case No. 1:04-cv-00332-EGS**
CONOCOPHILLIPS, INC., *et al.,*	
Defendants.	

CONOCOPHILLIPS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CERTIFICATION OF INTERLOCUTORY APPEAL

Martin D. Beirne (D.D.C. Bar # TX0025)
Jeffrey T. Nobles (D.D.C. Bar # TX0039)
W. Bruce Stanfill (D.D.C. Bar # TX0026)
David A. Pluchinsky (D.D.C. Bar # TX0027)
BEIRNE, MAYNARD & PARSONS, LLP
1300 Post Oak Blvd., 25th Floor
Houston, TX 77056
(713) 623-0887
(713) 960-1527 (facsimile)

Thomas D. Yannucci, P.C. (D.C. Bar # 358989)
Michael D. Jones (D.C. Bar # 417681)
Christopher Landau (D.C. Bar # 425319)
Brant W. Bishop (D.C. Bar # 459255)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
(202) 879-5200 (facsimile)

Russell D. Howell (*Of Counsel*)
CONOCOPHILLIPS COMPANY
McLean Building
600 North Dairy Ashford Road
P.O. Box 4783
Houston, TX 77210

Counsel for Defendants ConocoPhillips; ConocoPhillips Company; Tokyo Timor Sea Resources Inc.; Phillips Petroleum Company ZOC; Phillips Petroleum Company Indonesia; Phillips Petroleum (96-20), Inc.; Phillips Petroleum Production Indonesia, Inc.; Phillips Indonesia, Inc.; Phillips International Investment, Inc.; ConocoPhillips (03-21) Pty Ltd; ConocoPhillips (03-12) Pty Ltd; ConocoPhillips (03-13) Pty Ltd; ConocoPhillips (03-19) Pty Ltd; ConocoPhillips (03-16) Pty Ltd; ConocoPhillips (03-20) Pty Ltd; ConocoPhillips Australia Pty Ltd; ConocoPhillips Australia Gas Holdings Pty Ltd; ConocoPhillips JPDA Pty Ltd (f/k/a and also sued as Phillips Petroleum Company ZOC Pty Ltd); ConocoPhillips Pipeline Australia Pty Ltd; ConocoPhillips STL Pty Ltd; ConocoPhillips WA-248 Pty Ltd; Darwin LNG Pty Ltd; and Tokyo Timor Sea Resources Pty Ltd

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Pursuant to Fed. R. Civ. P. 59(e), the ConocoPhillips defendants (collectively ConocoPhillips) respectfully request this Court to reconsider its order of September 21, 2006, denying ConocoPhillips' motion to dismiss. In the alternative, pursuant to 28 U.S.C. § 1292(b), ConocoPhillips respectfully requests this Court to certify the order for immediate interlocutory appeal.

LEGAL STANDARDS

As this Court has explained, reconsideration is warranted (among other things) "to correct clear error or prevent manifest injustice." *Lance v. United Mine Workers of Am. 1974 Pension Trust*, 400 F. Supp. 2d 29, 31 (D.D.C. 2005). A district court has "considerable discretion" in this regard. *Id.*; *see also MacIntosh v. Building Owners & Managers Ass'n Int'l*, 355 F. Supp. 2d 223, 230 (D.D.C. 2005) (Sullivan, J.) (granting motion for reconsideration); *Tripp v. United States*, 257 F. Supp. 2d 37, 44 (D.D.C. 2003) (Sullivan, J.) (same).

The legal standard governing certification for interlocutory appeal is set forth in the statute itself: such certification is appropriate "[w]hen a district judge … [is] of the opinion [1] that [its] order involves a controlling question of law as to which there is substantial ground for difference of opinion and [2] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Again, "[w]hether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court." *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003) (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995)).

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS ORDER DENYING CONOCOPHILLIPS' MOTION TO DISMISS.

