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008 The PRESIDENT: Please be seated. I give the floor to Professor Pellet.

Mr. PELLET: Thank you, Mr. President.

Mr. President, Members of the Court. This afternoon, in two successive but distinct sets of arguments, I shall examine the Portuguese Application, first in the light of the law relating to the international responsibility of States and then in the light of the "*Monetary Gold* principle"; and I shall show that the Court cannot in any manner whatsoever rule on Australia's responsibility without previously ruling on the interests of a legal nature of Indonesia.

THE PORTUGUESE CLAIMS FROM THE STANDPOINT OF THE LAW OF INTERNATIONAL RESPONSIBILITY

1. Mr. President, I obviously have no intention of delivering an academic statement on the mechanisms of the international responsibility of the State. I do not have time for that, and this is not the place.

Moreover, as I listened to the arguments put forward on behalf of Portugal (see CR 95/5, pp. 34-35), I detected no real disagreement between the Parties on this point, in any event as regards the principles applicable. They both accept that, in accordance with Article 1 of Part 1 of the International Law Commission's draft articles on State responsibility, "[e]very internationally wrongful act of a State entails the international responsibility of that State" (see CR 95/5, p. 74); they both also appear to accept that, judging by the general structure of the draft articles, such responsibility has practical consequences only if, and to the extent that, the breach has caused damage to another State.

009 What is more, Portugal's submissions, which have remained unchanged throughout the proceedings (see PM, pp. 235-237; PR, pp. 273-275 and

CR 95/13, pp. 76-79), follow this arrangement very precisely: the first sets out, in very general terms, the rules said to have been breached by Australia; the next two list the actions by which the rules in question are alleged to have been breached; and in its Submissions 4 and 5, Portugal asks the Court to draw practical conclusions from this with regard to reparation and the cessation of these alleged breaches.

With your permission, Mr. President, I shall follow this plan and show that, after 512 pages of written pleadings - not counting the annexes - and seven oral hearings which produced 383 pages of verbatim records - I do indeed love statistics! - Portugal has still not succeeded in specifying which precise actions by Australia are supposed to have breached which precise rules of international law (I). And, as additional legal argument, I shall go on to show that the submissions of the applicant State, taken by themselves, are both inappropriate and inadmissible (II).

I. Australia has not committed the breaches of international law of which it is accused

2. No one, I think, on either side of the bar, can dispute the fact that there is an "internationally wrongful act of a State" - hence responsibility - "when: *(a)* conduct consisting of an action or omission is attributable to the State under international law; and *(b)* that conduct constitutes a breach of an international obligation" (International Law Commission, draft articles on State responsibility, Part 1, Art. 3).

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Mr. President, what actions by Australia does Portugal allege constitute a breach of international obligations?

It is not easy to establish this in the light of the Portuguese submissions, which are both out of touch with reality and, if I may say

so, tangled in knots; and the oral arguments we have heard on behalf of Portugal, particularly those of last Monday, have helped to make things still more confused.

In his introduction to Portugal's oral reply, Mr. Galvão Teles nevertheless made a praiseworthy effort at clarification which I shall take as my starting-point:

> "The case before you is clearly circumscribed. It concerns the negotiation of a permanent delimitation of the continental shelf in the area of the Timor Gap ... It then concerns the negotiation, conclusion and performance of an agreement relating to the natural resources of East Timor - as well as Australia's, of course. It further relates to the enactment of Australian laws." (CR 95/12, pp. 13-14.)

To start with, let us keep to that, since Portugal invites us to do so through the authoritative voice of its Co-Agent.

3. The first breach by Australia is, therefore, "the negotiation of a permanent delimitation of the continental shelf in the area of the Timor Gap ..."; that is what it says, Mr. President: negotiation, and no more, - not negotiation with Indonesia. The second breach asserted by Portugal is "the negotiation, conclusion and performance of an agreement" relating to the natural resources of East Timor - "an agreement", Mr. President, an agreement "with a State", as our opponent said - or, rather, did not say! (CR 95/12, p. 12) - not an agreement with Indonesia. Third alleged breach: "the enactment of Australian laws".

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I shall not dwell on the last-mentioned allegedly wrongful act: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (*Vienna Convention on the Law of Treaties*, Art. 26.) The Australian laws complained of by Portugal, by virtue of their very terms, are merely measures for the performance of the treaty; they are not "detachable" from it, and only if the treaty itself were invalid could those laws constitute a breach of international

law - a hypothesis which is in any case unverifiable since Portugal means to prevent us, to prevent you from examining the validity of the 1989 Australo-Indonesian Treaty (see PM, p. 75, para. 3.06; PR, p. 16, para. 2.10 and CR 95/13, p. 57) even though, as we shall see, its position on this point was considerably diluted last Monday.

There remain therefore the negotiation, still under way, of "a" delimitation agreement and the negotiation, conclusion and performance of "an" agreement for the development of the natural resources of the Timor Gap.

4. According to the most firmly established principles of the law of the sea, "the delimitation of the continental shelf between States with opposite ... coasts shall be effected by agreement ... in order to achieve an equitable solution" (*Montego Bay Convention*, Art. 83, para. 1). This is the A, B, C, *"le B-A-BA"*, of the law of delimitation of maritime spaces, and the Court, in its jurisprudence, has always firmly upheld this dual requirement of agreement, on the one hand, and an equitable solution, on the other (see the *Judgments* of 20 February 1969, *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 53, and 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 299).

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In so far as the first internationally wrongful act imputed to Australia, the negotiation of a delimitation agreement, is at issue, the problem of the content of the agreement, whether equitable or otherwise, does not arise; it can simply be assumed that the agreement has not been concluded. The mere fact of negotiating an agreement with the coastal Power whose coasts are opposite to those of Australia could not constitute a wrongful act unless the Power in question was not entitled

to be there - and that point can definitely not be judged by the Court; I shall return to this shortly.

The same remark is applicable to the Australo-Indonesian Agreement of 11 December 1989. By preventing you from pronouncing on Indonesia's capacity to conclude such an agreement, Portugal rules out in any case the "positive" wrongfulness, if I may put it that way, which might have consisted in the negotiation and conclusion of the Agreement *with that country*.

5. However, there are two further points on which Portugal lays stress - albeit with unequal force, depending on its counsel:

- first of all, the Australo-Indonesian Agreement is said to be unlawful on account of its actual content; it is claimed that it relates to the exploitation of Timorese natural resources (CR 95/12, pp. 36 and 73; CR 95/13, p. 27); and,
- secondly, Portugal, ever fond of its "negative propositions", claims that Australia, by negotiating and concluding this treaty with Indonesia, wrongfully "bypassed" it though it is still the Administering Power (CR 95/12, p. 13).

I have not much to say on the first point, Mr. President: my friend and colleague, Professor Derek Bowett, and myself showed, during the hearing on Friday 10 February (CR 95/11, pp. 8-49): (1) that by concluding the 1989 Treaty, Australia had simply exercised its own right of permanent sovereignty over its natural resources, without infringing either the rights or the interests of the Timorese people, which are, moreover, equally valid and just as worthy of attention; (2) that this Agreement constitutes an equitable compromise - albeit rather disadvantageous to Australia - between the conflicting contentions of Australia, on the one hand, and of Indonesia and Portugal (which are

exactly identical!), on the other; and (3) that this is in every respect consistent with the requirements of the law of the sea identified by the jurisprudence of the Court and clearly codified by the Montego Bay Convention, particularly Articles 76 and 83 thereof, and more especially paragraph 3 of the latter Article.

Portugal remained strangely silent about these arguments at the beginning of the week, while Australia, for its part, continues to find them hard to fault: the one no doubt explains the other! In any case, since Portugal has not dealt with this point, I can hardly do more than respectfully request you, Members of the Court, to refer to our oral arguments on the matter, which we regard as important, since it disposes of the accusation - central to Portugal's contention - that Australia is "plundering" the natural resources of East Timor. Definitely not; it is only exercising its own rights, those recognized to it, as to any State, by international law, and recognized to the Australian people, as to any people. Our arguments on this important point are reproduced in the verbatim record (CR 95/11, pp. 8-49).

6. There remains, of course, the other principle said to have been infringed by Australia, that of the right to self-determination, the importance of which it in no way disputes.

Why and how does Portugal say that Australia has infringed this principle? On this point there was nothing really new in the arguments we heard last Monday, but since I am replying to those arguments, they will constitute my starting-point: "the Portuguese claim ... is founded on the disregard by Australia of the status of East Timor as a non-self-governing territory on the one hand, and of that of Portugal as its Administering Power on the other" (CR 95/13, p. 46).

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My friends and colleagues, Henry Burmester and James Crawford, have shown that this position is untenable: no general, abstract status of "administering Power" exists; such a designation implies obligations, functional ones, vis-à-vis the United Nations (they are set out mainly in Article 73 of the Charter) and no doubt, corresponding rights, although they too are functional and presuppose that the States "possessing" them are in practice able to discharge those obligations and to exercise those rights - which is not the case here. Similarly, Australia, unlike other States, incidentally, acknowledges that the Timorese people have the right to self-determination and that they have not fully exercised that right up to now. It said so as far back as 1975; it maintained its opposition to the way in which Indonesia had gone about the incorporation of East Timor, in 1979, when it recognized the enduring (and probably permanent) situation created by Indonesia on the ground (see PM, Ann. III.37) - and this, as Professor Crawford pointed out, was what *de jure* recognition represented; it maintains the same position - that the people of East Timor have the right to self-determination - today; this Court knows it; Indonesia knows it; only Portugal persists in ignoring it.

