

HORTA v THE COMMONWEALTH*

In a unanimous judgment most notable for its brevity (eight pages) and its speed (eight days), the High Court in *Horta v The Commonwealth* upheld the validity of Commonwealth legislation concerning petroleum resources in the Timor Gap against a challenge by three East Timorese plaintiffs. The challenge presented an opportunity for the Court to engage with and refine the relationship between international law and domestic law, in particular the external affairs power (s 51(xxix) of the Constitution). However, the Court declined the opportunity and decided the case without reference to international law, basing its decision on the fact that the subject matter of the legislation was geographically external to Australia. Whilst the decision was not surprising, it is disappointing that the Court, which has been activist in other areas of constitutional law, was not prepared to examine more closely the relationship between the external affairs power and international law.

A *The Facts*

The Timor Gap is an area of sea and continental shelf between Australia and East Timor. It is an area in which it is expected that petroleum resources will be found¹ and so an area of potential economic significance to Australia and to Indonesia. In 1972 international maritime boundary agreements between Indonesia and Australia were concluded, but a gap remained in the boundary between Australia and what was then Portuguese East Timor. Negotiations between Portugal and Australia over the boundary took place but were unsuccessful.²

In 1975 Portugal withdrew from East Timor. Shortly afterwards, in December 1975, Indonesia invaded East Timor. Indonesia has remained in occupation of East Timor since that invasion. Since 1976, Indonesia has claimed sovereignty over East Timor under international law, and since 1979 that claim has been recognised by Australia.³ However, the international community, through the United Nations, has continued to view Portugal as the administering power of East Timor and has condemned Indonesia's invasion and occupation.⁴

Since the recognition of Indonesian sovereignty by Australia, negotiations have taken place between Indonesia and Australia concerning the continental shelf and the maritime boundary between Australia and Indonesia in the Timor

* (1994) 123 ALR 1 (*Horta*).

¹ Ivor Ries, 'BHP finds no place like home', *Financial Review* (Sydney) 20 October 1994.

² Sasha Stepan, 'Portugal's Action in the International Court of Justice Against Australia Concerning the Timor Gap Treaty' (1992) 18 *MULR* 918, 918.

³ *Horta* (1994) 123 ALR 1, 3.

⁴ United Nations General Assembly Resolutions: GA Res 3485 (XXX) 1975; GA Res 31/53 1976; GA Res 32/34 1977; GA Res 34/40 1979; GA Res 36/50 1981; GA Res 37/30 1982: Stepan, above n 2, 921.

Gap. The areas of the continental shelf claimed by the two countries overlap. The outcome of the negotiations was the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia ('the Treaty') which came into permanent force in February 1991. The Treaty permits and regulates the exploration for, and exploitation of, petroleum resources in the Timor Gap pending a resolution of the competing claims over the area. Australia considers the Treaty to be a binding and valid treaty under international law and considers that performance of the terms of the Treaty by Australia is consistent with international law.⁵ The plaintiffs in the *Horta* case disputed this, as does Portugal which has brought suit in the International Court of Justice against Australia in respect of the Treaty.⁶

In 1990 the Commonwealth Parliament enacted the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 ('the Zone of Cooperation Act'). The Zone of Cooperation Act clearly relates to the Treaty and is directed towards the fulfilment of Australia's obligations under the Treaty. The Treaty, which is contained in a schedule to the Act, divides the Timor Gap into three areas: A, B and C. Area A is subject to joint management by Australia and Indonesia, Area B is subject to management by Australia and Area C is subject to management by Indonesia. The Parliament also enacted the Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 which amended existing Commonwealth laws where necessary or appropriate (collectively these two Acts will be referred to as 'the Acts'). The *Horta* case concerned the validity of these Acts.

The plaintiffs in the case were three individuals, each of whom is East Timorese. Each plaintiff asserted a beneficial entitlement, in common with all the people of East Timor, to the natural resources of the continental shelf adjacent to East Timor⁷ (ie the Timor Gap). Each plaintiff was also a permanent resident of Australia and an Australian taxpayer. The first plaintiff also asserted that he was bringing the proceedings on his own behalf, and on behalf of the members of the National Council of Maubere Resistance⁸ and the People of East Timor.⁹ All three plaintiffs sought declarations that the Acts are not valid laws of the Commonwealth and that the making of the Treaty was not within the executive power of the Commonwealth.

⁵ *Horta* (1994) 123 ALR 1, 3.

