

## SEPARATE OPINION OF JUDGE ODA

1. I voted in favour of the Judgment because I agreed with the Court that the Application brought by Portugal against Australia on 22 February 1991 should be dismissed, as the Court lacks jurisdiction to entertain it.

However, I am unable to subscribe to the reason given by the Court for this finding, that is, that

“[the Court] cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct *in the absence of that State’s consent*” (Judgment, para. 35; emphasis added.)

When it refers to the “consent” of Indonesia the Court itself seems to be uncertain as to what this “consent” of Indonesia 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 these proceedings or would it have meant that Indonesia would have had to have accepted that jurisdiction under Article 36 (2) of the Statute?

For my part, I believe that the Court cannot adjudicate upon the Application of Portugal for the *sole* reason that Portugal lacked *locus standi* to bring against Australia this particular case concerning the continental shelf in the Timor Sea.

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2. Portugal, in its Application, defined the dispute, on the one hand, as

“relate[d] to the opposability to Australia:

- (a) of the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor; and
- (b) of the right of the people of East Timor to self-determination, and the related rights (right to territorial integrity and unity and permanent sovereignty over natural wealth and resources)” (Application, para. 1).

On the other hand, Australia, which did not regard Portugal as having authority over the Territory of East Timor in the late 1980s, has *only* been accused by Portugal in its Application of having engaged in

“[the] activities . . . [which] have taken the form of the negotiation and conclusion by Australia with a third State [Indonesia] of an agreement relating to the exploration and exploitation of the continental shelf in the area of the ‘Timor Gap’ and the negotiation, currently in progress, of the delimitation of that same shelf with that same third State [Indonesia]” (Application, para. 2; emphasis added).

3. If there had been anything for Portugal to complain about this would *not* have been “the opposability” to any State of either “the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor”, or “the right of the people of East Timor to self-determination, and the related rights” (Application, para. 1). Any complaint could *only* have related to Portugal’s alleged title, whether as an administering Power or otherwise, to the Territory of East Timor together with the corresponding title to the area of continental shelf which would overlap with that of Australia. In this respect Portugal, in its Application, has given an incorrect definition of the dispute and seems to have overlooked the difference between *the opposability* to any State of its rights and duties as the administering Power or of the rights of the people of East Timor and *the more basic question* of whether Portugal is the State entitled to assert these rights and duties.