This is an unusual motion for reconsideration, because the Court *accepted* the central premise of ConocoPhillips' motion to dismiss, but then applied that premise only to ConocoPhillips' co-defendant, the TSDA. All of plaintiffs' claims against both the TSDA and ConocoPhillips, as this Court recognized, seek "to recover damages for the loss of opportunity to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia" in the period after East Timor gained independence in 2002. Order 2; *see also* Sec. Am. Compl. ¶ 1. And the key problem with those claims, as this Court again recognized, is that (unlike the claims in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990)) they necessarily challenge the validity of foreign acts of state:

> In order for the Court to recognize that plaintiffs had a "right to compete or bid" in the post-independence period of East Timor, the Court must find the official acts of the TSDA in awarding contracts to those companies that had won concession rights back in 1991 as invalid, which in turn, means finding Annex F, which authorized such renewals, as invalid.

Order 18. That central insight disposes of all of plaintiffs' claims not only against the TSDA but also against ConocoPhillips. Because a court cannot recognize the underlying rights asserted by plaintiffs without calling into question the validity of foreign acts of state, the identity of the defendant against whom plaintiffs assert those rights is immaterial. In short, this Court applied the proper analysis to plaintiffs' claims against the TSDA, and this motion simply asks the Court to carry forward its own logic to plaintiffs' claims against ConocoPhillips. In particular, as described below, the Court's central insight that plaintiffs' claims necessarily challenge foreign acts of state requires dismissal of those claims on both standing and act of state grounds.

A. Standing

The threshold question presented here is whether plaintiffs even have standing to bring their claims. As noted above, all those claims seek "to recover damages for the loss of opportunity to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia" in the period after East Timor gained independence in 2002. Order 2; *see also* Sec. Am. Compl. ¶ 1. It necessarily follows, as this Court recognized, that "[i]n order for plaintiffs to get the relief they seek, they must first have a legally cognizable right to 'compete or bid for rights' in the areas about which they are complaining." Order 14 (quoting Sec. Am. Compl. ¶ 1). If there is no such "right" in the first place, then plaintiffs cannot have suffered a legally cognizable injury through the alleged deprivation or impairment of any such right.

The basic problem for plaintiffs, as this Court again recognized, is that neither "plaintiffs nor any one else had a right to 'compete or bid for rights' in the Timor Gap" in the period after East Timor gained independence in 2002. Order 15 (quoting Sec. Am. Compl. ¶ 1). That is because "Annex F of the Timor Sea Treaty entered into by East Timor and Australia" specifically ratified the existing concessions that had been jointly awarded by Australia and Indonesia in 1991. Order 14-15; *see also id.* at 15 (noting that Annex F "is an official act of both East Timor and Australia," and "[t]hrough Annex F, East Timor and Australia made a sovereign decision to confirm, rather than disavow, the concessions that were awarded through the competitive bidding process in 1991"). In other words, the underlying right that plaintiffs are allegedly seeking to vindicate here does not exist as a matter of law:

> By signing and ratifying this bilateral international treaty, East Timor and Australia confirmed their joint decision to allow companies, who had made substantial investments since 1991 in the Timor Gap, to continue exploring and developing the oil and natural gas reserves. In 2002, when the Treaty came into

> effect, no provisions were made for bidding or further opportunities to compete for concession rights in the Timor Gap.

Id. Needless to say, plaintiffs cannot claim to have been injured by the alleged deprivation of a non-existent right.

The most that plaintiffs can say is that they *wish* that East Timor and Australia had decided to disavow the existing concessions and establish a new bidding process after East Timor gained independence in 2002. As the D.C. Circuit has explained, however, disappointed wishes are insufficient to confer standing. *See, e.g., Free Air Corp. v. FCC*, 130 F.3d 447, 449 (D.C. Cir. 1997) ("[W]ould-be … applicant" lacks standing to complain "that the Commission's grant of a license [to another party] deprives it of the opportunity that would arise if the license were to go ungranted and a new contest open to all comers were someday to be announced"); *Energy Transp. Group, Inc. v. Maritime Admin.*, 956 F.2d 1206, 1212 (D.C. Cir. 1992) (plaintiff lacks "disappointed bidder" standing to challenge government agency's failure to establish a bidding process unless "the law required [the agency] to initiate" such a process).

