Self-Determination Undetermined: The Case of East Timor

Keywords: Australia; East Timor; International Court of Justice; Portugal; treaty.

1. INTRODUCTION

On 22 February 1991, Portugal filed a case against Australia in the Registry of the International Court of Justice (ICJ) instituting proceedings in a dispute concerning "certain activities of Australia with regard to East Timor".[1] The impetus behind the case was the conclusion of the Timor Gap Treaty between Australia and Indonesia in December 1989.[2] The application alleged that Australia's conduct had caused "particularly serious legal and moral damage to the people of East Timor and to Portugal, which will become material damage also if the exploitation of hydrocarbon resources begins."[3] Jurisdiction was founded on the parties' declarations under Article 36(2) of the Statute.[4]

The Australian counter-memorial raised issues concerning both the Court's jurisdiction and the admissibility of the case. After consultation with the President, the parties agreed "that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits."[5]

In its final submissions to the Court, Portugal first asked the Court to reject the Australian objections to jurisdiction and admissibility and then presented a complex series of submissions on the merits of the case.

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1. Application instituting Proceedings, at 3. At the time of writing, all documents submitted by the parties concerning this case, had not yet been published. Publication of these materials will be forthcoming in the relevant 'Pleadings'.
2. Australia/Indonesia Treaty on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, reproduced *in* 29 ILM 469 (1990). This treaty is also appended, as a schedule, to the Australian Petroleum (Australia-Indonesia Zone of Cooperation) Act, No. 3 (1990), which is reproduced *in* Annex 2 of the Application, *supra* note 1.
3. Application, *supra* note 1, at 15, para. 26.
4. *Id.*, introductory para. The Portuguese and Australian declarations under the Optional Clause are reproduced *in* 1989-1990 YBICJ 90 and 62.
5. East Timor (Portugal *v.* Australia), 1995 ICJ Rep. 90, at 92, para. 4.

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The first two substantive submissions formed the lynchpin on which the others rested. The first asked the Court to declare that specified principles were binding on Australia. The second proceeded to apply these principles to the substance of the case, asking the Court:

> 2. [t]o adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the [Timor Gap Treaty], has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement [i.e., Indonesia], the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power [i.e., Portugal] with respect to the exploration and exploitation of the continental shelf in the same area; and, finally, inasmuch as it contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own);
> (a) has infringed and is infringing 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, and is in breach of the obligation not to disregard but respect that right, that integrity and that sovereignty;
> (b) has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;
> (c) is contravening Security Council Resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations.[6]

The subsequent Portuguese resolutions were logically dependent on these claims. In particular, it claimed that Australia should cease committing the acts impugned, especially those concerning the continental shelf, "until such time as the people of East Timor shall have exercised its right to self-determination, under the conditions laid down by the United Nations."[7]

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6. *Id.*, at 94, para. 10.
7. *Id.*, at 95, para. 10.

The Australian submissions were much more succinct:

> [t]he Government of Australia submits that, for all the reasons given by it in the written and oral pleadings, the Court should:
> (a) adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible; or
> (b) alternatively, adjudge and declare that the actions of Australia invoked by Portugal do not give rise to any breach by Australia of rights under international law asserted by Portugal.[8]

As is apparent, the issues involved in this case were diverse and interrelated, although three broad themes may be discerned: procedural issues arising from the non-participation of Indonesia in the proceedings; the institutional and substantive implications of self-determination; and questions of United Nations law.

Because of the agreed joinder of the objections to the Court's competence and merits issues, all aspects of the case were fully argued. The brevity of the judgment is consequently striking. In seventeen pages, by fourteen votes to two,[9] the Court dismissed the Portuguese case on the ground that it lacked jurisdiction, and yet managed to make observations on matters such as self-determination along the way. Surprise should only be magnified when one realizes that the Court spent only seven pages justifying its decision, once the factual account of the proceedings, statement of the parties' claims, and the like are subtracted from the total. This is a bare judgment, denuded of the justification one would expect.

In the analysis of the case, it is crucial to be absolutely clear on the nature of the Portuguese claim. The case was complicated by Indonesian non-participation and Portugal's need to avoid triggering procedural foreclosure based on an indispensable parties argument derived from the *Monetary Gold* case.[10] If Indonesian interests were implicated in the proceed-

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8. *Id.*, at 93-95, para. 10.
9. In favour were: President Bedjaoui; Vice-President Schwebel; Judges Oda, Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, and Judge *ad hoc* Stephen. Against were: Judge Weeramantry and Judge *ad hoc* Skubiszewski. *See id.*, at 106.
10. Monetary Gold Removed From Rome in 1943 (Italy *v.* France, United Kingdom, and United States of America), 1954 ICJ Rep. 19. For analyses of the development of the Monetary Gold doctrine written before the East Timor judgment was delivered, *see* I. Scobbie, *The East Timor Case: The Implications of Procedure for Litigation Strategy*, 9 Oil & Gas Law and Taxation Review 273 (1991); and I. Scobbie, *The Presence of an Absent Third: Procedural Aspects of the East Timor Case*, *in* Catholic Institute for International Relations and Interna-

ings, then the case would automatically be rendered inadmissible. Accordingly, Portugal did not base its claim on the illegality of the Indonesian occupation of East Timor, nor was the validity of the Timor Gap Treaty in issue. Rather, the Portuguese case was structured around two fundamental propositions:

1. Australia violated the rights of the East Timorese people - in essence, their rights to self-determination and permanent sovereignty over natural resources - by negotiating and concluding the Timor Gap Treaty with Indonesia; and
2. as Portugal was the state designated by the UN as the administering Power of the territory of East Timor, Australia had committed a delict by excluding it from negotiations on the exploration and exploitation of the Timor Gap and by contemplating exploration and exploitation under "a plurilateral title to which Portugal is not a party".[11]

2. THE GROUNDS OF THE DECISION

2.1. The agreed parameters of the case

The proceedings demonstrated a concordance between the parties on issues which underpinned the case. Both recognized the right of the East Timorese people to self-determination; the status of East Timor as a non-self-governing territory; and the fact that Portugal had been designated by the UN as the administering power of East Timor.[12] However, Australia contested the legal consequences Portugal sought to draw from these

tional Platform of Jurists for East Timor, International Law and the Question of East Timor 223 (1995).

11. East Timor case, *supra* note 5, at 94.
12. *Id.*, at 99, paras. 21, 103, 31.

propositions.

