CR 95/14

Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNE 1995

Audience publique

tenue le jeudi 16 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 16 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,

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M. Francisco Ribeiro Telles, premier secrétaire d'ambassade, ministère des affaires étrangères,

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M. Richard Meese, avocat, associé du cabinet Frere Cholmeley, Paris,

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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. Today the Court will resume its hearings in the case concerning *East Timor (Portugal* v. *Australia)* continuing the second round of oral arguments. It now falls to Australia, the respondent State, to begin its presentations this morning and to continue and conclude them this afternoon, as decided. I accordingly give the floor to the Agent to begin the oral arguments of Australia. Mr. Griffith, please.

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

Australia now takes stock at the end of the pleading of Portugal's case. Although Portugal's final submissions repeat those of its Memorial and Reply, in fact we now face a case which is but a shadow of the original claim in the written pleadings. That pleading was that Australia was not entitled to deal *at all* with Indonesia with respect to the disputed area of the Timor Gap and, instead, was required to deal exclusively with Portugal, *and only with Portugal*, in its capacity as Administering Power.

We see two lines of response by Portugal to Australia's exposure of the impossibility and the implausibility of Portugal's primary arguments. First, there are the sounds of silence. In other words, a failure to grapple with the merits of the issues. When Portugal does deal with the issues, it reverts to repetitions of positions which have been demonstrated as untenable. Secondly, the internal inconsistencies of the oral presentations have resulted in counsel for Portugal returning to the Court to offer a series of positions and choices on a declining, and somewhat inconsistent, scale, as apparent fallback positions. What *is* abandoned is the unsupportable claim of complete exclusivity of dealing which Portugal previously said is required by the resolutions of the Security Council and the General Assembly. With Portugal it is a case of different days, different *données*.

Many lines are cast to the Court, with various hooks and bait, as if Portugal is engaged in long-line fishing for a majority Members of the Court. This is much as Portugal itself fishes out the natural resources offshore Western Sahara. And we know that Portugal does this pursuant to agreements made, not with the administering power recognized as such by the United Nations, but with the State exercising sovereign powers. The Court must be shocked by the inconsistency of

Portugal's presentation of itself as the altruistic protector of the natural resources of the people which it abandoned over 20 years ago whilst at the same time, joining in the exploitation of a natural resource (in a manner which has recently been described as "plunder") in derogation of the very principle upon which it relies to maintain its case against Australia.

Mr. President, the difficulty about Portugal's case is that it is constantly changing. Previously, as we said, Portugal claimed to have the *exclusive* capacity to deal with other States in respect of East Timor. It now says:

- that States may deal with Indonesia in relation to matters other than the non-renewable resources of the territory (CR 95/12, p. 12, Galvão Teles; CR 95/12, pp. 36-37, Dupuy; see also CR 95/12, pp. 69, 71, 79, Correia); it also says
- that States may deal with Indonesia provided they consult with Portugal or the representatives of the people of East Timor (CR 95/12, p. 13, Galvão Teles; CR 95/13, p. 38, Higgins; CR 95/13, p. 40, Galvão Teles); another version is
- that States may enter into agreements with Indonesia applying to East Timor provided that the agreements apply to Indonesian territory generally and not solely to East Timor (CR 95/13, pp. 27, 28, Higgins); yet again it is said
- that States may deal with Indonesia provided that this is on the basis of informal relations but not on the basis of *de jure* recognition (CR 95/12, p. 26, Dupuy); and, inconsistently, it is put
- that States may deal with Indonesia on the basis of "articulated *de facto* recognition" but not *de jure* recognition (CR 95/13, p. 37, Higgins).

These positions are plainly inconsistent with each other. With so many changes, it is difficult to believe that any one of these propositions is genuinely held.

We have heard much about the *données* of this case, which Portugal says prescribe its status as an Administering Power, and direct the Court to accept the determinative effect of Security Council and General Assembly resolutions made between 1975 and 1982. But, Mr. President, what are the real *données* in this case? Let me suggest the following:

1. Australia and its people are entitled to exercise their own sovereignty, and to explore and

exploit their own offshore resources in the area of the Timor Gap.

2. For almost 20 years Portugal has abandoned the territory of East Timor. It does not and cannot exercise the sovereign powers of the coastal State and probably, almost surely, will never return to do so.

3. Also for the same 20-year period, Indonesia has exercised the sovereign powers of the opposing coastal State in respect of the offshore waters between Australia and East Timor.

4. The Court can take no position on the delimitation of the Australian entitlement to this entire area.

5. The 1989 Treaty has been known to the United Nations for six years and no United Nations organ, principal or subordinate, has deemed this Treaty to be in conflict with the right of self-determination of the people of East Timor.

6. It is for Portugal to demonstrate that there are operative norms of international law which prevent Australia from acting as a coastal State in respect of its claims to offshore waters, pursuant to the 1989 Treaty.

What then are the opposing *données*? In essence Portugal says there are two. The first, and most important for the people of East Timor, is that East Timor is a non-self-governing territory and its people are entitled to self-determination.

But, Mr. President, on this there is no dispute.

In the opening oral presentations in reply, Portugal again sought to accuse Australia of the very opposite to Australia's continuously stated policy of recognition and support for the right of self-determination for the East Timor people. Indeed, it sought also to produce the equivalent of oral evidence for the Court. Mr. Ramos-Horta was motioned to move across the Court to sit behind counsel who read an alleged quotation reported in that well-known journal of record, *The Northern Territory News* (CR 95/12, p. 11).

Mr. President, if the point of the reference to Mr. Ramos-Horta's reported statement that "This is the first time I have heard Australia supports self-determination" (CR 95/12, p. 70) is to suggest that Australia has not previously supported the right of the people of East Timor to

self-determination, the Court well knows that this is untrue. Whether regarded as pro- or anti-Australian, the extracted part of Renouf, *The Frightened Country*, pp. 438-449, included in our folder of plans and materials with the Court, and first misleadingly cited by Portugal on the opening day of the oral proceedings (CR 95/2, p. 26), establishes one thing, namely, that before and after 1975 Australia repeatedly, and strongly, supported the right of the East Timorese to an informed act of self-determination. Australia's position was put bluntly to Indonesia, was clearly stated at the United Nations, and was repeated by Australian Prime Ministers and Foreign Ministers, and elsewhere as public statements of Australia's policy. The Court has been taken through statements of Australia's policy in the written and oral proceedings. And, as the Court remembers, this policy continued after Australia's recognition of the *de jure* sovereignty of Indonesia at the inception of negotiations for the Treaty. For example, in 1983, the then Foreign Minister repeated Australia's "concern that an internationally supervised and accepted act of self-determination had not taken place" and the hope that Indonesia and Portugal would be able "to reach a lasting settlement of this question, a settlement which will take into account the best interests of the people of East Timor" (PM, Ann. III.44, Vol. V, p. 269, para. 194; (Vol. V, p. 27, para. 194 of the English version)).

Mr. President, Members of the Court, it is not necessary to repeat again what is stated without equivocation to the Court as Australia's position on this issue of self-determination. However, as Portugal (CR 95/12, p. 24, Mr. Dupuy) specifically referred to an answer by Australia's Foreign Minister to a question without notice in the Australian Parliament on 7 February 1995 (a copy has been provided to the Court by Portugal), we must keep open the door, which Portugal again seeks to close, by referring to the part of the answer by Senator Evans which was not read by Professor Dupuy (CR/12, p. 24). What the Foreign Minister also said is -

> "In the case of East Timor, Australia recognises that the people of East Timor do have a right of self-determination - to choose, in effect, how they are governed. This has been Australia's position since before the events of 1975, and it has never been reversed."

The Foreign Minister also made the obvious point (not admitted by Portugal) that self-determination can involve a number of outcomes, of which emergence of an independent state is but

one, including "some form of association within or with another State or a degree of autonomy within another State". This also Portugal seeks to ignore. But it is an integral part of the entitlement to self-determination. Portugal continues to equate self-determination and the exercise of that right by the people of East Timor with independence as a separate sovereign State.

Do we have to say it again for Portugal? Australia recognizes that the people of East Timor have the right to self-determination under Chapter XI of the United Nations Charter. East Timor remains a non-self-governing territory under Chapter XI. Australia recognized this position long before Portugal accepted it in 1974. It has repeated this position, both before and after its recognition of Indonesian sovereignty and it says so now.

Portugal's expressions of indignation are a complaint that we refuse to dispute an issue which Portugal, for the theatre of its case, would wish Australia to dispute.

The fact is that recognition of Indonesian sovereignty over East Timor, and dealings with Indonesia in respect of East Timor, are not inconsistent with the status of East Timor as a non-self-governing territory. Nor are they inconsistent with the right of the people of East Timor to self-determination.

Mr. President, it may well be that the Court, as part of its judgment in this case dismissing Portugal's claims against Australia, will find it appropriate to note what is common ground between the Parties, namely, that the right of the East Timorese people to self-determination is accepted by both Parties. This is a matter for the Court. But, as a matter of propriety, it would not seem right to include such a statement as part of an empty order on an issue dressed up as opposable to Australia, but on which there is no disagreement and no dispute. As to such matters not in dispute, the Court should not contemplate making any orders against Australia.

The second *donnée* of Portugal, as stated in the written pleadings, and which seems now substantially abandoned or modified beyond recognition, is that, by reason of resolutions of the Security Council in 1975 and 1976 and resolutions of the General Assembly between 1975 and 1982, Portugal has the designated status of "Administering Power" which must be accepted by this Court as entitling Portugal *exclusively and to the exclusion of all other States* to deal on behalf of

the East Timorese people.

Australia has demonstrated the impossibility of those resolutions supporting a *donnée* of this sort. We will refer in detail in our closing submissions today to the attempts by Portugal to modify its position so as to confine its arguments to agreements with respect to a non-renewable offshore resource. But the Court may now be clear on one thing: if Portugal has not established its case for the *donnée* it claims, its case must fail.

And, of course, Australia's case is that Portugal's case must fail in any event because of the absence of Indonesia as a party necessary in issues pertaining to claims which, not only involve characterizations of the conduct of Indonesia, but also involve, in essence, a direct attack upon the validity of a treaty between Australia and Indonesia.

One of the most striking features of Portugal's case is the persistent, single-minded concentration on the rights of Portugal and of East Timor, with scarcely an acknowledgment that Australia has rights. Anyone listening to Portugal's counsel during these three weeks of argument might be forgiven for not realizing that Australia *is* a coastal State, with quite specific legal claims to the resources in the area covered by the 1989 Treaty.

That Australia's claims have been disputed, first by Portugal and then by Indonesia, is clear. The problem facing Australia was how to secure an agreement which would enable Australia to exploit its own resources in security - that is, without protest or harassment by the authorities representing the opposite coast of East Timor. Australia's solution was the Timor Gap Treaty with Indonesia.

Portugal's solutions to this very real problem degenerate into increasing unreality. The initial suggestion was to make a treaty with Portugal - an exercise in futility. Then came the suggestion that Australia should have avoided any treaty and confined its exploitation to the 200-mile limit. Other counsel proposed the median line. The fact that these proposals involved an abandonment of claims Australia had maintained for 20 years and more seemed not to bother Portugal at all! And during the second round we were offered yet another helpful suggestion - Australia ought to have consulted with Portugal before agreeing the Treaty with Indonesia (CR 95/12, p. 13, Galvão Teles;

also CR 95/13, p. 38, Higgins; CR 95/13, p. 40, Galvão Teles).

Perhaps the most unreal proposal of all is that made, not to Australia, but to the Court. For the Court is told it cannot make a delimitation, but it must assume a line of delimitation so as to find that there is an area of East Timorese resources which, under the Treaty, Australia asserts a right to "plunder". It will be for the Court to decide how it handles these conflicting requests.