Indeed, plaintiffs' disappointment with the sovereign decision not to disavow the 1991 concessions is not unique to them; rather, it is a disappointment shared by every other company on the planet that might have wished to compete or bid for a concession in 2002. But that does not give every other company on the planet standing to challenge that sovereign decision in the absence of a legally cognizable right to the disavowal and reallocation of the 1991 concessions. The fact that plaintiffs "alleged that, unlike other would-be competitors with ConocoPhillips for this opportunity, [they have] explored, mapped, and invested considerable resources in preparing to develop the very oil and gas reserves at issue" is immaterial. Pls.' Opp. to ConocoPhillips Mot. to Dismiss Sec. Am. Compl. 7; *see also id.* at 12 ("Oceanic has pled specific facts that clearly distinguish it from any other would-be developer of these resources—namely, its

investment of considerable time and resources in discovering, mapping, and proposing to develop the very same reserves."). It is axiomatic that a litigant cannot manufacture standing by voluntarily expending its own resources. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 228 (2003); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006); *Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989). Whether or not plaintiffs invested time and money in this project has no bearing whatsoever on whether they have a legally cognizable interest at stake here. Indeed, plaintiffs cannot and do not allege that they made any such investments in justifiable reliance on anything done by ConocoPhillips; rather, plaintiffs made any such investments in their capacity as putative holders of the alleged Portuguese colonial concession. But plaintiffs cannot "bootstrap" their non-justiciable claim to ownership of the Portuguese colonial concession into standing to pursue an alleged competitive injury arising out of a non-existent competition in 2002. *See* 2/8/05 Tr. 14 (plaintiffs' counsel) ("The [Portuguese colonial concession] distinguishes Oceanic and Petrotimor from any other company who might show up and say I would like to get some oil out of the East Timor Sea."); *id.* at 28 ("[T]he rights that were given to us by Portugal years ago give us standing."); 2/9/05 Order 1-2 ("[T]he Court will view with great suspicion any claims emanating from Portugal's colonial concession.").

Nor can plaintiffs manufacture standing by simply alleging that ConocoPhillips "use[d] its influence in 2002 to convince the new East Timorese government to maintain the results of the tainted 1991 bidding process." Order 27. If, as this Court recognized, neither "plaintiffs nor any one else had a right to 'compete or bid for rights' in the Timor Gap" after East Timor gained independence in 2002, *id.* at 15 (quoting Sec. Am. Compl. ¶ 1), as a result of the sovereign

decisions of East Timor and Australia, then any challenge to the absence of any such right is necessarily a challenge to those sovereign decisions. In essence, plaintiffs are claiming that East Timor made a sovereign decision for an improper reason. But given that the decision not to disavow the 1991 concessions was a sovereign decision (as this Court recognized), the Court cannot second-guess the *reasons* for that decision. As the Court explained: "this Court cannot logically separate East Timor's motivation to award contracts to those companies that had won concession rights back in 1991 from the validity of its sovereign conduct to draft and approve Annex F of the Timor Sea Treaty which authorized renewals." Order 23. Because this Court must accept the validity of the sovereign decision, plaintiffs cannot seek damages from ConocoPhillips for allegedly procuring that decision by improper means.[1]

In rejecting ConocoPhillips' standing argument, this Court did not focus on this point. Rather, this Court stated that "[a]ccording to ConocoPhillips, *since plaintiffs did not bid for a concession when a competitive bidding occurred in 1991*, they cannot claim that they have been injured by 'the loss of the opportunity … to compete or bid' for the right to explore for oil and gas in the Timor Sea in 2002." Order 26 (emphasis added). But plaintiffs are not claiming that they were injured by their failure to obtain a concession in 1991. (They presumably know that any such claim would be time-barred, because they can hardly argue that ConocoPhillips' alleged wrongdoing made it futile for them to participate in the 1991 bidding process while claiming that they lacked the legal or factual tools at that time to bring a claim against ConocoPhillips.) Thus, plaintiffs expressly limited their claims to the deprivation of an

[1] It is worth noting (and this Court indeed noted in its order) that "plaintiffs have not raised any allegations that Australian officials have been bribed." Order 19 n.18. That point alone is dispositive here, because plaintiffs' claims are barred by the separate and independent sovereign decisions of *both* East Timor and Australia. Australia's unchallenged sovereign decision provides an independent basis for defeating plaintiffs' claims wholly apart from East Timor's challenged sovereign decision.

opportunity to compete or bid "in the post-independence period for East Timor" in 2002. Sec. Am. Compl. ¶ 1. Because plaintiffs could not and did not sue based upon their failure to obtain a concession in 1991, they cannot have standing here based on events that happened in 1991.