Moreover, both agreed that the Court would be unable to exercise the jurisdiction conferred on it by their Article 36(2) declarations if, in deciding the case, it would have to rule on either:

1. the lawfulness of Indonesia's entry into and continuing presence in East Timor;
2. the validity of the Timor Gap Treaty; or
3. the rights and obligations of Indonesia under that treaty, even if the Court did not have to determine its validity.[13]

2.2. Procedural foreclosure: the destination of treaty-making power

Australia argued that the decision sought by Portugal would compel the Court to rule on the lawfulness of Indonesia's conduct. Accordingly it invoked the *Monetary Gold* doctrine, claiming that Indonesia's "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[14] Portugal contested this formulation of the dispute, relying on the two fundamental propositions at the root of its case. It stated that it complained of only Australia's conduct in negotiating, concluding, and executing the Timor Gap Treaty as this breached Australia's obligation to treat East Timor as a non-self-governing territory and Portugal as its administering power. This complaint could be determined without considering Indonesian rights and responsibilities.

The Court stated that the Portuguese claim was "based on the assertion that Portugal *alone*, in its capacity as administering power, had the power to enter into the Treaty on behalf of East Timor".[15] By disregarding this "*exclusive* power", Australia had breached the obligations to respect the status of East Timor and Portugal.[16] Axiomatically, because Australia had concluded the treaty with Indonesia, it disputed this assertion of exclusive competence. Without referring expressly to the *Monetary Gold* doctrine, the Court ruled that it could not entertain the

13. *Id.*, at 100, para. 23.
14. Monetary Gold case, *supra* note 10, at 32.
15. East Timor case, *supra* note 5, at 101, para. 27 (emphasis added).
16. *Id.* (emphasis added).

case "in the absence of the consent of Indonesia." The determination of the legality of Australia's conduct would require determination of the prior question why only Portugal, and not Indonesia, could lawfully have concluded the Timor Gap Treaty:

> the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf.[17]

2.3. The irrelevance of rights *erga omnes*

Portugal had sought to exclude consideration of the *Monetary Gold* doctrine by arguing that the rights Australia had breached were rights *erga omnes*.[18] Thus, it could demand Australian respect for these rights regardless of whether or not another state had acted in a similarly unlawful manner. The Court warmly endorsed this characterization:

> Portugal's assertion that the rights of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable [...]. It is one of the essential principles of contemporary international law.[19]

This concession was, however, to no avail. The Court immediately ruled that normative status was irrelevant in matters of consensual jurisdiction:

> [*w*]*hatever* the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act.[20]

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17. *Id.*, at 102, para. 28.
18. Portugal had intentionally formulated its argument in terms of rights *erga omnes* rather than adduce the more expansive claim that issues such as self-determination had *ius cogens* status because the latter would inevitably call into question the validity of the Timor Gap Treaty. *See* Art. 53 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969); and International Law Commission, *Commentary to Draft Article 50*, II YBILC 247 (1966).
19. East Timor case, *supra* note 5, at 102, para. 29.
20. *Id.* (emphasis added).

2.4. *Données*: presuppositions based on UN action

Portugal had also sought to avoid triggering the *Monetary Gold* doctrine by arguing that the status of East Timor and its capacity as administering power had already been determined by the Security Council and General Assembly (GA). Accordingly, these were presuppositions (*données*) which could not be challenged but to which the Court and Australia had to defer. Portugal conceded that "the Court might well need to interpret those decisions",[21] but they precluded the need to consider the lawfulness of Indonesia's invasion of and presence in East Timor.

In considering this argument, the Court first noted that Australia disputed the Portuguese interpretation of the resolutions in issue, and in particular Australia's contention that the relevant Security Council resolutions[22] were neither binding under Chapter VII of the UN Charter nor framed in mandatory terms. It continued:

> the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.[23]

The Court asserted that the designation of Portugal as administering power by the General Assembly and Security Council did not imply that these organs "intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor."[24] Accordingly:

> [w]ithout prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the Parties.[25]

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21. *Id.*, at 103, para. 30.
22. Namely UN Docs. S/RES/384 (1975) and S/RES/389 (1976), both reproduced *in* Annex 1 to the Application, *supra* note 1.
23. East Timor case, *supra* note 5, at 103, paras. 30-31.
24. *Id.*, at 104, para. 32.
25. *Id.*

Consequently, the Court stated that it "would necessarily have to rule" on the lawfulness of Indonesia's conduct as a prerequisite if it were to decide on the substance of the Portuguese claims.[26] The Court perceived the root of the matter as being that:

> the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent.[27]

That being so, the case inevitably attracted the *Monetary Gold* doctrine, and thus the Court could not exercise the jurisdiction conferred upon it by the parties' declarations under Article 36(2) of the Statute.

3. PATHOLOGY: DISSECTING THE DECISION

The *East Timor* Judgment is asymmetrical: despite a near-unanimous decision, the Court's justification is threadbare and frequently proceeds on the basis of bare assertion rather than reasoned conclusion.[28] This cannot be explained by reference to an overt disagreement amongst the majority on the reasons for the decision as, for instance, occurred in the *Fisheries Jurisdiction* cases.[29] Only four of the majority judges appended individual

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26. *Id.*, at 104, para. 33.
27. *Id.*, at 105, para. 34.
28. *E.g.*, the Court's crucial ruling on the Portuguese *données* argument contains no justification supporting its conclusion. The parties devoted a great deal of argument to this issue, and yet, once the exposition of the parties' positions and agreements is excised, all that is left is the Court's repeated assertion that it rejected the Portuguese contention. *See id.*, at 103-104, paras. 30-33. The written pleadings in this case have not yet been published. Verbatim records of the oral pleadings in the provisional CR series were distributed daily during the oral proceedings. For the parties' arguments on the *données* issue, *see, e.g.*, the Portuguese Memorial, paras. 3.02 and 6.08-6.64, the Portuguese Rejoinder, paras. 5.01-5.12; and R. Higgins's oral arguments on 1 and 3 February 1995, CR 95/4, at 20-47 and CR 95/6, at 69-75, respectively. For Australia, *see* the Australian Counter-Memorial, paras. 318-349; the Australian Rejoinder, paras. 238-260; G. Griffith's oral argument of 6 February 1995, CR 95/7, at 45-52; and D.W. Bowett's oral argument of 9 February 1995, CR 95/10, at 25-37.
29. Fisheries Jurisdiction case (United Kingdom *v.* Iceland; Federal Republic of Germany *v.* Iceland), 1974 ICJ Rep. 3, at 175: from a bench of fourteen judges, which split ten to four, thirteen delivered individual opinions or made a declaration.

opinions to the judgment, three of whom wished only to expound additional reasons in support of the majority opinion.[30]

Although this can only be speculative, the absence of reasoning which characterizes this Judgment indicates that while the collegium could agree on the outcome, it could not agree on the details of its underlying justification. However, this internal dissensus was masked by the adoption of a Judgment which could command a majority precisely because it lacked articulated grounds for decision as opposed to a technically satisfying determination of the case.