⁶ Application of the Republic of Portugal to the International Court of Justice, filed in the Registry on 22 February 1991; 1991 ICJ General List No 84. See also Stepan, above n 2, 918.

⁷ Amended Statement of Claim, paras 2(b), 3(b), 4(b) (Case Stated Book, 3-5).

⁸ The Maubere people being the people of East Timor: Amended Statement of Claim, para 1 (Case Stated Book, 3)

⁹ Amended Statement of Claim, sub-para 2(c), (d) (Case Stated Book, 4).

B *The Issues*

The case proceeded by way of questions, in a case stated by Mason CJ, concerning six issues: justiciability, standing, the making of the Treaty, the validity of the Acts under the external affairs power, certain tax issues and delegation of executive power. The case stated proceeded on the basis that the Court was not called upon to decide at this point whether the Treaty was void at international law or resulted in Australia being in breach of its international legal obligations. Accordingly, the Court was asked to answer the questions concerning the Treaty and the validity of the legislation on the basis that the Treaty was void or resulted in a breach of international law.¹⁰ However, it was acknowledged that this question would have to be dealt with ultimately by the Court if it found in favour of the plaintiffs on the questions in the stated case.¹¹

Although the judgment of the Court did not deal with all the issues raised in the case, it is useful to set out those issues in some detail in order to provide an indication of the arguments canvassed before the Court.

Justiciability (Questions 1 and 2 of the Case Stated)

The plaintiffs alleged that the Treaty was void under international law and that entry into and performance of the Treaty was inconsistent with or in breach of Australia's obligations under customary international law, the Charter of the United Nations, the International Covenant on Economic and Social Rights, the International Covenant on Civil and Political Rights and the United Nations Convention on the Law of the Sea. These allegations centred on the assertion that the invasion and occupation of East Timor by Indonesia in 1975 was unlawful at international law and that Indonesia was therefore not competent to enter into a Treaty concerning the Timor Gap area. Further, it was alleged that the East Timorese people had been denied their right to self-determination under international law. The issue of justiciability centred on whether the status of the Treaty under international law was a matter which was justiciable in domestic law before the High Court. The contention of the plaintiffs was that it was justiciable because it concerned a constitutional fact on which the validity of the Acts depended.¹² On this basis the plaintiffs contended that the Court must determine the validity issue itself and not relegate it to an area of non-justiciability or simply accept the Executive's position on the matter by way of Executive Certificate.¹³

The Commonwealth, on the other hand, argued that the matter was not justiciable because it involved the acts of a foreign state or questions of a political nature on which a municipal court would not decide.¹⁴ In the alternative, the

¹⁰ See questions 4 and 5 of the case stated, set out in the orders of the Court: (1994) 123 ALR 1, 9. See also the Amended Plaintiffs' Submissions, 1, 17.

¹¹ See, eg, transcript of the *Horta* case, 21, 36, 46.

¹² See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

¹³ See Amended Plaintiffs' Submissions, 35.

¹⁴ Written Submissions of the Commonwealth of Australia (Submissions of the Commonwealth) 9-15.

Commonwealth argued that determinations by the Executive of certain 'facts of state' (of which the question of sovereignty over East Timor was one), evidenced by the giving of an Executive Certificate, are conclusive and leave no issue for determination by the Court.¹⁵

Standing (Question 3 of the Case Stated)

The plaintiffs asserted standing on the basis of the accepted approach to the issue — that they had, as East Timorese people with a beneficial interest in the Timor Gap area, an interest greater than the interests of a member of the general public.¹⁶ They also claimed standing on the basis of the rights and interests of the East Timorese people.¹⁷ The Commonwealth challenged the plaintiffs' standing on the basis that they did not have a sufficient legal interest nor a 'special interest' beyond that of an ordinary member of the public.¹⁸

The Making of the Treaty (Question 4 of the Case Stated)

The question here was whether the making of the Treaty was beyond the executive power of the Commonwealth if the Treaty was void or placed Australia in breach of international law. The plaintiffs' argument centred on the fact that Australia's rights over the continental shelf are dependent on international law — those rights have no basis in domestic law concerning state territory. It was then argued that the ambit of the Executive's power with respect to the continental shelf under s 61 is subject to international law, including conventions to which Australia is a party,¹⁹ because the Executive cannot act in breach of international law in relation to rights Australia gains only from international law.²⁰

By contrast, the Commonwealth argued that the executive power under s 61 extends to making arrangements with Indonesia in respect of the cooperative management of the Timor Gap, whether or not those arrangements result in a valid treaty in international law.²¹ Further, the Commonwealth asserted that the Crown's prerogatives in relation to foreign affairs, particularly treaties, are not reviewable by the courts.²² Finally the Commonwealth argued that, even if review were possible, inconsistency with a rule of international law not yet

¹⁵ Ibid 7. No Executive Certificate was in fact provided, but the Commonwealth invited the Court to proceed on the basis that, had a certificate as to Australia's recognition of Indonesian sovereignty over East Timor been applied for, it would have been given: *ibid* 8.