7. In so doing, the applicant State seriously underestimates - "disregards" would also be an appropriate word! - one essential factor: neither the Security Council nor the General Assembly has drawn any particular conclusions from the designations thus applied. It may, it is true, be said that these bodies initially called upon Indonesia to withdraw its forces - Indonesia, mind you - and that is where the principle of the relative force of *res decisa*, which is so bothersome to our opponents, comes into play (see CR 95/13, pp. 15 and 49); and they have not reiterated this requirement since 1975. They also called upon

the Portuguese Government "as administering Power to co-operate fully with the United Nations" (cf. Security Council resolution 384 (1975)). But with regard to third States, those not "directly concerned", there has been nothing of the kind.

Nothing of the kind. But there was a call - the call to "respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination" (*ibid.*). Nevertheless, unlike what happened in other cases - Southern Rhodesia or Namibia in particular - the Security Council did not lay down any particular means to achieve that goal; nor were any recommended by the General Assembly.

No, Mr. President, Australia does not have the "obsession with sanctions" which one of Portugal's counsel accused it of having (CR 95/13, p. 8). It would merely make two points:

- the first is that the United Nations organs have neither imposed nor even recommended sanctions in this case, unlike what happened in other cases; and yet it was Professor Higgins herself who, on Monday, laid stress on the importance of the particular circumstances of each case (CR 95/13, p. 30);
- the second is that the resolutions of the United Nations organs did, it is true, originally call upon all States to respect the right of the people of East Timor to self-determination - at least in the case of the three earliest resolutions (cf. Security Council resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976 and General Assembly resolution 3485 (XXX) of 12 December 1975), since the subsequent resolutions were no longer addressed to other States. Be that as it may, these same early resolutions are totally silent on the means which those other States should use for that purpose. The conclusions or the inferences drawn

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from this by Portugal with regard to the resulting obligations for Australia are merely the product of its imagination; as Professor Bowett showed this morning, the resolutions say nothing and imply nothing about the means of achieving the goal they set.

Mr. President, Australia, for its part, is convinced that it is serving the interests of the people of East Timor better by recognizing the presence of Indonesia in that territory, since it can then carry on a more active policy in regard to the territory, a policy which - it hopes - will assist the effective exercise by the Timorese people of their right to self-determination; a right of which - I shall come back to this - it was deprived first by Portugal and subsequently by Indonesia.

8. Oh yes, this attitude can certainly be criticized! Although on this point Portugal rather reminds me of those doctors in the works of Molière who preferred to have their patients die according to Hippocratic rules than to save them or to treat them regardless of dogma. In this instance, however, such criticisms can only be political; Australia has breached no rule since, in the absence of United Nations decisions indicating the precise means that States should use to promote the right of the Timorese people to self-determination, it is for each State, in the exercise of its sovereign discretion, to select those means. Portugal and Australia obviously do not take the same view of this matter; but it is a question of appreciation and expediency, not one of law. In this connection, neither Portugal nor the Court itself can substitute its own view of things for that of Australia; "[r]estrictions upon the independence of States cannot therefore be presumed", and in the absence of prohibitory rules (sanctions if you like) "every State remains

free to adopt the principles which it regards as best and most suitable" ("*Lotus*", *Judgment No. 9*, 1927, *P.C.I.J. Series A, No. 10*, pp. 18-19).

9. There is, moreover, another quite decisive argument to show that the conclusion of the 1989 Agreement could not possibly have infringed the Timorese people's rights of self-determination. I mention this argument only *pro memoria*, since Professor Bowett spoke about it this morning, but it is very important.

Portugal now admits (see CR 95/12, p. 36 and CR 95/13, pp. 26-27) that numerous States have been able quite lawfully to conclude agreements with Indonesia which, by virtue of their very terms, are applicable to "the territory of the Republic of Indonesia as defined in its laws" (see the many examples in the Australian Counter-Memorial, Appendix C, pp. 213-218). There is therefore only one remaining problem, that of the object of the treaty; Professor Bowett has talked about it; I have talked about it (see above, point 5). This is no more promising a field for Portugal since it does not show, nor can it show, that the natural resources it accuses Australia of plundering belong to the Timorese people - and for good reason: in Australia's opinion, but also on the basis of legal rules that have been brought to your attention, those resources are clearly, certainly and indisputably Australian.

10. Consequently, Mr. President, however one regards the matter, Australia has breached no obligation laid upon it by international law:

- first of all, it has concluded a treaty with Indonesia - just as many other States have done; but the "right of entering into international engagements is an attribute of State sovereignty" (*S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 25);

- secondly, this agreement relates to the joint exploitation of natural resources which Australia has always considered, and still considers, to be its own;
- thirdly, it was concluded in accordance with the most soundly established guidelines of the law of maritime delimitation and, moreover, does not prejudge any future delimitation;
- fourthly, it was not, however, concluded with Portugal, which has exercised no effective control over the territory of East Timor for 20 years and which could not have given effect to an agreement of this kind, any more than to a delimitation treaty;
- fifthly, it is true that some United Nations resolutions - early ones - called upon States to respect the right of the people of East Timor to self-determination, but they decided nothing, except with regard to the parties "directly concerned"; they did not even recommend the means appropriate for achieving this aim, which Australia, for its part, fully approves;
- sixthly, in the exercise of its sovereign discretion, Australia - and this is the last point - considers that the best way to achieve this aim is not to close one's eyes to the situation prevailing on the ground, which was created by the shortcomings of Portugal followed by the Indonesian invasion, but on the contrary to recognize that situation and try to act on the basis of this "given" - this being a genuine *de facto* "given" - for the good of the Timorese people's rights and interests.

I do not, Mr. President, perceive any internationally wrongful act in all this. But room for discussion about the advisability of some of the stances taken? Yes, of course, just as the justification for the stances taken by Portugal may be disputed. But as for breaches of international

law, certainly not! And without a breach there can be no international responsibility of the State. And without responsibility, no reparation nor - to use a broader term - any "remedies" (this sounds better in English than the somewhat uncouth French term "*remèdes*").

It is therefore only as a quite subsidiary argument, Mr. President, that I shall now show that, in any event, the Court could not grant Portugal the "remedies" it claims.

II. The Court could not grant Portugal the "remedies" it requests

11. Therefore, Mr. President, it is also solely for the sake of the discussion that I am proceeding on the basis that Australia could be held responsible for the wrongful acts with which Portugal charges it - *quod non*. The negotiation, conclusion and application of the Australo-Indonesian Treaty of 11 December 1989 would, according to that argument, be wrongful, as would the exclusion of any negotiation with Portugal, and that will be my starting-point.

This State is asking you to draw three sets of consequences from this:

- first, it is inviting you to "adjudge and declare" that this is so, and Professor Dupuy explained to us last week that the issue was "satisfaction" (CR 95/5, p. 38);
- also, it is asking for "reparation", by procedures it leaves it for the Court to determine - but *a contrario*, it can be deduced from the first three submissions that what is concerned is not mere satisfaction but compensation, failing which the fourth submission would duplicate the first three, and, here too, Professor Dupuy has informed us, this in fact is the real object of the fourth Portuguese submission (CR 95/5, pp. 44-46);

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- lastly, Portugal would like to have you enjoin Australia to desist from these activities which Portugal regards as wrongful and to guarantee that there will be no repetition of them; that is its fifth submission.

Taken in isolation, each of these requests is problematic. Furthermore, taken together, they give rise to serious objections.

12. Let us begin at the end: the cessation and the guarantee that there will be no repetition.

Professor Dupuy referred ironically to the fact that Australia saw, in these requests, invitations to the Court to make actual injunctions to a sovereign State (CR 95/13, pp. 69-70), and to invoke your Judgments of 1980 and 1986 in the cases concerning *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary Activities in and against Nicaragua* (*ibid.*).

It is quite correct that, in these two Judgments, the Court decided that the respondent States, Iran in the former case, the United States in the latter, should put an end to the actions which it had found were wrongful. But there are at least three differences between these cases and ours:

- in the first place, Portugal not only wishes the Court to prohibit Australia from continuing the *present* actions of which it accuses it, but also to enjoin it not to sign an agreement of the same kind *in future*, a request quite clearly contrary to the very principle of the actualization and individualization of responsibility, of which incidentally Portugal makes such a big issue (cf. CR 95/12, p. 41);
- secondly, Portugal completely distorts the facts of the case by calling upon Australia to refrain "from any act relating to the exploration and exploitation of the continental shelf in the area of the Timor Gap or

to the exercise of jurisdiction over that shelf, on the basis of any plurilateral title to which Portugal ... is not a party" (Submission 5 *(b)*); this overlooks the fact that Australia considers that the title which is the basis of its rights over the continental shelf in question is in no way "plurilateral" as Portugal curiously terms it, but purely and simply "unilateral" in that it is a matter of an "*ipso jure* title which international law attributes to the coastal State in respect of its continental shelf" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 31; see also *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 36);

- furthermore, and thirdly, even if the Australo-Indonesian Agreement did from thes basis of Australia's rights, Portugal totally overlooks an element which is nevertheless fundamental, and which was entirely absent from the cases on which you ruled in 1980 and 1986.

