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Audience publique

tenue le jeudi 9 février 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire relative au Timor oriental

(Portugal c. Australie)

COMPTE RENDU

YEAR 1995

Public sitting

held on Thursday 9 February 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning East Timor

(Portugal v. Australia)

VERBATIM RECORD

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
M. Oda
Sir Robert Jennings
MM. Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin, juges

Sir Ninian Stephen
M. Skubiszewski, juges *ad hoc*

M. Valencia-Ospina, Greffier

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Sir Robert Jennings
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
	Judges *ad hoc*	Sir Ninian Stephen
		Skubiszewski
	Registrar	Valencia-Ospina

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M. Miguel Galvão Teles, avocat au barreau du Portugal,

comme coagents, conseils et avocats;

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Mme Luisa Duarte, assistante à la faculté de droit de l'Université de Lisbonne,

M. Paulo Otero, assistant à la faculté de droit de l'Université de Lisbonne,

M. Iain Scobbie, *Lecturer in Law* à la faculté de droit de l'Université de Dundee, Ecosse,

Mlle Sasha Stepan, Squire, Sanders & Dempsey, *Counsellors at Law*, Prague,

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Mr. Jean-Marc Thouvenin, Head Lecturer, University of Maine and Institute of Political Studies, Paris,

as Advisers.

The PRESIDENT: Please be seated. The Court resumes its hearing in the East Timor case, and I give the floor to Mr. Burmester.

Mr. BURMESTER: Mr. President, Members of the Court.

Yesterday when I stopped, I had taken the Court through the 1988 and 1992 Fisheries Agreements between the European Community and Morocco. This showed that the 1988 Agreement only made sense if it applied to Western Sahara waters and a sketch map, which has been provided to you as a single sheet this morning and in the folder, indicates the location of the northern limit of the southern zone established under the Agreement at 28º44'N - a line just north of the boundary of Western Sahara. Clearly, the boundary of Western Sahara was not intended to represent the southern boundary of the fishing zone under that Agreement.

I also showed that the 1992 Agreement expressly accepts Moroccan authority over Western Saharan waters, particularly in its reference to Dakhla as a Moroccan port - and Dakhla is also shown on the sketch map you have. Despite some opposition by the European Parliament, the Council of the European Communities, including the representative of Portugal, approved the Agreement without conditions.

Prior to the 1988 Agreement, there had been a 1977 Agreement between Morocco and Spain. This Agreement divided the area of waters to which it applied by reference to waters north and south of Cape Noun. This was a convenient political compromise to hide the fact that the Agreement applied to the waters of Western Sahara. It was in part because Spain was not willing to say this explicitly that Morocco decided not to ratify the treaty (See A. Lahlou, *Le Maroc et le droit des pêches maritimes* (1983), pp. 178-179). There was also a 1976 Agreement between Morocco and Portugal, dealing with fisheries co-operation concluded only a year after the decision of this Court in the Western Sahara Advisory Opinion (Lahlou, pp. 195-196). Thus, all members of the European Union, including Portugal, are doing exactly what Portugal claims in this case that no State should do. This conduct provides the most powerful support for Australia's position in the present case.

Even if for certain purposes Portugal is or is to be regarded as an administering power, third States are not prevented from dealing with some other State securely in control of a territory, and

dealing with the natural resources of the territory *as such*. In the case of the European Community fishing agreements the economic interests of Spain and Portugal were clearly major motivating factors. And so in the case of Australia in protecting its own national economic interests. It is a matter for the competent organs of the United Nations to impose obligations not to deal in such cases, and neither in relation to Western Sahara nor East Timor have they done so.

Portugal seeks to dismiss the treaties by saying "*on ne peut pas présumer que leur conclusion ait été licite*" (CR 95/4, p. 66). But Portugal is a party through the European Community to these agreements and its fishing vessels benefit from them. What hypocrisy to accuse Australia of unlawful conduct by acting in the same way as Portugal itself. Mr. President, I am reminded of the doctrine of "clean hands", of not blowing hot and cold. I refer counsel for Portugal to paragraphs 402-403, in Australia's Preliminary Objections in the *Nauru* case, a document to which they are obviously attached, given its regular citation by them! Portugal's hands do not seem clean.

True, the position in the present case is not the same as that of *Western Sahara*, but this is because it is *weaker*, from the perspective of Portugal's claims, for three reasons.

First, the Fisheries Agreements deal with the Western Sahara under the rubric of "Moroccan waters". Dakhla is described as a Moroccan port. The *only* basis for the presence of European Community fishing vessels off Western Sahara is that those waters are "Moroccan waters". By contrast, Australia has for many years claimed its own sovereign rights as a coastal State to the whole area of the zone of co-operation, and the 1989 Treaty is in effect an interim compromise of those claims.

Secondly, the principal organs of the United Nations - including this Court, in an advisory opinion requested by the General Assembly - have dealt and continue to deal actively with the situation of Western Sahara. By contrast, the issue of East Timor has not come before a principal political organ of the United Nations since 1982, due to the complete lack of agreement among United Nations members on that issue, and Portugal is now prepared to talk to Indonesia as the authority in place "*sans conditions préalables*".

Thirdly, United Nations action in favour of self-determination has been demonstrably stronger

and more effective with respect to self-determination of Western Sahara as compared with East Timor, in part because of the very different attitude of the two relevant regional organizations, the OAU as compared with ASEAN. Each of these differences suggests that the position of Western Sahara should be much clearer and more definitive than that of East Timor. And yet third States including the member States of the European Community have not been prevented from dealing with Morocco, and have not refrained from dealing with Morocco, in respect of the natural resources of Western Sahara. This State practice cannot be ignored.

There is a further consideration to be weighed in the balance here, that of good faith in the proof and implementation of asserted rules of international law. Portugal cannot be heard to assert the existence of a rule in the case of East Timor when its own conduct, in *a fortiori* situations elsewhere in the world, contradicts any such rule. Portugal cannot demand from Australia a standard of conduct it does not comply with itself.

This same willingness of States to deal with the State in effective control is also demonstrated in relation to the phosphate resources of Western Sahara. These have been exploited by Fosbucraa, comprising a joint venture of Morocco and Spanish State-owned enterprises. The phosphate is exported with no direct return to the people of the Western Sahara (see ARej., p. 119, para. 212).

If Portugal's arguments in this case are correct, the members of the European Union clearly have dealt with the "wrong" State in relation to Western Sahara and should be restrained from doing so. Portugal is guilty of exactly what it accuses Australia of doing.

The fact that, as in the case of Australia, there has been no United Nations criticism of the actions of these States points to the conclusion Australia has been stressing - the right to self-determination is not infringed simply by third States dealing with States in actual control of self-determination territories.

Mayotte

One can illustrate the acceptance by States of the need to deal with realities by referring to other self-determination disputes. One can take the question of Mayotte. This is another example of conflicting sovereignty claims. A referendum on self-determination of the Comoros archipelago was

held on 22 December 1974 but following that France refused to recognize the territorial unity of the archipelago and retained control of Mayotte. France continues to claim sovereignty over Mayotte, while the United Nations continues to reaffirm the sovereignty of the Islamic Federal Republic of the Comoros over the Island (resolution 45/11 of 1 November 1990).

In almost identical resolutions passed between 1984 and 1994, the General Assembly has urged France to accelerate the process of negotiations with the Government of the Comoros with a view to ensuring the effective and prompt return of the island of Mayotte to the Comoros. There is, however, no call for States not to deal with France in relation to Mayotte. And inevitably, States will have found it necessary and appropriate to deal with France in relation to the island. For example, the European Community, despite the calls by the United Nations, has instead adopted a decision which includes Mayotte as a "Pays et Territoire d'Outre Mer" "relevant" to France (OJ, No. L263/1 19.9.91). In Annex 1 of the decision Mayotte is listed as a "collectivité territoriale" of France. This decision is no less than recognition, contrary to the United Nations position, and contrary, on the Portuguese thesis, to the obligation that the European Community must owe to the Comoros. Again Portugal invokes one rule for Australia and another rule for its own conduct.

A further example of States accepting reality is Goa, which prior to 1961 was recognized by the United Nations as a non-self-governing territory "under the administration of Portugal". No United Nations organ has ever adopted a resolution formally indicating that the people of Goa have exercised their right to self-determination or that Portugal is no longer the "administering Power" of Goa. Nevertheless, following the forcible occupation of Goa by India in 1961, various States recognized the annexation of the territory by India in subsequent years, and Portugal itself recognized the annexation in 1974. Portugal seeks to explain this example by saying it all occurred before the 1974 revolution (CR 95/3, p. 61). But this fact cannot affect the legal situation. States dealt with the State in actual control of the territory before the United Nations decided to accept its incorporation.

According to the thesis advanced by Portugal, even where the administering power loses control of a territory due to an uprising by the local population, other States would still be under an

obligation to respect the status of the administering power until such time as the United Nations determined either that the territory had achieved independence or that the former colonial State was no longer the administering power. Such an uprising would not of itself terminate the status of the territory as a non-self-governing territory, or the status of the administering power, since the groups seizing control might not be representative of the true aspirations of a majority of the people.

However, existing authorities and practice contradict this thesis.

In the *Guinea-Bissau* v. *Senegal Arbitration*, the Arbitral Tribunal noted the existence in international law of a norm which limits the capacity of the State to conclude treaties after the initiation of a process of national liberation, bearing on the essential elements of the rights of peoples.

The Arbitral Tribunal said that:

> "in this process of formation of a national liberation movement, the legal problem is not that of identifying the precise moment in which the movement as such is born. The important point to be determined is the moment from which its activity acquired an international impact (p. 38).
>
> ...
>
> Such activities have a bearing at the international level from the moment when they constitute, in the institutional life of the territorial State, an abnormal event which compels it to take exceptional measures, ie, when in order to control, or try to control events, it is obliged to resort to means which are not those used normally to deal with occasional disturbances." (Annex to the Application of Guinea-Bissau instituting proceedings in International Court of Justice, pp. 38-39.)

In that instance, the Arbitral Tribunal did not consider it to be the case, as Portugal contends, that all States were under an obligation to respect Portugal's sole right to deal with other States in respect of the territory until such time as the United Nations determined that it was no longer the administering Power in respect of Guinea-Bissau.

The Tribunal observed in that case that there had been repeated statements confirming the assertion that the war of national liberation in Portuguese Guinea had begun in 1963, thus accepting that Portugal would have lost its capacity to enter into treaties bearing on the essential elements of the rights of peoples in respect of that territory in 1963. This was so, notwithstanding that the United Nations General Assembly recognized only in 1972 "that the national liberation movements

of ... Guinea (Bissau) ... are the authentic representatives of the true aspirations of the peoples of those territories" (General Assembly resolution 2918 (XXVIII), 14 November 1972), and in 1973 recognized Guinea-Bissau as an independent State (General Assembly resolutions 3061 (XXVIII), 2 November 1973 and 3181 (XXVIII), 17 December 1973). Thus, the Arbitral Tribunal was willing to accept that, between about 1963 and 1972, Portugal had no power to enter into treaties in respect of the territory bearing on the essential elements of the rights of peoples, especially treaties concerning maritime delimitation, even though the General Assembly had at that time not yet done anything purporting to terminate the status of Portugal as administering Power, and notwithstanding that Portugal to some extent was still recognized as able to represent the territory in international fora. The Tribunal's conclusions are therefore totally at variance with Portugal's assertion that it alone can make treaties on behalf of East Timor.