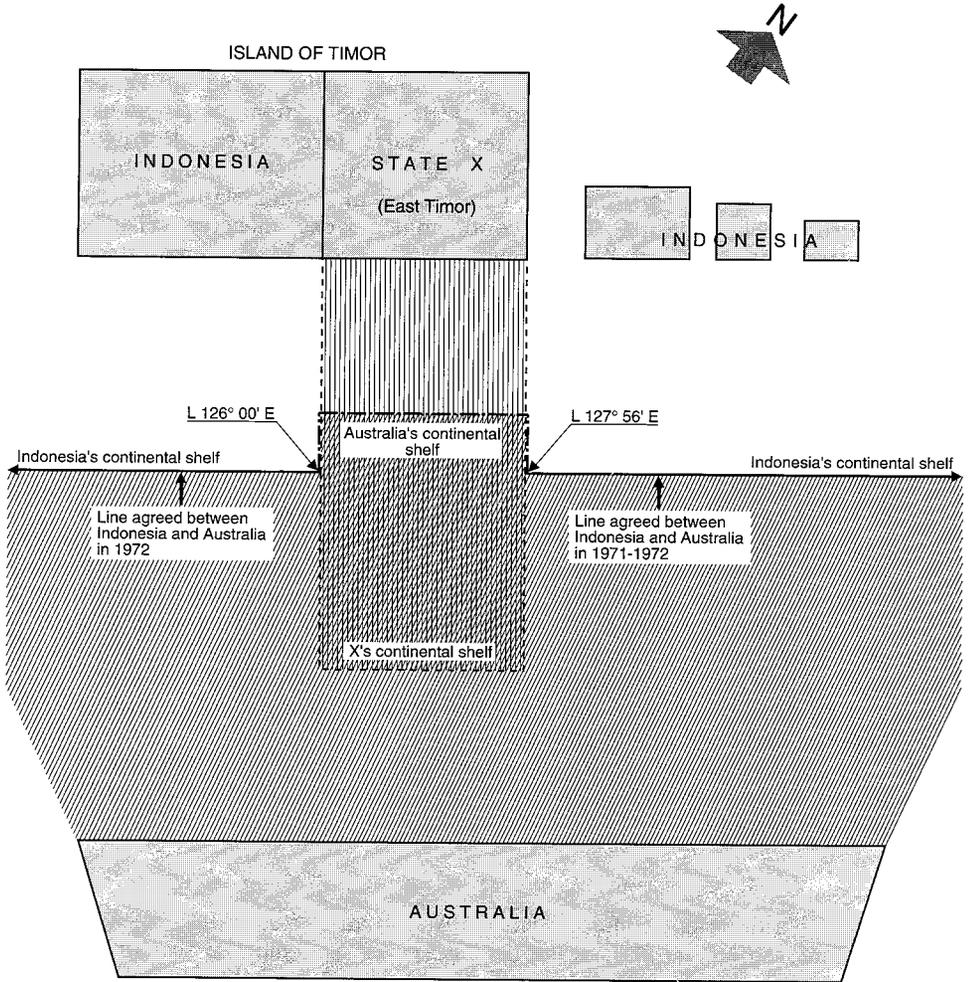
In particular Portugal contends, with regard to subparagraph (b) in the quotation in paragraph 2 above, that the right of the people of East Timor to self-determination and the related rights guaranteed by the United Nations Charter to a people still under the control of a colonial State or of an administering Power for non-self-governing territories should be respected by the whole international community under whichever authority and control that people may be placed. Australia has *not* challenged the “right of the people of East Timor to self-determination, and the related rights”. The right of that people to self-determination and other related rights *cannot* be made an issue — and is *not* an issue — of the present case.

The present case relates *solely* to the title to the continental shelf which Portugal claims to possess as a coastal State. This point cannot be over-emphasized.

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4. What, then, did Australia actually do to Portugal or the people of East Timor? It is essential to note that, in the area of the “Timor Gap”, Australia has not asserted a new claim to any seabed area intruding into the area of any State or of the people of the Territory of East Timor, nor has it acquired any new seabed area from any State or from that people (see sketch-map on page 109).

SKETCH-MAP



*N.B.:* The area with cross-hatching shows the location of the Zone of Cooperation under the 1989 Treaty and also gives a general idea of the "Timor Gap".

In fact, Australia's original title to the continental shelf in the "Timor Gap" cannot be challenged at all by any State or by any people. Under the contemporary rules of international law, Australia is entitled *ipso jure* to its own continental shelf in the *southern* part of the Timor Sea — but at the same time a State which has territorial sovereignty over East Timor, and which lies opposite to Australia at a distance of roughly 250 nautical miles, has the title with respect to the continental shelf off its coast in the *northern* part of the "Timor Gap" (see sketch-map: vertical hatching). How far each continental shelf extends is determined not in geographical terms but by the legal concept of the continental shelf.