The actions of which Iran on the one hand and the United States on the other were accused were purely unilateral. In this case, on the contrary, it is a treaty concluded with a third State which lies at the heart of the dispute - moreover, it is in order to "bypass" this third State - Indonesia, to name it once again (but I have stopped counting, Mr. President!), that Portugal refers in the abstract to "any plurilateral title", whereas what it is getting at by using this expression is actually the Australo-Indonesian Treaty of 1989.

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13. Here is clear evidence of the inadmissibility of this request. To put it plainly, what it amounts to is demanding of Australia that it should denounce or refrain from performing the treaty which binds it to Indonesia.

I am well aware - counsel of Portugal have explained it to us time and again (see CR 95/6, p. 39 and CR 95/13, pp. 54-55) - that our

opponents do not wish to hear any mention of conflicts of obligations, on the pretext that it is Australia itself which allegedly placed itself in that situation. But this is not the issue, which is rather that we do not see why the Court would enjoin Australia not to act on the basis of a "plurilateral title" - the Australo-Indonesian Treaty of 1989 - when Portugal also seeks to prevent the Court from ruling in addition on the validity of that title. One thing or another: either this title is valid and it is impossible to see how the Court could enjoin Australia to breach its undertakings; or it is not - but the Court must find that to be so, and, in order to do so, inevitably, rule on the interests of a legal nature of Indonesia; I shall have occasion to revert to this later.

Furthermore, it is because the problem was posited in these terms that, in its Judgment of 9 March 1917, the Central American Court of Justice refused to uphold El Salvador's claims seeking a declaration of nullity of the Bryan-Chamorro Treaty or Nicaragua's obligation to abstain from performing it:

> "Prononcer catégoriquement la nullité du traité Bryan-Chamorro ou, à défaut, recevoir l'exception d'incompétence, reviendrait à statuer sur les droits d'un autre signataire du traité, sans avoir entendu cette autre partie et sans qu'elle-même ait accepté la juridiction de la Cour." (*AJIL*, 1917, p. 729).

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14. Portugal sweeps the objection aside by arguing that Indonesia is adequately protected by Article 59 of the Statute of the Court (see CR 95/13, p. 53). But this is doubly false.

In the first place, such an argument leads to absurd results. Let us suppose, Mr. President (here I become Portugal), that Portugal succeeded; let us suppose that you ordered Australia not to rely on the "plurilateral title" which permits it to take part in the exploration and exploitation of the continental shelf in the area of the Timor Gap - in

short, not to perform the treaty binding it to Indonesia; let us also suppose that Indonesia accepted your jurisdiction and brought an application against Australia. What would happen? Inevitably, you would reject the Indonesian application - thus rendering explicit the argument which Portugal, for the moment, is asking you to close your eyes to. This clearly shows that what the Applicant is asking you to do is to distort the meaning and scope of Article 59. And it also reveals that, most definitely, Indonesia is its target.

Secondly, it is legitimate that Article 59 should operate in cases in which the respondent State and third States find themselves in a similar situation, for in that case the Court does not rule explicitly on the responsibility of the latter; since the same causes produce the same effects one might imagine that these other States would be declared responsible on the same grounds, were their conduct to be judged. That is a strong probability, but nothing more. This was the situation in the
924 case concerning *Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports 1984*, p. 431) and the case concerning *Certain Phosphate Lands in Nauru (I.C.J. Reports 1992*, p. 261), for example, and it is what motivated you to invoke Article 59 on those occasions. But it is anything but that where, as in the *Monetary Gold* case or in the case before us, a finding of the responsibility of the third State is an indispensable prerequisite for a finding of the responsibility of the respondent State. In its Judgment of 1954, the Court put it very clearly:

> "It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the

> consent of that third State, give a decision on that issue binding upon any State, either the third State, *or any of the parties before it.*" (*I.C.J. Reports 1954*, p. 33; emphasis added).

15. Furthermore, these objections do not concern Portugal's fifth submission only. They also apply, at least as forcibly, to its second and third claims.

Moreover, the second is worded in the same "tangled" fashion - I insist on this word, it is one of the characteristics of the case concocted by Portugal - as the fifth. In that submission, it is also a question "of a plurilateral title to which Portugal is not a party" - but here the procedure is all the less misleading for the fact that the "plurilateral title" is expressly mentioned, a few lines earlier on; for it is a matter of the "Agreement of 11 December 1989" and most decidedly so. It is the effects of that which Portugal is asking you to neutralize - and I believe I have shown that you cannot go along with it on this point.

16. Furthermore, Portugal's first three submissions raise other objections.

025 It is a matter, we have been told (CR 95/5, pp. 38-39), of "satisfactions". So be it. But satisfaction is just one of many forms of reparation. It cannot therefore be justified unless it is a question of repairing a damage. This is the case, Portugal tells us *(ibid.)*: Portugal and the people of East Timor have suffered a "legal prejudice" by virtue of the conclusion of the 1989 Agreement, which has infringed

- "the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources ..." (Submission 2 *(a)*)

and

- "the powers of Portugal as the administering Power" (Submissions 2 *(b)* and 3);

- and it has "contraven[ed] Security Council resolutions 384 and 389" and, more generally, disregarded "the binding character of the resolutions of United Nations organs that relate to East Timor" (Submission 2 *(c)*).

This latter submission, the one relating to the resolutions, can be eliminated straightaway: Portugal may well be one of the "interested parties" concerned by these resolutions, but it has no mandate to set itself up as the guardian of international order, and as such any failure - if there were any at all - by Australia to comply with these resolutions has perhaps caused damage to the United Nations (which, by the way, has not complained about it, has not noticed it ...), but certainly not to Portugal.

As regards the two other heads of damage invoked by Portugal, I must, once again, point out the extremely artificial nature of the edifice thought up by Portugal. Where in any case is the damage when Portugal is unable to exercise the rights it claims to be deprived of - either to itself, or to the Timorese people whose cause it champions today? Once again - and we always come back to this - it is not the negotiation, conclusion or performance of the Australo-Indonesian Treaty of 11 December 1989 which lie at the root of the prejudice of which Portugal complains; but rather, and quite clearly, two elements, which incidentally are linked, in which Australia has absolutely no part:

- first, Portugal's withdrawal from East Timor at the end of August 1975; in other words, four months *before* the Indonesian invasion; a withdrawal which is no more than the penalty for its poor colonial behaviour (if colonial domination can ever be "good", its own - as it now acknowledges - was particularly abominable anyway);

- second, of course, the Indonesian military invasion itself, on 7 December 1975, four months later.

It is the conjunction (and the succession - in that order) of these two events which lie at the origin of Portugal's eviction from East Timor; it is these two events and these alone which led to the loss by that country of any capacity to act on behalf of that territory. Australia had no part in it whatever (despite the accusations which Portugal made during the first round of the oral hearings but happily did not repeat last Monday). This situation - which is a fact, a "given", a *donnée*, - is due, and is due exclusively, to the action of a third party - which cannot be appraised in this Court - and of the Applicant State itself, which it therefore ill becomes to demand reparation for a damage resulting from a situation to whose creation, in fact, it largely contributed itself, always supposing that this damage actually exists.

17. Two further remarks on this point, Mr. President.

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Firstly, I was quite shocked, last Monday, to hear Professor Pierre-Marie Dupuy take up an argument that counsel of Portugal had already set out before (see CR 95/2, pp. 14-15), but less immodestly. According to my opponent, it is regrettable to seek "at all costs to foist onto post-1974 Portugal the colonial misdeeds of the régime which it actually overthrew" (CR 95/13, p. 67). What a strange idea! As far as I know it is States, not governments, not even political régimes, which incur international responsibility and the principle of the continuity of the State with respect to international law totally precludes a successor régime from being able to play the Pontius Pilate in order to relieve itself of the responsibilities of the régime it has replaced. *Forma regiminis mutata non mutatus ipsa civitas* (see, for

example, Charles Leben, "Les révolutions en droit international : essai de classification et de problématique générale", in SFDI, Colloque de Dijon, *Révolution et droit international*, Pédone, Paris, 1990, p. 13).

And in order to obscure this well-established principle, it is not enough to take refuge behind a fictitious example like my friend Pierre-Marie Dupuy last week, appearing as he did to claim that the South Africa of Nelson Mandela could hide behind its new democratic legitimacy in order to free itself from the responsibility incurred in Namibia by the South Africa of apartheid. It is, on the contrary, the grandeur of the true democracies that they take upon themselves the heritage of history. I do not for a moment dispute the fact that the Portuguese Republic today ranks itself among the true democracies; but why does it not take that step to its logical conclusion, like others, such as Germany or Japan, have not hesitated to do? Why does it seek to rid itself of its own faults by "shifting the blame" onto others which, like Australia in the present case, have no part in the situation for which it is itself (I am still speaking of the Portuguese Republic, the fittingly repentant heir of the dictatorship) one of the parties principally responsible? Who is playing at "it wasn't me, it was him", the "him" in this case being the Portuguese "ancien régime"?