By the time the United Nations recognized its independence, the Republic of Guinea-Bissau had already been recognized by some 40 States, following the proclamation of the independence of that country by the African Independence Party of Guinea (Rousseau, *Revue générale de droit international public*, Vol. 78, 1974, pp. 1166, 1168). These 40 States clearly did not consider themselves bound to await a determination of the General Assembly before deciding to recognize that a former colonial power, by force of events, has ceased to exercise, and ceased to have any right to exercise, any rights or powers in respect of the maritime resources of a non-self-governing territory.

On any view, Portugal is not the relevant State with whom Australia was obliged to negotiate after November 1975.

Mr. President, I have sought to show how, in the absence of any United Nations direction, States in fact deal with authorities in control of a territory entitled to self-determination so as to reach practical arrangements to enable peaceful co-existence. On occasion, this may necessitate resource agreements concerning disputed resources. In these circumstances, Australia says there is no breach of any obligation concerning the right to self-determination resulting from the conclusion of such an agreement.

Australia does not dispute the statements by Portugal that calls for respect for self-

determination do not leave States free to engage in activities totally "incompatible with those declared objectives" (PR, para. 6).

Portugal, however, keeps insisting, but without any analysis or proof, that the conclusion of a practical arrangement to share resources which Australia has consistently and in good faith asserted to be wholly its own is in some way to treat the people of East Timor as no longer having the right to self-determination or as not respecting or promoting the right. But this sort of assertion cannot succeed.

Promotion of the right and relevant State practice

An examination of the acts complained of by Portugal as in some way not promoting or failing to respect the right to self-determination show that they amount in fact to alleged breaches of a duty to "respect" the administering Power. I refer the Court to paragraph 172 of our Rejoinder. But the attempt to establish a non-severable link between the obligation of a State to respect self-determination and the obligation of a State to respect an administering power, fails completely. One has only to recall the clear and deliberate severance between the two evidenced by the United Nations resolutions on the Portuguese territories prior to 1974 - set out in the Appendix to the Rejoinder - to see the fallacy in the Portuguese argument.

Confirmation of the lack of any basis for the allegation that Australia's conduct in relation to the conclusion of the Timor Gap agreement has breached Australia's obligations in relation to self-determination can be found by examining the material Portugal itself puts forward in relation to human rights instruments.

Human rights

I refer in particular to the human rights covenants - Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The scope of the obligations of States Parties is set out in paragraph 3 of Article 1 of those covenants - an obligation which applies both to States having responsibility for the administration of

non-self-governing territories as well as to other States. The obligation is to "promote the realization of the right of self-determination", and "respect that right, in conformity with the provisions of the Charter of the United Nations".

An examination of the material included in annexes to the Portuguese pleadings shows the limited nature of the obligation. That material, rather than supporting the Portuguese contention of a breach by Australia, demonstrates the opposite.

General Comment 12 adopted by the Human Rights Committee (PR, Ann. II.34) concludes in relation to paragraph 3 of Article 1 of the ICCPR:

> "All States Parties should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with States' obligations under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."

If one then examines, for instance, the Report of the Netherlands to the Human Rights Committee, which was included by Portugal as relevant documentation (PR, Ann. II.35), one sees comments about Netherlands reaction to Namibia, South Africa and the Middle East. To what does the Netherlands point as action to promote the right to self-determination in those situations?

- Repeated condemnation by it of apartheid.
- Calls for full recognition of the right of the Palestinian people to self-determination.

But the Report, and this is particularly relevant for our purposes, records: "The thesis that the maintenance of relations with a State implies encouragement or approval of that State's policies cannot be accepted. (Para. 3.)

Australia agrees! In other words, the Netherlands accepts that it is not incompatible with the duty of a State to promote self-determination to maintain relations with a State that might be accused of denying the right.

Similarly in the Finnish Report included by Portugal in the documents (PR, Ann. II.36), Finland notes in relation to Namibia certain measures it has taken to promote independence, and refers particularly to the provision of aid and development assistance. Australia has done this in relation to East Timor, to a very considerable degree. This would have been impossible if Australia

had no relations with the State in effective control.

Further, and most significantly, Portugal itself indicates what it considers the limits of its obligations in relation to the application of the human rights covenants to East Timor. Mr. Gomes said at the 936th meeting of the Human Rights Committee on 1 November 1989 (PR, Ann. II.38):

> "Although Portugal had declared the Covenant to be applicable to East Timor, it was unfortunately not in a position to ensure that it was applied and effectively respected since it had no access to the Territory and was prevented from exercising its function as administering Power (para. 18) ...
>
> Portugal had expressed its concern about the territory and the many violations of human rights continuing there, in a number of international forums. It was continuing to co-operate in the Secretary-General's efforts to find a just, comprehensive and internationally acceptable solution to the problem." (Para. 20.)

In other words, expression of concern was the most Portugal thought it needed to do. Similarly, in relation to Palestine, Portugal "had consistently expressed its concern". In relation to Namibia, Portugal had supported self-determination "by its votes on General Assembly resolutions" (para. 23). In relation to South Africa it had

> "constantly and unequivocally condemned the apartheid régime ... Her Government considered that the application of indiscriminate sanctions against South Africa would be contrary to the interests of the majority of the population and neighbouring countries whose economies were closely linked with it, and that they would not lead to the establishment of the climate of dialogue within the country which was the only means of securing the dismantling of apartheid." (Para. 26.)

Mr. President, an examination of just these few documents of the Human Rights Committee points to only one conclusion. That is that the duty on States to promote self-determination and to respect the right does not envisage States severing all ties and relations with States in control of a people entitled to self-determination. State action, absent any collective decision to take particular sanctions, usually amounts to no more than calls for action in appropriate bodies, and provision of humanitarian aid and assistance.

Portugal's assertion that Australian conduct in relation to East Timor infringes its human rights obligations to the people of East Timor is therefore completely without foundation. In the case of East Timor, as has been demonstrated already, Australia has consistently on a bilateral basis raised with Indonesia the need to protect the rights of the people of East Timor, to reduce its military presence, to promote cultural autonomy. Australia has itself made a significant contribution to the

humanitarian relief of the people.

Unlike Portugal, Australia through its willingness to deal with the State in control of the people has been able to make a much greater contribution to the promotion of the rights of the people. Australia's conduct, as the analysis shows, is also consistent with the expectations of the international community as to the limited scope for action that Article 1(3) of the Human Rights Covenants contemplates.

Thus, United Nations resolutions on self-determination regularly talk of States providing "moral and material assistance" to peoples of colonial territories. There is no suggestion of anything further, apart from specific calls in specific situations to take specific actions. Australia has complied fully with the United Nations resolutions on East Timor, and the actions of which Portugal complains have not been shown to be contrary to United Nations demands.

Finally, I can deal briefly with the resolutions and statements of the European Parliament and the Council of Europe on which Portugal also seeks to rely (PM, Anns. II.106-11.114; CR 95/2, p. 40). These statements do not support Portugal's contention that States are under an obligation not to deal with Indonesia in respect of the territory. They support the proposition that the people of East Timor have the right to self-determination, but that is not in dispute in this case. They may support the proposition that these bodies consider the presence of Indonesia in East Timor to be illegal, but Portugal agrees that this is a matter which the Court is unable to consider in the present case. They confirm concern at the human rights record of Indonesia. Australia has expressed the same concern.

Mr. President, I have not examined specific actions by other States in relation to East Timor itself. This will be done shortly by Professor Bowett as part of his examination of the United Nations resolutions. That practice shows that many States recognize and deal with Indonesia as the State competent to deal with the territory of East Timor. States conclude bilateral treaties with Indonesia that extend to East Timor. Indonesia applies multilateral treaties to its territory, which includes East Timor. Yet there is no protest. (ACM, paras. 169-173 and Ann. 24). All this supports the contention that States do not see it as inconsistent with the duty to promote and respect

the right of self-determination to deal with the State in actual control of the territory of the people having such a right. Australia's conduct in this regard is no different than that of very many other States - both in relation to East Timor itself and other cases of self-determination territories with disputed sovereignty.

Conclusion

Mr. President, in conclusion, the obligation to promote self-determination is an example of an obligation where no particular means are prescribed. For Portugal to make its claim of a breach by Australia of the right of the people of East Timor to self-determination it must show that the particular conduct to which it objects in some way impeded or impedes the exercise of that right. For all the reasons set out in detail in the presentations of both Professor Crawford and myself, it has failed to do this. There is no breach by Australia of the right of the people of East Timor to self-determination.

I now invite you to call Professor Bowett. Thank you for your patience.

The PRESIDENT: Thank you Mr. Burmester. I now call upon Professor Derek Bowett to take the floor.

Mr. BOWETT: Thank you, Mr. President

The United Nations view of Australia's Conduct

Mr. President, Members of the Court, after these many days of pleading you can readily see what conduct by Australia is challenged by Portugal. Australia negotiated a treaty with Indonesia to regulate the exploration and exploitation of its own resources. Portugal would have you believe that that was a breach of international law.

Portugal now challenges the legitimacy of Australia's interest in those resources in part of the area of co-operation. In its written pleadings Portugal does not challenge the intrinsic validity of the Treaty. The essence of Portugal's challenge in those written pleadings is that the treaty was made with the wrong party: with Indonesia, and not Portugal. Of course, that position has now changed. In its oral arguments Portugal has clearly challenged the very substance of the Treaty. It is

"plunder" by Australia of East Timorese resources, contrary to the *jus cogens* right of self-determination and its corollary, the right of permanent sovereignty over natural resources (CR 95/2, pp. 37-45; CR 95/3, pp. 73-81).

But consider Australia's position. An agreement with the opposite coastal State was essential before exploration and exploitation of its own offshore resources could begin. With whom could Australia negotiate? With Portugal? That was scarcely realistic. Portugal had quit East Timor and was no longer an effective coastal State, able and willing to implement any agreement. With whom, then? The only realistic answer was with Indonesia, for Indonesia was in actual control of the territory and had been so for 14 years: and there was no sign that this would change. Indonesia was the opposite coastal State, for all practical purposes, and to have an effective agreement Australia could negotiate with no other.

Thus, the facts of the situation dictated Australia's choice of Treaty partner: and it was a choice made by Australia in the exercise of its powers, as a sovereign State, to negotiate agreements with neighbouring coastal States concerning resources in adjacent maritime areas.

Yet Portugal denies Australia had any freedom of choice, for Portugal argues that Australia was under a legal duty to negotiate with Portugal and *not* to negotiate with Indonesia.

What I wish to do now, Mr. President, is to examine the source of this alleged legal duty: the duty to negotiate with Portugal and *not* with Indonesia.

1. *The Source of the alleged duty to negotiate with Portugal and not to negotiate with Indonesia*

There are, I suppose two possible sources of this alleged "duty": general international law, and the United Nations Charter. Let me take these in turn.

Of course I realize that Professor Dupuy identified *three* sources (CR 95/3, P. 10): his third source was the Covenants on Human Rights which Mr. Burmester has already dealt with. But in invoking the Human Rights Covenants Professor Dupuy was talking of the rights of the people of East Timor. Here I am concerned with Portugal's alleged right to be the sole State able to treat on behalf of the territory.

(a) General international law

So I start with general international law. Now general international law certainly has relevance, and such rules as may be applied in fact support Australia's position and appear quite incompatible with the "duty" alleged by Portugal.

Take the general rules of maritime delimitation and resource management. They clearly impose an obligation to negotiate with the relevant *coastal State*; and for good reason, because only that State can fulfil and implement an agreement on management and sharing of offshore resources. One thing is clear. Portugal was *not* the coastal State in relation to East Timor, so Portugal's alleged duty to negotiate the Timor Gap Treaty with Portugal - and only Portugal - runs directly counter to this general rule.