If the Court is as perplexed as we are by these unreal and inept proposals from Portugal, it will perhaps forgive the note of irritation which is present in Australia's Reply.

In our first round of pleading we explained the dilemma facing Australia. What was Australia to do in this highly unusual situation, created in large part by Portugal's irresponsibility - I refer to its conduct in abandoning the territory in 1975 prematurely and without any serious attempt to resolve the internal conflict?

What Australia did was to conclude a provisional arrangement which was *not* a delimitation and was *not* designed to bind East Timor if it gained independence.

The fact of the matter is that, if exploration and exploitation of Australia's resources were to go ahead, there was no real alternative, given the very real dispute with Indonesia. All of Portugal's suggested alternatives - abstention, informal arrangements falling short of a treaty, a treaty with Portugal - are, quite frankly, unreal. They assume either that Indonesia could be duped, or that Australia should surrender its rights. Mr. President, Members of the Court, in the real world those assumptions cannot be made.

Portugal's presentation was marked by one other feature that requires some comment. Portugal would have the Court believe that it was acting altruistically in bringing this action. Its only interest, it said, was the people of East Timor. However, Portugal's altruism seems inversely proportional to the distance of a people from Portugal. It adopts one standard in relation to Western Sahara, of which more shortly, yet expects Australia to adopt a quite different standard in relation to a people far from Portugal - a territory where Portugal has no economic interests of its own at stake. Double standards are much in evidence.

Ultimately, it is unclear precisely *where* Portugal claims the border is between legality and

illegality. Having said that the only problem which arises is that of knowing to what extent a State can take account of *effectivité* alone, and to what extent it is unable to do this (CR 95/12, p. 13, Maitre Galvão Teles), Portugal does not then seek to define what that extent is. Professor Dupuy says one thing; Professor Higgins another. It merely identifies a number of factors which, in combination, can distinguish Australia's conduct from the precedents on which Australia relies, including Portugal's own conduct in relation to Western Sahara. By refining its theory in this way to distinguish all precedents, Portugal is simply tailoring a principle of international law to fit Australia's specific conduct only.

Another feature was the silence of Portugal - silence in response to questions posed by Australia, and silence in response to major legal arguments of Australia.

And, we note, the Court has not been provided with any information as to the aid and humanitarian assistance, if any, provided by Portugal to East Timor, despite Australia's invitation for it to provide this information (CR 95/7, p. 31, Ambassador Tate). For Portugal, invocation of a principle and status in Court are more important than actual assistance and support to a people with whom it claims to have had brotherly ties for over four centuries. By 1975 we know that that 400 years of brotherhood (CR 95/2, p. 46) had produced no civilized infrastructure, only 13 kms of sealed road and 90 per cent illiteracy and less than 10 university graduates. Apparently, there has been no significant financial assistance from Portugal since. Some things do not change. In contrast to this, the significant financial and humanitarian assistance provided by Australia to East Timor has been described by Ambassador Tate (CR 95/7, pp. 29-30).

This silence was also reflected in the second round of oral pleadings. We accept the time constraints that Portugal was under. But surely, some response to Australia's analysis on, for instance, the status of an administering Power, made by Mr. Staker, or, the exercise by Australia of its own rights over natural resources, made by Professors Pellet and Bowett, might have been forthcoming. Instead, Portugal shifts ground; by its silence it leaves many of Australia's arguments unanswered.

No explanation was given as to whether this was because it agreed with them, or, whether, in

light of its shift in argument, Portugal no longer considered them relevant. The Court will have to draw its own conclusions.

Whatever the reasons behind Portugal's decision to bring this case - and these must remain matters of speculation - there can be absolute certainty on one point. This is, quite simply, that Portugal seeks to persuade this Court to reach a decision which Portugal knows, Australia knows (and the Court must realize), no other organ of the United Nations wishes to make. It can be stated with absolute certainty that if Portugal were to place the 1989 Treaty before any of the political organs of the United Nations - it does not matter whether we have in mind the Committee of 24 or the General Assembly, or the Security Council - no political organ would censure Australia for violating the right of self-determination by reason of concluding this Treaty. There is no *donnée* there.

The deliberate policy of Portugal is to use the Court to make a condemnation of Australia which Portugal knows no United Nations organ would entertain. What Portugal intends to do with such a judgment, if it gets it, is an interesting question. The chances of influencing Indonesia are, one suspects, nil. Australia's compliance with such a judgement would not only re-activate Australia's dispute with Indonesia but also would encourage Indonesia to exploit, unilaterally, the areas which under the Treaty were subject to joint control.

Australia suspects Portugal may have a further aim, and this is to use such a judgment in the political organs of the United Nations. It will be waved in their faces as a reprimand, as a censure of their indifference over the past 15 or so years. Will it produce any practical effects beyond penalizing Australia? The one result one can predict with absolute confidence is that it will help the people of East Timor not at all.

Mr. President, Members of the Court, Australia will address its reply to the case of Portugal in the following order:

Professor Bowett will discuss the resolutions of the Security Council and the General Assembly, and also discuss the Treaty.

Mr. Burmester will deal with standing and status of administering power.

Professor Crawford will then discuss the issues of recognition and self-determination.

Professor Pellet will then deal with issues of responsibility, and the *Monetary Gold* principle.

Professor Crawford will return briefly to discuss issues of propriety, and in particular the Northern Cameroons issue.

I will then make my summation and read Australia's final submissions. Mr. President, I ask you to call upon Professor Bowett.

Mr. PRESIDENT: Thank you, Mr. Griffith. I give the floor to Professor Bowett.

Mr. BOWETT: Thank you, Sir.

Mr. President, Members of the Court, I had not realized until hearing Portugal's Reply, how tiresome Australia has been in this case.

Australia is "negative" (CR 95/13, p. 9): that means we keep saying "No" to Portugal's arguments.

Australia is obsessed with "sanctions" (CR 95/13, pp. 8-34): that means we keep insisting that Australia, too, has rights, and that Australia cannot be deprived of those rights by mere inference from United Nations resolutions. It would require the Security Council to adopt sanctions against Australia under Chapter Seven of the United Nations Charter to do that.

Portugal has urged the Court to adopt a curious perspective to this case. Listening to Portugal, only Portugal and the people of East Timor have rights: Australia has only duties. I cannot recall a single statement on behalf of Portugal which acknowledged that Australia has rights as well as duties, save for one brief acknowledgment by Professor Dupuy (CR 95/12, p. 36).

Now, I trust the Court will not adopt that perspective. Australia is a sovereign State, with a coast abutting on the maritime area of the Timor Gap. Whatever rights the territory of East Timor has, Australia has them too. East Timor has a right of territorial integrity: agreed, but Australia has it, too. East Timor has the right of permanent sovereignty over its natural resources: agreed, but so, too, does Australia.

So the truth of the matter is that there are two opposite territories - the sovereign State of

Australia and the non-self-governing territory of East Timor - with equal rights, rights to their off-shore resources, and one of them, Australia, needs an agreement with its neighbour opposite in order to get ahead with exploration and exploitation.

Now, Australia presents no problems. But East Timor certainly does, because Portugal, the Administering Power, is dispossessed, and Indonesia is now in control *and likely to stay*. I emphasize that last point because that was what was so important about the United Nations resolutions. The General Assembly resolution 34/40 of 21 November 1979 no longer re-affirmed the earlier resolutions. It signalled a new approach which no longer called for Indonesian withdrawal but left it to the Secretary-General to negotiate with Portugal, Indonesia and the people of East Timor on how the right of self-determination of those people was to be protected.

Australia's reading of the situation in the United Nations was that Indonesia was there to stay. The Court will no doubt form its own judgment on whether Australia was right in coming to that conclusion, although it is not for the Court to substitute its own political judgment for that of a member State.

Curiously, these political judgments are irrelevant for Professor Higgins. In a mechanistic way she argues (CR 95/13, pp. 22-23) that the earlier resolutions have not been revoked, therefore they endure, and a decline in voting support is a "political phenomenon" of no legal significance. Well, would that life were so simple!

I repeat, it was Australia's political assessment, having closely watched everything that was happening in the United Nations, that Indonesia was there to stay, and, incidentally, that was an assessment shared by many States. Professor Higgins disagrees, as she is entitled to. She believes that, as with Namibia, we may be in for a long haul, but that, ultimately, self-determination will prevail (CR 95/13, p. 22).

Time will tell, but after 1979 Australia concluded that the United Nations lacked the political will to enforce change.

Having reached that conclusion, what options did Australia have? As I said in the first round, there were three. First, negotiate with Portugal - an absolutely pointless exercise. It seems that even

Portugal now recognizes the futility of that option. The Court will have noticed that in the course of these oral proceedings, we have heard very little of Portugal's original contention that Australia was under a legal duty to negotiate with Portugal. So we can set aside that option.

The second option was to do nothing, and this is really what Portugal now says Australia should have done. Abstention is the solution, according to Portugal.

But, Mr. President, why should Australia abstain? On the view genuinely held by Australia the area up to the Timor Trough was Australian shelf. What rule of law required Australia to abstain from negotiating practical arrangements of a provisional nature that would allow Australia to exercise its rights to explore and exploit its resources? In fact Article 83, paragraph 3, of the 1982 Convention supported the opposite conclusion: it advocated that, if a delimitation agreement was impossible, Australia should seek some provisional arrangement. Moreover, we are not talking about some temporary abstention. If Indonesia was there to stay, and if Australia could not treat with Indonesia, the "abstention" required of Australia would be indefinite.

Mr. President, we heard much of the rights of East Timor. What about Australia's rights to explore and exploit its own natural resources - its own continental shelf? These rights merit equal consideration with the rights of East Timor. The Court cannot simply close one eye, and have regard only to the rights of one side, East Timor.

So, inevitably, Australia took the only realistic and lawful option, that of negotiating with Indonesia, and that resulted in the 1989 Treaty.

What is wrong with this Treaty? When one tries to unravel the Portuguese arguments, the picture is obscure and confused.

Did either of the two parties - Australia and Indonesia - lack capacity to make that Treaty? It seems not. Australia's capacity as a coastal State is not in doubt, and Portugal says the standing of Indonesia is not in issue in this case although, logically, if Portugal asserts the sole right to represent the territory with this type of Treaty, that must mean Portugal denies Indonesia's capacity to do so.

Was there something illegal in the terms, the substance, of the treaty? It seems that, for Portugal, there was. The recurring theme of "plunder" found in Portugal's oral arguments can mean

only one thing: Portugal regards the Treaty as an instrument of theft of East Timorese resources, contrary to the right of permanent sovereignty over their natural resources belonging to the people of East Timor. That is the crux of Portugal's complaint. And it raises all sorts of problems.

First, and foremost, how can Portugal expect the Court to accept the view that there is theft if the Court cannot itself delimit the shelf boundary? How can the resources of any part of the Zone of Co-operation be held to be East Timorese, if no boundary exists and the Court cannot establish one?

Second, how can the Court uphold this challenge to the Treaty, based upon a rule of *jus cogens*, without finding the Treaty to be invalid? And if it makes that finding, expressly or impliedly, how can it do so without hearing Indonesia, one of the parties to the Treaty?

Third, if the Court were to accept the Portuguese argument, how does the Court propose that Australia's right to explore and exploit its shelf resources should be respected and implemented?