The second remark I wanted to make, Mr. President, is that in international law, as, to the best of my knowledge, in all contemporary legal systems, the true author of the damage is considered to be the party who is at the origin of the chain of causality, of what is sometimes called the "transitive causality" of damage (see, for example, Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Pédone, Paris, 1973, pp. 186-187).

It is not the song mentioned by Professor Crawford last week (you remember: "I danced with the man who danced with the girl who danced with the Prince of Wales" (CR 95/8, p. 60)) which this calls to mind most, but rather the famous French song "Tout va très bien, Madame la Marquise ..." ("Everything is fine, your Ladyship"), in which one has to go right back to the suicide of the Marquis to find the actual cause of the death of the grey mare ... Likewise here, if there is any damage to the Timorese people, the true cause, the prime cause, must be sought in the catastrophic Portuguese colonial administration, which resulted in Portugal's withdrawal, then the invasion by Indonesia, which substituted its effective control of the territory for that of the former colonial power, which thereby lost the capacity to conclude and to apply - they go hand in hand, as I showed last week and it was not refuted - treaties relating to the territory.

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18. In these circumstances, Members of the Court, it seems difficult to see how you could grant any reparation whatever, in whatever form - be it satisfaction or compensation - to Portugal: if damage there is, it originates in the action of a third party and of the Respondent State itself; that State should therefore be the last to call upon the Court to make "declarations" which would relieve it, at little cost, of its own responsibilities without returning to the people of East Timor the effective enjoyment of the right of peoples to self-determination, of which it has been deprived, in part at least, by the excesses of the former colonial Power itself.

These remarks apply, of course, to Portugal's first submission which, moreover, as Mr. Gavan Griffith pointed out last Friday (CR 95/11, pp. 55 and 70) and again this morning, is purposeless since the right of the people of East Timor to self-determination is not disputed by Australia,

which nevertheless believes that, as things stand, the return of the former colonial Power would not be the best way of guaranteeing the exercise of that right.

Further, as its Agent said this morning, Australia well understands that it might be "tempting", if I may put it like that, for the Court to make a declaration of the kind Portugal invites it to make by its first submission. But it very strongly hopes, Members of the Court, that you will not "succumb" to this temptation. The function of your distinguished Court "is to decide in accordance with international law such disputes as are submitted to it"; it would be paradoxical if, by a declaration to no purpose, you were to grant satisfaction to Portugal on a point over which, precisely, there is no dispute between the Parties. It is quite another matter if you were to find in the reasons for your judgment that the Parties agreed on this point, but, if you make it an element of the operative part of the judgment, regardless of whether that is your intention or not, such a decision would look like an expression of a reproof which, in all sincerity, Australia does not believe it has deserved.

This leads me to a second observation on the same lines. Portugal urgently invites you, Members of the Court, to make "a new ... contribution to the law of self-determination" (CR 95/13, p. 75; see also CR 95/2, p. 47). Australia wishes to moderate this heady enthusiasm. If your judgment makes it possible to clarify certain points in the still controversial field of the right of peoples to self-determination, so much the better! Even if, when it suits it, Portugal marvels at the precision of the rules which are said to stem from this principle (see CR 95/3, pp. 12-13). But such a development cannot be an end in itself; what matters is not to "fill in the blanks"

of a chapter of international law, however important it may be, but to deliver a judgment, a judgment based on sound but practical reasons. Our opponents sometimes seem to forget that it is the honour of a State which is at issue ... and that State asks you to reject Portugal's submissions. To do that, it does not think that the Court has any need to transform itself into the collective author of a new treatise on international law.

19. I have just given the many reasons why "satisfaction" in the form of a declaration by the Court would not be appropriate: there is no damage and, in any case, if damage there be, it is caused by the conduct of Indonesia and Portugal, not Australia. This applies, *a fortiori*, to the fourth submission of Portugal, in which that country requests "reparation ... in such form and manner as may be indicated by the Court, given the nature of the obligations breached". What is more, since the reference here is to reparation for material damage, the damage invoked by Portugal is, on its own admission, future, contingent and uncertain (*cf.* CR 95/5, pp. 44-46). It is just the kind of damage that does not qualify for reparation in international law. The Agent of Australia referred to this last Friday (CR 95/11, pp. 66-69).

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It therefore suffices to mention in this respect one further point: the Court is not, here, in the same position as it was in the earlier reparation cases with which it had to deal, whether the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 26), the *Hostages* case (*I.C.J. Reports 1982*, p. 45) or the *Military Activities* case (*I.C.J. Reports 1986*, p. 149). In all those cases, it decided to fix the amount of reparation at a later stage; but that was possible only because the damage was certain and "computable". Nothing of the sort applies in the present case: the damage is indeterminate and indeterminable.

20. Hence, Mr. President and Members of the Court, none of Portugal's submissions appears to be either well-founded or even admissible. Everything combines to invalidate them: the unreality of the damage claimed; Portugal's own responsibility in the occurrence of the damage, or that of a third State, absent from the proceedings and whose conduct cannot, for that reason, be judged; or these three causes taken together.

Well, Mr. President, I have reasoned, in this latter part of my argument, like Portugal. I mean "with ifs and ands": if Australia had committed the breaches of international law held against it, could the submissions of the Applicant State be entertained? The answer is no. It is all the more so if, by abandoning the "ifs", we concern ourselves with the real case; in which event, it will be observed, as I think I have shown in the first portion of this statement, that Australia has not committed the internationally wrongful acts of which it is accused. No breach and, therefore, no responsibility. No responsibility and, therefore, no reparation.

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For that matter, you will not, I think, have to ponder these issues of substance, in any case not from this angle: Portugal's Application is inadmissible and Australia believes that you lack jurisdiction to deal with it. At the very most, since here the merits of the case and the preliminary objections are particularly closely linked, you will have to find that the reasoning on the merits that the Applicant State is inviting you to follow would oblige you to rule on the interests of a legal nature of an absent State. This observation brings me to my second set of arguments, which will be shorter, and to an examination of the Portuguese claims in the light of the principle of consent to the jurisdiction of the Court.

THE PORTUGUESE CLAIMS FROM THE STANDPOINT OF THE PRINCIPLE OF CONSENT TO THE JURISDICTION OF THE COURT

1. Allow me first of all, Mr. President, to reassure the worried co-agent of Portugal who made, on this point, an appeal to "fair procedure" by Australia (CR 95/13, p. 43). I do not have any fresh argument up my sleeve that we might have kept to ourselves until the last minute! On the other hand, may Mr. Galvão Teles allow us, too, to be "stubborn" and tell him, amicably but firmly, that it is Portugal that is determined to "confuse things" (see CR 95/13, p. 45), thus obliging us to revert to this important point despite the lengthy treatment the parties have already devoted to it.

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I understand too, Mr. President, the candid perseverance with which Portugal is bracing itself against its wavering certainties: assailed by remorse as belated as it is commendable regarding the people of Timor, it had to come up with something spectacular. The political organs of the United Nations did not seem receptive to its concerns; year after year the General Assembly defers consideration of the question; the Committee of 24 itself gives it but perfunctory attention; and the Security Council has taken no interest in it at all for 20 years. There remained the World Court, but with a hefty obstacle - Indonesia, Members of the Court, does not accept your jurisdiction. Hence the idea arose - I do not really know how, but one can imagine - of finding a more accessible victim. So Portugal opted for Australia, a far-away State with which it maintains cordial but somewhat neutral relations, which is very directly concerned by what goes on in the region of the world where East Timor is also located, and a State which, by contrast, has accepted the optional clause in Article 36.

Very quickly of course, Portugal, which, as we have been able to observe in the last three weeks, has no lack of skilful counsel, realized that it was liable to come up against major obstacles. And, first of all, this one: Australia is not only, like many other countries, a treaty partner of Indonesia; it is also a coastal State which, as such, has rights. No matter: an attempt would be made to sidestep the issue by specifying that the Court is not being asked to rule positively on a delimitation, but to condemn the provisional arrangement concluded with Indonesia, for want, as it happens, of delimitation. But this would lead on to another problem: by this expedient, Indonesia would inevitably be reintroduced into the "legal landscape" unless, instead of being couched in these positive terms, the question were put in the negative. And this is assuredly how Portugal came to seise the Court of an application not against Indonesia but against Australia; not of submissions directed against recognition of the former by the latter, but against disregard for the supposed rights of Portugal; of a request not for delimitation but, I would say, for "non-delimitation".

This presentation is sufficiently complicated and tortuous to be misleading, on a first reading. But the impression does not withstand analysis, and all the adroitness of the counsel of Portugal fails to conceal the evidence: not only is Indonesia in fact targeted, but the Court cannot answer the artificial and tortuous questions put by Portugal's Application unless it rules, first and necessarily, on the responsibility of Indonesia - and Portugal finds in its way the cardinal principle of consent to the Court's jurisdiction and, more precisely, the principle which, in a nutshell, we have been calling "the *Monetary Gold* principle" at this bar for the past three weeks.