Or take the general rules on recognition. As Australia has shown in its Counter-Memorial (Part III, Chapter 2), Australia was entitled - absent a mandatory resolution of the Security Council to the contrary - to recognize the sovereignty of a State in effective and actual possession of the territory. And Indonesia had effectively controlled East Timor for 14 years before this Treaty was concluded! So, again, Portugal's assumption that Australia was under a legal duty not to recognize or treat with Indonesia over East Timor runs directly counter to the rules of general international law regarding recognition.

Of course, Australia readily concedes that, under the United Nations Charter, an obligation might be imposed on Australia which has no counterpart in general international law. But that would arise only when a clear provision in the Charter so provided, or where, in the application of Charter provisions, the Security Council, acting under Chapter VII of the Charter, imposes a mandatory obligation on a State. We must therefore examine what I might term "United Nations Law" to see whether this provides the source of the duties alleged by Portugal.

(b) United Nations Law

(i) The United Nations Charter

As to the Charter itself, Portugal has been unable to identify any provision which clearly establishes the legal duty it alleges was binding on Australia.

Of course, Portugal cites various Charter provisions: Article 1, para. 2; Article 2, para. 5; Articles 55 and 73, for example. But to assert the right to self-determination of the people of East Timor - which Australia fully accepts - or their right to development; or the duty to assist the United Nations; or even to assert the status of Portugal as "administering Power" does *not* substantiate this rather precise legal duty on Australia. The extraction of such a precise legal duty from these very general provisions is pure speculation on the part of Portugal. And, as we shall see, it is speculation confined to Portugal. Nowhere else - not in Security Council resolutions, nor even in General Assembly recommendations - do we find even a hint that these organs shared Portugal's thesis that such a precise legal duty can be extrapolated from these very general Charter provisions or even from the resolutions relating to East Timor.

(ii) United Nations resolutions

Mr. President, with your permission I should like, now, to examine with some care the relevant resolutions adopted in relation to East Timor. I shall begin with the Security Council resolutions because, as a matter of law, only the Council, acting under Chapter VII, could impose this precise legal obligation on Australia in a situation such as this. However, I shall continue by examining also the General Assembly resolutions because - irrespective of the strictly legal position - it is important to see whether at any time the Assembly shared Portugal's extraordinary interpretation of the Charter.

What we are looking for in these resolutions is evidence of the United Nations view on three points.

(1) Was Australia legally bound to negotiate only with Portugal?

(2) Was Australia legally precluded from treating with Indonesia?

(3) Was Australia at any time regarded as having violated the Charter? And, in particular, was Australia ever regarded by the United Nations as contravening the right of self-determination of the people of East Timor?

(a) The Security Council resolutions

The Security Council has adopted only two resolutions: resolution 385 of 22 December 1975

and resolution 389 of 22 April 1976.

Let me say a brief word about the constitutional basis of these resolutions. I can be brief because, as their texts demonstrate, neither resolution addresses any of the three points I have just mentioned. Neither resolution calls on Australia or member States generally to negotiate only with Portugal. Neither resolution calls on Australia not to deal with Indonesia. And neither resolution condemns Australia for any violation of the United Nations Charter or of international law. That is true both in respect of any paragraph addressed to Australia by name - for no such paragraph exists - and in respect of any paragraph addressed to States generally, which would include Australia.

In this sense, therefore, discussion of the constitutional basis is peripheral to our inquiry. The usually critical question of whether the Council was issuing a mere recommendation, or a binding, mandatory injunction, scarcely arises if the resolutions do not address Australia at all.

However, lest some may not share that view - and Portugal does not - let me take the argument that further step, and demonstrate that the Security Council was consciously acting under Chapter VI of the Charter, not Chapter VII, and moreover was making recommendations with a view to a pacific settlement of the situation rather than issuing mandatory, binding directives to States.

Of course, I accept that the Council need not invoke Chapter VII expressly in order to act under Chapter VII. But here all the evidence points to a deliberate choice by the Council to avoid Chapter VII, and even to avoid binding decisions under Chapter VI. Australia submits that this was quite deliberate, for the Council knew that mandatory sanctions against Indonesia would not be supported by member States. And, for the same reason, the Council avoided requiring member States even to embark on the sanction of non-recognition. To suggest, as Portugal does, that member States were bound to apply such sanctions anyway, by necessary inference from the Council's finding of a right to self-determination, is really to defeat the deliberate policy of the Council, a policy to avoid any suggestion of sanctions. This is clear from the resolutions.

Look at the terms of the resolutions. You will note the complete absence of any reference to Article 39, or to the concept of a "threat to the peace, breach of the peace, or act of aggression". You will note that the Council "calls upon", or "urges" States to do certain things. There is a

complete absence of words which denote binding obligations, such as "decides", "demands", "orders", "insists". The resolutions refer to the aim of achieving a "peaceful solution" of the situation - and that is Chapter VI language.

If you look at the language of delegates in the Council the conclusion is the same. France referred to the necessary "negotiations" and the "good offices" of the Secretary-General (S/PV 1915, 22 April 1976, pp. 11-12). Japan referred to the aim of a "negotiated settlement", and a "peaceful solution" (A/C. 4/SR. 2180, 3 December 1975). Such terms reinforce the conclusion that this was a situation properly characterized under Chapter VI of the Charter.

And this, clearly, was the view of the General Assembly. On 12 December 1975, the Assembly adopted resolution 3485 (XXX). Paragraph 6 of that resolution drew the situation of East Timor to the attention of the Security Council "in conformity with Article 11, paragraph 3, of the Charter".

Now the Court will recall the terms of Article 11, paragraph 3 of the Charter:

> "The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security."

It is absolutely clear that a situation *likely to* endanger international peace and security is a Chapter VI situation: those are the very words of Article 33.

The first resolution, 385, was certainly adopted under Chapter VI of the Charter, rather than Chapter VII. And Australia is nowhere mentioned. There are, in fact, only two States mentioned: the first is Indonesia - whose armed intervention is "deplored" - and the second is Portugal whose failure to discharge its responsibilities as administering Power is "regretted".

It seems clear - and this is reflected in the debates in the Council - that the Council felt blame attached to both Indonesia and Portugal. But the Council was not prepared to condemn Indonesia for aggression, or hold it responsible for a threat to the peace or breach of the peace, although it did call on Indonesia to withdraw its forces. But no sanctions of any kind were decided, authorized or even recommended against Indonesia, not even the sanction of non-recognition.

As to other member States, which, of course, includes Australia, they were urged to co-operate fully with the United Nations and, in addition, they faced a "call" in one operative

paragraph which is worth citing because Portugal relies so heavily upon it:

The Security Council, "*Calls upon* all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination ..."

In the second resolution, resolution 389 of 22 April 1976, that call was repeated: as in other respects, including the call addressed to Indonesia to withdraw its forces, the second resolution in substance repeats the first, although with some weakening of the language.

Now given the texts of those resolutions, how can it be suggested that Australia was under a legal obligation in 1989 *not* to treat with Indonesia, and to treat only with Portugal in relation to the resources of the Timor Gap? If, as Australia contends, the Council was acting under Chapter VI, *prima facie* no binding legal obligation would be created in any event. But, quite apart from that, the specific obligation to treat, or not to treat, with this or that State does not arise by necessary, logical inference from this very general call on member States to respect the people's right to self-determination.

This is clear from the Security Council's own practice. Take, for example, the Council's practice in relation to Rhodesia. The Council did not simply call on States to respect the right of self-determination of the people of Rhodesia, leaving the rest to logical inference. It quite specifically spelt out the obligations "not to recognize" the white minority régime (resolution 216 (1965)); not to "entertain any diplomatic or other relations with" that régime (resolution 217 (1965)); and "to treat the racist minority régime as ... wholly illegal." (resolution 328 (1973)).

So, too, with Namibia. Having affirmed the right of the people of Namibia to self-determination, the Council did not leave the rest to mere inference. No legal duties for member States were assumed to arise by necessary inference from that finding. The Council spelt out precisely what was required from member States. They were specifically called on "to refrain from all dealings with the Government of South Africa" (resolution 269 (1969)); they were called on "to refrain from any dealings with the Government of South Africa" which were inconsistent with the Council's finding that the South African presence in the territory was illegal (resolution 276 (1970));

they were specifically requested to "refrain from any relations - diplomatic, consular or otherwise - with South Africa implying recognition of the authority of the Government of South Africa over the Territory of Namibia ..." (resolution 283 (1970)). And in the Court's 1970 Advisory Opinion on Namibia it was *because of resolution 276 (1970)* and the express finding that South Africa's presence was illegal that member States were held to be obliged to abstain from treaty relations with South Africa in which South Africa assumed power to represent Namibia.

Exactly the same practice can be seen in the Security Council's treatment of the South African "Homelands", of Turkish occupied Cyprus, of Iraq's occupation of Kuwait, and of Israel's occupation of Arab territories following the Six-Day War of June 1967. In Australia's Counter-Memorial (ACM, Appendix A, pp. 182-193) we have set out this practice in some detail, so I do not need to review it again now.

The conclusion is clear. It is not the practice of the Security Council to leave the legal obligations of States to arise by inference from general findings of a right to self-determination, or even a finding that a State's occupation of territory is illegal. In all cases the Council spells out the legal obligations it imposes for the very good reason that, if matters were left to mere inference, confusion would result: States would almost certainly draw different inferences. Yet here we have nothing. The Security Council has not spelt out or imposed a single legal obligation on Australia or any other member State which would preclude Australia from entering into the Timor Gap Treaty with Indonesia. Nor did Portugal ever propose to the Security Council or the Assembly a resolution which would have precluded Australia or States generally from dealing with Indonesia, or would have condemned it for having done so.

In Australia's submission, that is conclusive. But, for the sake of argument, let us suppose that this conclusive practice did not exist and that it was possible to argue, as Portugal now argues, that legal duties did arise by mere inference. If such was the case, and if we assume Portugal is right to argue that legal duties arose for Australia by virtue of these two Security Council resolutions, is it not extraordinary that the Council has never challenged Australia's conclusion of the 1989 Treaty? After all, if Portugal is right, in December 1989 Australia committed a flagrant breach of duties

arising from the Council's express affirmation of the right of self-determination of the people of East Timor. The Council was well aware of the existence of the Treaty. So Portugal asks us to believe that for 14 years the Council, knowing of this flagrant breach by Australia, has kept silent! The idea is impossible to accept. Whatever the failings of the Security Council, silence is not one of them.

Then there is another, quite separate consideration. We have heard from Portugal a great deal about the duties which, by inference, Australia is alleged to have assumed. I want, now, to talk about Australia's rights.

As Professor Pellet will emphasize, Australia, too, has a right of sovereignty over its natural resources. Australia, too, has a right to exploit its off-shore resources and, to that end, to negotiate whatever arrangements are practicable with neighbouring coastal States. Without such arrangements, exploitation is usually impossible.

Now in the present case, negotiation with Portugal was useless. Australia had a stark choice: negotiate with Indonesia, or abandon any hope of exercising these important rights.

The Court will readily see the implications of Portugal's thesis. Australia is to be denied those sovereign rights by necessary inference from the general call to respect the territorial integrity of East Timor, and the right to self-determination of its people.

Mr. President, I find that scarcely credible. If Australia is to be deprived of these very important rights it would require *(i)* an express finding by the Security Council that Australia had committed a delict consisting of a "threat to the peace, breach of the peace, or act of aggression" and, in consequence, such a sanction was to be applied against Australia, and *(ii)* an express or implied invocation by the Council of its powers under Chapter VII. I do not believe that Australia could be deprived of its sovereign rights by mere inference, or by action under Chapter VI of the Charter.

There is, I suppose, the possibility that, despite the silence of the Security Council, the General Assembly, even lacking mandatory power, might have expressed the view that a legal duty had been imposed on Australia, and that in concluding the Timor Gap Treaty Australia had breached that duty. The promotion and protection of the right of self-determination is, after all, a specific

power assumed by the Assembly. So let us briefly review the relevant General Assembly resolutions to see whether they lend any support to Portugal's thesis.

