

International Court of Justice — Provisional measures of protection — Criteria — Prima facie basis for jurisdiction — Plausibility of rights — Link between rights to be protected and measures sought — Risk of irreparable harm — Court free to order different measures from those requested — Binding nature of provisional measures — Relationship between measures and proceedings before different international tribunal — Seizure by one party to arbitration of legal documents from legal adviser of other party — Whether plausible right to confidentiality — Whether need to protect — Undertaking by Attorney-General of seizing State — Presumption of good faith — Whether undertaking affording sufficient protection — Power to modify Order for Provisional Measures — Rules of Court, Article 76 — Removal of case from List

International tribunals — Conduct of proceedings — Good faith — Equality of parties — Confidentiality of communications between party and its legal advisers — Seizure by other party of material resulting from those communications — Whether contrary to international law — Seized material relating to arbitration between two States — Material having national security implications for seizing State — Whether material concerning commission of criminal offence by former official of seizing State

General principles of international law — Confidentiality of communications between State and its legal advisers — Seizure by other State of material resulting from such communications — Legal professional privilege — Sovereign equality of States — Equality of parties in international litigation — Good faith

QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF
 CERTAIN DOCUMENTS AND DATA

(TIMOR-LESTE *v.* AUSTRALIA)¹

International Court of Justice

Order on the Request for Provisional Measures. 3 March 2014

¹ A list of counsel participating in the proceedings appears at para. 13 of the Order of the Court of 3 March 2014.

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, and Bhandari, *Judges*; Callinan² and Cot,³ *Judges ad hoc*)

Order on the Request for Modification of Provisional Measures. 22 April 2015

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson and Gevorgian, *Judges*; Callinan and Cot, *Judges ad hoc*)

Order on Removal of the Case from the List. 11 June 2015

(Abraham, *President*)

SUMMARY: *The facts*.—In 2006 Timor-Leste and Australia concluded a treaty regarding resources in the Timor Sea. In 2013 allegations were made, apparently based upon statements by a former member of the Australian Secret Intelligence Organisation (“ASIO”), that Australian intelligence officers had bugged the offices of the cabinet of Timor-Leste and that Australia had thereby obtained information regarding Timor-Leste’s negotiating positions at the time that the 2006 treaty was under negotiation, giving Australia an unfair advantage in those negotiations. Timor-Leste initiated arbitration proceedings with Australia under the provisions of the United Nations Convention on the Law of the Sea, 1982. Those proceedings were conducted under the auspices of the Permanent Court of Arbitration. On 3 December 2013, while the arbitration proceedings were pending, Australian officials, acting under a warrant issued by the Attorney-General of Australia pursuant to Section 25 of the Australian Security Intelligence Organisation Act, searched the offices in the Australian Capital Territory of a lawyer acting for Timor-Leste in the arbitration. They seized a quantity of documents and data which, according to Timor-Leste, included advice from Timor-Leste’s lawyers regarding the arbitration proceedings and other documents relating to those proceedings.

Timor-Leste maintained that the documents and data in question were the property of Timor-Leste and that their seizure and subsequent detention violated the sovereignty of Timor-Leste and its rights under international law and any relevant domestic law. Timor-Leste commenced proceedings

² Appointed by Australia.

³ Appointed by Timor-Leste.

against Australia before the International Court of Justice, seeking a declaration that its rights had been infringed, an order for the return of the documents and data and satisfaction in the form of an apology and payment of costs.⁴ Timor-Leste requested that the Court grant provisional measures of protection, pursuant to Article 41 of the Statute of the Court, ordering Australia to seal all the documents and data seized and deliver them to the Court pending the final resolution of the case, to destroy all copies, to furnish a complete list of those persons to whom any of the documents or data had been disclosed and give an assurance that it would not intercept or cause the interception of any communications between Timor-Leste and its legal advisers.⁵

Australia contended that, even if the documents and data were the property of Timor-Leste, there was no general principle of immunity or inviolability of papers and property of one State held in the territory of another State. If there was a principle that a State was entitled to the confidentiality of communications with its legal advisers, that principle was not absolute. In particular, Australia contended that any such principle did not apply when the communication concerned the commission of an offence. Australia maintained that it had a legitimate interest in obtaining evidence of a serious criminal offence which might have been committed by the former ASIO officer and using that evidence in a prosecution.