It seems to Australia that Portugal puts the Court into an impossible position. Moreover, if the Court is to invalidate the Treaty - and despite Portugal's denials, that is in fact what Portugal does request the Court to do - where does this process of review stop? The Court has never before struck down a delimitation agreement, or an agreement such as this on co-operation in joint exploration and exploitation. The Court has always accorded to coastal States full freedom to determine the "equities" of the situation. If the Court challenges the "equities" of the 1989 Treaty, on the ground that it allows one party, Australia, to "plunder" resources which do not belong to it, it can presumably do so on only one of the following grounds:

1. that there is a delimitation, implicit in the Court's reasoning, which does not coincide with the division of resources agreed by the parties, *or*

2. that Indonesia had no capacity to consent to such a treaty on behalf of the people of East Timor.

Of these two grounds the second is impossible. Portugal does not now argue it and the Court cannot rule on Indonesia's capacity if Indonesia is not a party in this case. So we are left with the first. But the first ground is to be heard, it is without precedent. It does not depend at all on the status of East Timor as a non-self-governing territory: it is a ground of challenge which could be

applied to any delimitation treaty.

I will anticipate the objection that, where two coastal States make a treaty - whether a delimitation agreement or a co-operation agreement for joint development - they both give consent, and this bars any subsequent challenge by either. So my "scenario" is unreal.

But why is the present Treaty different? Indonesia and Australia have given their consent. Portugal's answer, presumably, is that Indonesia could not give consent on behalf of East Timor. That, of course, exposes the true basis of Portugal's complaint. It is a complaint against Indonesia and that complaint is that Indonesia lacked capacity to represent the territory of East Timor and, in the event, wrongfully ceded to Australia resources belonging to East Timor.

Mr. President, in all that I have said so far, the resolutions passed by the United Nations have figured very little. Their importance lay in the clear signal they gave after 1979, that the United Nations was not going to oust Indonesia from the territory of East Timor: and Australia had to adjust to that fact.

On Monday Australia was soundly criticized by Professor Higgins for not accepting the "determinative effect" (CR 95/13, p. 14) of United Nations resolutions. The criticism is misplaced and inaccurate. Australia does accept that Portugal has been named as Administering Power. Australia does accept that East Timor is a non-self-governing territory under Chapter XI of the Charter. Those are determinations we accept.

But the question is what are the implications of these determinations for Australia? Do they mean, necessarily, that Portugal has exclusive treaty-making power, or legal standing to bring this case? Do they mean that no treaties can be made with Indonesia? Those are the questions at issue, and the simple fact is that the resolutions, determinative as they may be, do not provide answers to those questions. And that is true whether one looks for binding decisions or recommendations.

This is why Professor Higgins has to rely on mere inference. The resolutions, she says, confirm the status of Portugal "with all the implications for admissibility" (CR 95/13, p. 14); they confirm the entitlements of the people of East Timor "with all the implications for the merits" (CR 95/13, p. 15). The trouble is, Mr. President, that Portugal's propositions depend upon these

"implications", not the words of the resolutions themselves. Australia can accept the determinative effect of resolutions, clearly spelt out. It cannot accept these "implications" which Portugal seeks to derive from the resolutions.

It seems clear from Portugal's oral pleading that Portugal does not now suggest that these resolutions imposed direct or specific obligations on Australia *not* to treat with Indonesia. Such obligations as Australia may have are no more, nor less, than the obligations for *all* States deriving from:

(a) the finding, or "*donnée*", that Portugal is the Administering Power; and

(b) the finding that the territory of East Timor remains a non-self-governing territory; and

(c) the finding that its people have a right of self-determination.

The question is, therefore, what duties arise from these findings? And, again, it is a question of duties for *all* States, not just Australia.

The idea that all States have a general duty to treat only with Portugal, and not Indonesia, seems to have been abandoned. Faced with the fact that some 30 or more States have made treaties with Indonesia that clearly apply to East Timor, Portugal's reply is to say "Ah, but those are different: those treaties don't affect the non-renewable resources of East Timor, so those treaties do not conflict with the right of the people to permanent sovereignty over their natural resources". In the words of Professor Higgins, those treaties have nothing to do "with the natural resources of East Timor" (CR 95/13, p. 26).

So, some treaty-making with Indonesia is all right. Portugal no longer asserts an exclusive right to make treaties in general - only treaties affecting non-renewable resources. In the words of Professor Correia, Portugal's *ius tractum*, its treaty-making monopoly, exists only "on matters directly concerning important and non-renewable natural resources and territorial integrity" (CR 95/12, p. 73). Mr. President, the consequences of that proviso are clear.

First, this "duty to treat with Portugal and with no other State" in practice binds only Australia. For no other State has negotiated over non-renewable, natural resources. Only Australia, it seems, as the opposite coastal State, is in that position.

Second, since a treaty with Portugal would be quite pointless, this means Australia must abstain. As I said earlier, it is important to grasp the essence of Portugal's argument. The rights of East Timor are paramount, the rights of Australia do not signify. Australia must abstain.

In practice this means that, so long as the territory remains non-self-governing - and this may last for 20, 50, 100 years, Australia must abstain. It can have no treaty, and its own sovereign rights cannot be exercised or protected.

Portugal hesitates to put the position in such stark terms. Instead, Portugal attacks this specific Treaty because of the terms, or substance, of the Treaty. We are told that the Treaty violates the status and inviolability of the territory; and, second, that it violates the right of self-determination of the people of East Timor and their corollary or right to permanent sovereignty over the natural resources. These violations are not so much violations of any express provision in the resolutions addressed to Australia: they are violations of the findings or "*données*" contained in the resolutions.

Let us take that first allegation. Does the Treaty really violate the status of the territory as a non-self-governing territory: or violate its territorial integrity? Let me make a number of observations.

First, it cannot be said that, because the territory is non-self-governing, therefore no treaty can be made to regulate the exploitation of its off-shore resources. It is commonplace for States to make treaties of this kind for their dependent territories.

Second, this Treaty in fact identifies quite clearly the rights attaching to East Timor. Because of the 1971 and 1972 delimitations on either side, one can see exactly what area is to be identified as the area in which East Timor has claims, although these claims are translated into rights to participate in the proceeds of exploitation. If the Treaty simply merged the off-shore area into the off-shore area of Indonesia, so that there was no possibility of distinguishing the area of East Timorese rights from those attaching to Indonesia itself, the matter might be different. But here the separate identification poses no problems.

This is why the anxieties expressed by my good friend Professor Dupuy are, with respect,

misplaced. He is concerned that the 1989 Treaty is not specific, and obliterates the separate identity of the people and the territory of East Timor (CR 95/12, p. 34). But in fact, because of the "gap" and because the "gap" is so well defined, there is no difficulty about identifying the area attaching to the coast of East Timor. Indeed, the Treaty itself, in its Preamble, identifies the area of shelf as that which lies between northern Australia and East Timor. So separate identification in the future is simple enough.

Third, the allegation of breach, or violation, by Australia has been made only by Portugal. No United Nations organ, no other member State, and not even the Secretary-General has ever made such an allegation - even though the primary responsibility for safeguarding the interests of the people of non-self-governing territories rests with the General Assembly.

Now, let us turn to the second allegation: this is that the Treaty violates the right of self-determination of the people of East Timor, because it appropriates their resources, contrary to their right of permanent sovereignty over natural resources. This is the "plunder" allegation. This is what makes this Treaty different, apparently, from treaties on the Protection of Investments, or Air Transport, or double-Taxation, or even, we are told, the European Community Agreements with Morocco over fishing off the coast of Western Sahara. So it is not the fact that the appropriated resources belonged to a non-self-governing territory like Western Sahara. What is wicked about this Treaty is that it contemplates the appropriation of *non-renewable* resources attaching to East Timor. Oil is different from fish!

Well, Mr. President, there are a number of comments to be made on that argument.

First, the original complaint was that Australia had made a treaty with Indonesia, and not Portugal. It must be clear, now, that the real complaint is different. Because other States making treaties with Indonesia, and concerning East Timor, seem to be unobjectionable.

Second, it can't be that Portugal relies just on the right of permanent sovereignty over natural resources. The fish off the coasts of Western Sahara are natural resources. The resources have to be *non-renewable* before the principle applies, so this is some new principle, invented for the occasion, and calculated to affect only Australia, but not, of course, Portugal.

Third, how can it be assumed that the resources belong to East Timor, rather than Australia?

It is this last point which merits closer examination. As I have said, such a pronouncement assumes an implicit delimitation by the Court.

Then there is another problem. If the Court finds, as Portugal requests, that the 1989 Treaty is a violation of the people's right of self-determination - or of sovereignty over natural resources - that would constitute:

(a) a finding that the 1989 Treaty is not a valid provisional arrangement within the meaning of Article 83, paragraph 3, of the 1982 Convention on the Law of the Sea, and

(b) a finding that not only Australia, but also Indonesia, has violated a norm of *ius cogens* in concluding this Treaty.

Any finding that Australia has unlawfully taken the resources of East Timor is a finding that Indonesia has unlawfully ceded those resources.

Then, there would be a further finding:

(c) That until East Timor achieves independence Australia has no hope of securing an agreement on the exploitation of the off-shore resources in the area of the Timor Gap. Australia's sovereign rights must remain in abeyance, for an indefinite period.

And, finally, there would be an implicit finding which would lie behind the judgment, but which the judgment could not reveal, and that is:

(d) That some notional line of delimitation has been drawn by the Court.

Mr. President, that concludes my argument. Could I ask you to call on Mr. Burmester?

Mr. PRESIDENT: Thank you, Professor Bowett. I call upon Professor Burmester.

Mr. BURMESTER:

STATUS OF ADMINISTERING POWER

Mr. President, Members of the Court,

The role of Portugal in relation to East Timor is central to these proceedings. That is agreed

by both Parties. But the second round of oral pleadings on this issue given on Monday, by Professor Correia, shows that Portugal and Australia are still far apart on this issue. My task today is to clarify the Australian position concerning the status of Portugal as Administering Power - both in relation to the merits and in relation to the standing of Portugal.

Portugal maintains that, as the designated Administering Power of East Timor, it has certain duties to assist in the achievement of self-determination for the people of East Timor - its "main legal duty as Administering Power consists in upholding the right of the people of East Timor to self-determination and independence" (CR 95/12, p. 71) it says.

From this, Portugal concludes that the duty is accompanied by the necessary powers to maintain unimpaired the natural resources pertaining to the territory "which may be instrumental for the viability of independence if the people will choose it as their political future" (CR 95/12, p. 71).

Portugal also concludes that either from its objective status as Administering Power or on the basis of its position as defined in United Nations resolutions, it has the capacity to represent the people of East Timor in judicial proceedings concerning the disregard and infringement by a third State of fundamental rights appertaining to that people.

Australia disagrees with each of these conclusions.

I note in passing that while Portugal continues to assert its full capacity as Administering Power, its primary focus in its argument now appears to be on its capacity as the only State with the duty of defending and representing the interests of the people of East Timor. Its role in this regard is "pivotal" (CR 95/12, p. 47); it provides the "umbilical cord" which ties East Timor to the international community (CR 95/12, p. 53).

Yet, as Professor Dupuy said, Portugal itself has no interest in the petroleum resources of the Timor Gap (CR 95/13, p. 73) only, as the Agent made clear, an interest for the people of East Timor (p. 74).

Despite this, Portugal continues to assert that it has its own rights as Administering Power which justify legal proceedings in relation to the resources of the territory. This is clearly not so. As I outlined to the Court the other day, Portugal has no capacity as a coastal State to negotiate and to

conclude a treaty relating to the natural resources of East Timor. Nothing Portugal says rebuts this. All that Portugal points to is its alleged capacity as Administering Power - a capacity which clearly does not equate to a capacity equivalent to that of a sovereign State over a piece of territory.