(b) The General Assembly resolutions

There are eight resolutions, adopted between 1975 and 1982. Not one refers to Australia. Not surprisingly, nothing in any of these resolutions suggests Australia is to be deprived of its rights to exploit its natural resources. Even more striking, not one expressly contemplates legal duties for all member States, such as a duty not to recognize Indonesia, or a duty not to deal with Indonesia in matters affecting East Timor. That is remarkable if only because, in its resolutions on Rhodesia, Namibia, and the Arab territories occupied by Israel, for example, the General Assembly had done precisely that.

What one finds instead is an initial censure of Indonesia - though not for aggression, mark you - it was "military intervention" which was deplored. And even this censure disappears after 1976 as an express paragraph in the resolutions. In the debates more and more States referred to the need to accept the reality of the situation brought about by Indonesian control. Indeed, some even questioned whether the matter should remain on the agenda. The Assembly's interest shifted to United Nations mediation between Indonesia, Portugal and the people of East Timor, in an attempt to promote self-determination and to deal with humanitarian issues. And even then, despite the increasingly mild terms of the resolutions, support in the Assembly for any United Nations involvement declined. The last resolution in 1982 barely passed, with only 50 States in favour, 46 against, and 50 abstentions. I invite the Court to examine the table, numbered 2 in your folder, which you have as a loose sheet, showing that decline in support for any action in relation to East Timor. That table shows the marked decline in support and by 1982 less than one-third of the members supported it.

It is this passage of time - between the early resolutions of 1975 and 1976 and the conclusion of the Timor Gap Treaty - which is crucial. Certainly at the outset of the United Nations interest it was prepared to censure Indonesia in somewhat mild terms, and to affirm the right of East Timor to territorial integrity, and the right of its people to self-determination. But the fact of the matter is that

the United Nations lost interest, or at least lost hope of effecting a change in the situation. That was a factor Australia had to take into account: it meant Australia had no choice but to deal with Indonesia.

But Portugal's thesis, as ably and clearly presented by Professor Higgins, is that the passage of time does not matter. The obligations of member States persist, based on a logical, necessary inference from the early resolutions. Let us pause for a moment and examine these logical, necessary inferences drawn from the earlier resolutions. Did Portugal draw such inferences? Let me cite from the Summary Record of the Fourth Committee in 1982 (A/C.4/37/SR.19, p. 34).

> "Portugal was co-sponsoring a draft resolution on East Timor for the first time. In previous years Portugal had felt that, as administering Power, it was difficult for it to support draft resolutions which skirted the main issue, that of the effective resumption of administration of the territory ..." (Para. 25.)

Now if Professor Higgins is right; if by logical, necessary inference from the earlier resolutions the position of Portugal as administering Power was fully vindicated, why had Portugal found it difficult to support those resolutions? Why had Portugal felt they "skirted the main issue"? Mr. President, the likely answer is that those resolutions did *not* confirm that Portugal had exclusive rights to represent the territory; and did *not* require member States to recognize only Portugal.

If that was so when the resolutions were first adopted, how much weaker they become as the years pass and the majority dwindles. But Professor Higgins denies this. The passage of time is of no consequence. States must continue to do their duty - their inferred duty - based on the early resolutions and totally ignore the very profound change of attitude within the United Nations. States must continue to act as if the United Nations had never wavered from its early resolution.

Mr. President, that is a view of the obligations of member States which is far removed from reality or practicality.

You will recall Portugal's argument as put by Professor Higgins (CR 95/5, pp. 8-32). The absence of resolutions after 1982 is irrelevant legally and easily explained: the Assembly is too busy to keep renewing the same resolutions, and, anyway, it is not the practice, and the Cold War made it difficult.

Mr. President, it is indeed the practice. Issues like South-West Africa and Rhodesia were

kept on the agenda, and resolutions passed, despite the Cold War, year after year precisely because member States did not lose interest and were determined to change the situation. If the interest is there, there is no question of the Assembly being too busy.

The real explanation lies in this table that I have referred you to. After 1982 member States felt that Indonesia was there to stay. The same conclusion was forced on Australia, and when, for lack of any alternative, Australia dealt with Indonesia there was not one word of criticism from the United Nations.

Mr. President, whatever one thinks of the Assembly's record in the matter, one thing is clear. There is no evidence not a shred of any support in the Assembly for Portugal's claims before this Court. In all these years there has not been a single voice in the Assembly to support the thesis that member States could deal only with Portugal, and not with Indonesia. And not one voice has been heard to echo Portugal's complaint that Australia has violated the right of the people of East Timor to self-determination. And that is true of both the debates in the Security Council and in the General Assembly.

How, then, can it be that a legal duty to deal exclusively with Portugal was imposed on Australia - as a direct and necessary consequence of the right to self-determination of the people of East Timor - and yet neither organ ever referred to such a duty, or regarded Australia as being in breach? There was no secret about the Timor Gap Treaty. Portugal brought it to the attention of the Committee of 24 on 9 November 1988. Member States were well aware of it. Yet no one - apart from Portugal - has ever charged Australia with a breach of this supposed duty to deal exclusively with Portugal, or of the right to self-determination. If Portugal is right, Australia breached a rule of *jus cogens*, deriving from United Nations resolutions - and nobody noticed! That is truly astonishing. Is it possible that the United Nations did not share, and does not share, Portugal's view?

Is it possible, Mr. President, for the whole world community to be wrong: and Portugal right? I suggest not. And not simply because the record of debates does not support Portugal. The fact is that Portugal is unable to show, by any process of legal reasoning, how you can start from the simple and unobjectionable premise of the right of self-determination, and then extrapolate to this

wild allegation of a legal duty on Australia to deal exclusively and futilely with Portugal. The flaw lies in that wild extrapolation, which no one else accepts.

2. *The conduct of other States as evidence of the existence of the legal duty alleged by Portugal*

Mr. President, I would like now, with your permission, to examine the conduct of other States. The relevance of this conduct is obvious. If, as Portugal alleges, the source of the supposed duties, binding on Australia, lies in the right of self-determination, then all States must be under similar duties. For the right of self-determination of the people of East Timor exists *erga omnes*, says Portugal. In consequence, all States must be bound by the same duties. As I shall show, many States reject any suggestion that they are subject to such duties: not just Australia. And from this abundant State practice, therefore, the conclusion emerges that the supposed duties are entirely illusory.

Let me take first the group of States which take the view that the people of East Timor have already exercised their right of self-determination. This is a position more extreme than that taken by Australia, but, clearly, if they are right the whole basis of Portugal's case collapses: for the territory has, on this view, been lawfully integrated into Indonesia. That group of States includes Bangladesh, India, Iran, Iraq, Jordan, Malaysia, Morocco, Oman, the Philippines, Saudi Arabia, Singapore, Suriname, and Thailand. In Australia's Counter-Memorial (pp. 77-86), Australia has given the actual statements of representatives of those States supporting that position.

Then there is a group of States which take the view that the people of East Timor retain their right to self-determination, but at the same time accept the reality that Indonesia is now in effective control of the territory and do not expect the situation to change. This group includes Canada, Japan, Papua New Guinea, New Zealand, the United Kingdom, Sweden, Mauritania, and the United States. To cite Sweden's representative in the Fourth Committee in 1979: "Sweden recognized that there was in East Timor today a *de facto* situation to which there was no realistic alternative" (A/C.4/34/SR.23, 2 November 1979).

In similar vein, New Zealand has expressed the view that "the situation there is irreversible" (ACM, Ann. 6); and the United States has made the judgment that "the integration [meaning the

integration into Indonesia] was an accomplished fact" (Ann. 4).

States are entitled to deal with the authority in control. And if they do so they are not acting unlawfully.

This is borne out by the State practice, for there is clear evidence that States have, like Australia, concluded treaties with Indonesia relating to the territory of East Timor. The treaties in question are double taxation agreements or treaties for the promotion and protection of investments, or air transport agreements and, clearly, if they are intended and expressed to apply to East Timor they imply recognition of Indonesia's capacity to represent the territory.

It is beyond question that in 1976 Indonesia legislated to incorporate East Timor into Indonesia as its twenty-seventh province. From that moment, so far as Indonesia was concerned, any reference to "the territory of Indonesia" included East Timor.

Thus, there are at least 20 post-1976 treaties on the avoidance of double taxation [ACM, at least Ann. C] with Austria, Canada, The Czech Republic, Denmark, Finland, France, Germany, India, Japan, Korea, Luxembourg, New Zealand, Norway, the Philippines, Poland, Sweden, Sri Lanka, Switzerland, Tunisia and Thailand. All these treaties define the territorial scope of the treaties in these terms: "the term 'Indonesia' comprises the territory of the Republic of Indonesia as defined in its laws ..."

There are nine recent agreements on the Protection and Promotion of Investments which use the same territorial application clause: with Sweden and Poland in 1992, and with Egypt, Malaysia, the Netherlands, Turkmenistan, Slovakia, Laos and Hungary in 1994.

Then there are two Agreements on Scheduled Air Transport, with Turkey in 1993 and with New Zealand in 1994. These, too, use the phrase "The territory of the Republic of Indonesia as defined in its laws ..."

Necessarily, since the laws of Indonesia then defined East Timor as part of Indonesia, this is clear recognition of Indonesia's capacity to make treaties in respect of the territory of East Timor.

So, Mr. President, there are at least 30 States which have treated with Indonesia in terms

which include East Timor. These States clearly do not accept Portugal's contention that Portugal - and only Portugal - can represent the territory. Nor do they understand that, by necessary implication from the United Nations resolutions, they are in duty bound *not* to conclude treaties with Indonesia affecting the territory of East Timor.

The Portuguese argument to the contrary is, frankly, unacceptable (PR, para. 6.14). Whether double taxation agreements deny the right of self-determination is not the point. The point is that the treaties necessarily recognize Indonesia's capacity to conclude agreements relating to East Timor. And to say, as Portugal does, that for Indonesia to define the territory as part of Indonesia under its own law is not the same as saying the territory is Indonesian under international law equally misses the point. I repeat, the point is simply that all these States recognized Indonesia's capacity to conclude treaties on behalf of East Timor. And there is another point of some importance. We have no record - or we know of no record - of any protest by Portugal addressed to States concluding these treaties with Indonesia. These were not "secret" treaties, and Portugal must be presumed to have known about them. Portugal regards itself as the administering Power. Why, then, did Portugal not make some protest, or express some reservation, when, according to these treaties, they entail recognition of Indonesia's right to treat in respect of East Timor? There is nothing unusual about such a protest or reservation. It is, in fact, a common feature of State practice when one State objects to another treating territory belonging to the former State as if it were its own. States regard this as a prudent, minimal step to preserve their rights. Could it be that Portugal, too, had in fact accepted the reality of Indonesian control?

In conclusion, Mr. President, I would simply emphasize that both within the United Nations and outside the United Nations, in their bilateral relations with Indonesia, many States accept the reality of Indonesian control and are prepared to deal with Indonesia as regards the territory of East Timor.

To say, as Portugal says, that this is an illegal act, because only Portugal can represent the territory, is simply wishful thinking on the part of Portugal. The United Nations has never taken that view, nor have member States, and there is no rule of international law, absolutely none, to support

Portugal's thesis.

Now in drawing that conclusion I am *not* saying the various resolutions of the United Nations relating to East Timor are meaningless. Nor am I saying that the principle of self-determination is without any application in this situation. It may be useful, therefore, if I say a little about the significant consequences of those resolutions, as Australia sees them.