During the hearings on the request, counsel for Australia communicated to the Court an undertaking by the Attorney-General of Australia⁶ to the effect that the material seized and detained would not be used for any purpose other than national security interests, including a potential prosecution, and that the material would not be seen by anyone involved in the arbitration proceedings. The undertaking was further clarified by counsel during the hearings.⁷

Order of 3 March 2014

Held:—(1)(a) (by twelve votes to four, Judges Keith, Greenwood and Donoghue and Judge ad hoc Callinan dissenting) Australia was to ensure that the content of the seized material was not in any way or at any time used by any person or persons to the detriment of Timor-Leste until the present case had been concluded (para. 55(1)).

(b) (by twelve votes to four, Judges Keith, Greenwood and Donoghue and Judge ad hoc Callinan dissenting) Australia was to keep under seal the seized documents and electronic data and any copies thereof until the further decision of the Court (para. 55(2)).

⁴ For the relevant parts of Timor-Leste's Application, see para. 2 of the Order of 3 March 2014.

⁵ For the relevant part of the Request, see para. 5 of the Order.

⁶ See para. 38 of the Order.

⁷ See para. 39 of the Order.

(c) (by fifteen votes to one, Judge ad hoc Callinan dissenting) Australia was not to interfere in any way in communications between Timor-Leste and its legal advisers in connection with the arbitration proceedings, with any future bilateral negotiations concerning maritime delimitation, or with any related procedure between the two States, including the present case (para. 55(3)).

(2) Both Parties had made declarations accepting the jurisdiction of the Court under Article 36(2) of the Statute. While Australia had reserved the right to contest the jurisdiction of the Court at a later stage, it had not done so in the present phase of the proceedings. The requirement that there appear, *prima facie*, to be a basis for the jurisdiction of the Court was therefore satisfied (paras. 18-21).

(3) At this stage of the proceedings, the Court was not called upon to determine definitively whether the rights asserted by Timor-Leste existed, it had only to decide whether the rights claimed by Timor-Leste for which protection was sought were plausible. The claimed right to confidential communication between a State and its legal advisers in relation to litigation and negotiations could flow from the principle of sovereign equality of States and the equality of parties in litigation and negotiation and was thus plausible (paras. 22-8).

(4) There was a sufficient link between the rights claimed and the measures requested (paras. 29-30).

(5) The right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed immediately to safeguard the confidentiality of the material seized on 3 December 2013. Measures were necessary to prevent such harm, notwithstanding the undertaking given by the Attorney-General of Australia. The Court had no reason to doubt that the undertakings would be honoured; once a State had made such a commitment concerning its conduct, its good faith in complying with that commitment was to be presumed. The undertaking, however, envisaged that use might be made of the material seized for national security purposes and there remained a risk of disclosure of this potentially highly prejudicial information. While the undertaking thus made a significant contribution towards mitigating the risk, it was not in itself sufficient (paras. 31-48).

(6) The provisional measures ordered by the Court did not have to be identical to those requested. In the present case, it was essential to ensure that the content of the seized material was not in any way divulged to anyone who could use it to the detriment of Timor-Leste in its relations with Australia over the Timor Sea. It was therefore necessary that the material be kept under seal until further decision of the Court. It was also appropriate to order Australia not to interfere in any way with communications between Timor-Leste and its legal advisers regarding the arbitration proceedings, any future negotiations concerning maritime delimitation or any related procedure, including the proceedings before the Court (paras. 49-52).

Dissenting Opinion of Judge Keith: The record showed that, whatever the limitations of the original undertaking by the Attorney-General of Australia, by the close of the hearings, Australia had given a clear undertaking, binding as a matter of international law, which afforded sufficient protection to the rights which Timor-Leste sought to protect and thus removed any risk of irreparable harm being done to those rights before the Court could rule on the merits of the case (pp. 22-6).

Separate Opinion of Judge Cançado Trindade: The Court had not gone far enough in its Order. There was an autonomous regime of provisional measures which entitled the Court to protect rights which were not necessarily those with which the proceedings on the merits were concerned. The test of “plausibility” of rights was without proper legal foundation and misconceived. The risk of irreparable harm to the fundamental rights of Timor-Leste as a litigating party were such that the Court should have acceded to the request to order that the material seized by Australia be sealed and delivered into the custody of the Court so as to ensure that there could be no improper use thereof (pp. 26-52).