I turn then to examine Portugal's arguments about its capacity as Administering Power, including its right to represent the people of East Timor. First, two preliminary issues.

(a) Relationship between Chapters XI and XII of the Charter

Portugal argues that there is no relevant distinction between territories under Chapter XI of the Charter and trust territories under Chapter XII (CR 95/12, p. 54-56). However, Portugal refers only to authorities which establish that the right to self-determination is the same for both types of territory. This may be accepted. But from this proposition one can derive absolutely no assistance in terms of equating the powers and rights of an administering Authority established by a Chapter XII Trusteeship Agreement, and the powers of an administering Power, a status that is not defined anywhere in the Charter or in any legally binding agreement. For the reasons already given by Australia, the powers of the two States cannot be equated. Chapter XI comprises a unilateral declaration made by each member State - it does not confer a status by means of a contract, as in the case of a Chapter XII agreement: the leading international lawyer relied on by Portugal recognizes this distinction (Bedjaoui, "Commentaire de l'article 73 *in* Cot/Pellet", *La Charte des Nations Unies*, 2nd ed., 1991, p. 1072).

In particular, one notes with astonishment the apparent suggestion by Professor Higgins that, by a simple majority, the General Assembly can strip an administering power of its authority over a territory, in the same way it can deprive a trusteeship power of its trusteeship (CR 95/13, p. 11). This is the only interpretation I can give to the statement that if it had been the intention to remove Portugal from its status as Administering Power "the United Nations procedures for doing so would have been engaged". The fact is, as Dr Staker made clear, the United Nations has never assumed a power to determine the entitlement of a State to exercise authority over a Chapter XI territory (CR 95/10, pp. 59-60). Not even in relation to Portugal pre-1974.

The General Assembly can require certain action by an administering Power - it cannot however deprive it of, or confer on it, any governmental or territorial authority it possesses or lacks under general international law. Portugal, of course, possesses neither in relation to East Timor.

(b) Analogy with powers of international organizations

Portugal seeks to draw an analogy with the power implied in an international organization to bring international claims when required for the discharge of its functions, and it says that a similar power must be implied in an administering power to bring proceedings to protect the people of a territory for which it is responsible (CR 95/12, pp. 73-74). But this analogy is mistaken. An administering power is not an artificial person. As a State, it has rights of its own and it is able to defend those rights, including by bringing legal proceedings. If it is seeking to defend not rights of its own but those of a self-determination people, its capacity to bring proceedings depends on whether it is in fact the authorized and effective representative of the people with the ability to defend those particular rights. There is no occasion to resort to implied powers - the question is whether, in a particular case, the administering power is endowed with the relevant capacity. Australia says that in relation to the resources of East Timor Portugal does not have its own capacity nor any representative capacity. It had been rejected as representative by the people prior to December 1975 and the *Guinea Bissau/Senegal* Arbitration confirms that it could not, in these circumstances, represent the people of East Timor in relation to maritime resources. The finding in that case excludes entirely the notion that, simply by virtue of being an administering Power, a State can represent the territory in general. Portugal made absolutely no reference to that decision on Monday.

United Nations resolutions

In response to Australia's analysis of the role of Portugal envisaged in the United Nations resolutions, Portugal seeks to place enormous importance on the fact that it is called *the* Administering Power in a number of the resolutions. The question that needs to be asked is: Why did the United Nations refer to Portugal as Administering Power, despite its lack of any effective control of the territory?

Portugal offers one answer (CR 95/12, p. 57) namely, that "it makes sense" for the United Nations to have retained in Portugal those duties, powers and rights which could "usefully be exercised" even in a situation of lack of effective control by Portugal. Portugal appears to consider the status of Administering Power is directly related to that of being an "interested party" within the meaning of the resolutions. The only reason Portugal is an interested party, it says, is because of its "historical duty" to the people of East Timor, and the fact that it has duties, powers and rights as Administering Power which it continues to be obliged to exercise (*ibid.*, p. 67).

But one can, with as much sense, provide alternative answers as to why Portugal is called Administering Power.

For instance, the reference to Portugal as the Administering Power can be regarded as no more than a recital of a historical fact; it was an explanation of why Portugal continued to be an interested party in a resolution of the issue, despite its complete absence from the scene. It implies nothing about its treaty-making capacity in relation to the territory.

Further, whatever Portugal says, it is as equally plausible to say that a reference to Portugal as "the Administering Power" implied absolutely nothing as to the powers and rights of Portugal to take a leading and active role in defence of sovereign rights in East Timor. Such an interpretation is supported by a reading of the resolutions as a whole. It is also confirmed by an examination of the Southern Rhodesian case, on which Portugal seeks to rely. In that case, the United Kingdom, the named Administering Power was, like Portugal, without any presence in the territory. However, there the similarities end. In the case of Southern Rhodesia, the Security Council and General Assembly repeatedly emphasized the illegality of the minority régime. Binding sanctions were adopted. The General Assembly specifically called on the Administering Power to undertake a number of tasks (see Appendix A to ACM, pp. 182-184). The Security Council specifically called on the United Kingdom to quell the rebellion (Security Council resolution 217 (1965)). In resolution 328 (1973) the Security Council recorded that the United Kingdom "as the Administering Power, has the primary responsibility for putting an end to the illegal racist minority régime", and called upon that Government to take all effective measures to bring about the conditions necessary to

enable the people of Zimbabwe to exercise freely and fully their right to self-determination and independence (see ACM, paras. 250-251).

The absent Administering Power was recognized as the principal State concerned and was specifically directed to undertake certain particular tasks. There has been no such direction here. In that case, one was, of course, dealing with an internal rebellion - that was the situation in East Timor pre-December 1975. It clearly has not been the basis on which the United Nations has dealt with the issue since then. This cannot be ignored when considering the role of Portugal in discharging any functions it might have as Administering Power. This is a situation more akin to Western Sahara. There United Nations resolutions regularly refer to the two parties to the conflict - Morocco and the Popular Liberation Front. There is no reference to the Administering Power: Spain has renounced its role as such, although the United Nations still lists it as Administering Power in publications. If Portugal's argument about the status and capacity of Administering Power were correct, Spain would still have the right, indeed the duty to initiate legal proceedings against the member States of the European Community for dealing with the resources of Morocco!

Let me turn yet again to the resolutions on East Timor, so far as they concern the role of Portugal to see if they confirm that leading role which Portugal claims in defending the rights of the people of East Timor and its own rights as Administering Power. This has already been done in detail by counsel for Australia (CR 95/7, pp. 45-52; CR 95/9, pp. 11-13) and that analysis showed Portugal had no such role. It is in no different position to Indonesia. Portugal replies that this is not so and it relies on the resolutions, and particularly two aspects thereof. First, the recital in the 1982 resolution 37/30 whereby the General Assembly bears in mind that "Portugal, the Administering Power, has stated its full and solemn commitment to uphold the right of the people of East Timor to self-determination".

But this recital can hardly confer powers on Portugal. It can be seen as no more than welcoming the fact that Portugal by 1982 was at last fully acknowledging its role as a participant in the process of seeking a solution in a way that would achieve self-determination, a role that did not now envisage any return of Portugal to the territory. In 1981, operative paragraph 3 of resolution

36/50 had called upon Portugal to co-operate with the United Nations to guarantee the full exercise of the right to self-determination. The 1982 preambular paragraph, relied upon by Portugal, records Portugal's response to this call. In terms of operative provisions, all that the General Assembly envisaged in 1982 was the Secretary-General initiating consultations with all the parties directly concerned. Portugal was not, unlike the United Kingdom in relation to Southern Rhodesia, called upon to take any action of its own. Resort to dictionary meanings of the word "uphold" used in a preambular paragraph, hardly engenders confidence that the powers claimed to arise and to flow from such words in fact exist.

The second principal feature relied upon by Portugal in relation to the United Nations resolutions are the substantial differences in the 1980 and 1981 General Assembly resolutions between the references to Portugal and the references to other interested parties (CR 95/12, p. 66). Portugal's interest is specific. But ultimately this is only because it is the Administering Power. Portugal also points to Security Council resolution 384 of 1975 and the call made there on Portugal as Administering Power to co-operate to enable the people of East Timor to exercise their right to self-determination. Portugal, however, acknowledges that this resolution does not say what conduct shall be adopted by Portugal - that is a matter for decision by Portugal (CR 95/12, p. 64). But a decision to adopt particular conduct, such as bringing court proceedings, cannot give Portugal rights it no longer possesses.

Mr. President, as I indicated at length the other day, Portugal continues to misrepresent the role the United Nations envisages for it as a protagonist role. This is the Administering Power that scuttled away at the first sign of internal trouble, that for a number of years after this wanted nothing to do with East Timor and only more recently regained an interest. Mr. Griffith recounted the facts in this regard the other day. The United Nations resolutions reflect this and they provide no support whatever for Portugal's claim to have the right to take legal proceedings or to have a status which requires Australia to deal with it in relation to the resources of East Timor.

Portugal argues that the reference throughout the resolutions to the representatives of East Timor as separate and distinct from Portugal as Administering Power does not detract from

Portugal's ability to represent and defend the interests of East Timor. Political representation in United Nations organs is distinguished from Portugal's "general representation of the territory in the domain of international relations" or Portugal's right to "represent the territory of East Timor in the domain of relations between States" or Portugal's "general capacity as a State, member of the international community, [responsible] for the fulfilment of its duties as Administering Power" (CR 95/12, p. 63).

Portugal disclaims its sovereignty over East Timor. Yet, at the same time it keeps insisting that as Administering Power it has a general capacity to act on the international plane in respect of East Timor. It cannot have it both ways. In any event, the basis for the capacity it asserts is clearly not the United Nations resolutions, for they clearly do not authorize such capacity. The only basis can be the existence of some "objective status" of Administering Power which survives intact despite abandonment of a territory and rejection by its people of the authority of the State. Portugal ultimately recognizes this. Professor Higgins says that "administering Power" is to be given its "normal meaning" (CR 95/13, p. 12; see also CR 95/12, p. 69). That is to beg the question, not answer it.

For all the reasons already given, Australia contends that use of the name "administering power" defines rights and duties towards the United Nations. It determines nothing as to the powers and rights of a State in relation to the relevant self-determination territory. Those powers and rights can only be determined by general international law. In the circumstances of East Timor, Portugal can point to no basis for retention of the powers it would have if it were in effective control or, as in the case of Southern Rhodesia, had been charged with certain tasks. Portugal would have the Court believe that while it cannot speak for the people in relation to negotiations about how and when they exercise their right to self-determination, nevertheless Portugal can continue to conclude treaties on behalf of the people, including treaties concerning their resources. So much for a separate and distinct status!

Administering Power

Mr. President, as I have shown, the United Nations resolutions lead Portugal nowhere so far as its rights are concerned. There therefore remains only this one basis for Portugal's claim to both have standing, and to have a status opposable to Australia: that is its claim that there exists an objective status of Administering Power, and Mr. Staker addressed the Court in some detail on this. In the second round of oral pleadings Portugal said hardly a word in response. Now I know that silence in this context cannot be taken as consent, but silence nevertheless suggests the absence of any strong arguments to rebut the Australian claims. All that Portugal offers is a willingness to "hang around" (CR 95/12, p. 53). While it hangs around, presumably it expects Australia to also hang around, prevented from exploiting maritime resources to which it has a longstanding claim. That certainly appears to be Professor Higgins' view (CR 95/13, p. 38). Australia just has to abstain.