3.1. Rethinking intervention

There is some evidence for this hypothesis within the text of the report. In his Separate Opinion, Judge Oda stated that he was unable to subscribe to the reason given by the Court for its decision, namely that it could exercise jurisdiction "in the absence of [Indonesia's] consent":

> [w]hen it refers to the 'consent' of Indonesia the Court itself seems to be uncertain as to what this 'consent' would have meant. Would it have meant that, in order for the Court to exercise its jurisdiction, Indonesia would have had to have intervened in the proceedings or would it have meant that Indonesia would have had to have accepted that jurisdiction under Article 36(2) of the Statute?[31]

The inclusion of this passage in Oda's Opinion is itself significant. Under the terms of the Court's drafting procedure,[32] this Opinion would have been circulated to the whole Court before it adopted the final text of the

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30. Judge Shahabuddeen principally, and Judge Ranjeva solely, provided further exegesis of the Monetary Gold doctrine (*see* East Timor case, *supra* note 5, at 119 (Judge Shahabuddeen, Separate Opinion); and *id.*, at 129 (Judge Ranjeva, Separate Opinion)), while Judge Vereshchetin argued that the people of East Timor constituted an equally absent third party. *Id.*, at 135 (Judge Vereshchetin, Separate Opinion). Judge Oda, while voting with the majority, dissented from the views expressed in the collegiate opinion and argued that Portugal lacked standing to bring the case. *Id.*, at 107 (Judge Oda, Separate Opinion).

31. *Id.*, at 107, para. 1 (Judge Oda, Separate Opinion).

32. This is currently encapsulated in the 1976 Resolution concerning the Internal Judicial Practice of the Court, 1989 ICJ Acts and Documents No. 5, at 165, reproduced *in* 70 AJIL 905 (1976). For a detailed survey of the evolution of the Court's internal practice, *see* G. Guyomar, Commentaire du Règlement de la Cour Internationale de Justice Adopté le 14 Avril 1978: Interprétation et Pratique 75 (1983); *see also* R.B. Lillich & G.E. White, *The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms*, 70 AJIL 28 (1976).

Judgment.[33] It could have ordered the deletion of this passage[34] or have amended the Judgment to deal specifically with this point.[35] Either would have required the support of a majority of the judges,[36] which was obviously not forthcoming.

The provisional conclusion which may be drawn from Oda's comment is that the Court is reconsidering the Chamber's rulings on intervention under Article 62 of the Statute made in the Judgment admitting Nicaraguan intervention in the *Land, Island and Maritime Frontier Dispute*.[37] In that case it was established that a state seeking intervention under Article 62 did not need to possess an independent jurisdictional title with both principal parties in order for it to be admitted to the proceedings:

> [t]he competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute.[38]

However, the Chamber closely circumscribed the legitimate parameters of applications to intervene, ruling that Article 62:

> is not intended to enable a third State to tack on a new case, to become a new party, and so to have its own claims adjudicated by the Court. A case with a new party, and new issues to be decided, would be a new case. The difference between intervention under Article 62, and the joining of a new party to a case, is not only a difference in degree; it is a difference in kind [...]. Incidental proceedings [such as intervention] by definition must be those

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33. *See* 1976 Resolution, *supra* note 32, Art. 7(ii).
34. *See* R.Y. Jennings, *The Internal Judicial Practice of the International Court of Justice*, 59 BYIL 43 (1988).
35. R.Y. Jennings, *The Collegiate Responsibility and Authority of the International Court of Justice*, *in* Y. Dinstein (Ed.), International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne 349-350 (1989).
36. *See* S. Petrén, *Forms of Expression of Judicial Activity*, *in* L. Gross (Ed.), II The Future of the International Court of Justice 450 (1976).
37. Land, Island and Maritieme Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Application to Intervene), Judgment, 1990 ICJ Rep. 92.
38. *Id.*, at 133, para. 96. The authoritative commentary on jurisdictional requirements and intervention is Sh. Rosenne, Intervention in the International Court of Justice, especially Chapter 5, at 90-109 (1993).

> which are incidental to a case which is already before the Court or Chamber. An incidental proceeding cannot be one which transforms that case into a different case with different parties.[39]

The constraints imposed by this conception of intervention excludes as illegitimate 'mainline applications', where the intervening state seeks to assert rights against the principal parties in the absence of a jurisdictional title.[40]

That members of the Court could have thought possible an intervention by Indonesia in the *East Timor* case presents a dual paradox. In the first place, Indonesia could not have intervened to claim that it possessed treaty-making capacity over the continental shelf area pertaining to East Timor. This would have amounted to the introduction of a new case raising new issues which went beyond the parties' submissions.[41] The irony is that this would have converted the case into that which the Court claimed was before it, but which it could not decide. In the second place, under the *Land, Island and Maritime* rules, had Indonesia been allowed to intervene, it would not have been bound by the decision.[42] Thus, had the Court decided in favour of Portugal, Australia would have remained in the impasse of which it complained, owing obligations to Portugal under the Judgment while owing conflicting obligations to Indonesia under the Timor Gap Treaty.[43]

3.2. Rethinking *Monetary Gold*

Even so, the question of intervention under Article 62 was alien to the *East Timor* case. Like Albania in *Monetary Gold*, Indonesia did not lodge

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39. Land, Island and Maritime Frontier Dispute, at 131-135, paras. 93-101. For quotation *see id.*, at 133-134, paras. 97-98.
40. The distinction between intervention *per se* and 'mainline applications' was first drawn in the Continental Shelf case (Libyan Arab Jamahiriya/Malta; Italy Intervening) (Application to Intervene), Judgment, 1984 ICJ Rep. 3. That case also excluded as illegitimate mainline applications under Art. 62 in the absence of a jurisdictional title valid against the principal parties. *See id.*, paras. 36-37.
41. 'Submissions' in this context should be construed narrowly corresponding to the French term '*conclusions*'. *See* J. Basdevant, *Quelques Mots sur les 'Conclusions' en Procédure Internationale*, *in* R. Ago (Ed.), I Scritti di Diritto Internazionale in Onore di Tomaso Perassi 173 (1957).
42. *See* Land, Island and Maritieme Frontier Dispute, *supra* note 37, at 135-36, para. 102. This was reinforced in the merits phase of the case. *See* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Merits), 1992 ICJ Reps. 609-610, paras. 421-424.
43. *See, e.g.*, the Australian Counter-Memorial, para. 279-282.

an application to intervene. Unlike *Monetary Gold*, the *rights* of an absent third party were not the only considerations germane to the case. *East Timor* presented a fundamentally different configuration of issues which the Court chose to discount.