Accordingly, ConocoPhillips did not base its standing argument on plaintiffs' failure to bid in *1991*, but instead on the absence of any legally cognizable right for plaintiffs (or anyone else) to compete or bid for a concession in *2002*. *See* Mem. in Support of Mot. to Dismiss 11 ("The basic problem for Petrotimor is that it cannot … identify any *legally cognizable interest* in the establishment of a competitive bidding process to reallocate the rights to develop East Timor's natural resources upon that country's independence in 2002.") (emphasis in original); *see also id.* at 14 ("Petrotimor has not identified any right to a bidding process at all, much less to any particular kind of bidding process, upon East Timor's independence in 2002."); Reply Br. in Support of Mot. to Dismiss 5 ("Once again, the core problem for Petrotimor is that it had no legally cognizable underlying right to any sort of competitive process from East Timor and Australia in 2002. It cannot create something out of nothing."); *id.* at 6 ("[I]n the absence of the deprivation of a legally cognizable interest, a 'disappointed bidder' cannot sue.").

Plaintiffs had no such right in 2002 *regardless* of whether they bid in 1991. ConocoPhillips simply noted that plaintiffs had not even bid in 1991 to refute any suggestion that they had standing as "disappointed bidders"—here, there was no bidding process in 2002 (and no right to such a process), and plaintiffs did not even bid when there was such a process. As ConocoPhillips explained, all the "disappointed bidder" cases cited by plaintiffs "have involved legally cognizable interests created by domestic United States procurement statutes and/or regulations." Mem. in Support of Mot. to Dismiss 13. A party simply cannot claim to be a

"disappointed bidder" in the absence of any legally cognizable right to bid. *See, e.g., Free Air*, 130 F.3d at 449; *Energy Transp. Group*, 956 F.2d at 1212.

Accordingly, the standing issue here cannot be resolved by the proposition that "bidding is not a prerequisite to injury when bidding was impossible or futile." Order 26 (citing *Astech-Marmon, Inc. v. Lenoci*, 349 F. Supp. 2d 265, 167 (D. Conn. 2004)). Regardless of whether it would or would not have been futile for plaintiffs to bid in 1991 (and even regardless of whether they *had* bid in 1991), the fact remains that they had no legally cognizable right to bid upon East Timor's independence in 2002:

> Petrotimor … sets up, and knocks down, a straw man by arguing that ConocoPhillips contends that Petrotimor's "choice not to bid in 1991 is somehow disqualifying." Opp. 8. ConocoPhillips contends nothing of the sort. Rather, Petrotimor's failure to bid in 1991 is relevant because it shows that Petrotimor's argument fails on its own terms. Petrotimor argues that it was entitled to "an opportunity to compete" for the disputed concessions. Opp. 1. But the relevant sovereigns did not establish "an opportunity to compete" in 2002 precisely because such an opportunity had already been established in 1991, and the sovereigns did not want to overturn the results of the 1991 bidding and the subsequent decade of investment and progress. That is why Petrotimor is forced to assert the non-existent status of "continuous disappointed bidder," 2/8/05 Tr. 22 (Petrotimor's counsel), as if a bid remained open forever in legal limbo. That position has no basis in principle or precedent.

Reply Br. in Support of Mot to Dismiss 6-7. Indeed, as defendants emphasized in this regard:

> [T]he Second Amended Complaint is not about the competitive process in 1991 (which Petrotimor cannot challenge now because any such challenge would be manifestly untimely), but about the *absence* of a competitive process in 2002. Petrotimor cannot, and does not, claim "futility" with respect to bidding in 2002: a party obviously cannot claim that it was "futile" to participate in a bidding process that did not exist.

Id. at 7 n.3 (emphasis in original).