Whatever role Portugal may have within United Nations organs in relation to East Timor, it is a quite different matter to say that States in relation to dealings outside the United Nations are legally bound to deal with one State and not another State because the United Nations calls the former State the Administering Power. Portugal has not shown any basis for such a claim. The simple fact is that there is *nothing* in the Security Council and General Assembly resolutions on East Timor which say that all States must deal exclusively with Portugal or that Portugal has the exclusive right and capacity to deal with other States in respect of East Timor. Portugal cannot simply assert that the expression "administering power" is to be given its "normal" meaning without demonstrating what its normal meaning is. Portugal cannot say that Australia seeks to deny that the General Assembly has determined that Portugal is an Administering Power with "normal" Chapter XI rights and responsibilities, without showing what are Chapter XI rights and responsibilities of an administering Power. As I have indicated these are clearly not the same as a Chapter XII Trusteeship Power.

Reduced to its minimum, Portugal's claim to have rights to represent the people of East Timor and to bring these proceedings becomes a cry of "If not us, who else?" and suggestions that to leave Portugal without a remedy would mean it could not discharge its duties or protect the people of

East Timor. Portugal simply assumes that the achievement of self-determination is somehow impossible without Portugal playing the pivotal role. It describes itself as the "essential element" (CR 95/3, p. 72), an "instrument privilégié", standing in a "symbiotic relationship" with the people of East Timor to realize their rights (CR 95/3, p. 70). Hence, any infringement of Portugal's status is said to be at the same time, an infringement of the right of the people of East Timor to self-determination (CR 95/4, p. 53). However, self-determination is not dependent on the existence of an administering Power playing this kind of role. The process of self-determination can be advanced by the United Nations without an administering power playing any role at all, as the case of Western Sahara since 1975 demonstrates. And the United Nations can take active measures to advance self-determination even where the administering Power is actively *opposing* those efforts, as the case of the territories under Portuguese administration prior to 1974 also demonstrates.

The United Nations has described Portugal as a "party directly concerned", but it has never suggested that Portugal's role is "pivotal" or "essential". The United Nations itself, as the guardian of the law relating to self-determination, is clearly equipped to take action if it considers it necessary to protect the interests of the people of East Timor. Nothing stops the General Assembly or Security Council adopting resolutions requiring member States to take specific action. Portugal is not the only, or even the primary, instrument of self-determination in East Timor.

As I emphasized in my presentation last week, good intentions on the part of a displaced colonial power are not sufficient to confer standing. Portugal cannot pretend that the events of 1975 did not occur and that it is in effect in the position of seeking to protect rights over resources to which it has a legitimate claim. It clearly is not. Nor does it have any substantive ground for complaint that Australia has failed to respect its status as Administering Power. It is a displaced colonial power. Nothing more.

Mr. President, that concludes my statement; this might be a convenient time to break.

The PRESIDENT: Thank you Mr. Burmester. The Court will have a break of 15 minutes and the meeting is suspended.

The Court adjourned from 11.30 to 11.55 a.m.

The PRESIDENT: Please be seated. I give the floor to Professor James Crawford.

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

Introduction

1. In this part of the Reply, I will deal with the arguments relating to self-determination and recognition. This discussion in no way substitutes for the lengthy account of these issues I gave in the first round (CR 95/9, pp. 20-68), since most of what was said then was not even mentioned by Portugal in its second round. What I will do is deal with some specific points made by counsel for Portugal, especially Professors Dupuy, Correia and Higgins, while taking the opportunity to summarize Australia's arguments on these issues.

2. Professor Higgins began her analysis by complaining of Australia's "deconstruction" of international law; it made, she said, "depressing listening" (CR 95/13, pp. 8, 28). She associated it with an Australian view of international law in which obligations were dependent entirely on sanctions (CR 95/13, p. 8), and she followed up this assertion by mentioning the word "sanction" 29 times. This was a useful tactic, since her repetition was liable to lull the Court into a false sense of insecurity about what Australia's argument really is. In my speech on self-determination and recognition, I used the word "sanction" not at all. Mr. Burmester used it once, incidentally (CR 95/10, p. 19). Professor Bowett did use it, pointing out, for example, that the Security Council had deliberately refrained from imposing on Indonesia any sanction, even the sanction of non-recognition (CR 95/10, p. 27). This is, of course, true, as Professor Higgins agreed (CR 95/13, p. 32). Professor Bowett also showed that the United Nations could not take away Australia's legal rights except by way of a sanction (CR 95/10, pp. 32-33); Professor Higgins never addressed that issue.

3. But Professor Bowett also showed that the United Nations had imposed no requirement of non-recognition or of not dealing with Indonesia, even in a Chapter VI resolution (CR 95/10, pp. 26-31). The issue here is not one of sanctions but of *obligation*. Australia says that, as a third State, it

is under no obligation not to deal with Indonesia arising from the principle of self-determination. Leaving issues of admissibility to one side, this Court can only find in favour of Portugal if it decides that Australia is under such an obligation. Sanctions are a quite separate issue, which relate to the enforcement of obligations. But first those obligations have to exist and it was to this that Australia's argument was addressed.

Australia's arguments summarized

4. This parody of the Australian argument was accompanied by a failure to acknowledge the actual Australian argument. It may be helpful if I summarize it.

5. Australia denies that third States are under an automatic obligation, under general international law, not to recognize or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is no automatic obligation of non-recognition or non-dealing, even though that State may be denying the people the right to self-determination. Australia was prepared to recognize and to deal with Portugal when it controlled and administered East Timor, even though it was in breach of self-determination for the entire time. Similarly with Indonesia, whether or not it is in breach of self-determination - a matter which Portugal accepts this Court cannot determine in these proceedings. Moreover, the designation of the territory concerned under municipal law is not decisive. The people of East Timor had and have an international law right of self-determination. They had it at the time when East Timor was a Portuguese province, and in Australia's view, nothing has happened since 1975 to change that.

6. Australia accepts that the competent organs of the United Nations can require third States not to deal with a State in control of territory but violating self-determination of the people of the territory. Those organs can, by action taken on behalf of member States - as in Southern Rhodesia, Namibia, Northern Cyprus - oblige member States not to recognize an entity securely controlling territory. But they have not done so in the present case. Australia goes further - probably further than it need have done. It shows that the relevant United Nations organs have not even *recommended* that member States not recognize or deal with Indonesia. It goes further still. It

shows that no United Nations body, including the Secretary-General, the Committee of 24 or, for that matter, the Human Rights Committee has even *complained* of Australia's conduct in entering into the 1989 Treaty. No requirement, no recommendation, no complaint. Sanctions are peripheral to the argument. The point is merely that, so far as the United Nations *has* expressed itself, there is nothing to sanction and, to the very substantial extent of its silence, there is no obligation under general international law (see further CR 95/9 pages 22-3, paragraph 7 for the summary of Australia's position).

Portugal's response

7. Now it is true that, in response to this, Portugal's argument has undergone a significant shift during oral argument. It now accepts that States *can* deal with Indonesia (CR 95/12, p. 12, Galvão Teles; CR 95/13, p. 27, Higgins). What would previously have been an imprescriptible breach is now acceptable as an "articulated *de facto* recognition" (CR 95/13, p. 37, Higgins). But at this point the argument becomes more divergent. Having abandoned its earlier claim to a monopoly in treaty-making for East Timor - an abandonment which was inevitable faced with the fact that many States *do* enter into treaties with Indonesia which are in terms applicable to East Timor - Portugal has to find another theory (CR 95/12, p. 71, Correia).

8. According to Mr. Galvão Teles it is as follows. States can deal with Indonesia, but provided at the same time they do not exclude Portugal. He said:

> "ce que l'Australie a fait ce ne fut pas seulement de négocier et conclure un accord avec l'Indonésie. Ce qu'elle a fait, ce fut d'exclure toute négociation avec le Portugal, se passer de lui, agir même contre sa volunté explicite, formellement exprimée dans la qualité de puissance administrante" (CR 95/12, p. 13).

9. Having been frustrated in its claim for a monopoly, Portugal now claims a veto. But this is extraordinary. The States which entered into double tax and other agreements with Indonesia expressly applying to East Timor did not seek the permission of Portugal. Portugal does not inscribe "*nihil obstat*" or give its "*imprimatur*" to the texts of relevant treaties with Indonesia in the United Nations Treaty Series. Portugal never even bothered to object to multilateral treaty-making

involving East Timor, as other States have done in analogous cases.

10. Let me restate the obvious. The practice which Mr. Burmester, Dr. Staker and I analysed in the first round - the practice of third States dealing with the State in effective control of a Chapter XI territory, in the absence of a call from the United Nations not to do so - involves the *exclusion* of the other claimant State. States do not seek the permission of the Comoros before dealing with France in relation to Mayotte, and *if* they dealt with the Comoros, I doubt they would seek the permission of France. States do not seek the permission of Spain before dealing with Morocco in relation to Western Sahara - on the contrary, as I will show, *Spain* seeks the permission of Morocco! States did not seek the permission of Portugal before dealing with India in respect of Goa, in the period from 1962 to 1974. They do not seek the permission of Portugal now before dealing with Indonesia. *No one* deals with Portugal in respect of East Timor, apart from the Secretary-General's mediation, in which Indonesia is also involved and which is taking place *sans conditions préalables*.

11. The veto theory evidently does not work. So Portugal is forced back to a different theory. It would be more accurate to say, a number of different theories, partly overlapping. I could count four such theories: (1) that Australia's acts of treaty-making were associated with recognition *de jure*; (2) that those acts were incompatible with East Timor's status as a non-self-governing territory; (3) that those acts were incompatible with Portugal's status as Administering Power; (4) that those acts involved conduct incompatible with East Timor's right to permanent sovereignty over natural resources. The fourth ground has already been dealt with by Professor Bowett, but I will need to say something about each of the other three.

12. Now as Professor Higgins recognized (CR 95/13, p. 9), there are issues both of admissibility and merits in relation to each of these current ways of putting Portugal's case, and just as was the case with earlier more categorical Portuguese formulations, the issues of admissibility and merits are closely intertwined. I will refer briefly to the admissibility issues as I deal with each of Portugal's arguments.

(1) Australia's acts of treaty-making were associated with recognition *de jure*

13. Portugal complains that Australia's acts of treaty-making were associated with recognition *de jure* - to use Maître Galvao Teles' words: "Il s'agit de conduites de l'Australie prises sur une base *de jure* ..." (CR 75/12, p. 14; cf. also p. 12). The point was taken up by Professor Higgins, who was characteristically clear:

> "To recognize *de jure* the integration without an act of self-determination ... engages one's responsibility ... To go from silence, from dealings on human necessities, from even an articulated *de facto* recognition, to a *de jure* recognition, is clearly to cross the line at which one's conduct contributes to delay in realization of the right of self-determination." (CR 95/13, pp. 36-37.)

(a) At the level of the merits

14. The first point to be made is that the Portuguese Application focuses on Australia's conduct in negotiating, concluding and beginning to implement the Treaty. It does not relate to Australia's recognition as distinct from the conclusion of the Treaty. The Application was fully analysed in Australia's first round of pleadings, to which reference is made (CR 95/7, pp. 66-67, Crawford). The same position was taken -necessarily, since the Application defines the case - in the Portuguese submissions, which were repeated unchanged on Monday (CR 95/13, pp. 76-78, Cascais).

15. Moreover until Monday - again as pointed out by Australia (CR 95/9, p. 34, Crawford) - Portugal had not complained that Australia's recognition was *premature*. Its complaint was that Australia had ever recognized Indonesia - self-determination was, it was said, an *imprescriptible* bar (CR 95/5, p. 26, Higgins). One of the disadvantages of oral argument - the Court may think it is one amongst many - is that the arguments of one side may give counsel on the other side new ideas. And true enough, Professor Dupuy now says, for the first time, that the Australian recognition was premature (CR 95/12, p. 38, referring to "ce peuple envahi").