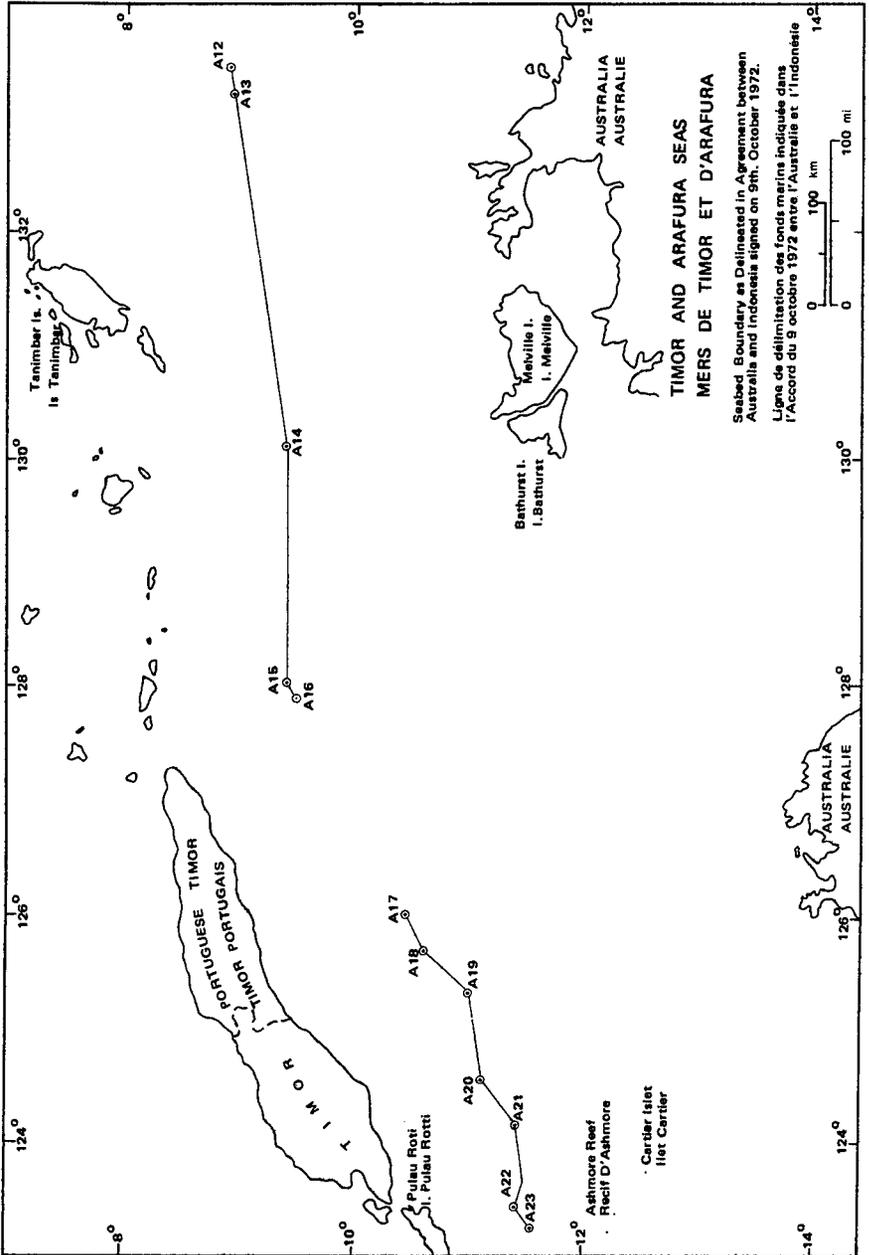
The continental shelves to which both States are thus entitled overlap somewhere in the middle of the "Timor Gap". Just as in the cases contemplated by Article 6 (1) of the 1958 Convention on the Continental Shelf and by Article 83 (1) of the 1982 United Nations Convention on the Law of the Sea, Australia should have negotiated with the coastal State lying opposite to it across the Timor Sea (see sketch-map: State X as indicated therein) and did indeed negotiate with that State with respect to the overlapping continental shelves.

5. A recital of the events which have taken place since the 1970s in relation to the delimitation of the continental shelf in the relevant areas can usefully be given at this stage.

Pursuant to the Agreement "establishing certain seabed boundaries" (United Nations, *Treaty Series*, Vol. 974, p. 307), Australia and Indonesia drew a line of delimitation east of longitude 133° 23' E in the Arafura Sea on 18 May 1971 — in the area between Australia, on the one hand, and West Irian (Indonesian territory on the island of New Guinea) and Aru Island (Indonesian territory), on the other. On 9 October 1972 the same two Governments, acting under the Agreement "establishing certain seabed boundaries in the area of the Timor and Arafura seas, supplementary to the Agreement of 18 May 1971" (United Nations, *Treaty Series*, Vol. 974, p. 319) (*N.B.* the Chart attached to this Agreement is reproduced on page 111 of this opinion), defined other lines of delimitation west of longitude 133° 23' E extending to longitude 127° 56' E in the area of the Timor and Arafura seas between Australia, on the one hand, and the Tanimbar Islands (Indonesian territory), on the other. Another line was drawn westward from longitude 126° 00' E. This latter agreement, however, left open a gap of nearly 120 nautical miles between these two lines off the coast of "Portuguese Timor" (as it is called on a chart attached to the Agreement), which was commonly known as the "Timor Gap".