¹⁶ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

¹⁷ Amended Plaintiffs' Submissions, 33.

¹⁸ Submissions of the Commonwealth, 18-9.

¹⁹ Amended Plaintiffs' Submissions, 19-21.

²⁰ Reliance was placed on: *New South Wales v Commonwealth (the Seas and Submerged Lands Case)* (1975) 135 CLR 337, and on the Seas and Submerged Lands Act 1973 (Cth) in support of this argument.

²¹ Submissions of the Commonwealth, 24.

²² *Ibid* 25. (This is an aspect of justiciability.)

incorporated into Australian law by legislation would not be a ground of review.²³

The Validity of the Legislation Under the External Affairs Power (Question 5 of the Case Stated)

This issue concerned the validity of the Acts under the external affairs power if the Treaty was void or resulted in a breach of international law by Australia. The plaintiffs' argument was that the legislation could only be justified under the external affairs power and that the foundation for the exercise of the power was Australia's international obligations under the Treaty. It was argued that if the Treaty was void or its performance contrary to international law, then there were no international obligations and so the legislation was beyond power.²⁴ The plaintiffs made it clear that they were not arguing that Australia could never legislate in breach of international law; they were arguing that the external affairs power could not be the head of power relied upon if the legislation was implementing a treaty which was void at international law.²⁵ That is, the argument was that there is a limit to the extent of the external affairs power, and that limit is defined by the content of international law.²⁶ The plaintiffs argued that this limitation also extended to matters which were geographically outside Australia,²⁷ but they argued that, in any event, the Acts could not be supported as relating to a subject geographically external to Australia.²⁸ The plaintiffs also briefly raised the narrower argument that the external affairs power is coextensive with international law where Australia derives particular rights only from international law, as is the case with the continental shelf.²⁹

In response, the Commonwealth argued that consistency with international law is irrelevant to the question of validity of legislation under the external affairs power, just as it is irrelevant to questions of validity under any other head of power. The Commonwealth sought to justify the Acts as being valid under the external affairs power by virtue of the fact that they concerned matters geographically external to Australia,³⁰ relying primarily on *Polyukhovich v The Commonwealth*.³¹ The Commonwealth also put arguments concerning other circumstances in which the external affairs power can operate, namely matters affecting Australia's relations with other nations and laws giving effect to international treaties.³²

²³ Ibid 26.

²⁴ Amended Plaintiffs' Submissions, 2, 5-6.

²⁵ Ibid 6.

²⁶ See, eg, transcript of the *Horta* case, 35.

²⁷ Ibid 29.

²⁸ Amended Plaintiffs' Submissions, 9.

²⁹ Transcript of the *Horta* case, 16, 36-7.

³⁰ Submissions of the Commonwealth, 30-2.

³¹ (1991) 172 CLR 501.

³² Submissions of the Commonwealth, 32-9.

The Tax Issues (Question 6 of the Stated Case)

The tax issues concerned the effect of certain Treaty provisions dealing with taxation and revenue arrangements. The plaintiffs argued that the Acts are invalid because they purport to give force of law to the provisions of the Treaty which 'affect Australian tax' (s 13 Zone of Cooperation Act),³³ and in doing so violate various constitutional restrictions, outlined below.

The first of the tax issues concerned Area C of the Timor Gap. Under the Treaty, Indonesia manages this area and is to pay to Australia 10% of the tax it collects in relation to the area. The plaintiffs contended that, as Area C is an area over which Australia claims sovereign rights, it retains power to impose taxation over the area. However, because the Treaty precludes Australia from granting exploration or production licences over Area C, Australia is effectively precluded from exercising its power of taxation over that area. Australia denies any sovereign rights in Indonesia regarding the continental shelf and claims such rights itself. The plaintiffs argued therefore, that if Indonesia imposes a tax in relation to the area, it must be imposed pursuant to a power delegated to Indonesia by Australia and the tax collected by Indonesia is therefore Australian tax.³⁴ This, the plaintiffs contended, is an impermissible delegation of Australia's legislative power (concerning taxation) to Indonesia.³⁵