Mr. President, this might be a time at which you would wish to make a pause.

The PRESIDENT: How much time will it take for you to finish your statement please?

Mr. BOWETT: Nine minutes.

The PRESIDENT: Alright, please proceed.

Mr. BOWETT:

3. *The consequences of the resolutions on East Timor*

The resolutions have important consequences although, after so many years of relative inactivity in the United Nations over East Timor, it is difficult to estimate their practical or legal significance today.

Firstly, there is clearly a dispute between the United Nations and Indonesia, principally over whether there has been a valid act of self-determination by the people of the territory but also, if resolution 389 (1976) is still regarded as operative by the Security Council, over the presence of Indonesian forces in the territory.

Secondly, there is clearly a dispute between Portugal and Indonesia, for it is the very presence of Indonesia which compels Portugal to be an administering power in name only, and denies to Portugal the effective exercise of the authority normally attaching to an administering power. It is for this reason that the mediation of the Secretary-General has been directed towards contacts with both Indonesia and Portugal, as well as the people of the territory.

Thirdly, the express finding that the people of East Timor have the right to self-determination has consequences for all States. Australia does not dispute this finding: what Australia disputes is

that you can infer from this finding a legal duty to deal exclusively with Portugal. Clearly the primary consequence of this finding is its effect on Portugal and Indonesia, for it rests with them to give effect to it: this is precisely why the Secretary-General's mediation efforts involve direct contact with these two States.

As regards other States, the consequence of the finding, obviously, is that they must respect this right of self-determination: and that duty Australia fully accepts. But, as State practice shows, no State has taken the view that this means dealing exclusively with Portugal. The duty to respect the right of self-determination means something more than the duty to make futile gestures. But precisely what this duty means, in terms of the conduct required of member States, was not specified by either the General Assembly or the Security Council. Member States had "*une obligation de résultat*", no more: the means by which they were to implement that duty were left to their discretion. And no one in the United Nations - except Portugal - no one has challenged Australia's discretion.

I ask the Court to put itself in the shoes of the Australian Government in 1989. What options did Australia have? One option, I suppose, was to negotiate with Portugal and produce an agreement totally devoid of any practical effect: a piece of paper! No, there would be two pieces of paper, for there would have been an immediate strong, formal protest from Indonesia. You may be certain that the consequence of that option would be a serious deterioration in the relations between Australia and Indonesia, and of no help whatsoever to the people of East Timor.

Another option was to do nothing: simply to leave this important maritime area and its resources unclaimed, unregulated and undeveloped. The Court can imagine the difficulties the Australian Government would face in justifying this policy of inaction to its own people.

Another option, suggested by counsel for Portugal last week (CR 95/5, p. 32) was for Australia to confine its off-shore activities to the south of the median line. Well, what an option! Abandon your claims and settle for exploitation on your opponent's terms! This Court well knows the danger of accepting a *de facto* maritime boundary. The only beneficiary from that option would have been Indonesia!

Or was there a further option, in fact, the one Australia chose? This was to respect the finding by both the Security Council and the General Assembly that the people had a right to self-determination, and a right to development, and to see how, as a practical matter, those rights could be accommodated. And that required an accommodation with Indonesia, for only Indonesia was in a position to pass on to the people of the territory the economic benefits of the development of their offshore resources.

The accommodation reached was the Timor Gap Treaty, an agreement which, by its terms, does protect as far as possible the interests of the people of East Timor. I shall, at a later stage in these pleadings, take the Court through the essential features of the Treaty, so the Court can satisfy itself that this is not a "greedy" treaty. This is not some despicable agreement designed to allow Australia to plunder the offshore resources of East Timor. The Court will note that Portugal does not, in its written submissions, attack the agreement as such. It is only during these oral arguments that the treaty has been denigrated as an instrument of plunder.

Moreover, this is not a situation in which everything turns on the rights of Portugal, or on the right of the people of East Timor. The Court will forgive me if I stress, yet again, that Australia, too, has rights. As a Coastal State it had every right to negotiate such arrangements as would enable it to exploit its own offshore resources. Australia, too, had obligations towards its own people and could not remain passive and inactive in the face of demands that practical arrangements should be made to allow offshore development to proceed.

The problem for Australia was how to achieve this in a difficult, and highly unusual, situation in which, in truth, the United Nations gave no guidance. There was a clear need to avoid friction between Australia and Indonesia, if at all possible. If you read the Preamble to the Timor Gap Treaty you will see the importance both parties attached to this. They recorded their commitment to "maintaining, renewing and further strengthening the mutual respect, friendship and co-operation between their two countries". They concluded the Agreement "mindful of the interests which their countries share as immediate neighbours".

These are not simply flowery phrases put in for the sake of appearances. They reflect the

practical realities of the region. Australia and Indonesia *are* neighbours. They *need* to promote friendship and co-operation. It was Australia's judgment that these aims could be secured without prejudicing the interests of the people of East Timor, and that remains Australia's view to this day.

But let us leave that for a later stage. For the moment, it suffices that I conclude by emphasising that at no stage has either the Security Council or the General Assembly taken the view that Australia was legally bound to deal exclusively with Portugal, and not with Indonesia; at no stage has either organ condemned Australia for any violation of the right to self-determination of the people of East Timor; and at no stage has the conclusion of the Timor Gap Treaty been condemned by either organ.

Mr. President, that concludes my statement. I apologize for delaying the Court.

The PRESIDENT: Thank you very much Professor Bowett. The Court will have a break of 15 minutes. The meeting is suspended.

The Court adjourned from 11.40 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. I give the floor to Professor Christopher Staker.

Mr. STAKER:

Consequences of the description of Portugal
as the administering Power of East Timor

Mr. President, Members of the Court.

This is the first time that I appear before this Court, and I am deeply conscious that it is an honour to do so.

It is my task this morning to deal with one further aspect of the Argument of Portugal relating to self-determination and misrecognition. This is the argument concerning the alleged consequences of the description of Portugal as the "administering Power" of East Timor.

In these proceedings, Portugal complains that Australia has negotiated in respect of the petroleum resources in the Timor Gap with Indonesia rather than Portugal, and has excluded any negotiation with Portugal. This complaint is set out in Portuguese submissions 2 and 3. Portugal

says that by these acts, Australia has "*méconnu*", or "disregarded", the status of Portugal as the administering Power of East Timor.

Portugal argues that in international law there exists an objective legal status of administering Power of a non-self-governing territory (e.g., CR 95/5, p. 61, Mr. Galvão Teles; CR 95/6, pp. 44-45, Mr. Correia). Portugal maintains that where the United Nations General Assembly or Security Council refers in a resolution to a particular State as the administering Power of a particular non-self-governing territory, that this reference constitutes a "determinative designation or finding", that is "incontestable", and which has *erga omnes* effect. That is, that it is opposable against all States. (See ARej., para. 182; also CR 95/2, pp. 62-63, Mr. Galvão Teles.)

Portugal says that the General Assembly and Security Council resolutions on East Timor that were adopted between 1975 and 1982 designate Portugal as the administering Power of that territory, and that the United Nations has never revoked this status. Thus, says Portugal, its status as the administering Power of East Timor constitutes a "given" in this case, a "chose réglée", or "*res decisa*" (PR, paras. 2.22-2.23, 4.28, 4.30; CR 95/2, p. 57, Mr. Galvão Teles; CR 95/3, pp. 52-53, Mr. Correia; CR 95/5, p. 59, Mr. Galvão Teles).

Finally, Portugal argues that as the administering Power of East Timor, it has the exclusive legitimate right and competence to enter into treaties with other States in respect of East Timor. To deal with a third State any third State in respect of East Timor is said to be a wrongful "*méconnaissance*" or "disregard" of the rights and powers of Portugal as the administering Power (e.g., PM, para. 8.14; PR, para. 6.15.).

Before dealing with this aspect of the merits, it is appropriate that I make a preliminary observation on its relationship to questions of jurisdiction and admissibility, on which Australia's arguments have already been heard. Portugal argues that because its status as administering Power is a "given" in this case, and because the mere fact of any dealing with any State other than Portugal is wrongful, a determination of Australia's responsibility would not require a preliminary decision on the rights and responsibilities of any third State not before the Court. Portugal says that the *Monetary Gold* principle is therefore inapplicable. Professor Crawford and Professor Pellet have

already dealt with this argument.

But, Mr. President, even when one looks at the merits of Portugal's argument on the assumption of admissibility, the *Monetary Gold* principle imposes important limitations on the question of substance which the Court is asked by Portugal to decide. The question whether all States are under an obligation to deal exclusively with Portugal in respect of East Timor, and with no other State, *as a consequence of Portugal's alleged objective legal status as the administering Power of East Timor*. That is the question which the Court is asked by Portugal to decide. If it is *not* possible to answer this question as Portugal proposes, then the Court would - on any view of the *Monetary Gold* principle - be unable to give a decision on the legality of Australia's dealings with Indonesia in respect of the Timor Gap. It would be impossible to determine that Australia is not entitled to deal with Indonesia without *first* examining and deciding upon the rights and capacity of Indonesia in relation to the territory.

Portugal's whole case therefore hinges on these two words -"administering Power" - and their supposed legal effect.

Portugal can point to the fact that five or six of the ten General Assembly and Security Council resolutions adopted between 1975 and 1982 on the question of East Timor refer to Portugal as the "administering Power" of that territory. Portugal also points out that the Committee of 24 has referred to Portugal as the "administering Power" since then. But this of itself goes no way to proving the Portuguese theory of what these words mean.

Mr. President, Members of the Court, Australia argues that in international law there is no special objective legal status of administering Power, binding *erga omnes*, and opposable against all States. (ARej., Pt. II, Ch. 1, esp. paras. 184-198). Australia does not take issue with the proposition that in some cases the General Assembly can adopt resolutions which have "determinative" effect, which have legal consequences for States. But this does not mean that every reference in a General Assembly or Security Council resolution to a factual or a legal situation constitutes a legally binding determination of that situation.

Australia does not deny that the General Assembly can determine with binding legal effect

whether a particular territory is a non-self-governing territory under Chapter XI of the Charter. But it does not follow from this that a reference by the General Assembly to a particular State as the "administering Power" of such a territory constitutes a determination of an objective legal status, opposable against all States for all purposes, and much less that such an "objective" status entails the consequences that Portugal claims.

In fact, an examination of United Nations practice suggests precisely the contrary. In none of the relevant United Nations resolutions dealing with non-self-governing territories is there any suggestion of a corresponding status of "administering Power". Important General Assembly resolutions on self-determination have repeatedly affirmed that it is for the General Assembly to determine whether a territory is non-self-governing, and that this is not a matter within the reserved domain of the State administering that territory. The United Nations has also assumed the responsibility of determining when Chapter XI ceases to apply to a non-self-governing territory. And the General Assembly has adopted resolutions setting out the criteria to be applied by the General Assembly in determining whether or not a particular territory is non-self-governing.

In contrast to this, neither the General Assembly, nor the Security Council, nor the Committee of 24, nor any other United Nations organ, has ever sought to define the content of a concept of "administering Power", nor to define the criteria for determining whether a particular State has that status in respect of a particular non-self-governing territory, nor to define the extent of its powers of administration in respect of the territory. Nor has the General Assembly or any other organ purported to reserve to itself the competence to determine whether a particular State has this status, in a way legally binding on all Members. Relevant United Nations resolutions have never even remotely suggested that an acknowledgment by the United Nations that a particular State is the "administering Power" establishes a special juridical status in international law, having *ipso jure* effect, binding *erga omnes*, until such time as the status is subsequently modified by the United Nations. Nor have they ever suggested that a State designated as the administering Power by the United Nations has the exclusive competence to deal with other States in respect of the territory, whether or not it exercises any control over it.