At that time Portugal did not, however, attempt to negotiate with Australia on the delimitation of the continental shelf in the area thus left open for Portugal's benefit by the 1972 Agreement between Indonesia and Australia. This certainly leads one to question whether Portugal did, at that time, deem itself to be in the position of a coastal State with sov-

CHART ATTACHED TO THE AGREEMENT OF 9 OCTOBER 1972



ereignty over the eastern part of the island of Timor (East Timor) and whether it in fact thought that it could claim a title to the continental shelf in the “Timor Gap”.

Instead of dividing the area by drawing a boundary, as in the case of the 1971 and 1972 Agreements with Indonesia as explained above, Australia agreed in the 1989 Treaty with Indonesia “on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia” to constitute a “Zone of Cooperation”. The content of the 1989 Treaty — what was gained and lost in the “Timor Gap” both by Australia and by the State lying opposite to it (see sketch-map: State X as indicated therein) — cannot be disputed, as the Treaty was drawn up with the consent of the States concerned.

6. Indonesia had apparently claimed since the 1970s the status of a coastal State for the Territory of East Timor, considered to be one of its provinces (as explained in paragraph 13 below), and, as such, had negotiated with the opposite State, Australia, on the overlapping part of their respective continental shelves. On that basis, Australia concluded in 1989 a treaty with Indonesia which would remain in force for an initial 40-year term and successive terms of 20 years unless the two States agreed otherwise (Art. 33) (Application, Ann. 2, text of the Treaty annexed to the Petroleum Act, 1990). If Portugal had claimed the status of a coastal State, whether as administering Power of the non-self-governing Territory or otherwise, and had thus claimed the corresponding title to the continental shelf in the northern part of the “Timor Gap” extending southward from the coast of East Timor, then Portugal could and should have initiated a dispute over that title *with Indonesia* which had made a similar claim. The party with which Portugal should have engaged in a dispute over the conflicting titles to the continental shelf in the northern part of the “Timor Gap” (see sketch-map: vertical hatching) could only have been *Indonesia*.

A dispute could have turned on which of the two States, Indonesia or Portugal, was a coastal State located on the Territory of East Timor and thus was entitled to the continental shelf extending southwards from the coast of the Territory of East Timor, thus meeting the continental shelf of Australia in the middle of the “Timor Gap”. This is the dispute in relation to which Portugal could have instituted proceedings against Indonesia on the merits. However, any issue concerning the seabed area of the “Timor Gap” could *not* have been the subject-matter of a dispute between Portugal and Australia unless and until such time as Portugal had been established as having the status of the coastal State entitled to the corresponding continental shelf (in other words, Portugal would have to be designated as State X, see sketch-map).

7. If Portugal was the coastal State with a claim to the continental shelf in the “Timor Gap” (see sketch-map: vertical hatching), then the Treaty which Australia concluded with Indonesia in 1989 would certainly

have been null and void from the outset. *Alternatively*, if Indonesia was the coastal State, and thus had a right over the relevant area of the continental shelf (see sketch-map: vertical hatching), then Portugal quite simply had no right to bring this case. In order to do so, Portugal would have had to have been a coastal State lying opposite to Australia.

In order to entertain the Application against Australia with respect to the continental shelf in the "Timor Gap" or, more specifically, the area called the "Zone of Cooperation" which Australia claims in part, the Court needs to be convinced, as a preliminary issue, of the *standing of Portugal* in this case as being a coastal State with a claim to the continental shelf in the Timor Sea as of 1991, the year of the Application (see sketch-map: State X as indicated therein).