The second tax issue related to Area B. Under the Treaty, Australia manages this area and is to pay to Indonesia 10% of all tax collected in relation to the area. The plaintiffs argued that this arrangement breaches ss 81 and 83 of the Constitution because it requires Australia to pay moneys collected to Indonesia instead of into the Consolidated Revenue Fund.³⁶

The third tax issue related to Area A which is jointly managed by Indonesia and Australia. The plaintiffs argued that the Treaty precludes Australia from imposing any new tax in relation to that area without the consent of Indonesia. This, it was argued, introduces the consent of Indonesia into the legislative processes of the Commonwealth Parliament and amounts to a purported amendment to the Constitution which is invalid.³⁷

The Commonwealth contested these arguments. In relation to Area C, it contended that neither the Treaty nor the Acts prevent Australia from imposing taxation in relation to the Timor Gap zone. Any tax imposed by Indonesia, it was said, is imposed under Indonesian law, not by authorisation of Australian law, so there is no delegation of legislative power to Indonesia.³⁸ In relation to Area B, the Commonwealth contended that taxes collected in relation to the area will be paid into the Consolidated Revenue Fund, as required by the Constitution. The obligation under the Treaty to pay moneys to Indonesia is an obligation under

³³ Amended Plaintiffs' Submissions, 29.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Plaintiffs' *[sic]* Supplementary Submissions, 2.

³⁷ *Ibid.* 3.

³⁸ Submissions of the Commonwealth, 41.

international law that has no operation in Australian law because there is, as yet, no legislation giving it effect. Accordingly, there is no breach of ss 81 or 83 of the Constitution.³⁹ Finally, in relation to Area A, the Commonwealth again contended that the Treaty has not been given the force of Australian law by statute and therefore the requirement of the consent of Indonesia to any new tax is not required in the legislative processes of the Commonwealth Parliament.⁴⁰ Further, the Commonwealth said, agreement by the executive to act in a certain way cannot bind the Parliament and so does not affect the legislative power of the Parliament.⁴¹

Delegation of Executive Power (Question 7 of the Case Stated)

Under the Treaty powers of management of the Timor Gap are conferred on a Ministerial Council and a Joint Authority. Section 4 of the Zone of Cooperation Act provides for these bodies to exercise ‘the rights and responsibilities of Australia, in relation to the exploration for and exploitation of petroleum resources in Area A of the Zone of Cooperation, in accordance with the Treaty’. The plaintiffs argued that this amounts to the conferral of executive power on the Ministerial Council and the Joint Authority contrary to s 61 of the Constitution and to the principle of responsible government embodied in the Constitution.⁴²

The Commonwealth, on the other hand, contended that there is no impermissible delegation of executive power — that s 61 does not preclude the delegation of executive power to a statutory authority or statutory office holder, or even on a foreign state.⁴³ Parliamentary supervision of the activities of the Council and the Authority is retained because s 4 is a provision of Australian law, subject to amendment by the Parliament.⁴⁴

C The Decision

The Court delivered a unanimous judgment to the effect that the plaintiffs’ action ‘must fail’.⁴⁵ Unfortunately, the Court did not find it necessary to deal with all of the issues raised in the stated case. As the judgment makes clear, it became common ground in the course of the hearing that the Court should first consider whether the external affairs power issue would clearly be decided adversely to the plaintiffs. The Court did decide this issue adversely to the plaintiffs and thus it was unnecessary for it to consider the issues of standing, justiciability or the making of the Treaty.

³⁹ Ibid 42.

⁴⁰ Ibid 43.

⁴¹ Ibid.

⁴² Amended Plaintiffs’ Submissions, 23-5.

⁴³ Submissions of the Commonwealth, 44.

⁴⁴ Ibid 45.

⁴⁵ (1994) 123 ALR 1, 8.

The Validity of the Legislation Under the External Affairs Power

The Court's starting point was the proposition, accepted by a majority in *Polyukhovich v The Commonwealth*,⁴⁶ that a law with respect to a subject which is territorially external to Australia is clearly a law with respect to external affairs for the purposes of s 51(xxix) of the Constitution.⁴⁷ The Court noted that Brennan J and Toohey J in *Polyukhovich* each required some additional nexus with Australia, but found it unnecessary to resolve the difference between this approach and that of the majority.⁴⁸ According to the Court, it was clear that the subject matter of the legislation in this case, namely the Timor Gap area and exploration for and exploitation of petroleum within it, fell within the concept of a matter geographically external to Australia⁴⁹ and that there was an 'obvious and substantial' nexus between the subject matter of the legislation and Australia.⁵⁰ The enactment of the legislation was relied on to demonstrate this nexus, revealing a certain circularity of reasoning — an Act concerning a matter external to Australia is valid if there is a sufficient nexus between the matter and Australia, and the existence of the nexus is demonstrated by enactment of the Act. Thus, it appears that, after *Horta*, any further requirement of sufficient nexus (if it exists) is so easily satisfied as to be meaningless.