16. But the conclusion of the Treaty in 1989 was not a case of premature recognition. Many other States had recognized Indonesia before then, and dealt with it in its capacity as a State permanently controlling East Timor. And there is no evidence whatever that the conclusion of the

Treaty, to use Professor Higgins' words "contributes to delay in realization of the right of self-determination" as a matter of fact. Ten years before, the United Nations had come to the conclusion that it should cease to call for Indonesia's withdrawal. If ever there was an act which "contribute[d] to delay in realization of the right of self-determination" (CR 95/13, p. 37, Higgins), it was the failure of the United Nations to take any decisive action. That failure occurred long before 1989; in fact it occurred immediately after 1975.

17. Mr. President, on this point I will simply refer the Court to my earlier exposition of the international authorities relating to non-recognition on grounds of self-determination. I referred to the *Namibia* Opinion, to the ILC's Draft Articles on State Responsibility, and to the Friendly Relations Declaration (CR 95/9, pp. 52-60). I argued that none of these authorities gave any support to Portugal's position here, and that these were the only international authorities I was able to find on the point. There was *no* attempt by Portugal to respond to this argument.

18. Instead, Professor Higgins said that once the General Assembly had applied the label "non-self-governing territory" there was nothing more to be done; international law then sprung into action, took over, and did the rest (CR 95/13, pp. 30-31). Repetition of resolutions was quite unnecessary (CR 95/13 pp. 23-24). Mr. President, no one who has followed the attempts to get the General Assembly to pass many of its resolutions every second year - the so-called biennialization debate - will believe this for a minute. Listening to Professor Higgins one might think it sufficient if the General Assembly turned its attention to an issue every decade or so - in which case, nonetheless, a resolution on Timor is overdue, the last one was 13 years ago.

19. The only remaining comment relates to the distinction between *de jure* and *de facto* recognition. There is some discrepancy here. On the one hand Professor Higgins appears to say that an "articulated *de facto* recognition" would have been acceptable (CR 95/13, p. 37). On the other hand, according to Professor Dupuy, this would simply have been a lesser illegality, "le moindre mal", he called it (CR 95/12, p. 27). It is worth noting that no United Nations resolution articulating a rule of non-recognition for any situation has ever drawn a distinction between *de jure* and *de facto* recognition. If there is an automatic substantive body of non-recognition law, it does not agree with

either Professor Higgins *or* Professor Dupuy.

20. Mr. President, this disarray, even in Portugal's own ranks on the last day of its case, reflects the disarray, it is fair to say, in the literature and the practice of *de facto* and *de jure* recognition. These are in a state of confusion and incoherence, despite attempts to impose some order (e.g. by H. Lauterpacht, *Recognition in International Law*, Cambridge, CUP, 1946, pp. 329-48; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Paris, Pedone, 1975, pp. 629-647). In the words of Charles Rousseau, "si l'on veut dire par [reconnaissance *de facto*] que la reconnaissance est la constatation d'un fait, on ne fait que répéter un truisme, puisque toute reconnaissance présente invariablement ce caractère" (C. Rousseau, *Droit international public*, 1977, Vol 3, p. 522; cf. L. Delbez, *Principes généraux du droit international public*, 1964, p. 164 ("Parler d'une reconnaissance de fait c'est employer une expression dénuée de sens")). Similarly Ian Brownlie states that

> "If there is a distinction [between *de jure* and *de facto* recognition] it does not seem to matter legally. Certainly the legal and political elements of caution in the epithet *de facto* ... are rarely regarded as significant." (I. Brownlie, *Principles of Public International Law*, 4th ed., Clarendon Press, Oxford, 1990, p. 94.)

The usual view is that *de facto* recognition is applicable to situations which are possibly temporary, uncertain, not yet consolidated. But there is so much uncertainty in the practice that one cannot determine a general rule. As Verhoeven concludes, in the best modern study of the problem:

> "il faut renoncer à donner de la distinction entre reconnaissance *de facto* et reconnaissance *de jure* une explication unique. Sauf à sacrificier la réalité des rapports internationaux à la réalité théorique de systèmes abstraits, il faut admettre les significations multiples qu'a reçues la reconnaissance dite *de facto* au gré des intentions souveraines." (J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Paris, Pedone, 1975, p. 631.)

21. I know that Professor Higgins is uncomfortable with references to "la réalité des rapports internationaux", even in French. But Verhoeven's conclusion clearly contradicts her bright threshold between "articulated *de facto* recognition" and *de jure* recognition (CR 95/13, p. 37). And the sharp distinction she seeks to impose is yet another aspect of her view that international law in this field has an autonomous, independent, self-executing, automatic - I almost said, imprescriptible -

character. Her approach again contradicts that of Professor Dupuy who, as in Portugal's first round, preferred indirection, subtlety, finesse - in the present context, degrees of illegality (CR 95/12, p. 27). But the problem here is that - leaving to one side, as Portugal studiously did in its second round, the closeted realms of *jus cogens* and State crimes - degrees of illegality are irrelevant, if indeed the concept has any meaning at all. If Australia acted illegally, it is not to the point to have Professor Dupuy say that it could have been worse!

22. Thus the apparent concessions made by Portugal on this score disappear, and one is left with a panoply of State practice, *de facto* recognitions, treaty making without the consent of Portugal - all of it illegal according to Portugal, but all of it entailing the various problems for Portugal's case which Australia analysed in its first round and which produced the apparent concessions on Monday. The answer is clear, even to the blind. The array of State practice accommodating the presence of Indonesia in East Timor - while at the same time acknowledging that the people of East Timor have a right of self-determination - shows that Portugal has no preferred position, and that there is no obligation on third States arising automatically from the principle of self-determination not to recognize Portugal's substantial disappearance from the scene. In other words, third States are not required by general international law to refuse to recognize *de jure* a State's control over a Chapter XI territory. If the subsequent exercise of self-determination by the people of the territory leads to their independence, then the recognition situation will change. *De jure* recognition means no more than that.

23. Thus, in entering into the 1989 Treaty with Indonesia, Australia accepted that Indonesia's control over the territory was consolidated and was not of a merely temporary character. The General Assembly had previously come to the same conclusion, and had ceased to call for Indonesia's withdrawal, still less its immediate withdrawal. On what basis is the Court, acting in isolation from the judgment of the political organs, and in a case where Indonesia is absent, to second-guess that assessment?

24. Moreover it was necessary for Australia to do this, in 1989, if it was to secure the exploitation of its own continental shelf. For Australia to have entered into the 1989 Treaty without

saying anything about recognition would have been a meaningless gesture, as Professor Bowett has shown.

(b) At the level of admissibility

25. I turn then to the issue of admissibility in relation to the *de jure* recognition, having dealt with the merits. The question is whether the argument about *de jure* recognition associated with and entailed by the conclusion of the Treaty of 1989 is admissible. Portugal stresses again that it does not rely on non-recognition based on use of force, despite that being "un fait illicite majeur" (CR 95/12, p. 15, Galvão Teles). As Mr. Galvão Tales pointed out, "[ce] fait illicite majeur ... se trouve en dehors de l'objet de l'instance" *(ibid.)*. One wonders, nonetheless, how this "fait illicite majeure" allows for "articulated *de facto* recognition". Portugal does not explain.

26. The repeatedly affirmed Portuguese position as to the use of force puts the Court in the most extraordinary difficulty, a matter to which Australia will return this afternoon.

27. Thus in order to sustain its argument that the *de jure* recognition contained in the 1989 Treaty and expressed by making that Treaty is unlawful, Portugal has to show that the principle of self-determination requires Australia not to recognize Indonesia, 14 years after its occupation of the territory, 10 years after the United Nations ceased to call for its withdrawal. I leave aside for separate treatment the arguments based on East Timor's status as a non-self-governing territory and Portugal's description as "Administering Power"; these are separate grounds of Portugal's argument. But so far as recognition *de jure* is concerned, an absolutely necessary basis for the obligation of non-recognition in 1989 - a *condition préalable* - must be to show that Indonesia was violating the right of the East Timorese right to self-determination in 1989.

28. That would not be a *sufficient* basis for an obligation of non-recognition. It would also be necessary to show that the obligation on third parties to promote self-determination required them not to recognize the sovereignty or governmental authority of the State in question, which, as I have shown, is not the case in the absence of a collective policy of non-recognition adopted or recommended by the United Nations (CR 95/9, pp. 64-67).

29. But it would be *necessary* to show that the State in control was violating self-determination in 1989. If it was not, if it was acting in accordance with the principle of self-determination, no problem would arise - on Portugal's own argument. But it is obviously true that the Court cannot decide that Indonesia was violating the right of self-determination in 1989. There is no *donnée*, no resolution. That is a *condition préalable* within the meaning of *Monetary Gold*, as analysed by this Court in the *Nauru* case, and it means that this way of putting Portugal's case is inadmissible.

(2) Australia's acts of treaty-making were incompatible with East Timor's status as a non-self-governing territory (and its people's right to self-determination)

30. Mr. President, the second basis for Portugal's argument depends on Australia's alleged failure to recognize East Timor's status as a non-self-governing territory and its people's right to self-determination and I deal with that second argument first.

(a) At the level of the merits

31. Australia has already explained why, as a matter of international law, the people of East Timor retained a right of self-determination after 1975, and why, in Australia's view, that right has not been lost, notwithstanding subsequent events (CR 95/9, pp. 42-43). Portugal expressly accepted this explanation (CR 95/12, p. 9, Galvão Teles). On the other hand it said nothing at all about the further point made by Australia, which is that East Timor remains a non-self-governing territory under Chapter XI *because* its people continue to have a right of self-determination (CR 95/9, pp. 62-64). This is the approach of resolution 1541, which treats those two issues as correlative and yet does not deal with the "status" of administering power.

32. What followed was remarkable. Counsel for Portugal simply failed to deal with the careful, classical argument about the legal position of a State exercising "sovereign rights" over a Chapter XI territory, which Australia had made in its first round (CR 95/9, pp. 31-48, Crawford; pp. 69-87, Burmester; CR 95/10, pp. 8-21, Burmester, pp. 45-75, Staker). General international law conceptions of State authority were, they said, "clearly outside the scope of the present case"

(CR 95/12, p. 49, Correia). They simply and successively denied that the concept of sovereign authority had *any* application to Chapter XI territories (e.g., CR 95/12, pp. 34-35, Dupuy; pp. 44, 51, Correia). To be fair, they accepted the logical implication of this view, which is that the General Assembly can, by majority vote (including by a majority of 50-46 with 50 abstentions) deprive States of their territorial authority over Chapter XI territories (CR 75/12, p. 35, Dupuy; pp. 55, 67, Correia; CR 75/13). For example, Professor Higgins referred to the United Nations procedures for removing a State such as Portugal "from its status as Administering Power" (CR 95/13, p. 11), and Professor Dupuy referred to non-self-governing territories being fully equated to trust territories - where the power does exist - "placés sous le contrôle étroit et finalisé des Nations Unies" (CR 95/12, p. 35; similarly CR 95/12, pp. 55, 67, Correia; and for earlier discussion of the point see CR 95/9, pp. 41-42, 60, Crawford).