The General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960), contains no positive reference at all to administering Powers, let alone any suggestion that they have special rights or powers by virtue of Chapter XI that other States are bound to respect. Nor does that Declaration have anything to say about the circumstances in which a change in the State administering a non-self-governing territory may occur, or should or should not be recognized by other States.

However, in order to test the Portuguese thesis, let us assume for the purposes of argument that the first step in the Portuguese theory is correct - that is, that the General Assembly and Security Council have the capacity to determine authoritatively that a particular State is the administering Power of a non-self-governing territory. Let us also assume that the Security Council and General Assembly resolutions on East Timor adopted between 1975 and 1982 have determined that Portugal is the administering Power of East Timor - even though not all of these resolutions refer to Portugal as such - and let us assume that this determination has not been revoked.

Let us then consider what the consequences of this would be.

According to Portugal, there are a number of consequences which necessarily flow from the status of administering Power. Portugal argues that because its status as administering Power is incontestable, the applicability of these consequences to Portugal in relation to East Timor is similarly incontestable.

First, Portugal claims that as administering Power of East Timor, it exercises all powers equivalent to sovereignty or sovereign authority over East Timor. In Portugal's words, it exercises in relation to the territory "all the powers inherent to its capacity of a State subject of international law" (CR 95/6, p. 45, Mr. Correia), or "*toutes les compétences propres aux Etats avec les seules limitations découlant des normes du droit de la décolonisation*" (PR, para. 4.60).

Second, Portugal claims to exercise these powers in relation to East Timor *to the exclusion of any other State*. As Mr. Galvão Teles put it, the Portuguese argument is that Portugal's status as administering Power "*implique qu'il n'y ait pas, quant à ce territoire, d'autre autorité* de jure *que celle du Portugal, sauf, bien entendu, celle du peuple du Timor oriental lui-même*" (CR 95/2,

p. 60, Galvão Teles). The result of this, says Portugal, is that "The non-participation of Portugal prevents treaty-making in relation to East Timor... [T]he legal competencies of treaty-making continue to belong to it [Portugal] and no one else" (CR 95/4, p. 14). In short, says Portugal, "Australia is under an obligation to deal with Portugal and no one else" (CR 95/4, p. 25 Correia).

Third, says Portugal, Portugal's exclusive right and capacity to deal with other States in respect of the territory will continue until such time as the General Assembly terminates Portugal's status as the administering Power. (PR, paras. 4.16, 4.22; CR 95/4, pp. 10-11, Mr. Correia). Whether or not Portugal exercises any control over the territory is considered to be irrelevant. Portugal says that for so long as the United Nations has not expressly terminated Portugal's status as the administering Power, all States remain under an obligation to deal solely with Portugal.

Mr. President, Members of the Court.

Each of these three alleged consequences of Portugal's designation as administering Power constitute a giant leap in Portugal's reasoning. If one begins from the premise that Portugal has the status of administering Power, and if one accepts, as Portugal argues, that States are under a duty to respect the powers and duties of an administering Power (e.g., PM, para. 3.01), the *next* logical step would be to ask the question: what are the rights and powers (if any) of an administering Power? Why should it be, as Portugal contends, that the State designated by the United Nations as the administering Power should be treated by *all* States in the world as the *sole* State entitled to deal with others in respect of the territory, even if that State has exercised no control over the territory whatever for almost 20 years?

One would expect Portugal to advance carefully reasoned arguments in support of such an extreme proposition. In fact, one finds almost no argument at all. Both in Portugal's pleadings, and in its oral argument, the proposition that the designated administering Power is the *sole* State entitled to conclude agreements with other States in respect of the territory appears more as an assumption than an argument. Portugal assumes that if the General Assembly can adopt "constitutive" resolutions, determining that a particular territory is a non-self-governing territory within the meaning of Chapter XI, it must logically be able to adopt similar resolutions determining which State

is the administering Power of that territory (e.g., PR, para. 4.09; CR 95/2, p. 56, Mr. Galvão Teles; CR 95/3, pp. 64-65, Mr. Correia). In its Reply, Portugal says that a determination by the United Nations that a territory is non-self-governing

> "*serait incomplète et ne pourrait produire les effets juridiques voulus par cette déclaration avec force obligatoire s'il subsistait une incertitude sur l'identité du titulaire des pouvoirs et des devoirs juridiques concernant l'administration du territoire*" (PR, para. 4.09).

However, assuming the United Nations can identify which State is the holder of the rights and duties of the administering Power, this merely begs the question what those rights and duties are.

Professor Dupuy has told the Court that in matters of self-determination, the Charter speaks for itself - *Carta ipsa loquitur* (CR 95/3, pp. 11-14, especially at 13). But nothing in the Charter expressly says anything about the powers exercisable by an administering Power over a non-self-governing territory, or about that State's capacity - exclusive or otherwise - to deal with other States in respect of the territory.

Australia says that it is *not* obliged by international law to deal solely with Portugal as the administering Power in relation to East Timor. I should perhaps add, for the sake of clarity, that this does not necessarily mean that it would be illegal for a State to recognize Portugal as having the capacity - even the exclusive capacity - to enter into treaties in respect of the territory. Australia does not ask the Court to find that all States are *obliged* to recognize Portugal as having lost its rights and powers to deal with other States in respect of the territory. But in the circumstances of the case, in view of the fact that Portugal has had no presence in the territory and exercised no control over it for almost 20 years, it is not contrary to international law for States to recognize Portugal as no longer exercising any powers of sovereignty over it.

Professor Correia said last week that "Australia never explains which jurisprudence, practice or literature support this bizarre theory of a limited status for an Administering Authority like Portugal" (CR 95/4, p. 15). This is a curious criticism, since the authorities and precedents on which Australia relies are set out in the Rejoinder (ARej., Part II, Chap. 1). I shall refer to some of these precedents shortly. It is, on the contrary, Portugal which cites no authority in support of its theory, and the Portuguese theory which is inconsistent with the fundamental structure of Chapter XI

itself.

As Professor Crawford has demonstrated, the rights of a State - whatever they may be - to exercise sovereignty, or sovereign authority, over a non-self-governing territory do not have their source in the Charter. Rather, those rights are created and lost outside the Charter under general international law. No doubt Chapter XI of the Charter imposes certain *obligations* on States which have or assume responsibilities for the administration of non-self-governing territories, but Chapter XI does not itself create or extinguish rights to exercise sovereign powers in such territories.

In effect, Portugal's argument equates non-self-governing territories under Chapter XI with trust territories under Chapter XII, despite the clear distinction between them for this purpose under the Charter.

In Chapter XII of the Charter, Article 81 provides that trusteeship agreements shall be entered into which "shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory". The State so designated is referred to in the Charter as the "administering authority". Thus, in the case of a trust territory under Chapter XII, there is clearly a specific State which enjoys the juridical status of "administering authority" by virtue of the relevant trusteeship agreement and the Charter. This status may be conferred on a State which never previously had any right to administer the territory. The United Nations therefore determines through the trusteeship agreement not only which State shall administer the territory, but also the extent of the powers, obligations and rights of the administering authority, and the terms on which they shall be exercised. Chapter XII of the Charter is itself the source of that State's authority over the territory.

On the other hand, under Chapter XI, the United Nations has no dispositive powers to determine which State is entitled to administer a particular non-self-governing territory, in a way that would be opposable against all States for all purposes. It cannot be suggested that when Portugal joined the United Nations in 1955, that the United Nations had a choice whether to "determine" that Portugal would be the administering Power of East Timor, or whether to "appoint" some other State to this task. Portugal itself concedes this. In its Reply it states that determinative characterizations

by the General Assembly of a particular State as the administering Power of a territory "se limitent à constater des situations pré-existantes" and that such characterizations are made "après l'examen de la situation concrète du territoire et de la position de cet Etat par rapport à ce territoire" (PR, para. 4.59). In oral argument Portugal has conceded that the jurisdiction of an administering Power over a territory "is not granted but only determined by the United Nations" (CR 95/4, pp. 10-11, Correia). In other words, even on the Portuguese view a designation by the United Nations of a particular State as the administering Power is normally no more than an acknowledgment of a prevailing situation at the time the determination is made.

Nonetheless, Portugal suggests that by designating a particular State as the administering Power, the United Nations is able to deal with "controversial situations" by making determinations having definitive legal effect, thereby resolving that controversy (CR 95/3, pp. 66-67, Correia). Portugal gives a number of examples, including Southern Rhodesia, French Somaliland, and the territories under Portuguese administration (CR 95/3, pp. 66 ff., Correia). But these examples are simply not in point. In these examples, the controversy or uncertainty concerned the question whether the territories there were Chapter XI non-self-governing territories. If they were, there was no controversy as to the identity of the State entitled to control and deal with other States in respect of the territory. To prove its thesis, Portugal needs to point to examples where the General Assembly has adopted resolutions to resolve a controversy or uncertainty as to the identity of the particular State entitled to exercise sovereign powers over a territory. But an examination reveals that in fact, in cases where there has been a dispute between two States over the right to administer a particular non-self-governing territory, the General Assembly and Security Council have never taken the view that they had the power to resolve this dispute in a way binding on the parties, let alone on third States.

Mr. Burmester has referred to the example of the Falkland Islands (Malvinas). This has been determined by the General Assembly to be a non-self-governing territory under Chapter XI of the Charter. There is a long-standing dispute between the United Kingdom and Argentina over which State is entitled to exercise sovereign authority over that territory. Yet it has never been suggested

that the General Assembly could make a "determinative designation" that the United Kingdom has the status of "administering Power" of the Falkland Islands (Malvinas), and thereby create an obligation binding on Argentina and every other State not to disregard or fail to respect that status - *a fortiori* that it could determine that Argentina is the "administering Power" and thereby impose an obligation on the United Kingdom to abandon the islands.

In the present case there is a long-standing dispute between Indonesia and Portugal over which State is entitled to exercise sovereignty over the territory of East Timor. The situation is no different. Chapter XI does not empower the United Nations to resolve this dispute.

Nor does Chapter XI empower the United Nations to determine the *extent* of the powers or authority of a State administering a non-self-governing territory. The extent of that authority exists independently of Chapter XI. In cases where a former colonial power remains in control of a Chapter XI territory, the extent of its powers over the territory will normally be determined by the pre-Charter position. As Professor Crawford has already pointed out, in some cases, the colonial power will have exercised complete colonial sovereignty over the territory. In such cases, the former colonial power will, if it continues to administer the territory, exercise all powers of sovereignty in respect of it under Chapter XI. In the case of other territories such as international protectorates, the colonial State may have had more limited powers in relation to that territory. But whatever powers the relevant State had prior to the operation of Chapter XI, these were not altered by Chapter XI.

In brief, where a State does exercise certain powers over a non-self-governing territory, Chapter XI imposes obligations on that State in respect of the *manner* of their exercise. But Chapter XI itself does not "confer" or even define the extent of those powers. In particular, it is not the source of those powers. The authority of a State to exercise sovereignty over a particular Chapter XI territory is found outside the Charter, under general international law. Similarly, where a State loses all control over a Chapter XI territory, its rights in respect of that territory following that loss of control are also determined under general international law, and not under Chapter XI.

From this it follows that all powers which, by general international law, depend upon effective, actual possession of a territory must cease when that possession is lost. The only

remaining question, therefore, is whether the power to conclude the 1989 Timor Gap Treaty was of that kind. Did it presuppose real, effective possession?

The answer is clearly yes. There cannot be a "coastal State" *in absentia*. International law imposes duties, as well as rights on the coastal State, and these duties are contingent on presence in the territory. For instance, the duty to conserve the living resources, the duty to guarantee innocent passage, the duty to protect freedom of navigation, and the duty to protect licensees lawfully prospecting in the area, can only be discharged by a State in actual effective control.