In the first place, in *Monetary Gold*, the essence of the United Kingdom's argument was that its right to the compensation awarded by the Court in the *Corfu Channel* case constituted a prior right to gold looted from the Central Bank of Albania.[44] Italy, on the other hand, claimed that it had a right to the gold as satisfaction for Albanian expropriation of Italian assets.[45] Consequently, the prior question which arose was whether title vested initially in Italy or Albania. The lawfulness of Albania's action *vis-à-vis* Italy was accordingly the issue which the Court refused to decide in the absence of Albanian consent. In *East Timor*, Portugal did not deny that Australia was competent to conclude treaties regarding its continental shelf. It did not seek to usurp Australia's right to do so. Nor did it assert an exclusive competence in this matter: it did not assert that its rights pre-empted or excluded any rights which Indonesia might possess.[46] Rather, it claimed that Australia should not have excluded Portugal, as administering power, from this process. Its second submission was unequivocal on this point:

> inasmuch as [Australia] has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf [and of] contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party.

This precision was ignored in the Court's reformulation of the Portuguese claim which was thus distorted in such a way which inevitably attracted

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44. Corfu Channel case (United Kingdom *v.* Albania), Judgment, 1949 ICJ Rep. 244.
45. For a full account of the facts, *see* Monetary Gold case, *supra* note 10, at 25-27; the Italian Application Instituting Proceedings, filed in 1953, Pleadings 8-15; and the statement of facts contained in the 1953 arbitral award regarding ownership of the gold, reproduced *in* Annex 5 to the Italian Statement on the Preliminary Question, Pleadings 24, 28, and 45-54.
46. *See* R. Higgins, CR 95/13, at 28. Australia itself recognized that Portugal possessed a legitimate interest in East Timor affairs. In his oral argument of 6 February 1995, Griffith, *supra* note 28, at 18-19, noted that GA Res. 36/50 (1981) had identified the 'interested parties' in the East Timor dispute as Portugal, the East Timorese people, and Indonesia. He concluded: "[c]learly Portugal is not recognized by the United Nations as the sole legitimate authority in East Timor. It is merely one of several parties directly concerned."

the *Monetary Gold* doctrine. The validity of this reformulation must be doubted. In the *Asylum* proceedings, the Court ruled:

> it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.[47]

By ascribing to Portugal a claim to exclusive competence over Timorese rights to continental shelf entitlement, the Court undoubtedly invented an issue which was absent from the final submissions. This was undoubtedly fatal to the Portuguese case.

Seen in its true light, the configuration of the case resembled *Certain Phosphate Lands in Nauru*[48] and not *Monetary Gold*. At most, a decision in Portugal's favour

> might have implications for the legal situation of [Indonesia], but no finding in respect of that legal situation will be needed as a basis for the Court's decision on [Portugal's] claims against Australia.[49]

However, even this is not certain. The only certainty is that a decision in favour of Portugal would have had implications for the legal situation of Australia. Its situation *vis-à-vis* Portugal would be settled by the judgment, but its situation *vis-à-vis* Indonesia would be a consequence of the case and thus a post-adjudicative and ultimately hypothetical matter. On the other hand, a decision favourable to Australia would formally have left Indonesia's legal situation undisturbed.

3.2.1. *Attempting to avoid* Monetary Gold: *arguments based on* données *and* erga omnes *obligations*

If all in issue in this case had been a dispute over the correct destination of treaty-making power between Portugal and Indonesia, then invocation of *Monetary Gold* to foreclose proceedings would have been proper and unexceptional. Given the different configuration of the dispute, *Monetary Gold* was strictly irrelevant but, in addition, other factors should have acted independently to displace reliance on this doctrine. These were the

47. Asylum case (Colombia *v.* Peru), Judgment, 1950 ICJ Rep. 395, at 402.
48. Certain Phosphate Lands in Nauru (Nauru *v.* Australia), 1992 ICJ Rep. 240.
49. *Id.*, at 261-262, para. 55.

données and *erga omnes* arguments which the Court summarily dismissed.

Australia recognized the force of the *données* argument. If accepted, the presuppositions provided by UN resolutions[50] would make the *Monetary Gold* doctrine irrelevant as they precluded any determination of Indonesian responsibility. As the Court recorded:

> Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; [...] that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.[51]

During the proceedings, Australia had repeatedly argued that the implementation of East Timor's right to self-determination was a matter for the responsible UN organs, asserting that it was ready to act on any authoritative decision made by them. However, it claimed that no decision had been taken which imposed obligations on Australia in this matter.[52] This reverses the logical priorities involved in the issue of *données*. The issue is not one, as Australia contended, of residual freedom of state action in the absence of specific obligation. On the contrary, the question is one of obligations imposed on states by virtue of their organizational membership.

In hindsight, the argumentative strategy adopted by Portugal on the *données* issue was perhaps unfortunate. On the one hand, it argued that the Security Council resolutions in issue were taken under Chapter VII of the Charter, and thus were binding as a matter of law on member states under Article 25. On the other hand, it claimed that the resolutions, whether they were issued by the Security Council or the General Assembly, embodied determinations on the status of East Timor and Portugal which both Australia and the Court had to accept as factual presuppositions. This twin-track approach dissipated the force of the argument. The Security Council resolutions did not expressly state whether they were taken under Chapter VI or Chapter VII and thus both parties expended a great deal of effort in arguing whether or not their terms could be interpreted as mandatory.[53] This was the issue on which the Court relied to reject the

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50. *See* note 22, *supra*.
51. East Timor case, *supra* note 5, at 103, para. 30.
52. *See* note 28, *supra*; *see also* para. 71 of the Australian Counter-Memorial.
53. *Id.*

argument.[54] It cannot be doubted that the parties' explorations in textual exegesis detracted attention from the more compelling issue that, when located within an institutional context, the resolutions were determinative of legal status from which legal consequences should be seen to flow.