33. This construction was useful, for it supports Portugal's thesis that the Australian recognition contained in the 1989 Treaty and articulated in terms of "sovereignty" was logically inconsistent with East Timor's status as a non-self-governing territory or the right of its people to self-determination. But Australia itself asserted and exercised sovereignty, or sovereign authority, over each of its Chapter XI territories, while respecting the rights of the peoples concerned and bringing each of them to a regular exercise of self-determination leading either to independence or self-government. By the same token, it recognized other States' sovereignty over their colonies, while supporting the application of Chapter XI and the principle of self-determination to them. That was consistent terminology and a consistent position. That others may choose to define terms differently is beside the point, and certainly it produces no logical inconsistency, absolute or otherwise.

34. Mr. President, Portugal's expulsion of sovereign authority from the Chapter XI garden was a little less revolutionary than might appear, because having expelled that idea by the front door, counsel let it back in, in a poor disguise, through the back door. Professor Correia, for example, said that the authority of a State over a Chapter XI territory constitutes an "objective status ... in international law" (CR 95/12, p. 45), an "objective, and general status" (CR 95/12, p. 72). He went on to say that administering States are "independent States which keep their attributes as such when

they act on the international scene in relation to the non-self-governing territories for whose administration they are responsible" (CR 95/12, p. 44). Subsequently, he noted that administering Powers retained

> "the capacity to assume international obligations in relation to the non-self-governing territory ... together with all other manifestations of the general international immediacy peculiar to States which are full subjects of international law" (CR 95/12, p. 61).

35. I do not need to repeat my analysis of this issue from the first round (CR 95/9, pp. 31-48). Australia recognizes *both* Indonesian sovereignty and the right of self-determination of the people of East Timor, having previously recognized Portuguese sovereignty and the right of self-determination of the people of East Timor. That is an acceptable, comprehensible manner of speaking of these issues, and as I have shown it involves no contradiction. If, on the other hand, instead of "sovereignty", Professor Correia would prefer that we substitute another term, well, we can do that. He suggests the following term:

> "objective status in international law ... entailing the capacity to assume international obligations in relation to the non-self-governing territory ... together with all other manifestations of the general international immediacy peculiar to States which are full subjects of international law" (CR 95/12, pp. 45, 61).

If we do use his term, I suppose no substantial harm will be done. International law textbooks will be longer, and so will speeches before the Court. That may be substantial harm. No doubt, in time, we will come to call it "international immediacy", or "immediacy" for short. But whatever the label the legal substance will not be changed, and that is what counts.

36. And to apply Professor Correia's label of "international immediacy" to East Timor may not produce the results he seeks. Portugal does not seem to be very "immediate" in relation to East Timor. If what States have over non-self-governing territories is "the capacity to assume international obligations ... together with all other manifestations of the general international immediacy peculiar to States", it is worth noting that there have been no manifestations of Portuguese immediacy since December 1975, and not a single international obligation assumed by Portugal for East Timor since that date. Portugal ceased to manifest its immediacy on the mainland in August 1975, and its immediacy on Atauro lasted only until the day after the Indonesian

intervention - at which Portugal immediately left. So Professor Correia's semantic shift gets us nowhere.

(b) At the level of admissibility

37. At the level of admissibility, Australia has not failed to recognize or respect the East Timorese people's right to self-determination as such. What it has done is to recognize the reality of Indonesia's governmental control over the territory, a recognition which - in the form which Portugal complains of, the 1989 Treaty - long postdated the United Nations decision not to call for Indonesian withdrawal. Australia's conduct can only be held to be a violation of international law, in the absence of a declaration of illegality and of a duty of non-recognition by the competent organs of the United Nations, if the Court can determine, *inter alia*, that Indonesia's presence in 1989 was unlawful (CR 95/7, pp. 73-75, Crawford; CR 95/8, pp. 20-21, Pellet). Portugal has made no attempt to do this, no doubt accepting that it is precluded from doing so by the *Monetary Gold* principle. This way of putting the Portuguese case is inadmissible.

(3) Australia's acts of treaty-making were incompatible with Portugal's

(a) At the level of the merits

38. Mr. President, much of what I have said in the preceding section as to the status of the territory of East Timor applies equally in relation to Portugal's status as Administering Power, and that matter has, anyway, already been discussed by Mr. Burmester this morning.

39. I need only to make one point, relating to an observation by Professor Dupuy on Monday. He said that Australia did not dare repeat the furtive suggestion that Indonesia might be the administering Power in relation to East Timor (CR 95/12, p. 34).

40. Mr. President, pleadings before this Court are not a good place for making furtive suggestions. What Australia says is that it is open to the General Assembly to identify or acknowledge, for the purposes of Article 73, which State has or has assumed responsibilities for the

administration of East Timor. It might well take the view that Indonesia has done so. There is good United Nations authority for this possibility. I refer to the report of Mr. Gros Espiell on *The Rights to Self-Determination. Implementation of United Nations Resolutions* (H. Gros Espiell, UN E/CN.4/Sub.2/405/Rev.1 (1980) p. 14 (para. 90)). We cited that report in the first round - Portugal has not mentioned it.

(b) At the level of admissibility in relation to Portugal's status as Administering Power

41. At the level of admissibility, equally, little more needs to be said. I have already analysed the failure of Portugal's attempts to substitute for the general legal status of States over Chapter XI territories a single United Nations-derived self-perpetuating status of administering Power (see paras. 32-36 above). The status of administering Power for United Nations purposes exists, for whatever that may be worth - much in some cases, or in other cases, such as Spain over Western Sahara, very little indeed. (For the continued listing of Spain for the purposes of Article 73 *(e)* see United Nations Doc. A/AC.109/1196, 1 July 1994.) It does not necessarily coincide with sovereignty, or sovereign authority, or "international immediacy", if one prefers Professor Correia's terms, in relation to territory under general international law. If it did, the General Assembly by majority vote could dispose of territories to which Chapter XI applies, and this it cannot do (CR 95/9, pp. 60-61, Crawford).

42. It follows from this that Portugal has to show that its title as Administering Power coincides with substantial governmental authority over East Timor, and there is absolutely no finding to that effect by the General Assembly, as at 1979, or 1982, still less as at 1989. Moreover, there is - Portugal disclaims this but it remains true in fact - a dispute between Portugal and Indonesia over who has this "objective and general status" (CR 95/12, p. 72, Correia). They cannot both have it.

43. Thus in order to make out this ground of complaint, Portugal must first show that in 1989 Indonesia did not have the authority it claims and exercises over East Timor, and specifically the authority to make this Treaty. That is obviously a *condition préalable* under the *Monetary Gold*

principle, and it makes this aspect of Portugal's case inadmissible.

The Practice of Third States in Self-determination Conflicts

Mr. President, Members of the Court.

44. It follows from what has been said this morning that, even on the assumption that the Court can reach the merits of Portugal's claim against Australia, that claim must fail. And this conclusion is clearly supported by the practice of third States dealing with disputed claims to self-determination.

45. The Court will be relieved to hear that I will not review again the various examples of State practice reviewed in Australia's earlier pleadings - Mayotte, for example, the Falklands, Gibraltar, Goa, etc., (CR 95/9, pp. 79-82, CR 95/10, pp. 11-15, Burmester). One of the reasons for Professor Higgins despair on Monday was her apparent difficulty in grasping the distinction between the obligations of a State which actually administers or controls a Chapter XI territory (whether or not it is listed by the Committee of 24) and the position of third States. States which actually administer or control a people who have a right of self-determination are in a quite different position. For those States there is no element of "minimalism" (CR 95/13 p. 33, Higgins).

46. But the position is, and State practice confirms, that third States are not required to refrain from dealing with a State in actual authority of a Chapter XI territory, whether or not it is designated as administering State by the General Assembly and whether or not that State is itself complying with self-determination, in the absence of a declaration of illegal presence and the spelling out of corresponding obligations by the competent United Nations organs. Portugal asserts that in such cases there is an automatic obligation of non-recognition and non-dealing (CR 95/13, p. 30, Higgins). The practice shows that this is simply not true. As Mr. Burmester has shown, the position of Southern Rhodesia is quite different, based on clear and repeated United Nations resolutions, including Security Council resolutions requiring non-recognition, and on substantial and widespread compliance with those resolutions. Nothing more needs to be said on this.

47. By contrast some comment is called for on Portugal's treatment of the 1992 European Community-Morocco Fisheries Agreement. Australia did not rely on that Agreement

to show that Portugal is behaving illegally (see CR 95/9, pp. 82-87, CR 95/10, pp. 8-11, Burmester) - although Portugal is anxious to say "It's not me, it's the EC"! Australia relied on the Agreement, and its predecessors, to show that third States *do* enter into treaties with a State in possession of a Chapter XI territory but which is not the administering Power listed by the United Nations, and that they do so in relation to the natural resources of the territory. Portugal says against Australia that this is automatically illegal, even in the absence of United Nations resolutions to this effect. But the EC does it, and is not criticized by other States or by the United Nations. This is an important example of State practice, the more important because Portugal is a consenting party to it. And there is no justification, such as Australia has, for Portugal - or the EC - seeking to protect its long-standing claims to the resource in question. The only title the EC has to fish in those waters is the title it derives from Morocco.

48. Faced with this clear example, what does Portugal now say? Professor Correia sought to distinguish the 1992 Agreement on no fewer than seven grounds (CR 95/12, pp. 77-82).

49. *First*, he said that under the EC arrangements Portugal had no veto over the conclusion of the Agreement (CR 95/12, pp. 77-78). That is true but irrelevant; Portugal approved it.

50. *Second*, he said that the EC "did not act against any expressed wish of the Administering Power of Western Sahara" (CR 95/12, p. 78), by which he meant Spain. On that basis one wonders why the EC bothered to contract with Morocco at all! Spain was happy to fish Western Saharan waters, just as it has been to mine Western Saharan phosphate - one can doubt if in either aspect it is acting in its capacity as Administering Power. Apparently for Portugal, Spain's "expressed wish", those are Professor Correia's words, would have been enough. *A chacun ses convoitises*, to paraphrase Professor Dupuy (CR 95/12, p. 1). In fact the EC has reopened negotiations with Morocco for a new agreement to apply from 1 May 1995. The Court will no doubt be interested to see how that agreement treats Western Sahara!

51. *Third*, Professor Correia said that in the Community fisheries agreements there was a "certain ambiguity" as to their territorial extent (CR 95/12, p. 78). I am surprised that he worries so much about the *terms* of the agreements, since for other purposes Portugal treats treaties merely as

facts, and the fact is that EC trawlers - Portuguese trawlers - have been licensed to fish, and have fished, in the waters off the Western Sahara under successive agreements with Morocco. There was, for example, a reported incident involving a Portuguese vessel in 1980 which actually led Portugal to recognize the Sahrawi Republic! (see *Revue générale de droit international public*, 1980, p. 197). But the studied ambiguity of the earlier agreements is anyway entirely dispelled in the Agreement of 1992, as Mr. Burmester has shown (CR 95/9, p. 86). That Agreement is perfectly clear: it applies to Western Saharan waters and to the port of Dakhla in Western Sahara.

52. *Fourth*, Professor Correia said that even so the 1992 Agreement made no express reference to the territory of Western Sahara, or to Western Sahara as a Moroccan province (CR 95/12, p. 78). Now it is true that the Agreement does not refer to the territory of the Western Sahara as such. But it does refer to one part of the territory of Western Sahara, the port of Dakhla, described in the French text as a "port marocain" in the same way and in the same terms as Casablanca. In Portuguese - Professor Correia will forgive my pronunciation - the Agreement reads "*portos marroquinos*".