As I repeat, an issue on which Portugal could have initiated a dispute would have been its own entitlement to the continental shelf off the coast of East Timor, but could *not* have related to the competence of Australia to conclude a treaty with Indonesia.

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8. The present Judgment, in my view, seems to rely heavily on the jurisprudence of the case concerning *Monetary Gold Removed from Rome in 1943* (1954). That case does not seem to be relevant to the present case as the Court found in 1954 that "[t]o go into the merits of [questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy]" in a case brought by Italy against France, among other co-Respondents, "would be to decide a dispute between Italy and Albania" and that "[t]he Court cannot decide such a dispute without the consent of Albania" (*I.C.J. Reports 1954*, p. 32). In that case "Albania's legal interests would not only be affected by a decision [of the Court], but would form the very subject-matter of the decision" (*ibid.*).

The present case is quite different in nature. The dispute does not relate to whether Indonesia, the third State, was entitled in principle to conclude a treaty with Australia, but rather the subject-matter of the whole case relates solely to the question of *whether Portugal or Indonesia*, as a State lying opposite to Australia, was entitled to the continental shelf in the "Timor Gap". This could have been the subject of a dispute between Portugal and Indonesia, but cannot be a matter in which Portugal and Australia can be seen to be in dispute with Indonesia as a State with "an interest of a legal nature which may be affected".

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9. East Timor was under Portuguese control from the sixteenth century onwards and the Constitution of Portugal of 1933 stated that the territory of Portugal comprised East Timor in Oceania. East Timor kept

the status of an overseas territory of Portugal even after the war, in contrast to Indonesia which gained its independence from the Netherlands. There is no doubt that, prior to 1974, Portugal had sovereignty over East Timor as one of its own overseas provinces and that Portugal, as the coastal State, would have had a right to the continental shelf in the seabed areas off the coast of East Timor in the Timor Sea.

10. On the other hand, the United Nations Charter contains a “declaration regarding non-self-governing territories” (Chap. XI) under which Member States which have or assume responsibilities for the administration of the colonial territories, accept as a sacred trust the obligation to promote the well-being of the inhabitants of these territories and, to this end, to transmit regularly to the Secretary-General statistical and other information of a technical nature relating to the territories. Portugal never supplied regular information on its own colonies scattered throughout the world and was not seen to have acknowledged that those colonies had the status of non-self-governing territories under the United Nations system.

In 1960 the United Nations General Assembly, after having made the “Declaration on Decolonization” proclaiming the right of all peoples to self-determination (resolution 1514 (XV)), adopted a resolution addressed in particular to Portugal in which it considered East Timor to be a non-self-governing territory within the meaning of Chapter XI of the Charter and requested Portugal to transmit to the Secretary-General information on East Timor, among other non-self-governing territories under Portuguese control (resolution 1542 (XV)).

11. Between 1961 and 1973 the General Assembly repeatedly appealed to Portugal to comply with the decolonization policy of the United Nations and continued to condemn Portugal’s colonial policy and its persistent refusal to carry out that United Nations policy. In 1963 the Security Council for its part deprecated the attitudes of the Portuguese Government and its repeated violations of the principles of the Charter, urgently calling upon Portugal to implement the decolonization policy (resolutions 180 (1963) and 183 (1963)), and in 1965 once again passed a resolution deploring Portugal’s failure to comply with the previous General Assembly and Security Council resolutions (resolution 218 (1965)). In 1972, the Security Council repeated its condemnation of the persistent refusal of Portugal to implement the earlier resolutions (resolutions 312 (1972) and 322 (1972)).

Portugal did not take any steps to assume the duties and responsibilities of a governing authority in relation to those territories which should have been treated as non-self-governing territories in accordance with the United Nations concept, and continued to regard them merely as its overseas provinces.