Because plaintiffs here assert standing to challenge the failure of East Timor and Australia to disavow the 1991 concessions in 2002, not the failure of Indonesia and Australia to award plaintiffs a concession in 1991, the Supreme Court's decision in *W.S. Kirkpatrick* is

readily distinguishable. That case was brought by a disappointed bidder who actually *had* participated in a bidding process, and alleged that the winning bidder had procured a particular contract by bribery. *See* 493 U.S. at 401-02. There was thus no question regarding the plaintiff's standing in that case: disappointed bidders unquestionably have standing to sue. *See, e.g., Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993). Here, in contrast, there was no bidding process at all in 2002, because both East Timor and Australia made sovereign decisions to reaffirm the concessions awarded in 1991. In the absence of a right to such a process (which plaintiffs have never identified), plaintiffs cannot claim to have suffered any legally cognizable injury, and hence lack standing. *See, e.g., Free Air,* 130 F.3d at 449; *Energy Transp. Group,* 956 F.2d at 1212.

B. Act of State Doctrine

Even assuming plaintiffs had standing, their claims fail under the act of state doctrine. As this Court explained, that doctrine "'precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.'" Order 13 (quoting *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964)); *see also W.S. Kirkpatrick,* 493 U.S. at 409 ("[T]he acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid," and must be given legal effect in American courts).

Again, this Court correctly applied the act of state doctrine in the section of its order dismissing plaintiffs' claims against the TSDA. As this Court explained, the basic problem for plaintiffs is that their claims necessarily challenge the independent and sovereign decisions by East Timor and Australia in 2002 not to disavow the concessions awarded in 1991 and reopen those concessions for competitive bidding:

> In order for the Court to recognize that plaintiffs had a "right to compete or bid" in the post-independence period of East Timor, the Court must find the official acts of the TSDA in awarding contracts to those companies that had won

> concession rights back in 1991 as invalid, which in turn, means finding Annex F, which authorized such renewals, as invalid.

Order 18; *see also id.* at 19 ("[T]he Court is barred by the act of state doctrine to pass judgment on the official sovereign acts of Australia and East Timor that resulted in the drafting, signing and ratification [of] the Timor Sea Treaty, including Annex F."); *id.* at 20 ("This Court is precluded from instructing the governments of both East Timor and Australia that they should disrupt a decade of economic investment and development in their own valuable natural resources, and instead afford companies, like plaintiffs Oceanic, an opportunity to compete or bid for concession rights."); *id.* at 25 ("Plaintiffs[']chief complaint revolves around East Timor's and the TSDA's decision regarding with whom they will partner to exploit … natural resources. East Timor's decision, embodied in the Timor Sea Treaty, was an act of state."); *id.* ("[T]he Court is foreclosed from questioning the validity of East Timor's decision to sign and ratify the Timor Sea Treaty, including Annex F, and to confirm, as opposed to disavow, the production sharing contracts that were awarded back in 1991.").

For just these reasons, this Court correctly dismissed plaintiffs' claims against the TSDA under the act of state doctrine. In so doing, the Court distinguished *W.S. Kirkpatrick* on three separate and independent grounds. *See* Order 16-20 & n.18. Only the first of those three grounds—that "*W.S. Kirkpatrick* involved a private lawsuit between two competing bidders," Order 16-17—does not apply equally to ConocoPhillips.

At core, as the Court explained, "this case is distinguishable from *W.S. Kirkpatrick* [because] this case *does* turn on the validity of an official act." *Id.* at 18 (emphasis added); *id.* ("Unlike the plaintiff in *W.S. Kirkpatrick*, the plaintiffs in this case *are* asking this Court to invalidate the official act of two foreign sovereigns.") (emphasis added). Here, as noted above, plaintiffs' claims necessarily challenge the sovereign and independent decisions of Australia and

East Timor in 2002 not to disavow the concessions awarded in 1991. Those sovereign decisions, as this Court recognized in the section of its decision dismissing the claims against the TSDA, are entirely different from the decision to award a particular construction contract at issue in *W.S. Kirkpatrick*. *See id.* at 19 n.18 ("[T]he Timor Sea Treaty, including Annex F, was ratified by two legislatures, whereas the procurement contract in *W.S. Kirkpatrick* did not require such actions."); *see also id.* ("It is one thing to question the motives of an official in approving a contract, and quite another to question the motives of an entire foreign legislature in ratifying a treaty.").