A rule which is inherent in the law of international organizations is the delegation of competence by its members within its field of operation.[55] This is encapsulated in the *electa una via non datum recursus ad alteram* principle which provides that where a power has been relinquished to an organization, then that organization alone is competent to act in place of, and by virtue of the delegation made by, its members:

> [w]henever an authority has obtained exclusive power to regulate certain subjects, it is unacceptable that some other authority should be entitled to undertake obligations with respect to those subjects [...]. [I]f [an organization has] an exclusive right to make rules [on given issues], then the Members will no longer be competent to regulate those matters themselves, nor to make treaties in that field.[56]

This is a long established principle, affirmed by the Permanent Court:

> reconnaître aux membres d'un organe établi suivant le principe collégial un droit quelconque d'agir dans un domaine autre que celui des rapports intérieurs de l'organe en question, c'est déroger nettement à la règle du droit commun: sans stipulation explicite, il est, par conséquent, impossible d'admettre pareille situation anormale.[57]

The *electa una via* principle is inherent in the concept of an international organization because to accord to individual members continued freedom

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54. *See* East Timor case, *supra* note 5, at 103, para. 31.
55. Inherency is used in the sense of Monaco's category of '*règle constitutionnelle*', but applied within the context of an international organization. *See* R. Monaco, *Observations sur la Hiérarchie des Sources du Droit International*, *in* R. Bernhardt (Ed.), Völkerrecht als Rechtsordnung internationale Gerichtbarkeit Menschenrechte: Festschrift für Herman Mosler 599 (1983).
56. H.G. Schermers, International Institutional Law 878-879 (1980).
57. Interpretation of the Greco-Turkish Agreement of December 1st, 1926, Advisory Opinion, 1928 PCIJ (Ser. B) No. 16, at 25. The French text of this opinion is authoritative. The official English translation, which is perhaps not so precise, states: "[t]o accord to individual members of an organisation constituted as a corporate body any right to take action of any kind outside the sphere of proceedings within that organisation, would clearly be contrary to an accepted principle of law. In the absence of an express provision, therefore, it is impossible to accept such an abnormal state of things." *See also* E. Lauterpacht, *The Development of the Law of International Organisation by the Decisions of International Tribunals*, 152 HR 403-406 (1976-IV).

of action over a matter regulated by an organization would be to negate its *raison d'être* and threaten to defeat its efforts.

This has direct application to the Portuguese claim that specified matters should be treated as presuppositions which were not susceptible to review by either Australia or the Court. For instance, Portugal adamantly denied that it asked the Court to rule *de novo* that East Timor had not exercised its right to self-determination. It simply sought recognition of the force of the UN resolutions which made this determination, and which designated East Timor as a non-self-governing territory with Portugal as its administering power.[58] This argument had been specifically deployed in response to the Australian objection that in order to decide the case, the Court would require to determine the status of the people of East Timor and thus rule on Indonesian responsibility.

In fact, the entitlement of East Timor to self-determination[59] and its status as a non-self-governing territory was not in dispute between the parties.[60] In its oral pleadings Australia unequivocally stated:

> this case is not about whether the people of East Timor have the right to self-determination. They do. Portugal says they do. Australia says they do. There is no dispute on this matter. [...] Thus the lengthy arguments in Portugal's written pleadings and oral proceedings, that the people of East

58. *See* Portuguese Reply, para. 2.20.

59. For discussion of East Timor's right of self-determination, *see* T. Franck & P. Hoffman, *The Right of Self-Determination in Very Small Places*, 8 New York University Journal of International Law and Policy 331 (1975-1976); R. Sureda, The Evolution of the Right of Self-Determination (1979); R. Clark, *The Decolonisation of East Timor and the United Nations Norms on Self-Determination and Aggression*, 1980 Yale Journal of World Public Order 2; K. Suter, East Timor and West Irian (1982); G. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 Hastings International and Comparative Law Review 323 (1994); and A. Cassese, Self-Determination of Peoples: A Reappraisal 223-230 (1995). *See also* the useful collection of essays *in* International Law and the Question of East Timor (1995).

60. The parties disagreed over the legal consequences which were attached to the right of self-determination. The position of the parties *vis-à-vis* the East Timorese right of self-determination thus broadly reflects the problem of self-determination in international law generally: its existence is widely endorsed, but there is no consensus on its scope, meaning, or content. At a UNESCO meeting of experts in 1989 it was rightly observed that "the debate is no longer whether peoples rights are recognized by international law [...], it is about their content". UNESCO International Meeting of Experts on the Further Study of the Concept of the Rights of Peoples para. 19 (1989). For an early 'soft law' attempt to clarify the content of the right of self-determination, *see* Universal Declaration of the Rights of Peoples of 4 July 1976 (The Algiers Declaration), reproduced *in* J. Crawford, The Rights of Peoples 187-189 (1988). *See also* Final Report of the UNESCO Meeting of Experts for the Elucidation of the Concept of the Rights of Peoples (1991).

> Timor have this right, deal with [a] matter not in dispute. Portugal pushes against an open door.[61]

In its judgment the Court took pains to affirm that "for both parties the Territory of East Timor remains a non-self-governing territory and its people has the right of self-determination."[62]

The negligible significance of this judicial affirmation becomes evident when one considers the implications of the Court's rulings. The Court's finding that any assessment of Australia's conduct in relation to East Timorese natural resources would require a prior determination of the lawfulness of Indonesian conduct in East Timor is difficult to reconcile with any meaningful interpretation of the substantive or institutional law on self-determination. In particular, these findings amount to a tacit rejection of two central tenets of the self-determination doctrine underlying the Portuguese submissions: firstly, that the right of self-determination gives rise to a duty *erga omnes* opposable to all states (including Australia) to respect that right which exists independently of any express organizational directive to do so; and secondly, that the natural resources of a people of a non-self-governing territory form an integral core of the right of self-determination and cannot be disposed of without either their consent or that of their administering power.[63]

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61. Griffith, *supra* note 28, at 9.

62. East Timor case, *supra* note 5, at 103, para. 31, and at 105-106, para. 37. The Court itself does not take the opportunity to affirm independently that East Timor is a non-self-governing with a right to self-determination. It restricts itself to affirming the parties' position *vis-à-vis* East Timor and the *erga omnes* character of the right.

63. In what Higgins referred to as 'legal deconstructionism', Australia sought to empty the right of self-determination of any substantive content. *See* R. Higgins, final oral argument, CR 95/13. This is clear from the arguments regarding the effect of the Timor Gap Treaty on East Timor's right of self-determination. The conclusion and implementation of the Timor Gap Treaty would not, Australia argued, "hinder any act of self-determination of the people of East Timor that might result from the negotiations. Whatever the choice made, the conclusion of the Treaty does not prevent the exercise at some later date of the right of the people of East Timor freely to choose their future political status in accordance with arrangements approved by the United Nations." Further, "a State can only breach the obligation to respect the right of a people to self-determination if its conduct prevents or hinders the exercise of the people of a non-self-governing territory of their right freely to determine their future political status". Australian Counter-Memorial, paras. 374-375. This argument is misconceived. It portrays the right of self-determination as no more than the right of a people to make a free political choice and ignores its core content of substantive entitlements. It is well-established that the right of self-determination entails more than the basic right of a people to determine freely the external political status of its territory. *See, e.g.*, GA Res. 1514 (XV); it provides that: "[a]ll peoples have the right to self-determination;

The Portuguese case was strategically structured around the two central claims that by negotiating, concluding, and implementing the Timor Gap Treaty, Australia had breached its dual obligations in respect of East Timor's rights as a non-self-governing territory and Portugal's rights as the United Nations designated administering power. Accordingly, Portugal argued that its Application was concerned exclusively with the conduct of Australia in breaching those obligations. This was severable from any question relating to the lawfulness of Indonesian actions in East Timor.