Dissenting Opinion of Judge Greenwood: Since an Order for provisional measures imposed upon a State legal obligations before it had been established that that State had given the consent necessary to found the jurisdiction of the Court, a degree of caution was necessary, which manifested itself in the criteria laid down in the Court’s jurisprudence. The requirement that measures should not be imposed unless they were necessary to protect plausible rights from a risk of irreparable harm also meant that any measures which were imposed should not go beyond what was necessary for the protection of those rights. In view of the undertakings given by the Attorney-General, the measures ordered went beyond what was needed (pp. 52-66).

Separate Opinion of Judge Donoghue: It was necessary to ask not only whether there was a risk of irreparable harm, but also what was the degree of probability that such risk would materialize. In the present case, the undertakings given by the Attorney-General meant that the first and second measures ordered were unnecessary. The undertakings did not address the third measure which the Court had been right to order (pp. 66-72).

Dissenting Opinion of Judge ad hoc Callinan: It was not necessary for the Court to order any provisional measures in view of the undertakings given by the Attorney-General of Australia. The Court could indicate provisional measures only if the criteria laid down in its jurisprudence were satisfied. If those criteria were met, the Court still had a discretion whether or not to order measures. In the present case, the national security of Australia and the enforcement within its territory or its criminal law were relevant considerations in the exercise of that discretion (pp. 72-82).

Order of 22 April 2015

The Court having fixed dates in September 2014 for the hearings in the case, those hearings were adjourned at the joint request of the Parties pending talks about settlement. On 25 March 2015, Australia informed the Court that it wished to return the material seized in December 2013 to the Australian lawyer advising Timor-Leste and to that end requested a modification of the Order of 3 March 2014. Timor-Leste informed the Court that it had no objection to the modification of the Order sought.

Held (unanimously):—The Order was modified to permit the return of the material. Article 76 of the Rules of Court gave power to order modification if that was necessary in light of changed circumstances. Since the original Order had been required because Australia had at that time refused to return the documents and data seized, Australia's current willingness to return them constituted a changed circumstance. The modification requested was appropriate and would be ordered (pp. 82-7).

Separate Opinion of Judge Cançado Trindade: The Court was master of its own procedure and should have acted *proprio motu* under Article 75(1) of the Rules, not simply acceded to the request of one Party even if that request was not opposed by the other Party. The Court was a court of law, not an *amiable compositeur* (pp. 87-91).

Declaration of Judge ad hoc Callinan: While the modification ordered was appropriate, it was too early to say whether the entire case could be disposed of (p. 91).

Order of 11 June 2015

Following the return of the documents and data to its legal adviser, Timor-Leste informed the Court that it wished to discontinue the proceedings. Australia informed the Court that it did not object and the President accordingly ordered the removal of the case from the Court's List.

The Orders of the Court and the opinions and declarations are set out as follows:

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The following is the text of the Order of 3 March 2014:

[147] ORDER ON THE REQUEST FOR PROVISIONAL MEASURES

1. By an Application filed with the Registry of the Court on 17 December 2013, the Democratic Republic of Timor-Leste (hereinafter “Timor-Leste”) [148] instituted proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013, and subsequent detention, by “agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law”. In particular, Timor-Leste claims that these items were taken from the business premises of a legal adviser to Timor-Leste in Narrabundah, in the Australian Capital Territory, allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. The seized material, according to Timor-Leste, includes, *inter alia*, documents, data and correspondence between Timor-Leste and its legal advisers relating to a pending *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia (hereinafter the “Timor Sea Treaty Arbitration”).

2. At the end of its Application, Timor-Leste requests the Court to adjudge and declare:

First: [t]hat the seizure by Australia of the documents and data violated (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

Second: [t]hat continuing detention by Australia of the documents and data violates (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

Third: [t]hat Australia must immediately return to the nominated representative of Timor-Leste any and all of the aforesaid documents and data, and destroy beyond recovery every copy of such documents and data that is in Australia’s possession or control, and ensure the destruction of every such copy that Australia has directly or indirectly passed to a third person or third State;

Fourth: [t]hat Australia should afford satisfaction to Timor-Leste in respect of the above-mentioned violations of its rights under international law

and any relevant domestic law, in the form of a formal apology as well as the costs incurred by Timor-Leste in preparing and presenting the present Application.

