THE INTERNATIONAL COURT OF JUSTICE

Portugal v. Australia

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*Note: This is a historical case, which means that the Court ought to address the facts and merits surrounding the case as if it took place within the time frame of 1991-1995. Advocates and Justices may wish to explore the more recent history of East Timor and its relations with Portugal, Australia, and Indonesia to develop a more thorough understanding of the case, but post-1995 information should not be cited in argument or used in reaching a verdict.

Historical Background

The territory of East Timor (see Appendix A) corresponds to the eastern part of the island of Timor, and East Timor’s south coast lies about 430 kilometers opposite the coast of Australia. In the sixteenth century, Timor was divided such that East Timor constituted a Portuguese colony while the western region of the island fell under Dutch control as part of the Dutch East Indies. According to United Nations law as of December 1960, East Timor is classified as a non-self-governing territory with the right to self-determination granted to its people. Portugal has recognized East Timor’s rights continually since first including them in its constitution in 1974. However, revolution in Portugal precipitated the emergence of many conflicting local political movements in East Timor beginning in April 1974. Portuguese authorities made efforts to recognize and negotiate with these political organizations, especially regarding self-determination and the territory’s future. The culmination of these negotiations was the reaffirmation of the people of Timor’s right to self-determination via independence and the establishment of a popularly elected People’s Assembly. In 1975, East Timor was declared by one of its political forces as the “Democratic Republic of East Timor.” Meanwhile, another political faction, MAC (Anti-Communist Movement), proclaimed the integration of East Timor into Indonesia (which, upon declaring independence in 1954, had become a neighboring state to East Timor). In response, the Portuguese government refused to accept either declaration, and neither claim obtained any significant international recognition. Portugal’s role as the administering power of the territory was once again acknowledged.

Per a 1972 agreement, Australia and Indonesia delimited the continental shelf located in the ocean region surrounding Timor and its neighboring islands. The division of territory left an opening that has become known as the “Timor Gap”—the whole area lying between East Timor and Australia. Then, in December 1989, Australia and Indonesia took their negotiations further, creating a “Zone of Cooperation” in a region between the Indonesia-occupied Timor (see “History of UN/ICJ Involvement) and Northern Australia, for the purpose of “joint exploration and exploitation of resources of an area of the continental shelf.” Since then, disagreements have arisen between Portugal and Australia. In all of its protests, the Portuguese government emphasized the right to self-determination of the people of East Timor and its own status as the territory’s administering power, a status that the Australian government had allegedly failed to respect. Portugal claims that serious legal and moral damage has been caused by the agreement between Indonesia and Australia and its consequences, and suspects that exploitation of the region’s hydrocarbon resources is imminent—exploitation that would result in serious material damage to East Timor.

History of UN/ICJ Involvement

In December 1975, Indonesian troops invaded and occupied by force of arms the territory of East Timor. Indonesia continues to occupy the territory despite struggles toward liberation by its people. In response, Portugal immediately went to the UN General Assembly and Security Council, both of which expressed their disapproval of the military intervention and called upon all States to respect the “territorial integrity” of East Timor and its administering power, Portugal. The com-
petent organs of the UN have never failed to recognize the rights of the people of East Timor to self-determination, territorial integrity, and unity. East Timor is still included on the UN list of non-self-governing territories, with its administering power clearly and unambiguously identified.

**Jurisdiction**

The Court has jurisdiction to deal with the dispute submitted to it inasmuch as Portugal and Australia have both accepted the compulsory jurisdiction of the Court, in accordance with Article 36, paragraph 2, of its Statute:

“The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.”

Australia harbors some objections to the jurisdiction of the Court in this case, but states that the claims regarding jurisdiction and the merits of its case are inextricably linked; therefore, the Court is to reach a verdict based on the merits of each case alone and proceed without an isolated argument on the Court’s jurisdiction.

**Merits of the Case**

**Portuguese Claim**

Portugal’s main claim is that Australia, by negotiating the 1989 treaty with Indonesia, a third party, and enacting the treaty’s contents without the permission of the territory of East Timor and its administering power, has infringed upon the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources. In its capacity of administering power, Portugal maintains that it is performing an international public service and that it solely holds authority over any duties or powers that involve the territory of East Timor. Australia has failed to observe the obligation of all UN member States to respect the duties and powers of the administering power of any non-self-governing territory.