In its Counter-Memorial, Australia objected to the Portuguese allegations concerning Australia's violation of East Timor's right of self-determination: they were inadmissible *inter alia* because they could not be answered in the absence of Indonesia.[64] The real substance of Portugal's allegation, Australia contended, was that Australia was not entitled to enter into a treaty with Indonesia because Indonesia could not lawfully represent the people of East Timor.[65] Accordingly:

> [t]o determine this case the Court has to determine the rights of the peoples of East Timor to self-determination and faced with assertion of Indonesian sovereignty this also requires the Court to determine the legal rights of Indonesia.[66]

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by virtue of that right they freely determine their political status *and freely pursue their economic social and cultural development*". Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/4684, at 66 (1960) (emphasis added). One of the core elements of self-determination is the right of a people to permanent sovereignty over its natural wealth and resources. *See, e.g.*, GA Res. 1314 (XIII); GA Res. 1803 (XVI); and Art. 1(2) common to the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (1976) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (1976). *See also* United Nations Council for Namibia, Decree on Natural Resources of Namibia, reproduced *in* 13 ILM 1513-1514 (1974). For the view that permanent sovereignty over natural resources is a "fundamental element of the right of self-determination" and for further discussion, *see* A. Cristescu, The Right to Self-determination: Historical and Current Developments on the Basis of United Nations Instruments UN Doc. E/CN.4/ Sub.2/404/Rev., at 78 (1981). Once it is accepted that permanent sovereignty over natural resources is not an independent right but is rather a substantive element of self-determination, it becomes clear that Australia's claim to uphold both East Timor's right of self-determination and its own right to dispose of East Timorese resources without the free and informed consent of the East Timorese people is legally and logically untenable.

64. *See, generally,* Australian Counter-Memorial, Part II.

65. Australian Counter-Memorial, para. 194.

66. *Id.*, para. 198.

Moreover, it was Indonesia and not Australia which owed a duty to respect the right of self-determination of the East Timorese. Australia could only incur an obligation consequentially as a result of a prior breach of Indonesia.[67] Thus "it follows that as a precondition for any finding of illegality by Australia, the Court would be bound to establish the prior illegal act of Indonesia."[68] The imposition of an obligation *erga omnes* required a collective decision by a competent UN organ. As no collective decision had been taken, Australia was under "no duty to abstain from making the Timor Gap Treaty in December 1989 and has incurred no international responsibility by so doing."[69]

The extent to which these arguments were accepted by the Court becomes evident if one considers the fate of Portugal's *données* argument which the Court noted rested on the premise

> that the United Nations resolutions and in particular those of the Security Council can be read as imposing an obligation on States not to recognise any authority on the part of Indonesia over the Territory and where the latter is concerned to deal only with Portugal.[70]

The Court was not convinced that the resolutions "went so far". It concluded that the resolutions could not be regarded as *données* "which constitute a sufficient basis for determining the dispute between the parties."[71]

Two points are worth noting here. First, the Court appears to endorse the Australian claim that, under the law of self-determination, the existence of any specific obligation on third states is dependent on a collective determination by the UN.[72] This is clearly problematic. The designation

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67. *Id.*, paras. 200-201.
68. *Id.*, para. 200.
69. *Id.*, para. 203.
70. East Timor case, *supra* note 5, at 103, para. 31.
71. *Id.*, at 104, para. 32.
72. It is essential to distinguish between the duty to respect the right of self-determination and a duty of non-recognition in respect of a violation of the right of self-determination. The latter is inextricably bound up with the prior actions of a third state (such as Indonesia). The former is opposable to all states regardless of the actions of any other state. *See* Cassese, *supra* note 59. In dismissing the *données* argument the Court was wrong to observe that the basis of Portugal's argument was that the Security Council resolutions imposed a duty on states not to recognize any authority on the part of Indonesia. Again this amounts to an unhelpful reformulation of the Portuguese submissions. The essence of the Portuguese submissions was that Australia had breached its duty to respect East Timor's right of self-deter-

by the General Assembly and the Security Council of East Timor as a non-self-governing territory and Portugal as its administering power attract the *electa una via* principle.[73] Accordingly, all UN members are bound to respect the rights and duties which flow consequentially from possession of that status. Customary international law imposes duties on states in respect of all self-determination situations regardless of whether the competent UN organs have imposed any specific obligations with respect to a particular case.[74] Australia distorted the picture by arguing that the General Assembly has an exclusive competence to direct which specific actions should be taken by members in respect of particular cases. Rather, the General Assembly has an exclusive competence to determine which entities are non-self-governing. Legal consequences automatically flow from this determination of status, and individual states retain the responsibility to act in accordance with the right of self-determination.

More importantly, the Court's ruling that the resolutions on East Timor could not be regarded as *données*, effectively vindicates the claim that any determination of Australian violation of East Timorese rights would require a prior adjudication on the lawfulness of Indonesian action in East Timor.

The Court's treatment of the Portuguese *données* argument is perplexing. The wholesale rejection of the resolutions as *données* cannot be reconciled with the Court's ready endorsement of the status of East Timor as a non-self-governing territory. On what basis other than the resolutions could such a determination have been made? Are the resolutions to be

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mination. It did not allege a breach of a duty of non-recognition of Indonesian authority in East Timor as this would have attracted the Monetary Gold doctrine. Professor Higgins dismisses the question of whether Australia was legally prohibited from dealing with Indonesia as 'legally irrelevant'. *See* Portugal's final oral argument, CR 95/13, at 28.

73. *See* B. Simma (Ed.), The Charter of the United Nations - A Commentary 927 (1994).

74. That every state has the duty to respect the right of self-determination is made explicit by the authoritative GA Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance With the Charter of the United Nations, GA Res. 2625 (XXV), UN Doc. A/8028, at 121. This Declaration was characterized as having customary status by the ICJ in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), 1986 ICJ Rep. 14. That all states are obliged to respect the right of self-determination is also implicit in treaty law. For example, Article 1(3) of both the ICCPR and ICESCR (*supra* note 63) provides that: "[t]he States Parties to the present Covenant *including* those having responsibility for the administration of Non-Self-Governing and Trust Territories shall promote the realization of the right of self-determination and shall respect that right" (emphasis added). For a discussion of the obligations imposed on states by the right of self-determination, *see, e.g.*, Cassese, *supra* note 59, at 133-140.

considered *données* as regards the status of East Timor but not as regards Portugal as the administering power nor the unlawful incorporation of the East Timorese into Indonesia? The confusion is only amplified by the absence of any judicial explanation of this crucial aspect of the case. Further, the Court affirmed that for both parties East Timor remains a non-self-governing territory. This appears to amount to a determination that East Timor has not lawfully been incorporated into Indonesia - the very matter which Australia argued was beyond the Court's jurisdiction.