2. Mr. Galvão Teles tells us that "Portugal and Australia agree on the meaning of the *Monetary Gold* rule" (CR 95/13, p. 43). Since he says so, I am quite ready to believe him - and I have nothing further to say about the analysis of that rule *in abstracto*. On the other hand, what I am certain of is that the parties are clearly not agreed on the implications of the principle in the present instance.

I shall show this by following, step by step (but in a different order) the last speech of Mr. Galvão Teles, who will thus be unable to accuse me of "unfair procedure", even though I may allow myself to touch briefly on some of last Monday's statements by other of Portugal's counsel.

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Our learned - and impetuous - opponent started off with a bold assertion by saying that "the proof that there is a distinction between, on the one hand, legality and responsibility and, on the other, validity" lay in the fact that Professor Crawford and I had, in the first round of oral pleadings, shared out our work in this way (CR 95/13, p. 45). To tell the truth, such a division was not easy and we adopted it only to follow Portugal on its own ground. Furthermore, what Mr. Galvão Teles forgot to say is that we both - I mean James Crawford and myself - reached the conclusion that, as it so happens, such a distinction is, in the present instance, completely artificial (CR 95/8, pp. 39 and 66-67).

We are still not, in truth, convinced of the opposite. Let us straightaway turn to the beginning of the second part of the statement of Mr. Galvão Teles, in which he formulates "three preliminary propositions".

> "*First proposition*: the responsibility arising from the unlawfulness of the conclusion and performance of a treaty is one thing; the invalidity of a treaty is another." (CR 93/13, p. 57.)

The only "proof" our opponent gives is Article 30, paragraph 5, of the Vienna Convention on the Law of Treaties. I am not sure that I clearly discern the relationship, but never mind. In the abstract, we agree on this point with Portugal; it is true that the wrongfulness of the conclusion and performance of a treaty may, *in some cases*, be due to factors other than the invalidity of the treaty itself. Likewise, and this is the

> "*Second proposition*: international responsibility may be incurred alike by the conclusion and performance of a valid treaty and by that of an invalid treaty." (*Ibid.*, p. 58.)

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That is also true, Mr. President; but it applies, once more, only *in some cases* - and that with which we are concerned is not one of them.

Why would the conclusion and performance of the Treaty of 11 December 1989 engage the responsibility of Australia? Not because it supposedly committed itself with a "*wrong party*", a "*mauvais cocontractant*". The Portuguese Reply is categorical in stating that "the absence of capacity (*capacité*) or entitlement (*légitimation*) of Indonesia" to conclude the treaty is not involved (PR, p. 211, para. 7.20), and the Portuguese counsel have never disputed this principle. Had they done so, incidentally, they would have collided head-on and openly with the *Monetary Gold* principle.

I shall observe in passing that, while the issue is not with whom Australia dealt, it cannot, either, be with whom it did not deal. As I said last week, without being challenged, these are two sides of the same coin (see CR 95/8, p. 14); the conduct that could be held against Australia is not, and cannot be, that it did not conclude and negotiate with Portugal - the conclusion of a treaty is a faculty, not an obligation - but that it negotiated and concluded *with Indonesia*. Yet Portugal expressly states that this is not impugned.

The conclusion is self-evident, Mr. President: it is the treaty itself which, according to Portugal, is not valid and this alleged invalidity, entailing the wrongfulness of its negotiation, conclusion and performance, supposedly founds the responsibility of Australia.

037 That, at least, very clearly establishes one thing: the first two "propositions" of Mr. Galvão Teles that I quoted just now may, no doubt, be regarded as correct in the abstract, but they are devoid of any practical effect in our case. Whereas, ever since the start of these proceedings, Portugal has been proclaiming that the invalidity of the treaty is not the point at issue, it is indeed the only factor which, in our case, could entail the wrongfulness of Australia's actions; no matter then that, in certain circumstances, there may be wrongfulness of treaty-linked actions without the treaty being invalid. That is not the case here.

5. Furthermore, the counsel of Portugal are well aware of this and it caused them, last Monday, to draw from that clear observation (which nonetheless took some four years to make its impact) two inferences.

Firstly, the Treaty of 11 December 1989 is supposedly invalid - and therefore entails Australia's responsibility - because - and, finally, only because - it allegedly concerns the exploitation of non-renewable natural resources belonging to the Timorese people. This discovery being made, all Portugal's counsel emphasize it. Professor Dupuy says: "*It is an agreement* [he is of course speaking of the 1989 Treaty between Australia and Indonesia] *concerning exploitation of the non-renewable natural resources of the continental shelf*" (CR 95/12, p. 36, italicized in the original). Professor Sérvulo Correia is also emphatic, referring to

> "la violation du droit du Portugal de s'acquitter de ses obligations et responsabilités en sa qualité de puissance administrante, qui inclut, au minimum, le droit de conclure des traités sur des questions qui se rapportent directement à des ressources naturelles importantes et non renouvelables" (CR 95/12, p. 73);

038 as is Professor Higgins, with this:

> "Le Portugal fait grief à l'Australie d'avoir agi illicitement en négociant, concluant et mettant en oeuvre un traité en vue de l'exploitation de ressources naturelles non renouvelables appartenant au peuple du Timor oriental." (CR 95/13, p. 27.)

That is what is said to substantiate the non-validity of the 1989 Treaty and, on the rebound, the wrongfulness of the actions imputed to Australia and - still as a consequence - its responsibility.

6. Portugal draws from this very new analysis a second inference. Mr. Galvão Teles expresses it in the form of a "third proposition", coming in addition to the other two I quoted just now: "the invalidity of a treaty is one thing; the judicial declaration of such invalidity is another" (CR 95/13, p. 58).

In other words: "Yes, that is true, the 1989 Treaty between Australia and Indonesia is not valid - this is Portugal speaking - but the Court has no need to declare it in the operative part of its Judgment".

By all means! But this has absolutely nothing to do with the question of concern to us, the applicability of the *Monetary Gold* principle. Nor would the Court, in 1954, have had any need to make of the rights and obligations of Albania an element of the operative part of its Judgment; on the other hand, it could not have been avoided finding on the possible responsibility of that country when giving the reasons for its Judgment; that was an essential ground, just as, in the present instance, the question of the possible invalidity of the 1989 Treaty constitutes a prerequisite for consideration of the merits of the

Portuguese submissions. And, for the same reasons as in 1954, the Court cannot proceed in that way since, in doing so, it would be determining a matter that "concerns the [international] responsibility of a third State", which it cannot do "without the consent of that third State" (*I.C.J. Reports 1954*, p. 33).

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7. Portugal then begins a prudent withdrawal: "it takes two parties to make a treaty", says Mr. Galvão Teles, asking why it should be necessary for the Court to rule, at the same time, on the responsibility of both one and the other; we have a situation of concurrent responsibilities, identical with that involved in the case concerning *Certain Phosphate Lands in Nauru* (CR 95/13, pp. 59-60).

Allow me to observe first of all, Mr. President, that, if that were so, it would be difficult to see why Portugal has applied itself so hard, so grimly even, for four years - since the filing of its Application up to and including the first round of its oral pleadings - to trying to prevent the Court from ruling on the validity of the Treaty between Australia and Indonesia.

This attitude was in fact entirely rational. Contrary to what the adroit co-agent of Portugal would have had us believe, the present case is only remotely comparable to that concerning *Nauru*; in the *Nauru* case, the validity of the Mandate and then of the Trusteeship Agreement was in no way a point at issue; only its application, by Australia, as the effective administrator of the territory, was challenged. That country did not manage to convince the Court that there was a link not only "temporal but also logical", to echo your own words, between any responsibility that it might itself have and that of New Zealand and the United Kingdom (*I.C.J. Reports 1992*, p. 261) - and I know a counsel who was much aggrieved about that!

Things are quite different here. As I have shown, and as Portugal now agrees, it is the validity of the Treaty itself which is at the heart of our debate. A treaty - unlike the colonial administration activities that were at issue in the *Nauru* case - is not a unilateral act; it is only rendered possible by the concurrent wills of two States at least. That being so, the "logical link" that the Court did not detect in 1992, between the actions held against Australia and those of its partners, is present here in an evident manner: it is through the concurrence of their wishes, recorded in the 1989 Treaty, that Australia and Indonesia together originated the allegedly wrongful acts which are today held against the former alone.

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What is more - as I said, without it being challenged, at the hearing of 6 February - it is Indonesia, and not Australia, that commanded the natural resources said by Portugal to pertain to East Timor. So if a State can be accused of availing itself of them unduly under the Treaty of 11 December 1989, Indonesia would assuredly be the culprit, not Australia (CR 95/7, p. 81; see also CR 95/11, p. 21). It is Indonesia that allegedly "ceded" to Australia rights not belonging to it. And only if the Court determines that - beforehand - could it, as appropriate and in a second phase, rule on any responsibility lying with Australia. If such there be, it is well "down the line" from that, also contingent, of Indonesia.