53. In this context I should note also the Treaty of Friendship, Good Neighbourliness and Co-operation between Morocco and Portugal, concluded on 30 May 1994. It refers in the preamble to the relations between the two States as "toujours significatives, profondes et enrichies par des rapprochements fructueux". Article 6 refers to the respective "populations" of the High Contracting Parties, and in particular it provides for "la coopération dans le secteur des pêches maritimes et de ses activités connexes" (Article 6 *(a)*). Since at the time of its conclusion, "la coopération dans le secteur des pêches maritimes" between Portugal and Morocco was governed exclusively under EC law by the 1992 EC Agreement and extended explicitly to Western Saharan waters, one can only assume that the "populations" referred to in Article 6 of the 1994 bilateral Agreement include the "population" of the territory, and that "[les] activités connexes" will be taking place, *inter alia*, at the "portos marroquinos" of Dakhla. There is very little "alterité" to be observed in the 1994 bilateral Agreement (Art. 6, but cf. CR 95/12, p. 15, Galvão Teles, CR 95/13, p. 36, Higgins).

54. *Fifth*, Professor Correia accused Australia of "truncating" the text by failing to attach a

page containing the information that a Portuguese member of the European Parliament was Rapporteur of the EC Parliamentary Commission which criticized the 1992 Agreement (CR 95/12, p. 81). In fact Mr. Burmester alluded to that Report, but said he would not "detain the Court with all the detail" (CR 95/9, p. 86). I apologize for our treating Mrs. Belo as a detail. What she wrote, on behalf of the Commission of Development and Co-operation was, *inter alia*, that the Agreement clearly, and I quote from the English text provided to the Court by Australia "implies that fishing is permitted up to the border with Mauritania, situated at approximately 21°"
(EC Doc. FR\RR\218\218314, p. 18). Clearly Mrs. Belo did not think there was a "certain ambiguity". Those are clearly the waters of Western Sahara.

55. *Sixt*h, Professor Correia noted, referring to earlier statements by Professor Higgins and Maître Galvão Teles, that the "licéité" of the 1992 Agreement cannot be determined in these proceedings (CR 95/12, p. 79, referring to CR 95/5 pp. 38, 66. The reference should be to CR 95/4 pp. 8, 66). This shows Portugal's express acceptance of the *Monetary Gold* principle, but otherwise it misregards Australia's argument. Australia cites the Agreement as an example of State practice, of States doing - without any international criticism - what Australia is criticized by Portugal - and only by Portugal - for doing in this case. The point is that State practice for this purpose is what States *do*, in the international framework. The fact that the EC, despite Mrs. Belo's views, unconditionally and unanimously ratified the Agreement is an important element in State practice. Mrs. Belo *helps* in the articulation of State practice, since it is clear that her views were ignored. The practice was deliberately engaged in by 12 States notwithstanding her arguments. EC member States' attention was drawn to the difficulty but they decided it was proper to ratify the Agreement anyway, and without any conditions. There has been no international protest, no United Nations criticism. There is no reason to think that the conduct is unlawful.

56. Portugal, it seems, disagrees. Professor Correia refers to statements by Professor Higgins and Maître Galvão Teles, whom he presents as relying on *Monetary Gold* (CR 95/12, p. 79; cf. CR 95/4, pp. 38, 66). What Maître Galvão Teles said, citing Professor Higgins, was slightly different: he said that European Community-Morocco Agreements "ne sont pas soumis à l'examen

de la Cour et *on ne peut pas présumer que leur conclusion ait été licite*" (CR 95/4, p. 66, emphasis added). So the Court is called on *not* to presume the legality of an agreement deliberately concluded, after warnings from Mrs. Belo, between 12 EC member States and Morocco and not criticized in any UN forum.

57. Mr. President, Professor Higgins elsewhere criticized Australia for relying on the *Lotus* presumption, the presumption that State conduct is lawful unless demonstrated otherwise (cf. *"Lotus"*, 1927, *P.C.I.J., Series A, No. 10,* p. 18; CR 95/13, p. 13, Higgins). Portugal reverses the *"Lotus"*; the presumption is that relations between States are illicit. And Portugal relies on that presumption for a relation it itself consented to, and, in the current negotiations with Morocco, seems to be continuing.

58. *Seventh*, in these desperate straits, Professor Correia twists again, and the team with him. A new word enters the argument - the word "non-renewable". It was used six times in Portugal's second round, one of the few words whose frequency increased as compared with the five previous sessions (CR 95/12, pp. 36 (twice), 72, 79 (twice); CR 95/13 p. 27), a complete table could be made available on request. The distinction is clear. Australia deals with the non-renewable resources of East Timor; Portugal and the European Community "only" with the *renewable* resources of Western Sahara (CR 95/12, p. 79). That, he said, made all the difference.

59. Before considering whether it makes a difference, two preliminary observations, one relating to admissibility, one to merits.

* *As to admissibility*, Australia does not accept that it will be exploiting the non-renewable resources of East Timor under the Treaty. It claimed those resources well before 1975 and it still does. Portugal accepts that the Court cannot *determine* whose resources they are; the Court is not asked to engage even in a provisional delimitation. I refer to what Professor Bowett said on this, this morning.
* *As to the merits*, observe what this argument does to Professor Higgins' automatic body of substantive self-determination law. At the beginning of the first round, that automatic body of

substantive law carried with it the logically necessary consequence that Australia could not deal with any State other than Portugal in respect of East Timor (CR 95/2, p. 53, Galvão Teles, 8th proposition; see also CR 95/4, pp. 14, 25, Correia). Now the proposition, apparently, is that Australia may deal with Indonesia with respect to the renewable resources of East Timor, but before settling any of its claims to non-renewable resources should first consult Portugal (CR 95/13 p. 38 ("Australia has not consulted Portugal about the Treaty"), Higgins). Thus is the decline in the Portuguese argument marked.

60. But Mr. President, Professor Correia's distinction between renewable and non-renewable resources fails, and for *three* reasons:

* *First*, because the State practice on which Australia relies is not limited to renewable resources. For example, Spain is dealing in Western Saharan phosphate, and has never been criticized by the United Nations (CR 95/10, p. 11, Burmester), nor by Portugal, as far as the public record shows. When the international community wants to stop third States dealing with non-renewable resources of a self-determination territory it is quite explicit, as it was with Namibian uranium and Southern Rhodesian chrome.

* *Second*, fisheries are only a renewable resource if they are harvested in a sustainable way, and there is every indication that this is not the case with the Iberian fisheries in the waters off Western Sahara. I refer in particular to a Reuter's News Service report of 20 November 1994, which refers to the early termination of the 1992 Agreement, at Morocco's insistence, because of the damage being done to the fisheries along what the report describes as "3,500 km ... of Morocco's Atlantic coast". Morocco's Atlantic coast is only 3,500 km in length if you take it down to the Mauritanian boundary. The report ends with a quotation from a spokesman for a Moroccan shipowners group. "We are being plundered", he says. The Court will by now be familiar with the concept of plunder. This is valuable plunder. In 1990, according to the same report, EC boats took 618,000 tonnes of fish worth US$514 million - that is over half a billion American dollars in one year; of this, Spain took about 90 per cent, Portugal about 10 per cent. It is true these are figures for the coast as a whole; the Moroccan authorities apparently

keep no separate statistics for the Western Saharan fishery. Copies of the Reuters report have been lodged with the Court.

* *Third*, there is no relevant distinction in international law between renewable and non-renewable natural resources. The principle of permanent sovereignty over natural resources, on which Portugal so relies, applies *equally* to renewable as to non-renewable resources. General Assembly resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources uses the terms "natural wealth and resources" and "natural resources" throughout. No doubt the Security Council and General Assembly would have used the same general language in their respective resolutions on East Timor, had either body thought it necessary to refer to the principle of permanent sovereignty over natural resources in any one of those resolutions - which they did not. For Portugal to attempt to make that distinction now is trimming, cutting its case to suit its conduct - and doing so at the very last moment. The Court will draw the necessary conclusions.

61. Two lessons are to be derived from all this, Mr. President. First, the high moral ground that Portugal assumes vis-à-vis Australia has been a feature of the case. But Portugal occupies the high moral ground only for the purposes of the case. It does not itself comply with the standard of conduct it sets for Australia. Secondly, Portugal's own practice powerfully supports Australia's argument about the position of third parties in relation to self-determination. A State cannot conscientiously argue in favour of a view of international law which it is itself contradicting, and continuing to contradict through its own deliberate conduct, at the time.

Conclusion

62. Professor Higgins, in a passage to which I have already referred, said that the Australian arguments on recognition and self-determination made depressing listening (CR 95/13, p. 28). Appearances before the International Court of Justice are not the occasion for the expression of personal views (cf however CR 95/3, p. 8, Dupuy; CR 95/12 p. 76, Correia). But one can sympathize. The practice of third States in dealing with self-determination territories in the absence

of co-ordinated non-recognition via the United Nations is not a particularly edifying one, and Portugal's own involvement does not improve the picture. The record suggests that Portugal's concern for preserving the natural resources of Chapter XI territories increases in direct proportion to their distance from Portugal.

63. By contrast it is worthwhile to compare the practice of States in cases where the United Nations *has* called for non-recognition and *has* determined that the presence of a given administration is illegal, as in Namibia, Northern Cyprus, Southern Rhodesia, the Bantustans. Northern Cyprus, for example, mentioned by Professor Higgins, was the subject of explicit Security Council resolutions based on explicit findings of illegality and invoking explicit obligations of non-recognition, and these resolutions have been complied with (but cf CR 95/13, p. 24, Higgins). By these means high levels of co-ordination have been achieved. States generally have not dealt with the illegal administrations in the proscribed ways, and when they have they have been criticized for it. Indeed, in the cases of Southern Rhodesia and Namibia, that criticism led to some important changes in position by a number of major States. The message is that collective non-recognition co-ordinated through the United Nations can work, even though it may take time. The co-ordination *gives* it the time to work, because it prevents the consolidation that is otherwise likely to occur if individual States are left to make their own individual decisions.

64. Moreover this Court can play a significant role, by appreciating, affirming and spelling out the implications of the collective action taken by the organs of the United Nations on behalf of member States. I refer to what I said the other day on the *Namibia* case (CR 95/9, pp. 52-55).

65. But it is a mistake to assume something to have been done - by virtue of Professor Higgins' timeless and irrebuttable legal prescription, attached to a label - when it so obviously has not been done. In 1975 the United Nations stopped short of making the determinations that Portugal needs to prove its case against Australia, that is, the determinations that Indonesian presence was unlawful and that in consequence member States were obliged to treat only with Portugal and not with Indonesia. Subsequently the General Assembly retreated further and further; to silence in 1982.

66. That was a deliberate evaluation of the political organs. Portugal seeks to rely only on the

aspects favourable to its case, while ignoring the many more negative aspects - for example the failure to declare Indonesia's conduct or presence illegal, or to call on third States not to recognize or deal with Indonesia. Given the United Nations failure - manifest by 1979 - the issue of non-recognition fell to be governed by general international law. And as I have shown, general international law imposes no obligation on third parties not to deal with a State securely in control of a Chapter XI territory, even though its title may be disputed by another State, or even (as in the case of Mayotte or Western Sahara) if the title is disputed by the General Assembly itself.

67. In the circumstances of the present case, any additional elements of Indonesia's conduct which might give rise to a duty of non-recognition or non-dealing in 1989 are not established, are in dispute even within the framework of the various East Timorese groups themselves, and Portugal clearly and correctly accepts that this Court cannot determine them. It follows that the Portuguese case based on non-recognition fails, *both* for reasons of substance and for reasons of admissibility.

68. Mr. President, Members of the Court, that concludes Australia's presentations this morning. This afternoon I would like you to call on Professor Pellet to deal further with the issues of *Monetary Gold* and with the issues of State responsibility.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you Professor Crawford. The Court will have its sitting this afternoon at 3 p.m.

The Court rose at 1 p.m.

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