



# RESEARCH NOTE

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## Portugal's Challenge to the Timor Gap Treaty in the International Court of Justice

### Commencement of action

On 22 February 1991 Portugal commenced an action in the International Court of Justice (ICJ) challenging the *Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia* (the Treaty).

Portugal is seeking declarations that the Treaty violates the rights of Portugal and the East Timorese people and is seeking reparation. Portugal could not directly challenge Indonesia in the ICJ as Indonesia has not recognised the jurisdiction of the ICJ and has not intervened as an interested party.

Although a decision in favour of Portugal would not be strictly enforceable, Australia would face international pressure concerning the Treaty. Such a decision would first require finding Indonesia's annexation illegal.

Oral argument was presented from 30 January-16 February 1995. **Judgment is expected on 30 June 1995.**

### Portugal's arguments

- The people of East Timor have a right to self-determination and a right not to be deprived of the means for their subsistence - as recognised in the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). They also have permanent sovereignty over their natural resources as recognised in the Charter of Economic Rights and Duties of States.
- Australia's negotiation and implementation of the Treaty infringe these rights.
- Portugal is the Administering Power of East Timor with duties, powers and rights in relation to East Timor. Exclusion of Portugal from negotiations has caused legal, moral and material damage to the people of East Timor and to Portugal.
- Australia has a duty not to recognise annexation or negotiate due to:

- Article 1(2) of the UN Charter which states that the purpose of the UN is to promote respect for equal rights and the self-determination of peoples (and Articles 55, 56, 73, and 75 *et seq*);
- the use of force in the annexation in contravention of Article 2(4) of the UN Charter which provides that:
 

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN;
- the unanimous 1970 General Assembly (GA) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. This states that no acquisition resulting from the threat or use of force shall be recognised as legal;

### Background

- 1971-72: Australia and Indonesia agree on a maritime boundary in the Timor sea with a gap left opposite the then Portuguese Timor.
- 1974: Portugal defers negotiations with Australia until the outcome of the 1974 United Nations Law of the Sea Conference (UNCLOS).
- 7/12/75: Indonesian annexation of East Timor.
- 20/1/78: Australian recognition of Indonesian control.
- 11/12/89: Australia signs a Treaty with Indonesia for the joint exploration of the Timor Gap (Zone of Cooperation) to be operative for 40 years with a 20 year renewal option. The area is likely to contain 100 million barrels of oil (5-10% of Bass Strait resource).
- 9/2/91: *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1991* implements the Treaty in Australia.
- 18/8/94: High Court in *Horta v The Commonwealth* upholds validity of the Australian Act under the external affairs power as concerning a matter geographically external to Australia. The Court stated it was therefore unnecessary to determine whether the Act contravenes Australia's international obligations.

- the unanimous 1974 GA resolution on the Definition of Aggression stating that no territorial acquisition or special advantage (eg oil deposits) resulting from aggression is lawful;
- a responsibility to act consistently with 8 G.A. resolutions (1975-82) on the right of the East Timorese to self-determination; condemning Indonesia's use of force; calling on Indonesia to withdraw its forces (in the earlier resolutions); and urging all States to cooperate with the UN. (Australia voted against these resolutions);
- an obligation under Article 25 of the UN Charter to carry out resolutions 384 (22/12/75) and 389 (22/4/76) of the Security Council to respect the territorial integrity and right to self-determination of the East Timorese people;
- an obligation to act consistently with the concerns expressed by the UN Commission on Human Rights on human rights violations in East Timor and encouraging an internationally acceptable settlement; and
- an obligation to comply with other resolutions such as the General Assembly 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.
- The Timor Gap Treaty is void under the Vienna Convention on the Law of Treaties, as it conflicts with a peremptory (internationally accepted) norm of international law to recognise the right to self-determination.
- Portugal did not delay its protest as it commenced the ICJ action within 2 weeks of the commencement of the Australian legislation.

### **Portugal has asked the Court to declare that Australia:**

- Must cease breaches of the right to self-determination, economic subsistence and permanent sovereignty over resources until the people of East Timor exercise their right to self-determination under UN conditions.
- Must refrain from negotiation or ratification of any agreement on the continental shelf or the Timor Gap with a State other than Portugal.
- Must pay reparation to the people of East Timor and to Portugal as determined by the Court.

### **Australia's arguments**

- This is the wrong case against the wrong party and for the wrong reasons. In order to determine Portugal's rights, the ICJ would have to determine the lawfulness of Indonesia's presence in East Timor. The ICJ however cannot determine this in the absence of Indonesia which is an indispensable party. Nor does the ICJ have jurisdiction where the real issue is not between Australia and Portugal.
- Portugal has no standing (legal interest) and is not the Administering Power as it withdrew from East Timor 20 years ago. It has waited too long to protest and should not be using Australia to rehabilitate its tarnished colonial past.
- Australia is entitled to deal with the State in effective control of East Timor and has a right to protect access to its own resources (Australia still claims sovereign rights over the area covered by the Treaty). No UN organ has criticised the Treaty.
- There is no legal obligation or UN resolution requiring non recognition (in contrast to resolutions concerning the Iraqi invasion of Kuwait, Turkish occupied Cyprus and South Africa's presence in

South West Africa). The Security Council resolutions were only recommendations and not mandatory.

- Australia's recognition from 1978 of Indonesia's sovereignty does not signify approval of the annexation. Recognition of sovereignty is not inconsistent with Australia's recognition of the right of the East Timorese to self-determination, human rights, territorial integrity and permanent sovereignty over resources.
- No UN resolution requires Australia to refrain from asserting its maritime claims until self-determination is exercised. Self-determination is a matter for the political organs of the UN.
- Australia has consistently supported discussions between Portugal and Indonesia under the auspices of the UN Secretary-General.
- Australia does not concede any Portuguese or East Timorese interest in the area.
- The Treaty contains a provisional seabed boundary only and does not prejudice the permanent boundary. It does not bind Portugal or any future government of an independent East Timor.

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