8. Is it really necessary, in these circumstances, to revert to the first part of the reasoning offered by Mr. Galvão Teles last Monday? Yes, it probably is, so as to leave nothing in the dark; but bearing in mind that the real issue the Court is required to decide is the *validity* of the 1989 Treaty between Australia and Indonesia, and that the

"actions" on which the Portuguese co-agent initially sought to focus attention cannot in fact be separated from them.

041 I shall not, Mr. President, launch into a refutation of the idea advanced by Mr. Galvão Teles that there is a difference between "propositions", on the one hand, and "significance", on the other - for three reasons: first, because I failed to understand it; second, because time is going by; and, third, because my opponent asked not to be told that the distinction was artificial (CR 95/13, p. 50). And I do not wish to vex Mr. Galvão Teles by doing so.

On the other hand, he will, I think, excuse me for telling him that I do not in the least find that the other distinction he advances between rights *erga omnes* and rights *erga singulum* does anything to "clarify matters", as he says (*ibid.*), in any case certainly not as regards the *Monetary Gold* principle, with which it has absolutely nothing to do. But since he seems to have abandoned the idea of drawing any inferences whatever from this, I venture, Members of the Court, simply to refer you to my arguments of 7 February on this point (CR 95/8, pp. 31-36).

The other two issues taken up by the co-agent of Portugal seem to me, on the other hand, to deserve more attention: these are the question of the "givens" and of some kind of acknowledgement Australia is alleged to have made to the effect that part of the Application, at least, is admissible. I shall say a few words, in order, on each of these two points.

9. Firstly, the famous argument of the "givens", the alpha and omega of the Portuguese contention, the magic formula that would remove all obstacles in Portugal's way and, to begin with, the nonetheless forbidding one represented by the *Monetary Gold* principle.

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"We therefore believe - said Mr. Galvão Teles - that the designation of Portugal as the Administering Power of East Timor, derived as it is from the United Nations resolutions, is sufficient to establish the unlawfulness of the actions of Australia precisely through the infringement of the rights of Portugal." (CR 95/13, p. 47.)

Admirable is the power of faith!

The United Nations resolutions - which, as Professor Bowett reminded you this morning, have not the remotest connection with "the actions of Australia" - would nevertheless suffice to "establish [their] unlawfulness".

Such assertions raise at least two sets of objections. The first concern the actual content of these so-called "givens", which, to tell the truth, have only a distant connection with our case, if indeed any connection at all. The second relate to the scope of the resolutions before the Court.

With regard to the second point, argued relentlessly by Portugal, it carries absolutely no conviction; you are required, it seems, simply to apply the resolutions which Portugal cites without being able to give any thought to their scope or their validity - simply because they are said to be "givens", a magic word if ever there was one.

While Mr. Galvão Teles is highly discreet (and, I feel, somewhat confused) on this point (see CR 95/13, p. 48), Professor Rosalyn Higgins, for her part, is frankly bold and - I say this with all the amicable regard I have for her - totally contradictory, since she asserts two things successively: at one point she says that if the dispute was between *Indonesia* and Portugal, that country, Indonesia as I understand it, could, in this Court, challenge the validity of the resolutions adopted by the United Nations, and that it would be for the Court to assess that validity (CR 95/13, p. 17); at a later point, however, she

maintains that if it is Australia which asks the Court to assess that validity, the Court cannot do so and must accept those "givens" (*ibid.*, p. 18). Is this really *"cette attitude de bon sens"* proclaimed by my distinguished opponent (*ibid.*, p. 19)?

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10. Let us now move on to the actual substance of these "givens". Professor Rosalyn Higgins (CR 95/13, pp. 27-33) and Mr. Galvão Teles (*ibid.*, p. 47) assert that the mere mentions of Portugal as the Administering Power and of East Timor as a non-self-governing territory are sufficient to give rise to an impressive set of legal consequences, including the unlawfulness of the action of which Portugal accuses Australia. Professor Bowett showed this morning that this is not the case and I see no point in reverting to the matter, except to point out once more that there is a manifest *non sequitur* in the Portuguese argument: why should the mere fact that Portugal is designated as the Administering Power or East Timor as a non-self-governing territory constitute "givens" which suffice to establish the responsibility of Australia for having concluded, with Indonesia, a treaty relating to the exploration and exploitation of what the two States regard as their own natural resources? Thereupon Professor Dupuy intervenes to give us the missing link: that is so, he tells us, solely because the Treaty is invalid since it implies, and is based on, the *de jure* recognition of the Indonesian presence in East Timor. But that finding, Members of the Court, you cannot make; it would take you far beyond what is permitted by the principle of consent to your jurisdiction.

11. However, with the last "proposition", the last "result" which my kind opponent, Mr. Galvão Teles, saw fit to put forward, he would have us understand that, even if all the resolutions are not "givens", at least some of them are.

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Australia is said to have acknowledged, through myself, "that no other party to the proceedings would be necessary, at least for the Court to rule on the contravention by Australia of Security Council resolutions 384 and 389" (CR 95/13, p. 52). Mr. Galvão Teles somewhat strains the meaning of what I said, since neither in the passage he quotes from my previous speech (CR 95/13, p. 51, quoting CR 95/8, pp. 29-30), nor in the lines preceding or following that quotation, did I mention any particular United Nations resolutions. On the other hand, it is true that I considered - and I still consider (we are obstinate on this side of the bar!) - that if (ah, the Portuguese "ifs"!), that if, then, Australia had violated the rights of the Timorese people - resolution or no resolution, by the way - its international responsibility could be engaged. But I also said - and I still maintain - that, for this to be so, Portugal would have to state what precise conduct of Australia, *regardless of the actions of Indonesia*, constituted an internationally wrongful act and what precise rule it contravened. But I found - and I still find - that Portugal proves quite unable to specify any such conduct.

Here again, Mr. President, Portugal argues in the abstract - by means of "ifs". Yes, *IF* the case was otherwise than it is, Australia would perhaps be responsible. Yes, *IF* the case was otherwise than it is, the Court could perhaps declare that responsibility to exist. But the case is what it is; the facts - I mean the real facts - are what they are, not those "reconstructed" by Portugal (for if we are "deconstructionist" (CR 95/13, p. 8), the Portuguese team is terribly "reconstructionist" and inventive). But we must not play about too much with the facts, the Court's jurisdiction strictly depends on them.

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12. I pointed out last week that our Portuguese friends suffer from a split personality (CR 95/8, p. 16). I fear that this legal schizophrenia has become even more pronounced with the passage of time.

Pleading the admissibility of the Portuguese Application, Mr. Galvão Teles stressed that:

> "the Portuguese claim is not founded on the breach by Australia of a duty of non-recognition of a situation created by the unlawful use of force. It is founded on the disregard by Australia of the status of East Timor as a non-self-governing territory on the one hand, and of that of Portugal as its Administering Power on the other.
>
> The question of the lawfulness or unlawfulness of Indonesia's conduct in regard to East Timor is therefore quite simply irrelevant." (CR 95/13, p. 46.)

Well then, if that is the case, if Mr. Galvão Teles is right, why, in dealing with the merits, did Professor Dupuy spend nearly an hour (and some 23 pages - I really am rather fond of statistics!) in attempting to establish the unlawfulness of "the *de jure* recognition of the integration of East Timor with Indonesia" (CR 95/12, pp. 18-41)? I am well aware, Mr. President, that this long speech also sought to demonstrate that the *de jure* recognition in question was incompatible with "the correlative recognition that [East Timor] still constitutes a non-self-governing territory and that its people has not exercised its right to self-determination" (*ibid.*, p. 18); exactly: here is clear evidence that this question of recognition (which cannot, of course, be settled without appraising the lawfulness of the Indonesian actions), that this question of recognition, then, is the indispensable prerequisite to the determination of the responsibilities, if any, of Australia. Otherwise,

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there would seem to have been a lot of fuss about nothing and a lot of time wasted by the Court and, incidentally, by everyone in this chamber!

Professor Crawford has already made that clear this morning: the demonstration of the unlawfulness of the recognition (whether *de jure* or *de facto*, it matters little) of the situation created by Indonesia is indispensable to the Portuguese line of argument. It is not certain that with it the argument can succeed; but it is certain that without it the argument fails. Yet along with this Portugal comes up against the *Monetary Gold* principle - and it is not by carefully separating in time its arguments on the merits, or the presentation of its argument on the merits, from the discussion of the admissibility of the Application that this problem, an insoluble one, can be made to go away.

13. Mr. President, Members of the Court, the State which appears before you as Respondent in this case is a victim, I would say, of being the wrong target of the Applicant State.

Portugal has always shown a lack of interest in its far-off Asian colony; today it feels itself "responsible but not to blame", to use an expression which had its moment of glory in France some while back; it is seeking, may I say, "to make up for things" as best it can in the eyes of Portuguese public opinion and in the eyes of a people which it abandoned to its unfortunate lot when still able to do something for it. The filing of an application against a State which had never imagined that acceptance of the Court's compulsory jurisdiction or the conclusion of the 1989 Treaty could put it in this situation constitutes some kind of expiatory rite, but Australia does not imagine for a moment that the "misplaced arrow" can transform itself into a "miscarriage of justice".