This reasoning, ConocoPhillips respectfully submits, applies with just as much force to plaintiffs' claims against ConocoPhillips as to plaintiffs' claims against the TSDA. Indeed, they are the *very same claims*: plaintiffs make the *same* allegations, and seek the *same* relief, against both defendants. The act of state doctrine is by no means limited to claims against foreign sovereigns or their agencies. To the contrary, the doctrine prevents American courts from inquiring into the validity of foreign acts of state *regardless* of the identity of the parties in the case. *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("In the act of state context, even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory."). Indeed, several of the classic Supreme Court cases in which the doctrine was first established involved disputes between private parties. *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309-10 (1918); *see also Society of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-03 (D.C. Cir. 2006) (applying act of state doctrine to disputes between private parties); *Glen v.*

Club Mediteranee, S.A., 450 F.3d 1251, 1253-57 (11th Cir. 2006) (same). What matters, in other words, is not the identity of the parties, but the nature of the underlying acts being challenged. Because (as this Court recognized) plaintiffs' claims necessarily challenge the validity of the sovereign acts of East Timor and Australia, plaintiffs cannot pursue those claims against either the TSDA or ConocoPhillips.

Nor does it matter, as this Court again recognized, what *relief* is requested. As the Court explained:

> [P]laintiffs allege that they are not asking the Court to declare Annex F to be invalid because they are not seeking declaratory or injunctive relief, but rather monetary damages. *The nature of the relief sought does not determine whether an act of state is implicated or not.* Regardless of the type of relief sought, plaintiffs are asking this Court to deem invalid an act of two foreign sovereigns taken within their own respective jurisdictions.

Order 19 (emphasis added). There is thus no basis for distinguishing ConocoPhillips from the TSDA based on the relief sought against either defendant; indeed, plaintiffs seek the *same* relief (money damages) from both defendants. *See* Sec. Am. Compl. 58-59. The key point here, as this Court recognized, is that the act of state doctrine precludes a finding of liability in the first instance, because the Court must accept as valid the sovereign decisions by East Timor and Australia not to disavow the concessions awarded in 1991. That is precisely why courts (including the D.C. Circuit as recently as August 2006) routinely apply the act of state doctrine to dispose of lawsuits between private parties seeking money damages. *See, e.g.*, *Society of Lloyd's*, 457 F.3d at 102-03; *Glen*, 450 F.3d at 1253-57. The issue is not whether the Court must "undo" any foreign sovereign decisions; rather, the point is that the Court must respect the validity of the foreign sovereign decisions not to disavow the concessions awarded in 1991 and thereby not to give *anyone* a right to compete or bid for oil and gas concessions upon East Timor's independence in 2002.

This Court, however, concluded that "ConocoPhillips cannot invoke the act of state defense as a bar to plaintiffs' claims." Order 37. That is so, the Court stated, because "*W.S. Kirkpatrick* … is the controlling case here," and "[t]he facts of *W.S. Kirkpatrick* could not be more similar to plaintiffs' cause of action against defendants ConocoPhillips in this case." *Id.* at 37-38. But, as noted above, this Court distinguished the claims here from the claims in *W.S. Kirkpatrick* on two separate and independent grounds wholly unrelated to the defendants' identity: (1) the claims here *do* necessarily challenge the sovereign acts of two nations (East Timor and Australia) in the Timor Sea Treaty, *id.* at 18-19, and (2) the claims here involve the allocation of rights to exploit natural resources, *see id.* at 19-20 (citing *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002)).

With all respect, the Court's reasoning in refusing to apply the act of state doctrine to plaintiffs' claims against ConocoPhillips cannot be squared with the Court's reasoning in applying the doctrine to plaintiffs' claims against the TSDA. With respect to the claims against ConocoPhillips, the Court stated:

> None of the claims or defenses asserted by either the plaintiffs or ConocoPhillips require[s] this Court to determine that ConocoPhillips' production sharing contracts with the TSDA is ineffective.

Order 38. With respect to the claims against the TSDA, in contrast, the Court stated:

> In order for the Court to recognize that plaintiffs had a "right to compete or bid" in the post-independence period of East Timor, the Court must find the official acts of the TSDA in awarding contracts to those companies that had won concession rights back in 1991 as invalid, which in turn, means finding Annex F, which authorized such renewals, as invalid.