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12. Following the “Carnation Revolution” in April 1974, the Government in Portugal was replaced by a new régime. The “Law of 27 July 1974”, promulgated by the Council of State, revised the old Portuguese Constitution and acknowledged the right to self-determination — including independence — of the territories under Portuguese administration. The new Government of Portugal convened conferences on decolonization in May 1975 in Dili and in June 1975 in Macao, to which it invited the representatives of several East Timorese political groups. The “Law of 17 July 1975” relating to the decolonization of East Timor, which resulted from those conferences, was intended to put an end to the sovereignty of Portugal over East Timor in October 1978.

On the other hand Indonesia, which seems not to have sought previously to annex East Timor to its own territory and had maintained friendly relations with Portugal, appears to have begun considering the annexation of East Timor in the 1970s. In July 1975, the President of Indonesia asserted that East Timor would not be competent to attain its independence. The political group UDT, which supported the approach of the Indonesian Government, organized a coup d’état on 11 August 1975. The local government in East Timor did not receive any effective assistance from Portugal itself; its members left in August 1975 for the island of Atauro north of Timor and, in December 1975, moved away from that island and thus left the area. Portugal did not accept the request of the FRETILIN group to return to East Timor and Indonesia began to prepare for a large-scale military invasion of the Territory. These developments marked the end of Portuguese rule in East Timor.

13. On 28 November 1975 FRETILIN declared the full independence of the Territory and the establishment of the Democratic Republic of East Timor. On the other hand, some other political parties, such as UDT and APODETI, which considered that it would be difficult for East Timor to maintain its independence, were willing to be annexed by Indonesia and on 30 November 1975 the representatives of those groups made a declaration of the separation of the Territory from Portugal and its incorporation into Indonesia.

In early December 1975 Indonesia sent an army of 10,000 men to Dili. On 17 December 1975, the pro-Indonesian parties declared the establishment of a provisional government of East Timor in Dili. Responding to an alleged appeal from the people of East Timor, Indonesia passed a law on 15 July 1976 providing for annexation, which the President of Indonesia signed on 17 July 1976. East Timor was thus given the status of the twenty-seventh province of Indonesia. The Portuguese authorities, which had already left the island, have never returned to East Timor since that time.

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14. As from the year 1974, which was marked by the change in Portuguese colonial policy under the new régime, the General Assembly con-

tinued to adopt successive resolutions on the implementation of the Declaration on Decolonization. In its 1974 resolution, the General Assembly welcomed the acceptance by the new Government of Portugal of the principle of self-determination and independence and its unqualified applicability to all the peoples under Portuguese colonial domination, calling upon Portugal to pursue the necessary steps to ensure the full implementation of the "Declaration on Decolonization" (resolution 3294 (XXIX)).

In 1975 the General Assembly, for the first time, adopted a resolution relating to East Timor in which it called upon Portugal as the administering Power to continue to make every effort to find a solution by peaceful means through talks between the Government of Portugal and the political parties representing the people of Portuguese Timor; strongly deplored the military intervention of the armed forces of Indonesia, and called upon Indonesia to desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the Territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence (resolution 3485 (XXX)).

Further to that General Assembly resolution, the Security Council, on 22 December 1975, deplored the intervention of the armed forces of Indonesia in East Timor, regretting that the Government of Portugal was not discharging fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter, called upon Indonesia to withdraw all its forces from the Territory without delay, and called upon Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination (resolution 384 (1975)). Several months later, on 22 April 1976, the Security Council once again passed a resolution in which it did not refer to the responsibility of Portugal as the administering Power of East Timor but was only concerned with the military intervention of Indonesia in that Territory (resolution 389 (1976)).

15. In a resolution of 1976, the General Assembly, following the same approach as the one adopted in the previous year, upheld the rights of the people of East Timor and strongly criticized the action of Indonesia (resolution 31/53). It should be noted, however, that Indonesia's claim that East Timor should be integrated into its territory was rejected *solely* in order to uphold the rights of the people of East Timor but *not* to protect the rights and duties of the State of Portugal in relation to East Timor or the status of Portugal as the administering Power. In 1977 the General Assembly kept to the outline of the previous year's resolution (resolution 32/34); the Government of Portugal did not feature in this resolution at all.