The Court's conclusion, therefore, was that the Zone of Cooperation Act is *prima facie* within the external affairs power, regardless of whether there existed a Treaty or not.⁵¹ Notwithstanding this, the Court acknowledged that there may be cases in which a law is *prima facie* within the legislative power conferred by s 51(xxix) but is nonetheless beyond Commonwealth power by virtue of some other provision of the Constitution, whether express or implied.⁵² This is uncontroversial as s 51 is expressed to be 'subject to this Constitution'.⁵³ The Court gave no indication of what limitations it envisaged, but examples would include the express limitation in s 116 of the Constitution on making any religious test a requirement for office under the Commonwealth⁵⁴ and the implied limitation on the power of the Commonwealth to interfere with freedom

⁴⁶ (1991) 172 CLR 501 (*Polyukhovich*).

⁴⁷ (1994) 123 ALR 1, 5.

⁴⁸ *Ibid* 5-6.

⁴⁹ This is because the Timor Gap continental shelf, while forming part of Australian territory at international law, is not part of Australia for the purposes of Australian constitutional law: *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 360, 468, 471, 494-5, 501.

⁵⁰ (1994) 123 ALR 1 (*Horta*).

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ See *Commonwealth v Tasmania* (1983) 158 CLR 1, 129 (Mason J), 254 (Deane J) (*Tasmanian Dam case*); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216 (Stephen J), 255 (Brennan J).

⁵⁴ See Leslie Zines, *The High Court and the Constitution* (1992) 237; see also transcript of the *Horta* case, 25-6.

of political expression.⁵⁵ However, the Court was of the view that no such limitation was relevant in this case:

Most importantly, the Court quite clearly stated that, even if the Treaty was void in international law or placed Australia in breach of international law, that would not deprive the Zone of Cooperation Act of its character as a law with respect to external affairs.⁵⁶ The external affairs power is not subject, either by its own terms or by any other provision of the Constitution, to a limitation that laws enacted pursuant to that power be consistent with international law. Nor is the power under s 51(xxix) confined within the limits of Australia's legislative competence as recognised by international law.⁵⁷

Thus the Court rejected any limiting role for international law in the operation of the external affairs power, at least so far as legislation concerning a subject geographically external to Australia is concerned. Whether there remains a limiting role for international law in cases where the legislation does not concern a subject external to Australia and where the only basis for the legislation is an international treaty, is not decided, although the tenor of the judgment is perhaps against any such limitation. If there are limitations on the power, they must be found in the Constitution itself, not outside it.

The Tax Issues

The tax issues were not resolved by the Court's decision on the question of the validity of the legislation under the external affairs power. Accordingly the Court dealt with those issues, although in a very brief fashion, after stating that the issues were not of 'real substance'.⁵⁸

Essentially, the Court based its reasons on the fact that the Acts do not provide for any moneys received by Australia to be paid to Indonesia or to be dealt with otherwise than in accordance with s 81 of the Constitution.⁵⁹ Nor do the Acts authorise any collection of Australian tax revenue by Indonesia or require any person to pay tax to Indonesia. The Acts do not delegate legislative power to Indonesia — any legislative power exercised by Indonesia will be legislative power of Indonesia.⁶⁰ In so far as the Treaty precludes the exercise of Australian legislative power without the consent of Indonesia, the Acts do not give effect to that term of the Treaty in Australian law. Such an undertaking, at an international level, 'is necessarily ineffective to confine the scope of the legislative powers conferred upon the Parliament by the Constitution'.⁶¹

⁵⁵ As outlined in *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1. The implied prohibition on discriminatory attacks on the states would also provide a limitation on the external affairs power: *Tasmanian Dam case* (1983) 158 CLR 1, 128-9 (Mason CJ), 255, (Deane J); Zines, above n 54, 237.

⁵⁶ (1994) 123 ALR 6.

⁵⁷ *Ibid* 7.

⁵⁸ *Ibid* 8.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*.