Id. at 18. Both of those statements cannot be right. Either plaintiffs' claims necessarily challenge the validity of the sovereign acts of Australia and East Timor, or they do not. To say that "the focus lies in ConocoPhillips' unlawful conduct and how that conduct resulted in harm to the plaintiffs," *id.* at 38, misses the point, because ConocoPhillips' alleged wrongdoing cannot

have resulted in any harm to the plaintiffs absent the sovereign decisions by East Timor and Australia not to disavow the concessions awarded in 1991, which the Court must accept as valid. Indeed, with the TSDA out of the case, it is difficult to see how litigation against ConocoPhillips alone can even proceed; after all, as a practical matter such litigation would necessarily impair and prejudice the TSDA's interests in its Timor Gap contracts and undermine its ability to govern the extraction, sale, and marketing of oil and gas from the Timor Gap. *See* Fed. R. Civ. P. 19. ConocoPhillips respectfully submits that the Court got it right with respect to the claims against the TSDA, and should simply have applied the same reasoning to dismiss the claims against ConocoPhillips under the act of state doctrine.

II. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY FOR INTERLOCUTORY APPEAL ITS ORDER DENYING CONOCOPHILLIPS' MOTION TO DISMISS.

In the alternative, ConocoPhillips respectfully requests this Court to certify for interlocutory appeal its order denying ConocoPhillips' motion to dismiss. *See* 28 U.S.C. § 1292(b). The key points here are that, even if this Court on reconsideration were to conclude that a dispositive distinction between the TSDA and ConocoPhillips is warranted, such a distinction involves "controlling question[s] of law" as to which there is (at the very least) "substantial ground for difference of opinion," and an interlocutory appeal would "materially advance the ultimate termination of the litigation." *Id.* These points are addressed in turn below.

A. Controlling Questions of Law On Which There Is Substantial Ground For Difference Of Opinion

As a threshold matter, there can be no dispute that the standing and act of state issues raised in this motion involve "controlling question[s] of law." 28 U.S.C. § 1292(b). If ConocoPhillips prevails on either of those grounds, this entire lawsuit is *over*. This is not a situation, in other words, where this lawsuit would continue regardless of the outcome of an

interlocutory appeal: at issue here are threshold questions about whether plaintiffs are entitled to pursue this lawsuit at all. It goes without saying that "controlling questions of law include issues that would terminate an action if the district court's order were reversed," *APCC Servs.*, 297 F. Supp. 2d at 96: that is what it means for an issue to be "controlling" in the first place. For this reason, it is not uncommon for courts to certify orders denying motions to dismiss for lack of standing, or under the act of state doctrine. *See, e.g.*, *Arnold v. Martin*, 449 F.3d 1338, 1340-41 (11th Cir. 2006) (*per curiam*) (standing); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 883 (9th Cir. 2005) (*en banc*) (standing); *Morris v. Hoffa*, 361 F.3d 177, 180 (3d Cir. 2004) (standing); *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1270 (D.C. Cir. 1994) (standing); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 530 n.1 (5th Cir. 1992) (act of state doctrine); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 301 (3d Cir. 1982) (act of state doctrine); *cf. Credit Suisse v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346-48 (9th Cir. 1997) (granting mandamus and reversing an order refusing to dismiss an action under the act of state doctrine).

Moreover, ConocoPhillips respectfully submits that there is, at the very least, "substantial ground for difference of opinion" on both the standing and act of state issues. Although there is obviously no precedent on the specific legal question whether plaintiffs in this particular case have standing, there is precedent (as noted above) on the legal question whether plaintiffs have standing to challenge a decision not to establish a bidding process in the absence of a legally cognizable right to such a process. *See, e.g.*, *Free Air*, 130 F.3d at 449; *Energy Transp. Group*, 956 F.2d at 1212. Similarly, to the extent that the Court holds that the act of state doctrine does not apply to lawsuits seeking damages from a private party, its decision conflicts with numerous other decisions, including the D.C. Circuit's decision in *World Wide Minerals*, 296 F.3d at 1165,

and the Fifth Circuit's decision in *Callejo*, 764 F.2d at 1113. ConocoPhillips recognizes that the Court may not agree with its position on the merits of these points, but they unquestionably present cutting-edge legal issues on which, at the very least, substantial ground exists for difference of opinion.