The effect of Portugal's argument would be that Portugal would have all the rights and powers of a State in control of a territory but none of the responsibilities - other than the responsibility, which Portugal admits, to promote self-determination by all means possible in international and diplomatic fora. The basis of State liability for acts affecting other States is physical control of a territory, (International Law Commission, Draft Articles on State Responsibility, Article 10, *Yearbook of the International Law Commission 1980*, Vol. II (Part Two), p. 31. See also *Namibia Advisory Opinion, I.C.J. Reports 1971*, p. 54) so Portugal contends that all States are under an obligation to deal solely with Portugal in respect of East Timor, even though Portugal cannot be responsible for acts in the territory affecting other States. If a territorial government for East Timor today authorized a mining company to explore for petroleum in an area of the continental shelf claimed by Australia, Australia could not seek to impose responsibility on Portugal in respect of that act. The converse must also be the case: Portugal cannot impose responsibility on Australia for not dealing with Portugal.

There is another fundamental difference between Chapter XI and Chapter XII. Where an administering authority appointed under Chapter XII is in breach of its obligations in respect of a trust territory, the United Nations has the power to terminate the trusteeship agreement. Once the trusteeship agreement is terminated, the former administering authority no longer has any right to control the territory. If it thereafter remains present in the territory, that presence is illegal. All this is affirmed by the *Namibia* Advisory Opinion (*I.C.J. Reports 1971*, p. 16) following earlier decisions of this Court (*South West Africa* case, *I.C.J. Reports 1966*, p. 6). However, in cases

where a State administering a non-self-governing territory under Chapter XI has failed to fulfil its obligations in respect of that territory, it has never been suggested that its right to control the territory might be terminated by the United Nations, so that its very presence in the territory would thereafter be unlawful.

The treatment by the United Nations of the question of territories under Portuguese administration demonstrates this. In 1970, the General Assembly referred to the "policy of colonial domination and racial discrimination" of Portugal and South Africa and the illegal racist minority régime in Southern Rhodesia (resolution 2708 (XXV), 14 December 1970, para. 7). In 1966, the General Assembly had terminated South Africa's Mandate over South-West Africa (resolution 2145 (XXI), 28 October 1966). Yet, while requesting the Security Council to consider taking appropriate measures, including sanctions, against Portugal, and despite on two occasions referring to Portugal's colonial policies as a "crime against humanity", the General Assembly nowhere suggested that it might have a similar power to terminate Portugal's right to control the territories it administered before the achievement of self-determination, so that Portugal's presence in those territories would thereafter become illegal. Nor has the General Assembly ever purported to terminate any other State's right to control a Chapter XI territory before self-determination was achieved. If the General Assembly did have the power to terminate a State's right to control a territory pending self-determination, the General Assembly might have been expected to exercise that authority in Portugal's case. Because of the difference between Chapter XI and Chapter XII in this respect, the *Namibia* Advisory Opinion on which Portugal relies is simply not in point.

If it is the case, then, that the United Nations cannot make any choice about which State is entitled to exercise sovereign powers or authority over a Chapter XI territory, and cannot determine the extent of the sovereign powers of that State, but can merely affirm or acknowledge what already exists, what basis is there for asserting that its acknowledgment of a prevailing factual situation has binding *erga omnes* effect? Portugal says that resolutions of the General Assembly determining that a particular State is the administering power have a value which is "interprétative" (PR, para. 2.22). But as has been said, in cases where the right of a State to exercise sovereign authority over a

territory is in dispute, the General Assembly has not sought to resolve that dispute. So if the United Nations merely acknowledges, or "interprets" a clearly existing situation, there *can* be no basis for asserting that this acknowledgment or interpretation will continue to have binding *erga omnes* effect, even after the situation changes. Interpretation is not the same as disposition. Furthermore, if the United Nations has no power to terminate the former colonial State's right to control the territory for so long as it remains present in the territory, how can it be said that *after* it relinquishes or loses control it must be recognized as having the sole right to enter into agreements with other States in respect of the territory until the United Nations terminates its status of administering Power?

In practice, where there has been an effective change in the State administering a particular non-self-governing territory, third States have not considered themselves bound to await a determination by the United Nations before recognizing this change. An example of where such a change occurred by consent of the States concerned is provided by the case of the Cocos (Keeling) Islands (see ARej., para. 195, for further details). In 1955, administration of that non-self-governing territory was transferred from the United Kingdom to Australia, pursuant to an arrangement between these two States. From 1957, Australia transmitted information on that territory under Article 73 *(e)* of the Charter, until the General Assembly decided in 1984 following a referendum that it was appropriate that the transmission of such information should cease. No United Nations approval was ever sought for the transfer of the territory. Nor did any United Nations organ ever formally purport to transfer the status of administering Power from the United Kingdom to Australia, or to make a "determinative designation" that Australia was now the administering Power. Australia's status as the administering Power was acknowledged for the first time by the General Assembly in 1965, and even then, only indirectly. It would be absurd to maintain that from 1955 until 1965 all other States were obliged not to deal with Australia in relation to the territory. Yet this would be the effect of Portugal's argument.

Even in cases where one administering Power has been forcibly displaced by another State, practice has not been uniformly to continue to recognize the former as the sole State entitled to deal with others in respect of the territory until the United Nations has "terminated" its status as

administering Power. A clear example of practice to the contrary can be found in the case of *Western Sahara*, to which Mr. Burmester has already referred. The United Nations has consistently reaffirmed that the people of Western Sahara have the right to self-determination, and has rejected the claim that the territory of Western Sahara has been incorporated into Morocco. The United Nations has never referred to Morocco as the administering Power of Western Sahara, nor has it ever purported to determine that Spain is no longer the administering Power. Yet this has not prevented certain States, including the European Community, of which Portugal itself is a member, from having dealings with Morocco as the State in effective control of the territory, in respect of the natural resources of the territory.

Mr. Burmester has also referred to the *Guinea-Bissau/Senegal* arbitration, which provides further confirmation that a State administering a non-self-governing territory may lose its authority to enter into agreements with other States in respect of it by force of events, even though its status as administering power has not yet been terminated by the United Nations. In particular, as Mr. Burmester observes, by the time that Guinea-Bissau's independence was recognized by the United Nations, when it admitted that State to membership in the Organization, some 40 States had already recognized its independence. In other words, even though the United Nations had not yet terminated Portugal's status as administering Power, these 40 States had ceased to recognize Portugal as having any right to administer the territory, or to deal with other States in relation to it.

There are clear parallels between Guinea-Bissau and East Timor. By August 1975, the stage had been reached in East Timor at which Portugal, in order to control, or try to control events, was obliged (to adopt the language of the tribunal in the *Guinea-Bissau/Senegal* arbitration) "*à recourir à des moyens qui ne sont pas ceux que l'on emploie d'ordinaire pour faire face à des troubles occasionnels*" (Tribunal Arbitral pour la Détermination de la frontière maritime Guinée-Bissau Sénégal, Award of 31 July 1989, reproduced in the Annex to the Application instituting proceedings in the Case concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal*), p. 39).

Indeed, in a note verbale to the Secretary-General dated 20 April 1977, Portugal itself says that:

> "Effective exercise of Portuguese sovereignty on the Territory of Timor ceased in August 1975 when, owing to the violent incidents which took place at the time in the Territory, the Governor of Timor was compelled to leave and to withdraw,

> together with his principal civil and military collaborators, to the Island of Atauro." (A/32/73, 28 April 1977).

The Democratic Republic of East Timor was proclaimed by FRETILIN on 28 November 1975, and was recognized by some 15 States as an independent State (Ch. Rousseau, *Chronique des Faits Internationaux*, RGDIP, 1976, p. 958. See also PM, para. 1.67). While not recognized by Australia or Portugal, this demonstrates that by that stage, certain States no longer considered themselves *bound* to recognize Portugal as having any rights or powers at all in respect of the territory. And this would be true irrespective of the subsequent occupation of the territory by Indonesia.

The fact of the subsequent Indonesian occupation of East Timor, whether lawful or unlawful under international law, cannot have had the effect of *restoring* to Portugal an exclusive right to exercise *de jure* powers of administration over the territory, which it had previously lost. In any event, following the occupation of East Timor by Indonesia, FRETILIN continued until 1984 to assert the existence of the Democratic Republic of East Timor as an independent State and rejected the view that Portugal was still the administering Power of the territory (PM, para. 1.67). Calls by FRETILIN after 1986, for a solution to the question of East Timor, which would involve the re-establishment of Portuguese presence pending self-determination (PM, paras. 1.70-1.71) cannot have been effective to reconstitute a legal situation totally at variance with the facts. Similarly, resolutions of the Security Council and General Assembly referring to Portugal as the "administering Power" cannot have had the effect of reconferring powers of administration on Portugal (even assuming that this was their intention). As has been said, Portugal itself admits that the United Nations cannot "confer" powers of administration *ex novo*, but can merely "determine" or "find" the existing situation.

Essentially, Portugal asks the Court to determine that a former colonial State which did not fulfil its obligations under Chapter XI when it was in control of a non-self-governing territory, and which has since lost all control over the territory and thus cannot fulfil those obligations, must still be recognized by all States some 20 years later as the sole State legitimately entitled to administer that territory.

Portugal is at present incapable of discharging the obligations of an administering member under Article 73, as Portugal itself informs the Committee of 24. Portugal's argument that Australia is impeding Portugal in the fulfilment of its obligations under Article 73, by misrecognizing its status of administering Power is therefore without substance. The effect of the Portuguese argument would be to prevent any agreement in respect of the continental shelf in the Timor Gap from being entered into with any State that would be capable of having any effective operation. Portugal is unable to give effect to any agreement which it may enter into, and it maintains that States would not be entitled to deal with Indonesia, which is able to do so. The territory would thereby become completely isolated from the international community. Sanctions and blockades always tend to have this effect, and can prejudice the interests of the people concerned. This is why the international community does not apply them automatically but only after consideration by the competent United Nations organs, and on the basis of express directions or recommendations. Portugal seeks to erect a policy of mandatory sanctions based on the two words "administering Power" - in effect, an argument for sanctions out of silence.

This Portuguese argument runs counter to the very object of Chapter XI. Chapter XI is concerned with the rights of the people of a non-self-governing territory. It is not a colonial charter intended legally to entrench the rights of the former colonial State such that they will indefinitely survive even a complete loss of control over the territory in question.

However, Portugal itself is ultimately forced to concede that this is not the effect of international law. Portugal does not challenge the legality of the conduct of other States which have entered into bilateral double taxation agreements with Indonesia which extend to the territory of East Timor. Portugal tries to draw a distinction between these treaties and the Treaty between Australia and Indonesia (PR, paras. 6.14-6.15; CR 95/4, pp. 63-64, Galvão Teles), but it is not possible to do so. For a State to deal with Indonesia in respect of East Timor, whether in the context of double taxation agreements or in the context of agreements for the exploitation of natural resources, is to deny that Portugal is the sole State with which others may deal in respect of East Timor. If it is illegal to deal with a State other than Portugal in the one context, it must be illegal to

deal with a State other than Portugal in the other context. In its Reply (PR, paras. 5.10-5.11), Portugal claims that all States are under an obligation analogous to the obligation described by this Court in the *Namibia Advisory Opinion* (*I.C.J. Reports 1971*, pp. 54-56). The Court said in that case (p. 55) that

> "member States are under an obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia".

