(c) throughout the period from sovereignty to the present the traditional society and its future generations have maintained a connection with the land and waters, and have transmitted rights and interests in relation to those land and waters, in accordance with the traditional laws and customs; and

(3) identify, at present, in respect of the land and waters claimed:

(a) the laws acknowledged and customs observed by the claimants (i.e. "normative system" of rules, as opposed to the existence of activities or "observable patterns of behaviour") ("**present laws and customs**"); and

(b) the constitution of the claimants as a society or group ("**present society**");

(4) determine:

(a) those present laws and customs (if any) ("**relevant laws and customs**") which are the same as the traditional laws and customs (or if not the same, are such that the change or adaptation of the present laws and customs is not of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws and customs); and

(b) whether the present society is substantially the same as the traditional society; and

(c) whether the present society has, by the relevant laws and customs, a connection with the land or waters claimed;

(5) if (4) above is satisfied, determine those sovereignty rights and interests which still exist under the relevant laws and customs; and

(6) determine whether any of those rights and interests have been extinguished by inconsistent legislative or executive acts of the Crown.

THE PETROTIMOR CASE – CHALLENGE TO AUSTRALIAN CLAIMS IN THE TIMOR SEA*

A third Court challenge to Australia's continental shelf claims in the Timor Sea has been dismissed by the a Full Court of the Federal Court (Black CJ and Beaumont and Hill JJ). Its decision of 3 February 2003 struck out the submissions made in this regard by the Applicants, who were a Portuguese company named *Petrotimor Companhia de Petroleos S.A.R.L.* and an American company named *Oceanic Exploration Company*. The Respondents were the *Commonwealth of Australia, the Joint Authority Established Pursuant to the Treaty of 11 December 1989 between Australia and Indonesia, Conocophillips (91-12) Pty Limited, Conocophillips JPDA Pty Limited and Phillips Petrotimor Sea Pty Limited*.

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The two earlier challenges were made respectively in the High Court (*Horta v Commonwealth of Australia* (1994) 181 CLR 183) and in the International Court of Justice (*Portugal v Australia* (1995) ICJ Reports 903).

The only success of the Applicants in the Federal Court was in relation to claimed misuse by the Respondents of confidential information belonging to the Applicants, and even this was limited in nature. Questions were raised as to whether there was jurisdiction to entertain these claims, especially as the other claims had been struck out. The Applicants were required to file and serve brief written submissions dealing with their questions within 21 days of the delivery of the decision on 3 February 2003.

Commonwealth submissions

Counsel for the Commonwealth submitted in the Federal Court that the issues raised by the Applicants in their pleading were non-justiciable (or alternatively, the Court had no jurisdiction to hear the proceedings), because in respect of each cause of action whether specifically, or if not specifically then as a necessary ingredient of it, it was necessary either that the Court make an adjudication on an act of State of a foreign government (the grant of concessions by Portugal to the Applicants in the proceedings), or alternatively to adjudicate upon the validity, meaning and effect of transactions of foreign States or both. In consequence, it was submitted, there was no justiciable issue for the Court to decide and additionally or alternatively there was no "matter" within the jurisdiction of the Court.

It was submitted that this came about as a result of the application of one or more perhaps overlapping principles, on each of which the Commonwealth relied, these being:

- The Court has no jurisdiction to determine or will not adjudicate upon claims which depend upon the exercise by the Executive of the prerogative in relation to foreign affairs and, particularly in the present context, involving the territorial boundaries of Australia's claim to the continental shelf between Australia and East Timor. If, contrary to the submission, the Court may adjudicate on matters involving the territorial boundaries of the Commonwealth then it would be bound by a certificate from the Executive stating what those boundaries are.
- The Court will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that Sovereign's own territory, cf *Potter v The Broken Hill Proprietary Company Ltd* (1906) 3 CLR 479. It was submitted that each of the claims made by the Applicants in the proceeding required the Court to adjudicate upon the validity of acts and transactions of Portugal or Indonesia as the case may be. Allied to this principle is the general principle that domestic Courts will not enforce foreign public law, cf *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 41 (the *Spycatcher Case*).
- Alternatively, the Court should not, as a matter of judicial restraint, adjudicate upon the claims of the Applicants involving matters affecting Australia's international relations having regard to the principles in *Buttes Gas and Oil Co v Hammer* [1982] AC 888.
- Alternatively, because the Court exercising the judicial power of the Commonwealth may only decide "matters", that is to say, justiciable controversies, it lacks jurisdiction to determine the Applicants' claims because the issues inherent in the Applicants' pleaded case are not justiciable, that is to say, matters which are capable of judicial determination.

Petrotimor submissions

For the Applicants it was submitted that these principles have no application to the present case because by the *Seas and Submerged Lands Act 1973* (Cth) ("the SSL Act") Parliament defined the boundaries of the area in respect of which Australian sovereign rights were to be exercised over the continental shelf and that exercise of sovereignty thereafter excluded any exercise by the Executive of the prerogative to define Australia's boundaries except as provided for in that Act. It was the Applicants' case that the SSL Act, which defined the continental shelf over which Australia had sovereignty by reference to the definition contained in the 1958 United Nations Convention on the Continental Shelf, properly construed, placed the boundary between Australia and the then Portuguese Timor along the median line between their coasts, so that the areas over which the Applicants were granted concessions were outside the area over which Australia exercised sovereign rights under that Act. Accordingly, it was submitted, there was no barrier to the Applicants' concession rights being recognised by Australian courts. The Timor Gap Treaty between Australia and Indonesia operated to extinguish the rights of the Applicants (and thereby leading to a right in the Applicants to compensation) or alternatively had no effect upon them, either as a matter of interpretation or because the Treaty was of no effect, its ratification being beyond the executive power of the Commonwealth. The subsequent legislation to give effect to the Treaty was likewise of no effect or, if it was, it gave rise to an entitlement of the Applicants to compensation or alternatively to the result that their rights had not been extinguished.