B. Materially Advance The Ultimate Termination Of The Litigation

Finally, ConocoPhillips respectfully submits that there can be no serious dispute that immediate appellate resolution of the legal issues set forth in this motion would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As noted above, if the Court of Appeals were to agree with ConocoPhillips that plaintiffs here lack standing and/or that their claims are barred by the act of state doctrine, then the upshot is that this litigation is *over*. It is hard to imagine a more compelling example of "materially advanc[ing] the termination of the litigation." *Id.* Allowing an interlocutory appeal here would not further the policy of avoiding piecemeal appeals, because there would be *no* subsequent appeal if ConocoPhillips were to prevail. Indeed, because the court's order dismissed plaintiffs' claims against the TSDA (which plaintiffs could always appeal at the conclusion of all proceedings), an interlocutory appeal now would bring needed clarity to this case even if plaintiffs were to prevail.

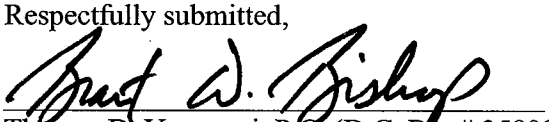
The value of an immediate interlocutory appeal is especially compelling in light of the extraordinary allegations in this case. Plaintiffs are alleging wrongdoing stretching back over a generation and spanning the globe. It is hard to overestimate the complexity and expense that further proceedings in this litigation, including discovery, will entail. In addition, these issues implicate sensitive diplomatic matters, given that plaintiffs' claims rest on allegations of bribery of foreign government officials. This Court should not put itself in the position of expending its scarce judicial resources, and the putting the parties to enormous burden and expense, if this

lawsuit may not belong in court in the first place. If ever an interlocutory order satisfied the criteria for certification, it is this one.

CONCLUSION

For the foregoing reasons, this Court should reconsider its order refusing to dismiss claims against ConocoPhillips. In the alternative, this Court should certify that order for immediate interlocutory appeal.

Respectfully submitted,



Martin D. Beirne (D.D.C. Bar # TX0025)
Jeffrey T. Nobles (D.D.C. Bar # TX0039)
W. Bruce Stanfill (D.D.C. Bar # TX0026)
David A. Pluchinsky (D.D.C. Bar # TX0025)
BEIRNE, MAYNARD & PARSONS, LLP
1300 Post Oak Blvd., 25th Floor
Houston, TX 77056
(713) 623-0887
(713) 960-1527 (facsimile)

Thomas D. Yannucci, P.C. (D.C. Bar # 358989)
Michael D. Jones (D.C. Bar # 417681)
Christopher Landau (D.C. Bar # 425319)
Brant W. Bishop (D.C. Bar # 459255)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
(202) 879-5200 (facsimile)

Russell D. Howell (*Of Counsel*)
CONOCOPHILLIPS COMPANY
McLean Building
600 North Dairy Ashford Road
P.O. Box 4783
Houston, TX 77210

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Counsel for Defendants ConocoPhillips; ConocoPhillips Company; Tokyo Timor Sea Resources Inc.; Phillips Petroleum Company ZOC; Phillips Petroleum Company Indonesia; Phillips Petroleum (96-20), Inc.; Phillips Petroleum Production Indonesia, Inc.; Phillips Indonesia, Inc.; Phillips International Investment, Inc.; ConocoPhillips (03-21) Pty. Ltd.; ConocoPhillips (03-12) Pty. Ltd.; ConocoPhillips (03-13) Pty. Ltd.; ConocoPhillips (03-19) Pty. Ltd.; ConocoPhillips (03-16) Pty. Ltd.; ConocoPhillips (03-20) Pty. Ltd.; ConocoPhillips Australia Pty. Ltd.; ConocoPhillips Australia Gas Holdings Pty. Ltd.; ConocoPhillips JPDA Pty. Ltd. (f/k/a and also sued as Phillips Petroleum Company ZOC Pty. Ltd.); ConocoPhillips Pipeline Australia Pty. Ltd.; ConocoPhillips STL Pty. Ltd.; ConocoPhillips WA-248 Pty. Ltd.; Darwin LNG Pty. Ltd.; and Tokyo Timor Sea Resources Pty. Ltd.