Without doubt, this should not be the outcome; the arrow should miss the target by a long way, so numerous are the reasons for its deflection, and so insurmountable the obstacles which preclude you from declaring

Australia responsible for the breaches of international law of which it is accused.

Those obstacles are, in the first place, procedural. Not only is Australia not the real Respondent, the State which Portugal was aiming at when it began these proceedings, but in addition, for you to make a determination - I do not say find Australia guilty - for you simply to make a determination on the breaches of international law for which it is so artificially blamed, you would, first of all and of necessity, have to determine the responsibilities of that great absentee - constantly present at these hearings - Indonesia. Your Statute, and in particular its Article 36, does not allow that. Consequently, as you decided in 1954 in the *Monetary Gold* case, you will be bound to find that in the absence of that country's consent you cannot rule on the submissions in the Portuguese Application.

14. Mr. President, Members of the Court, the Applicant State, after having completely fabricated the case which it submitted to you, has realized that it faced insurmountable procedural difficulties.

In order to avoid those pitfalls, it has had to prune its arguments to the bone - to exclude from them

1. the issue, a crucial one, of the delimitation of the respective maritime shelves of Australia and of East Timor;
2. the issue of the validity of the Australo-Indonesian Agreement of 1989;
3. the issue of the recognition, inevitably implied by the conclusion of that Agreement, of the presence of Indonesia in East Timor; and
4. the issue of the actual lawfulness of that presence;

and I have only mentioned the most glaring omissions, - and I was going to say the really "monumental" ones.

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However incomplete, this list calls for at least two comments, and these will be my closing words.

Firstly, I have the utmost doubt whether a State can submit a case to you and then prevent you from considering it by seeking to bar you from examining, from the legal angle, certain essential elements in its make-up. In concluding his speech the other day on the "sufficiency of the Parties to the proceedings", Mr. Galvão Teles said that "the path in the present case is a narrow one" (CR 95/13, p. 63); I fear for Portugal that the path has disappeared from under its feet ...

Secondly, it is astonishing that, despite its efforts to demarcate in this fashion the pseudo-dispute which it has submitted to you, Portugal has not succeeded in sending Indonesia "off the field"; Indonesia is everywhere; it is above all in the background of all Portugal's arguments: if Australia was responsible it would only be *because* Indonesia was responsible too, or rather it would be responsible *first*. In other words, Portugal cannot "escape" from the *Monetary Gold* principle. The resulting inadmissibility is the price to be paid for having submitted to the Court an artificial application which has simply been the pretext for "show proceedings" - but perhaps, after all, the proceedings themselves and the media fallout which Portugal anticipated from them represent that country's real aim?

Mr. President, Members of the Court, I thank you for your very great patience and I would ask you, Mr. President, to be kind enough to give the floor to Professor Crawford for a statement which he has promised to keep very brief. Thank you, Mr. President.

The PRESIDENT: Thank you Mr. Pellet. Professor Crawford.

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M. CRAWFORD : Monsieur le Président, Messieurs les juges.

1. J'ai effectivement promis à M. Pellet d'être bref. Je n'ai pas réussi à obtenir de lui la même promesse. Il faut pourtant dire quelques mots sur les questions examinées lundi par M. Dupuy sous le titre de l'opportunité judiciaire, titre qui ne concerne pas l'exercice d'un droit discrétionnaire comme semblait le penser M. Dupuy (mais voir CR 95/13, p. 64, M. Dupuy), mais les conditions minimales qui permettent à la Cour «de conserver son caractère judiciaire» (*Cameroun septentrional, C.I.J. Recueil 1963*, p. 29).

2. Le Portugal tente de placer la Cour dans une situation qui associe au plus haut point l'artifice et le danger.

Le caractère artificiel de la cause du Portugal

3. Ce caractère *artificiel* est à la fois positif et négatif, il marque ce qu'on demande à la Cour de faire et ce qu'on ne lui demande pas.

4. Quant à ce qu'on *demande* à la Cour de faire, on sollicite sa décision sur des propositions abstraites et artificielles à l'extrême. Permettez-moi de citer M. Galvão Teles, qui a dit lundi que, si le comportement de l'Australie est illicite, cela tient à ses rapports avec un Etat qui n'est ni la puissance administrante d'un territoire non autonome, ni le détenteur de l'autorité sur un territoire qui ne serait pas non autonome (CR 95/12, p. 13). Je compte là cinq négations et, pour ma part, je ne parviens pas à apprécier l'effet juridique d'une proposition qui contient cinq négations. Quoi qu'il en soit, c'est une proposition qui ne correspond pas à la manière dont le Portugal présente maintenant son argumentation. Voilà, je suppose, la sixième négation.

5. Ce n'est là qu'un exemple parmi d'autres. De façon plus générale, le Portugal saisit la Cour des demandes suivantes :

1. entériner la revendication d'une autorité territoriale par un Etat qui est pratiquement certain de ne jamais retourner sur le territoire;

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2. rendre exécutoire la revendication d'une autorité par un Etat qui n'a jamais exercé cette autorité depuis 1975, sauf pour introduire la présente instance;

3. interdire l'exécution d'un traité que l'on ne peut demander et que l'on ne demande d'ailleurs pas à la Cour de déclarer nul;

4. donner effet à une règle de *non-reconnaissance* pour laquelle il n'existe aucun précédent, sur l'initiative d'un Etat qui persiste lui-même, délibérément, à agir d'une manière incompatible avec cette règle;

5. empêcher ainsi l'Australie de reconnaître l'autorité d'un Etat tiers auquel l'article 59 du Statut permettra de continuer à exercer cette autorité;

6. protéger la souveraineté permanente d'un peuple sur des ressources naturelles qu'il n'est possible à la Cour ni de délimiter, ni même de déterminer;

7. condamner à des dommages et intérêts pour des préjudices impossibles à déterminer pour la même raison et qui, de toute manière, ne se sont pas produits et ne se produiront peut-être jamais;

8. de façon générale, substituer à des positions arrêtées contre un Etat tiers, dictées par la nécessité logique et juridique, des incidences contestées, sur la teneur desquelles même les conseils du Portugal ne peuvent se mettre d'accord (sur la distinction entre des «positions arrêtées» et des «incidences», voir *Certaines terres à phosphates à*

Nauru, C.I.J. Recueil 1992, p. 261, par. 55, citée dans CR 95/7, p. 70).

6. Permettez-moi maintenant de passer à l'aspect négatif, c'est-à-dire aux questions sur lesquelles il n'est pas demandé à la Cour de statuer. Elles sont légion, mais je choisirai seulement les plus importantes, liées au fait que des forces armées indonésiennes sont entrées au Timor oriental en 1975 et que l'Organisation des Nations Unies a brièvement déploré cette «intervention armée».

7. A ce propos la position du Portugal est restée cohérente et M. Galvão Teles l'a définie de nouveau lundi. Il a dit que le Portugal n'invoque d'aucune manière un principe de non-reconnaissance fondé sur l'emploi de la force. Il n'est pas demandé à la Cour de statuer - je ne reproduirai pas les citations - sur les *moyens* par lesquels l'Indonésie a acquis la maîtrise du territoire.

8. Le comportement illicite de l'Indonésie, s'il était effectivement illicite, ne peut être isolé de manière artificielle. La Cour ne peut pas statuer sur une situation hypothétique, la situation d'une atteinte à l'autodétermination qui ne soit pas liée à l'emploi illicite de la force. Elle ne peut pas statuer sur le caractère illicite du comportement de l'Indonésie, mais elle ne saurait apprécier le comportement de l'Australie sans statuer sur le caractère illicite de celui de l'Indonésie. Même en 1975 et 1976, alors que les organes des Nations Unies réagissaient à une situation réelle qui comportait l'emploi de la force, ils n'en ont pas moins témoigné d'une modération extraordinaire dans leur réaction. A partir de 1979 ils ont accepté le maintien de la présence indonésienne au Timor oriental. Il n'appartient pas à l'Australie d'expliquer cette attitude ou de la justifier; elle constitue un fait.

9. On demande pourtant à la Cour de réagir à cette même situation comme si ces résolutions étaient une «donnée» pour un aspect seulement de la situation, celui de l'autodétermination. Comment la Cour peut-elle dire ce que les résolutions auraient dit s'il n'y avait pas eu emploi de la force ? L'hypothèse sur laquelle on demande à la Cour de statuer est «éloignée de la réalité» et, en vertu du principe de l'affaire du *Cameroun septentrional*, la Cour ne devrait pas trancher.

10. J'ai fait valoir cette considération pendant le premier tour des plaidoiries (CR 95/9, p. 27-28). Point de réponse. M. Dupuy a brièvement évoqué l'affaire du *Cameroun septentrional*, mais pas dans cette optique (CR 95/13, p. 64). Pourtant, c'est une considération qui reste valable. Elle suffit à elle seule à rendre irrecevable la demande du Portugal.