In 1978 the General Assembly desisted from its rejection of Indonesia's claim that East Timor had been integrated. The 1978 resolution made no

request for the withdrawal of the Indonesian military from East Timor, but emphasized the inalienable right of the people of East Timor to self-determination and independence, and the legitimacy of their struggle to exercise that right (resolution 33/39). Since then the position of the General Assembly has remained the same; that is, the emphasis has been upon the relief of the people of East Timor (see resolutions 34/40, 35/27 and 36/50).

16. In 1980 the General Assembly welcomed the diplomatic initiative taken by the Government of Portugal with a view to finding a comprehensive solution to the problem of East Timor, and indicated that the General Assembly had heard the statements of the representative of Portugal (as the administering Power), the representative of Indonesia, various East Timorese petitioners and representatives of non-governmental organizations, as well as the representative of FRETILIN (resolution 35/27).

In 1982 the General Assembly, after having heard the statements of the representatives of Portugal, Indonesia, FRETILIN and others, requested the Secretary-General to initiate consultations with all parties directly concerned with a view to exploring avenues for achieving a comprehensive settlement of the problem (resolution 37/30). The consultations thus requested in the 1982 resolution have not yet yielded any fruitful result.

The General Assembly has included an item on the "Question of East Timor" on the agenda of every session since 1983. However, on the recommendation of the General Committee, the General Assembly has deferred consideration of the item of East Timor to the subsequent session ever since that time. The question of East Timor may be said to be a subject which has been shelved since 1983.

17. Portugal, which was willing to grant independence to the people of East Timor under the new Constitution of 1974, has not exercised any authority over the Territory ever since the local authority was forced to leave East Timor in 1975 on account of the turmoil in the island. Portugal has not, since 1974, supplied any information or statistics as required under the United Nations Charter and under the 1960 "Declaration on Decolonization". The United Nations, when dealing with the problem of East Timor since 1976, has *never* indicated that Portugal should have the right and the duty to administer this area as a non-self-governing territory.

The authority of Indonesia has been exercised in the Territory for nearly 20 years since that time. The United Nations has not given its approval to the annexation of East Timor by Indonesia. *However the rejection of Indonesia's claim that East Timor should be integrated into its territory disappeared from the 1978 resolution and the demand for the withdrawal of the Indonesian army ceased to be made.* The fact is that the interest of the General Assembly was directed more to humanitarian aid than to the form of administration of the Territory.

18. The incident which took place in 1991 at the Santa Cruz Cemetery in Dili in East Timor was extremely serious from this very standpoint.

Whether the right of the people of East Timor to self-determination has been duly respected by Indonesia may well be questioned in some other proceedings before the Court or in the different fora of the United Nations.

While the military intervention of Indonesia in East Timor and the integration of East Timor into Indonesia in the mid-1970s were not approved by the United Nations, there has *not* been any reason to assume that Portugal has, since the late 1970s and up to the present time, been entrusted with the rights and responsibilities of an administering Power for the non-self-governing Territory of East Timor. Few States in the international community have in the recent past regarded, or at present regard, Portugal as a State located in East Timor or would maintain that as such it may lay claim to the continental shelf off the coast of East Timor.

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19. Irrespective of the status of East Timor — which is still in abeyance according to the United Nations — and irrespective of the rights of the people of East Timor to self-determination guaranteed by the United Nations Charter, it is clear that Portugal has not been considered — at least since the early 1980s — to be a *coastal State* lying opposite to Australia and that in 1991, when Portugal's Application was filed in the Registry of the Court, it did *not* have any authority over the region of East Timor, from the coast of which the continental shelf extends southwards in the Timor Sea.

20. It follows that Portugal *lacks standing* as an Applicant State in this proceeding which relates to the continental shelf extending southward into the Timor Sea from the coast of East Timor in the "Timor Gap". For this reason *alone*, the Court does not, in my view, have jurisdiction to entertain the Application of Portugal and the Application must be dismissed.

(Signed) Shigeru ODA.