Delegation of Executive Power

This issue was dealt with by the simple statement that 'there is nothing in the Constitution which precludes the conferral of any executive power which the Act confers upon the Ministerial Council and Joint Authority.'⁶²

Justiciability

While finding it unnecessary to decide the issue of justiciability because of its answer to the external affairs issue, the Court nonetheless sounded a warning note: the fact that the Court considered the external affairs issue first

should not be understood as lending any support for the contention that, if [the external affairs issue] had been answered differently, the various questions of international law which the plaintiffs wished to raise would be justiciable in this Court in these proceedings.⁶³

The transcript of the hearing also reveals that the Court was particularly hostile to the notion that it would be required, if the plaintiffs were successful on the stated case, to decide the legality of Indonesia's invasion and occupation of East Timor at international law.⁶⁴

Standing and the Making of the Treaty

The Court's judgment was entirely silent on these issues.

D Comment

Ultimately, the most important issue in the case was that concerning the validity of the legislation under the external affairs power. The tax issue and the delegation of legislative power issues, although dealt with by the Court, were peripheral to the central issues in the case, and the decision on those issues seems to be plainly correct.

As indicated above, the Court's analysis of the scope of the external affairs power was limited. The Court fell back on the fact that the legislation concerned a matter physically outside Australia, and concluded that in such a situation international law did not provide a limit on the exercise of the external affairs power. While *Polyukhovich* certainly provided a rationale for the Court's decision, that case did not preclude the Court from considering whether there are limits to the external affairs power. The lack of detailed reasoning is disappointing, but perhaps more disappointing is the Court's rejection of the opportunity to give international law a meaningful role in an area where it is of manifest relevance, namely 'external affairs'. This is not a surprising result, however, given that ultimately the Court would have had to determine the legality of the Indonesian invasion and occupation of East Timor. A reluctance to do so is understandable, and had the Court decided the validity issue in the plaintiffs'

⁶² *Ibid.*

⁶³ *Ibid.* 7.

⁶⁴ See, eg, transcript, 18, 36, 45, 46, 69-70, 73.

favour, there remained the distinct possibility that they would have decided the justiciability issue against the plaintiffs.⁶⁵

Related to the justiciability issue is the question of the role of Executive Certificates where the Court is considering international events and international law. If the Court had found the international law issues justiciable, it is nonetheless likely that an Executive Certificate as to Australia's recognition of Indonesian sovereignty over East Timor (and possibly as to the existence of the Treaty) would have been accepted by the Court as conclusive,⁶⁶ as such issues have traditionally been regarded as unsuitable for determination by the courts and on which the courts and the executive should 'speak with one voice' (that of the executive).⁶⁷ Whether a different approach should or will be taken where a question of constitutional fact is involved is unresolved. Ultimately, however, more detailed speculation on justiciability and the role of Executive Certificates is not fruitful, as there is no real indication in the judgment of how these issues would be determined by the Court.

It seems that the judgment does not rule out a limiting role for international law in the interpretation of the external affairs power in cases where the legislation cannot be justified on the basis that it concerns a subject geographically external to Australia and must be justified solely on the basis of an alleged treaty obligation. In those circumstances, it may be that the validity of the treaty in question under international law will provide a limit to the extent of the external affairs power, subject of course to the problem of determining what international law is on any given subject and to the question of the role of an Executive Certificate. Any use of international law in this way will, it seems, need to be justified by some provision of the Constitution, whether express or implied, and *Horta* gives no indication that the Constitution will justify such a role. However, the consideration of any further role for international law in this area must await an appropriate case.

KRISTEN WALKER*

⁶⁵ This possibility is suggested by the comment of the Court on this issue: see above nn 57-8 and accompanying text.

⁶⁶ As to Executive Certificates generally, see *Chow Hung Ching v The King* (1948) 77 CLR 449, 467; *Bradley v The Commonwealth* (1973) 128 CLR 557, 562; *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 926-7. See also James Crawford and W R Edeson, 'International Law and Australian Law' in K W Ryan (ed), *International Law In Australia* (1984) 71, 130-1. As to Executive Certificates concerning the existence of a treaty, see *In re Chateau-Gai Wines Ltd v A-G of Canada* (1970) 14 DLR (3d) 411, 421-3; and Crawford and Edeson, above n 66.

⁶⁷ *The Arantazu Mendi* [1939] AC 256, 264; *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 961; *Baker v Carr* 369 US 186 (1962), 211.

* BSc, LLB (Hons) (Melb); Barrister and Solicitor of the Supreme Court of Victoria; Lecturer in Law, University of Melbourne.