Furthermore, Australia excluded negotiations with Portugal, the lone representative of the people of East Timor at this time, upon drafting the 1989 treaty. After the treaty’s ratification, Australia excluded further negotiations with Portugal regarding “matters of common interest and... questions relating to the maritime areas of direct concern to East Timor. According to Portugal, this exclusion serves as prima facie evidence of its deliberate circumvention of East Timor’s right to self-determination and Portugal’s rights as its administering power.

Portugal’s legal basis is explored more thoroughly in the “Applicable International Law” section below.

**Australian Claim**

Australia has rebutted many of the claims set forth in the Portuguese written Memorial. It first challenges the jurisdiction of the Court. According to Australia, Portugal lacks “a sufficient interest of its own to institute the proceedings.” The Australian Memorial states:

“... notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor... it cannot... claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would be without useful effect... its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the framework of ongoing procedures before the political organs [rather than the legal organ] of the United Nations.”

Furthermore, Australia argues that Portugal’s claim would require the Court to rule on “the rights and obligations of a State which is not a party to the proceedings [Indonesia, which Australia believes to be the true respondent in this case].” This is a violation of the ICJ Statute, which maintains that ICJ rulings refer to a single
incident and only to the parties involved (in this case, Portugal and Australia), who have accepted the compulsory jurisdiction of the Court.

Furthermore, Australia maintains that it has always recognized the right of the people of East Timor to self-determination, its status as a non-self-governing territory, and Portugal’s standing as its administering Power. Additionally, Portugal does not challenge Australia’s capacity to enact the 1989 treaty, nor does it challenge the treaty’s validity; therefore, Australia offers the question of whether a legal dispute actually exists between itself and Portugal.

Applicable International Law

In its case before the Court, Portugal cites the following pertinent international law:

· The UN Charter, to which Australia and Portugal are parties. In particular, Portugal makes reference to Articles 1, 55, and 56 which states that an objective of the UN is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people to take other appropriate measures to strengthen universal peace”; and Articles 73 and 75, which outline the expected practices of member States toward non-self-governing territories.

· The acts of the competent organs of the UN in its application of the UN Charter. In particular, Portugal refers to Security Council resolutions 384 and 389, which condemn the military intervention of Indonesia in the territory of East Timor and call upon all States to respect the territorial integrity and right to self-determination of East Timor.

· The higher principles of the self-determination of people and the integrity and unity of non-self-governing territories. These principles are asserted by State practice and international custom, as well as by resolutions of the General Assembly, such as the Declaration on the Granting Independence to Colonial Countries and Peoples (1960), Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73(e) of the Charter (1960), and Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN (1970).

· The principle of the permanent sovereignty of people and States over their natural wealth and re-

sources. This principle is supported by many UN resolutions, including but not limited to the International Covenant on Economic Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights.

· International Custom. Portugal relies upon the custom “that requires that States should negotiate on matters of common interest and, more particularly, upon the custom relating to the negotiation of issues related to the delimitation, exploration and exploitation of maritime areas.”

Reaching a Verdict

The issues that the Court ought to address in reaching a verdict in this case:

· Based on Australia’s claims, does the Court have jurisdiction over this case? Does a real legal dispute exist between Portugal and Australia? Is Indonesia the true respondent, and is this a relevant claim? The Court may dismiss the case on the basis of lack of jurisdiction alone.

· Has Australia respected the right of the people of East Timor to self-determination, territorial integrity, etc. and the delegation of authority to Portugal as the administering power of the territory? Has it overtly ignored or rejected these rights and duties?

· How legitimate are Portugal’s claims in the context of the international law cited? Does international custom dictate a certain behavior toward non-self-governing territories, and is this behavior congruent with Australia’s actions?

Sources for Further Research

As you prepare answers to the previous questions, you will need to conduct your own outside research. You should start by visiting the websites listed below. These will provide you with information on the background of the case and arguments for both sides. Use the information you gather as support of the argument you are going to make.

· International Court of Justice Homepage: http://www.icj-cij.org

· Portugal v. Australia—Portugal’s Application, written and oral pleadings, orders, judgments, some his-
Historical background: http://www.icj-cij.org/icjwww/icases/ica/ipa/ipaframe.htm

- “Crisis in East Timor”—some background information on East Timor’s relations with Portugal, Australia, and Indonesia: http://www.globalissues.org/Geopolitics/EastTimor.asp
- “The EU’s relations with East Timor”—background information, with references to UN involvement during colonization, conflict, and conflict settlement: http://europa.eu.int/comm/external_relations/east_timor/history.htm
Appendix A