Clearly, the conduct of these States entering into double taxation treaties with Indonesia is inconsistent with this assertion. Entering into treaty relations with Indonesia in a case in which Indonesia purports to act on behalf of or concerning East Timor is precisely what these States have done. This treaty practice of other States flatly contradicts Portugal's assertion that "Australia is under an obligation to deal with Portugal and no one else" (CR 95/4, p. 25, Mr. Correia).

Mr. President, Members of the Court,

If a designated administering Power does not have - by virtue of that status alone - the exclusive power to deal with other States in respect of a territory, what then is the effect of the status of administering Power?

The answer is that where the General Assembly or Security Council designates a particular State as administering Power, this designation has effect for the purposes of the United Nations. It is not binding in contexts outside the Organization.

Indeed, the same distinction may be observed even with respect to the key international concept of a State.

The question whether a particular territorial entity is a State depends on the application of rules of international law to the circumstances of a particular case. Statehood is not a legal status which is "conferred" by the United Nations. However, United Nations organs may be required to determine for their own purposes whether a particular entity is a State.

For instance, membership in the United Nations is open only to States (*United Nations Charter*, Art. 4, para. 1). In the exercise of their functions under Article 4, paragraph 2, of the Charter, the Security Council and General Assembly are therefore required to determine whether an

entity applying for membership in the Organization is in fact a State. However, where the United Nations has decided that an entity is a State in admitting it to membership, this does not mean that all member States are under an *erga omnes* obligation to recognize that entity as a State in all contexts and for all purposes. Nor does it mean that all member States are under an *erga omnes* obligation not to "disregard" or to "misrecognize" its legal status as a State. References to commentators supporting this proposition will be provided for inclusion in the verbatim record (H. Aufricht, "Principles and Practices of Recognition by International Organizations", *American Journal of International Law*, Vol. 43 (1949), p. 679, pp. 703-704; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 165; H.E.H. Mosler, "The International Society as a Legal Community", *Recueil des Cours*, Vol. 140 (1974-IV), p. 60; J. Crawford, *The Creation of States in International Law* (1979), p. 322; P-M. Dupuy, *Droit International Public* (2nd. ed. 1993), p. 71).

Similarly, where two competing entities claim to be the legitimate government of a particular State, the United Nations will necessarily have to decide which of the two represents that State within the Organization. But this does not mean that all member States will then be under an *erga omnes* obligation not to "disregard" or "fail to respect" the right of that entity to represent the State in all contexts and for all purposes, even in bilateral relations wholly outside the United Nations.

To give an obvious example, until 1971 China was represented in the United Nations by the authority in Taipei. Notwithstanding this, between 1949 and 1971, numerous States recognized the People's Republic of China and dealt with the Government in Beijing in respect of the territory of China. It was never suggested that this was contrary to international law, until, in 1971, the General Assembly decided to recognize the representatives of the People's Republic of China "as the only legitimate representatives of China in the United Nations" (General Assembly res. 2758 (XXVI) of 25 October 1971).

In short, where the United Nations recognizes an entity as a State, or as the government of a State, this may have certain implications for member States within the context of the Organization. But such recognition by the United Nations does not create an objective legal status, opposable

against all member States for all purposes, even in bilateral relations wholly outside the Organization. Nor does it mean that that government must be "respected" by all States as the sole authority entitled to represent the State in international relations. Such designations by the United Nations do not override the reserved domain of States in matters of recognition. As Professor Higgins has observed,

> "United Nations practice indicates unequivocally that neither admission to the Organization nor the seating of particular governmental representatives on its organs can obligate any member State to offer recognition." (Higgins, *op. cit*, p. 165.)

Mr. President, I am aware of the time. I would require perhaps a further ten minutes. I am entirely in the Court's hands, I could finish today.

Le PRESIDENT : Vous pouvez continuer.

Mr. STAKER: Thank you, Mr. President.

There is an obvious parallel with the concept of an administering Power of a non-self-governing territory. Chapter XI of the Charter imposes certain obligations on member States which have or assume responsibilities for the administration of non-self-governing territories. The reference to States which "have or assume responsibilities for the administration" of such territories is a descriptive phrase, encompassing a wide variety of different legal relationships between territories and the States administering them, including colonies, international protectorates and condominia.

The United Nations will need to determine for its own purposes which State it considers to have such responsibilities - for instance, for the purpose of receiving information under Article 73 *(e)* of the Charter. But where the United Nations makes such a determination for its own purposes, there is no basis for asserting that this renders incontestable the existence of an objective legal status, opposable *erga omnes*, for all purposes and in all contexts. It does not mean that all States must deal with the State so designated as the only State entitled to represent that territory in bilateral relations.

To say a territory is "non-self-governing" involves clear rights for the United Nations, and

clear obligations for the member State administering the territory. And these rights and obligations are spelled out in the United Nations Charter. But to say that States in their day-to-day dealings, quite outside the United Nations, are legally bound to deal exclusively with the administering power nominated by the United Nations - even if it is not in control of the territory - is very different. For that affects States *outside* the United Nations, and it has no basis in the Charter provisions.

To require States to deal exclusively with the State referred to by the United Nations as the administering power in relation to a territory would impose a very serious restriction on States, particularly in cases where the State concerned exercises no control over the territory at all. It would be a restriction limiting the normal prerogatives of States as regards recognition. Portugal has cited no authority for the view that references by the United Nations to a particular State as administering power is binding on all member States for all purposes, and that the State so designated must be recognized as having the exclusive authority to enter into agreements with respect to the territory. It merely assumes this to be the case. But restrictions on State sovereignty cannot be based on mere conjecture.

Mr. President, Members of the Court, one might ask why the General Assembly referred to Portugal as the administering Power of East Timor in resolutions adopted *after* Portugal had ceased to exercise any control over the territory. One reason for this was no doubt to ensure that East Timor continued to be regarded as a non-self-governing territory. So long as the United Nations continues to refer to Portugal as the notional "administering Power", it remains clear that the right to self-determination still subsists.

Beyond this, references to Portugal as administering Power are an acknowledgment that Portugal, by virtue of its historical association with the territory, continues to have a role in the work of the United Nations relating to self-determination in that territory. The nature of that role was considered by Mr. Burmester, dealing with the question of Portugal's standing to bring these proceedings.

It needs to be borne in mind, that even within the context of the United Nations, Portugal is not recognized as being the sole legitimate representative of the people of East Timor. As early as

1973, the General Assembly adopted a resolution approving the credentials of the representatives of Portugal "on the clear understanding that they represent Portugal as it exists within its frontiers in Europe" (resolution 3181(XXVIII) of 17 December 1973). In 1974, the General Assembly referred in a resolution to Portugal as the "administering Power" of the "territories under Portuguese domination" while at the same time indicating that it was not Portugal but the national liberation movements in these territories which were "the authentic representatives of the peoples concerned" (resolution 3294(XXIX) of 13 December 1974, operative para. 6). And in the resolutions dealing with East Timor, the General Assembly describes Portugal as merely an "interested party" or as one of "the parties directly concerned", together with Indonesia and the representatives of the East Timorese people. (See especially resolution 36/50 of 24 November 1981, operative para. 3. Also resolution 37/30 of 23 November 1982, operative para. 1.) This separate reference to the "representatives of the East Timorese people" makes it clear that the General Assembly did not consider that it was Portugal which had the role of representing the people of East Timor within the United Nations.

If, even within the context of the United Nations, Portugal is not the exclusive representative of the people of East Timor, there can be no basis for saying that in Australia's bilateral relations outside the United Nations, it must deal with Portugal as the sole State entitled to enter into agreements concerning the territory.

The conclusion then, as was argued in Australia's Rejoinder, is that in international law there is no general objective legal status of "administering Power" of a non-self-governing territory, binding on all States for all purposes, with the consequence that all States must recognize - or not "disregard" - the exclusive right and competence of the State so designated to enter into agreements applying to the territory. If there is a legal status of "administering power" at all, it is a status which exists for United Nations purposes. It is a functional status, which is not inconsistent with a lack of any substantive authority to control or represent the territory concerned.

Mr. President, I may have erred in my estimate slightly - I will perhaps need another five minutes. Shall I continue?

The PRESIDENT: Yes, please continue.

Mr. STAKER: Thank you, Mr. President.

This does not mean that a State will always necessarily be entitled to deal with the State in effective control of a non-self-governing territory. This merely reaffirms what has already been said - that it is for the United Nations, and particularly the General Assembly, to give guidance on the application of Chapter XI. Even where a former colonial State remains in control of a non-self-governing territory, the United Nations may in appropriate circumstances adopt resolutions calling upon States not to co-operate or give assistance to that State. This occurred in the case of the African territories that Portugal administered. But no such resolutions have been adopted here, as Professor Bowett has shown. Where the former colonial State has lost control of a non-self-governing territory through a rebellion by part of the local population, it is also possible for the United Nations to give directions requiring that the new régime not be recognized by member States, as occurred in the case of Southern Rhodesia. But there, there was a finding that the régime in that territory had violated the right to self-determination. The Rhodesian example cannot be used, as Portugal seeks to do, to support a more general proposition that the "administering power" must still be recognized by other States as having exclusive rights to administer a territory notwithstanding a complete loss of control over it.

Similarly, where the former colonial State loses control over the territory through the intervention of another State, the United Nations could adopt resolutions requiring member States not to recognize the change in administration as legal. In the absence of guidance by the United Nations, each State must determine for itself how to respond to the situation, bearing in mind the general principles of international law. In the case of East Timor, if the United Nations considered that the actions of Australia and of the other States which have recognized Indonesia's control were hindering the fulfilment of the purposes of Chapter XI, it could call for a cessation of these actions. However, no resolutions have been adopted which would require Australia to recognize Portugal as the sole State entitled to deal with other States in respect of the territory, either at the time the 1989 Treaty with Indonesia was concluded, or at all. There has been no criticism of

Australia or of other States which have had dealings with Indonesia in respect of East Timor.

If there is no objective general legal status of administering Power in international law, by virtue of which Portugal could be determined to have the exclusive competence to deal with other States in respect of the territory, Portugal's argument necessarily fails on the merits. The Court would be unable to determine that Australia had breached international law by dealing with Indonesia. The Court is unable to do this, first, because of the *Monetary Gold* principle. But the Court also cannot do this because Portugal does not request it to. Portugal asks the Court only to determine whether, by dealing with a State other than Portugal, Australia has failed to respect the rights of Portugal *as the administering Power*, and whether Australia has thereby also failed to respect the rights of the people of East Timor. That is, whether it is contrary to international law for Australia to deal with *any* third State in *any* circumstances. If there is no special status of administering Power, and no *erga omnes* legal obligation to deal exclusively with the State so designated by the United Nations, the answer must be no. Once this question is answered in the negative, Portugal does not ask the Court to go further and to consider whether entry into a treaty with this particular third State - Indonesia - is inconsistent with principles of self-determination. But as Professor Crawford and Mr. Burmester have also argued, the answer to this further question would also be in the negative. It is not inconsistent with the right to self-determination to deal with a State in effective control of a non-self-governing territory, in the absence of some binding direction from the United Nations. And as Professor Bowett has demonstrated, there is no binding direction from the United Nations requiring States to refrain from dealing with Indonesia in respect of East Timor.

Mr. President, Members of the Court.

That concludes Australia's argument that the entry into the Treaty with Indonesia is not inconsistent with the rights of the people of East-Timor to self-determination. There is one further issue relating to the substance of the case on which arguments remain to be put to the Court, namely the right of Australia to negotiate for the protection of its own maritime resources. Professor Pellet and Professor Bowett propose to address this issue. I invite the Court to call first upon Professor Pellet tomorrow.

Thank you Mr. President, Members of the Court for your very kind attention.

The PRESIDENT: Thank you, Professor Staker. The Court will resume these oral pleadings tomorrow at 10 a.m.

The Court rose at 1.15 p.m.

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