The arguments

Shortly put, the Commonwealth said that it was for the Executive to define the territorial boundaries of Australia, including the territorial sea and continental shelf. Hence, if an essential ingredient of an Applicants' case involved the Court in defining territorial boundaries, the Courts would not enter upon an adjudication of that. This principle might be seen as a corollary to the other principle relied upon by the Commonwealth, namely, that the domestic courts would not adjudicate upon the effectiveness of acts of state of foreign governments.

Thorough examination of issues

A notable feature of the Federal Court proceedings is the thorough examination made by Counsel and Judges, of the major and complex issues that were involved. These included the following as dealt with in the joint judgment of Black CJ and Hill J:

- There was consideration of the general principle discussed by the High Court In *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479, namely that the domestic courts will not explore rights granted by a foreign sovereign. O'Connor J (at 510) based his judgment on what he referred to as principles of international law which recognise that the Courts of a country would not, except subject to well known exceptions, inquire into the validity of the acts of a foreign state (paras 37 and 38 of joint judgment).
- The joint judgment held the Applicants' claim could not accurately be characterised as merely claims to test the validity of actions of the Australian Government under Australian law affecting the Applicants as the holders of the Portuguese concessions. It was an essential ingredient of most of the Applicants' claims that they did hold a valuable concession (para 43).

- Reference was made (para 47) to the overlapping principle in *Buttes Gas and Oil Co v Hammer* (1982) AC 888 that it was of the very nature of the judicial process that municipal courts would not adjudicate on the transactions of foreign states. Lord Wilberforce (at 938) was quoted:

> "there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign state were involved, which they had brought to a precarious settlement, after diplomacy and the use of force and to say that a least part of these were 'unlawful' under international law.
>
> *... this counterclaim cannot succeed without bringing to trial non-judiciable issues."*

- It was clear that there would be considerable embarrassment in the Court deciding what had been a most contentious issue between Portugal and Australia and which was still a subject of delicacy between Australia and the newly created East Timor (para 52).
- The Applicants relied upon the recent decision of *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 WLR 135 either as authority for a submission that *Buttes* should not be applied in Australia or should be distinguished. However, the *Kuwait case* was said by the joint judgment to concern a breach of international law that had been determined by the Security Council acting under the UN Charter (para 60), and it was distinguishable (para 63).
- As to whether there was a "matter" in which a Court might adjudicate, in *Re Ditfort* (1988) 19 FCR 347 Gummow J did not cast doubt upon the general principle, which His Honour accepted, that the question whether there was a breach of international obligations was not a justiciable issue and was not a "matter" in the constitutional sense. The general principle could be said to be, at least in part, to be an element of the separation of powers between the functions of the executive government and the Courts on the other hand (para 65).

The separate judgment of Beaumont J is also commended, and reference is made in particular to the following points contained in para 149 thereof:

- It may be accepted that the 1958 Continental Shelf Convention is part of the *Seas and Submerged Lands Act*; and that the Convention's definition of "continental shelf" is incorporated into the Act. Yet the question remains whether, **otherwise**, the Act made the provisions of the 1958 Convention, especially those directed at the process of locating a boundary, part of Australian domestic law. In my opinion, as a majority of Justices held in the *Seas and Submerged Lands Case*, it did not (see also, in analogous contexts *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration and Ethic Affairs v Teoh* (1995) 183 CLR 273; *Minogue v Williams* (2000) 60 ALD 366 at 372 – 373; D. Pearce and R. Geddes *Statutory Interpretation in Australia* 5th ed (2001) at 34).
- The contention that, on its proper construction, the 1958 Convention, consistently with the P(SL) Act, placed the boundary between Australia and Portuguese Timor along the "median" line between their coasts cannot be accepted. It is one thing to say that the Act incorporated the 1958 Convention's meaning of "continental shelf"; it is quite another to

say that by virtue of the operation of the Convention and the Act, the relevant boundary was located along a particular line.

- As James Crawford ("Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820 at 856) has noted, there are certain transactions which public international law, as an autonomous system of law, (ordinarily) purports to govern as between the parties. In that sense, in those cases, international law is "the proper law" of the transaction; so that questions of the validity or termination of a treaty, or **the location of an international boundary**, are matters that international law "integrally governs". These ("self-executing") contexts can be contrasted with the ("non self-executing") cases where (ordinarily) international law merely sets standards of (minimum) performance for municipal law systems, eg: in areas of human rights, where international law "operates not integrally but at one remove".

North Sea Continental Shelf Case

Finally on the judgments, reference is made to comments made in Beaumont J's judgment as one of his points in para 93. He refers to the comments in the Ministerial Statement made by the Australian Minister for External Affairs in the House of Representatives on 30 October 1970 on the grant of petroleum permits in the North Sea and observed:

> "The Minister was referring to the *North Sea Continental Shelf Cases* ([1969] ICJ reports 3). Germany was a party to the proceedings, but was not bound by the 1958 Convention. It was held, in essence, that the "equidistance" method of determining boundaries was not a rule of general or customary international law; and that, in the course of negotiations, one of the factors to be taken into account was, so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the shelf area."

Will there be an appeal to the High Court?

An application for leave to appeal to the High Court has already been mooted. While leave would normally be expected to be granted having regard to the issues involved, this may be one of those cases where it is withheld.