Australia's recognition in its oral pleadings that East Timor is a non-self-governing territory whose people is entitled to the right of self-determination should have removed any need for the Court to rule on the lawfulness of Indonesia's conduct as a prerequisite for determining Australian responsibility. For example, Australia could have argued that negotiation of the Timor Gap Treaty did not violate East Timor's rights, because it had already exercised its right of self-determination through integration with Indonesia in 1976. This clearly would have required the Court to rule on Indonesian rights, but Australia chose not to argue in this way. On the contrary, Australia recognized that East Timor was non-self-governing and that no exercise of self-determination had taken place. What it sought to do was to avoid the consequences of this recognition.

In its reply, Portugal noted that, at that point, Australia had not asked the Court for the judicial review of the determinations made in the resolutions.[75] Australia effectively did so during the oral proceedings.[76] It noted that Portugal's claim that the illegality of Indonesian action had been established by the UN, was aimed at equating these determinations to factual presuppositions binding on the Court and Australia. However, discharge of the Court's judicial function required it to evaluate the situation. The Security Council is a political body and the Court judicial: their functions were complementary. Judicial settlement would be meaningless if Security Council determinations bound the Court.[77] UN resolutions could not have the force of *res iudicata* between Portugal and Australia, and, therefore, the Court had to evaluate their legal worth as

75. Portuguese Reply, para. 4.29.
76. *See* A. Pellet's oral argument of 7 February 1995, CR 95/8, at 22-31.
77. *See* CR 95/8, at 24-25.

political organs dealt only with the political aspects of disputes.[78] Accordingly, the Application would be inadmissible because the legality of Indonesia's conduct would become an issue in the case.

The Court failed to engage squarely with this request for judicial review in the Judgment. It simply stated that it was "not persuaded"[79] by the Portuguese argument and that it could not:

> be inferred that [these resolutions] intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor [...].
>
> Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the Parties.[80]

This ruling avoids the issues raised by the Australian argument while delivering the conclusion it sought. Consequently, the claim that this ruling was "without prejudice" to the binding nature of the resolutions is disingenuous. The substance of this ruling is that these resolutions could legally be disregarded, and that amounts to the exercise of judicial review over UN action.

This is a thoroughly unsatisfactory state of affairs, particularly given the weakness of the Australian argument for judicial review. The ultimate premise of the Australian argument was that the resolutions did not constitute *res iudicata* between it and Portugal. This distorted the relationship in issue. In a diplomatic note delivered to Cameroon before it filed the application initiating the *Northern Cameroons* case,[81] the United Kingdom observed:

> the dispute in this case does not appear to be between [the United Kingdom] and the Government, but between the Government and the United Nations General Assembly. [...] The policies or practices with which the Government find fault have been endorsed by the United Nations and it would be improper for Her Majesty's Government to take upon themselves the submis-

78. *Id.*, at 26-27 and 30-31.
79. East Timor case, *supra* note 5, at 103, para. 31.
80. *Id.*, at 104, para. 32.
81. Northern Cameroons (Cameroon *v.* United Kingdom), 1963 ICJ Rep. 15.

> sion to the International Court of Justice of a dispute concerning them. Her Majesty's Government's obligations are to the United Nations rather than to any one particular member.[82]

During the proceedings, the United Kingdom claimed that Cameroon sought judicial review of UN action, and rejected as irrelevant a Cameroon argument which sought to draw a dichotomy between the political functions of the General Assembly and the judicial function of the Court. The United Kingdom claimed that UN political organs took all aspects, including the legal aspects, into account when dealing with an issue.[83]

The relevance of this for the Australian request for judicial review in *East Timor* is manifest. To argue that the resolutions were not *res iudicata* between Australia and Portugal was irrelevant. The true issue lay in the obligations owed by Australia as a UN member by virtue of its adoption of resolutions on East Timor. If, as Australia admitted, UN organs - and in particular the General Assembly - possess exclusive competence over non-self-governing territories, then the *electa una via* doctrine attaches. The burden lay with Australia to demonstrate why it could disregard these resolutions, but the Judgment remains silent on this point.

3.3. Rethinking *Certain Phosphate Lands in Nauru*

The *données* argument, seen in its proper light and institution context rather than simply as a question of the bare exegesis of texts of UN resolutions, should have been sufficient in itself to insulate the proceedings from the *Monetary Gold* foreclosure. Portugal had also attempted to achieve this by arguing that the obligations which Australia had disregarded were obligations *erga omnes*, and thus it could demand respect for these rights whether or not another state had acted in a similarly unlawful manner. The Court upheld the *erga omnes* nature of self-determination as 'irreproachable', but dismissed the plea on the basis that *Monetary Gold* attached

> [*w*]*hatever* the nature of the obligations invoked [...] when its judgment would *imply* an evaluation of the lawfulness of the conduct of another State

82. Northern Cameroons Pleadings 52.
83. *See, e.g., id.*, at 378.

> which is not a party to the case.[84]

This finding is incompatible with the Court's jurisprudence in the *Certain Phosphate Lands* case.[85] The Nauruan claim against Australia had impugned its conduct as trustee under the Trusteeship System, but Australia was not the sole trustee of Nauru. New Zealand and the United Kingdom also acted in this capacity. The Court recognized this, ruling that:

> a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.[86]

The continued validity of this point was expressly affirmed in *East Timor*,[87] but this is irreconcilable with the rejection of the Portuguese *erga omnes* argument. If Australia had breached the East Timorese people's right to self-determination, then no doubt this would imply a similar breach on the part of Indonesia, but Australia's culpability would arise independently from its own conduct. Australia's delict would lie in its disregard of East Timorese rights by concluding the Timor Gap Treaty, rather than in a denial of self-determination ultimately committed by Indonesia.