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Les dangers que présente la thèse du Portugal

11. L'affaire du *Cameroun septentrional* est pertinente à un autre titre encore. Le Cameroun y a reconnu qu'il cherchait à obtenir une décision sur une question de droit, décision qu'il pourrait utiliser devant les organes politiques des Nations Unies. En l'espèce, le Portugal ne commet évidemment pas l'imprudence de dire cela en termes exprès. Cependant, comme M. Pellet l'a montré et comme M. Griffith l'a établi la semaine dernière (CR 95/11, p. 65-70), ou bien les réparations effectivement demandées sont contradictoires (la déclaration d'opposabilité d'une proposition à laquelle l'Australie ne s'oppose pas, l'injonction contre l'exécution d'un traité qu'il n'est pas demandé à la Cour de déclarer nul, des dommages-intérêts pour des préjudices impossibles à évaluer), ou bien elles auront l'effet de profiter à l'Etat même que le Portugal reconnaît comme le principal auteur d'actes

illicites en cette affaire. Si l'Australie se replie sur la ligne médiane, comme le Portugal le demande avec insistance (CR 95/13, p. 38-39, Mme Higgins), cela ne profitera qu'à un seul Etat, l'Indonésie.

12. Dans ces conditions la Cour peut être portée à estimer que l'action est intentée, comme celle qu'avait introduite le Cameroun, afin de fournir des armes «juridiques» pour une guerre contre un autre Etat devant une autre instance, une instance politique. Des questions juridiques, bien qu'abstraites et tortueuses, sont présentées pour «envoyer un message» ailleurs, dans un autre conflit. Cela rend ces questions juridiques éloignées de la réalité à un autre titre encore : nul n'a réussi à établir si le traité de 1989 favorisait ou entravait l'autodétermination du Timor oriental. L'Indonésie sera-t-elle *moins* installée au Timor oriental parce qu'elle pourra exploiter le plateau continental jusqu'à la ligne médiane ?

13. C'est quand on examine le «message» que la Cour sera censée envoyer que les dangers suscités par le Portugal se manifestent le plus clairement. L'Australie a présenté - la Cour me pardonnera de le dire - une argumentation claire, convaincante et fondée pour montrer sa position d'Etat tiers en butte à un différend concernant l'autodétermination. Cette argumentation n'est pas moins claire, convaincante et fondée parce que, dans sa pratique étatique, le Portugal lui-même la confirme de manière délibérée.

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14. Il reste pourtant une autre difficulté. La Cour ne peut pas critiquer, moins encore condamner, l'Indonésie en l'espèce, mais ne saurait davantage «reconnaître», ou légitimer, le pouvoir de l'Indonésie au Timor oriental. Les organes politiques des Nations Unies se sont délibérément abstenus de déclarer que la présence de l'Indonésie au Timor oriental était illégale, et ils n'ont plus réclamé le retrait de

l'Indonésie à partir de 1979. La Cour ne peut donc juger que la présence de l'Indonésie est illégale - mais comment peut-elle juger qu'elle est *légale* ? L'Indonésie n'est pas présente à l'instance, et la Cour ne peut rien prononcer qui la mettrait en cause.

15. Le dossier portugais est un jeu de miroirs, de miroirs mobiles même, puisque le Portugal a radicalement modifié son argumentaire initial même si sa requête et ses conclusions sont nécessairement restées les mêmes. Dans ce jeu de miroirs, la Cour sera vue comme faisant quelque chose qu'elle ne peut faire, et ce *quelle que soit* la décision qu'elle prendre sur le fond.

Monsieur le Président, Messieurs de la Cour.

16. Cela étant, la décision la plus simple est celle qui sauvegarde l'intégrité judiciaire des procédures de la Cour. Pour ces motifs, qui s'ajoutent à tout ce qu'ont dit M. Griffith vendredi dernier et M. Pellet cet après-midi, l'Australie demande que la plainte du Portugal soit déclarée irrecevable.

Monsieur le Président, Messieurs de la Cour, je vous remercie de votre patience.

Le PRESIDENT : Merci beaucoup, M. Crawford. Je donne la parole à M. Griffith, agent de l'Australie.

054 M. GRIFFITH : Monsieur le Président, Messieurs de la Cour, l'Australie a montré dans ses exposés, la semaine passée et aujourd'hui encore, qu'elle avait à opposer aux diverses argumentations juridiques du Portugal une contre-thèse juridique détaillée, tant au niveau de la recevabilité qu'au niveau du fond. La position de l'Australie est honorable. Elle est conséquente. Le Portugal a changé de terrain, mais

les défenses australiennes restent solides sur les deux plans de la recevabilité et du fond.

L'Australie est une société multiculturelle tolérante et pacifique. Sa population comprend des gens venus comme colons et comme réfugiés de pays en conflit, dont quelques milliers de Timorais. Notre communauté nationale pacifique oeuvre en faveur d'une communauté internationale pacifique. L'Australie est attachée au règlement pacifique des différends. C'est pourquoi nous nous sommes soumis à la juridiction de la Cour au titre de la clause facultative. C'est pourquoi nous avons négocié avec l'Indonésie le traité relatif au «Timor Gap».

L'Australie avait un véritable litige à régler à propos des ressources marines du «Timor Gap» qu'elle dit être siennes. Comme le lui dictaient le droit international et la courtoisie entre Etats, elle a négocié pendant plus de dix ans, dans des conditions loyales, avec l'Etat exerçant le contrôle effectif du territoire côtier qui lui faisait face, afin de convenir d'une solution équitable et juste réglant provisoirement le différend.

Le Portugal invite la Cour à subvertir cet arrangement et à remplacer la concorde et la coopération pacifiques entre les Etats qui exercent effectivement les compétences d'Etats côtiers voisins, par un différend *inédit* : un différend que le Portugal demande que l'on *fasse naître* par décision de la Cour, dans des termes qui empêcheront que le différend même ne soit réglé par aucun autre traité que les parties pourraient conclure. Il est certain que ce n'est pas à cela que la Cour doit servir.

055 Vendredi dernier j'ai exposé les principales raisons d'opportunité judiciaire qui font que la Cour ne peut rendre en l'espèce une décision effective. J'affirme ces raisons. Non seulement toute décision

resterait sans efficacité mais elle serait irréelle, éloignée de la réalité. La Cour ne peut ignorer des obstacles aussi considérables. On ne peut laisser la volonté de l'une des parties fausser ainsi la fonction judiciaire.

Monsieur le Président, Messieurs de la Cour, dans ses conclusions, le Portugal s'est dit convaincu que la Cour ne viderait pas de son contenu le droit à l'autodétermination et qu'elle réaffirmerait la responsabilité des Etats à l'égard de ce principe fondamental. L'Australie ne dit pas que ce principe est vide de contenu. Au contraire, elle affirme qu'elle est attachée à un principe qu'elle a défendu pour le compte du peuple du Timor oriental à une époque où le Portugal manquait à ses devoirs à l'égard de celui-ci. C'est un principe que les deux Parties acceptent et qu'elles appliquent au Timor oriental. C'est un principe opposable à tous les Etats en ce qui concerne le Timor oriental. La position de l'Australie n'est ici en rien différente de celle de n'importe quel autre Etat. Cela étant, il serait mal venu que la Cour envisage de prendre une décision où ce principe serait déclaré opposable à l'Australie.

L'Australie a agi de bonne foi pour protéger ses droits souverains. Rien de ce qu'a dit le Portugal ne permet de conclure qu'elle a ce faisant agi illégalement.

Le Portugal n'a pas non plus montré sur quelle base on pouvait surmonter les objections que l'Australie oppose pertinemment à l'exercice par la Cour de ses compétences et à la recevabilité de la requête portugaise.

Monsieur le Président, Messieurs de la Cour, avant de donner lecture des conclusions finales de l'Australie, je dois remercier la Cour de l'attention et de la patience dont elle a fait preuve au cours des

056 plaidoiries, et à rendre hommage, par l'entremise du Greffier, à l'efficacité des services d'interprétation, de traduction et de transcription.

Monsieur le Président, Messieurs de la Cour, selon le paragraphe 2 de l'article 60 du Règlement, je vous lis les conclusions finales de l'Australie :

Le Gouvernement de l'Australie conclut que, pour les motifs qu'il a exposés dans ses écritures et ses plaidoiries, la Cour devrait :

a) dire et juger qu'elle n'a pas compétence pour statuer sur les demandes du Portugal ou que ces demandes sont irrecevables;

b) subsidiairement, que les actes de l'Australie visés par le Portugal ne donnent lieu à aucune violation par l'Australie de droits au regard du droit international que fait valoir le Portugal.

Le PRESIDENT : Merci beaucoup, M. Griffith. L'Australie, Etat défendeur, vient de conclure le deuxième tour de ses plaidoiries, en réponse aux plaidoiries du Portugal. Je tiens à adresser mes remerciements les plus chaleureux à tous les membres de la délégation australienne pour la contribution qu'ils ont faite à l'accomplissement de sa mission par la Cour.

Nous voici à la fin de la procédure orale dans la présente affaire. Selon la pratique habituelle, je demanderai aux agents de rester à la disposition de la Cour, qui pourrait avoir à leur demander de plus amples renseignements.

Sous cette réserve, je prononce la clôture de la procédure orale dans l'affaire du *Timor oriental*.

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La Cour se retire pour délibérer. Les agents seront avisés en temps opportun de la date à laquelle elle rendra sa décision.

Je vous remercie. L'audience est levée.

L'audience est levée à 17 heures.