4. SAVING AUSTRALIA FROM THE CONSEQUENCES OF ITS OWN ACTIONS

On this issue it is possible that the Court accepted Australia's arguments that there is no hierarchy of obligation in international law.[88] Australia had argued that a decision in Portugal's favour would expose it to a conflict of obligations arising under the Judgment and the Timor Gap

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84. East Timor case, *supra* note 5, at 102, para. 29 (emphasis added).
85. Certain Phosphate Lands in Nauru, *supra* note 48. For a commentary on this case, *see* I. Scobbie, *Case Concerning Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections Judgment*, 42 ICLQ 710 (1993).
86. Certain Phosphate Lands in Nauru, *supra* note 48, at 261-262, para. 55.
87. East Timor case, *supra* note 5, at 104-105, para. 34.
88. *See, e.g.*, Australian Counter-Memorial, at 279-282, paras. 186.

Treaty, as well as deprive it of the ability to protect its sovereign rights over the continental shelf in the Timor Gap.[89] On the basis that there is no hierarchy of obligations, Australia argued that its existing obligations should be preferred. It claimed that a decision in favour of Portugal would create a situation similar to that arising in the *Free Zones* case[90] where the Permanent Court refused to deliver a judgment detailing tariff exemptions because its validity would be dependent on the subsequent approval of the parties. As Australia could only seek Indonesia's agreement to termination of the Timor Gap Treaty should judgment in favour of Portugal be rendered, the force of the judgment would be dependent on subsequent Indonesian, and thus non-party, agreement. Accordingly, on the grounds of propriety, the Court should refuse to entertain the case.

This argument is specious. The *Free Zones* decision was based upon a rejection of *jugements d'accord*, i.e. is a decision which required the parties' subsequent approval, because this breached the principle of the finality of judgments laid down in Article 60 of the Statute.[91] In contrast, the Australian argument was predicated on the admission that a judgment in favour of Portugal would be binding on it. Only on this basis could a conflict of obligations arise.

Moreover, if, as Australia claimed, there is no hierarchy of obligations, then why should obligations owed to Indonesia be preferred to those owed to East Timor and Portugal? Similarly, why should Australia's rights to permanent sovereignty over the resources of its continental shelf be privileged over those of East Timor? Only the exercise of Australia's rights in one small sector of its continental shelf under a specific treaty régime were in issue, not the existence of those rights. If judgment had been given in favour of Portugal, assuming that Australia would then be bound to denounce the Timor Gap Treaty, it would simply find itself in the position of any other maritime state which had failed to reach a delimitation or development treaty with a neighbouring state.

In fact, even leaving to one side the view that obligations owed *erga*

89. *See, e.g.*, Australian Counter-Memorial, paras. 381-412, and its Rejoinder, at 274-283.
90. Free Zones of Upper Savoy and Gex (France *v.* Switzerland), 1932 PCIJ (Ser. A/B) No. 46.
91. *See id.*, at 160-162. The Court ruled: "[i]t follows that that part of the Court's judgment [...] is made dependent on the approval of the two Parties. Such a condition, if the consent is to be subsequent to the judgment, cannot be reconciled with Articles 59 and 60 of the Statute of the Court which provide that the judgment is final and binding."

omnes pre-empt those owed contractually, this whole line of argument proceeds upon a false premise. Because the Statute forms an integral part of the UN Charter,[92] by virtue of Article 103 of the Charter, obligations arising from a judgment must prevail. Accordingly, what Australia sought was protection from the consequences of an adverse judgment, i.e., protection from the consequences of its own wrongdoing. Had Portugal succeeded, Australia would presumably have had to reach some accommodation with Indonesia, the modalities of which were hypothetical. For instance, it might have been possible to reach agreement on a partial application of the Timor Gap Treaty régime south of the Timor/Australia median line. In any event, problems which Australia might have had with Indonesia would have been post-adjudicative and arisen as a consequence of the judgment. In previous jurisprudence the Court has consistently claimed that it cannot look to post-adjudicative questions when deciding the case in hand[93] nor contemplate that a party might not implement the judgment.[94] One may well wonder if the Court has also discarded these elements of its settled practice in deciding this case.

5. CONCLUSION

In a Judgment in which the central issue was self-determination, "one of the most essential principles of contemporary international law" which has "evolved from the Charter and from United Nations practice",[95] more could legitimately have been expected from the ICJ. Regardless of whether the decision favoured the Portuguese or Australian submissions, because of the importance of the issues at stake, such an impoverished and unreasoned judgment as this essentially amounts to a failure by the Court to discharge its functions as "the principal judicial organ of the United

92. Art. 92 UN Charter.
93. *See, e.g.*, Haya de la Torre case (Columbia *v.* Peru; Cuba Intervening), 1951 ICJ Rep. 71, at 79. This view was also implicit in the Certain Phosphate Lands ruling on the implications which that judgment might have for New Zealand and the United Kingdom. *See* note 85, *supra*.
94. *See, e.g.*, S.S. Wimbledon case (France, Italy, Japan, Great Britain *v.* Germany; Poland Intervening), 1923 PCIJ (Ser. A) No. 1, at 32.
95. East Timor case, *supra* note 5, at 102, para. 29.

Nations."[96] One is left with the impression that not only was Indonesia absent from these proceedings, but also the Court's collective critical faculties.

If, in the light of the Judgment, the Court comes badly out of these proceedings, Australia comes out worse. In October 1995, Australia announced that it would henceforth refuse asylum to refugees from East Timor as they were technically Portuguese citizens and should seek refuge there.[97] Only three months earler, Australia had argued before the International Court of Justice: "Portugal can point to no basis on which its position can be identified with that of the people of East Timor."[98] The implications of imposing nationality rather than conferring refugee status on persecuted East Timorese are far-reaching. Ironically, from an East Timor self-determination perspective, a grant of Australian asylum is preferable to Portuguese nationality. Among the core elements of self-determination is the right of a people to a separate identity, to exist territorially as a people,[99] and where expelled to exercise the right of return. The imposition of a foreign nationality is problematic because it dilutes the separate identity of a people and may ultimately affect the ability of a people to exercise the right of return. It can accordingly be argued that both Portugal's grant of nationality and the Australian refugee policy are in violation of East Timor's right of self determination. One can only assume that the 'open door' against which Portugal pushed is now firmly shut. This is the twist in the post-adjudicative tail.

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96. Art. 92 UN Charter.
97. *See* Economist, 4 November 1994, at 100; and Timor Link, No. 34, November 1995, at 6. The legality of this policy was recently upheld by the Australian Refugee Review Tribunal *See* M. Ceresa, *Refugee Ruling Parts E. Timor Brothers*, Australian, 13 February 1995, at 3.
98. Australian Counter-Memorial, para. 242.
99. The centrality of territory to a people's claim to self-determination was recognized by both the International Commission of Jurists and the UNESCO Meeting of Experts who include territorial connection or geographical base in their list of definitive criteria of peoples. *See* the ILC's Report on Events in East Pakistan (1972); and UNESCO International Meeting on the Further Study of the Concept of the Rights of Peoples, *supra* note 60.

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