3. In its aforementioned Application, Timor-Leste bases the jurisdiction of the Court on the declaration it made on 21 September 2012 under Article 36, paragraph 2, of the Statute, and on the declaration Australia made on 22 March 2002 under the same provision.

4. On 17 December 2013, Timor-Leste also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court.

[149] 5. At the end of its request, Timor-Leste asks the Court to indicate the following provisional measures:

- (a) [t]hat all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice;
- (b) [t]hat Australia immediately deliver to Timor-Leste and to the International Court of Justice (i) a list of any and all documents and data that it has disclosed or transmitted, or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (ii) a list of the identities or descriptions of and current positions held by such persons;
- (c) [t]hat Australia deliver within five days to Timor-Leste and to the International Court of Justice a list of any and all copies that it has made of any of the seized documents and data;
- (d) [t]hat Australia (i) destroy beyond recovery any and all copies of the documents and data seized by Australia on 3 December 2013, and use every effort to secure the destruction beyond recovery of all copies that it has transmitted to any third party, and (ii) inform Timor-Leste and the International Court of Justice of all steps taken in pursuance of that order for destruction, whether or not successful;
- (e) [t]hat Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste.

6. Timor-Leste further requested that, pending the hearing and decision of the Court on the request for the indication of provisional measures, the President of the Court exercise his power under Article 74, paragraph 4, of the Rules of Court, to call upon Australia:

- (i) immediately to deliver to Timor-Leste and to the International Court of Justice a list of each and every document and file containing electronic

- data that it seized from 5 Brockman Street, Narrabundah, in the Australian Capital Territory, on 3 December 2013;
- (ii) immediately to seal the documents and data (and any and all copies thereof);
 - (iii) immediately to deliver the sealed documents and data (and any and all copies thereof) either to the Court or to 5 Brockman Street, Narrabundah, in the Australian Capital Territory; and
 - (iv) not to intercept or cause or request the interception of communications between Timor-Leste (including its Agent HE Joaquim [150] da Fonseca) and its legal advisers in relation to this action (DLA Piper, Sir E. Lauterpacht QC and Vaughan Lowe QC).

7. The Registrar communicated forthwith an original copy of the Application and of the request to the Government of Australia. The Registrar also notified the Secretary-General of the United Nations of the filing of these documents by Timor-Leste.

8. Pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmission of the printed bilingual text of the Application to the Members of the United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the request for the indication of provisional measures.

9. By a letter dated 18 December 2013, the President of the Court, acting under Article 74, paragraph 4, of the Rules of Court, called upon Australia

to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings.

10. A copy of the above-mentioned letter was also transmitted, for information, to the Government of Timor-Leste.

11. By a letter dated 18 December 2013, the Registrar informed the Parties that, in accordance with Article 74, paragraph 3, of the Rules of Court, 20, 21 and 22 January 2014 had been fixed as the dates of the oral proceedings on the request for the indication of provisional measures.

12. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; Timor-Leste chose Mr Jean-Pierre Cot and Australia chose Mr Ian Callinan.

13. At the public hearings held on 20, 21 and 22 January 2014, oral observations on the request for the indication of provisional measures were presented by;

On behalf of Timor-Leste:

HE Mr Joaquim A. M. L. da Fonseca,
Sir Elihu Lauterpacht,
Sir Michael Wood.

On behalf of Australia:

Mr John Reid,
Mr Justin Gleeson,
Mr Bill Campbell,
Mr Henry Burmester,
Mr James Crawford.

[151] 14. During the hearings, questions were put by some Members of the Court to the Parties, to which replies were given orally. Timor-Leste availed itself of the possibility given by the Court to comment in writing on Australia's reply to one of these questions.

15. At the end of its second round of oral observations, Timor-Leste asked the Court to indicate provisional measures in the same terms as included in its request (see paragraph 5 above).

16. At the end of its second round of oral observations, Australia stated the following:

1. Australia requests the Court to refuse the request for the indication of provisional measures submitted by the Democratic Republic of Timor-Leste.
2. Australia further requests the Court stay the proceedings until the Arbitral Tribunal has rendered its judgment in the *Arbitration under the Timor Sea Treaty*.

17. By an Order dated 28 January 2014, the Court decided not to accede to Australia's request for a stay of the proceedings, considering, *inter alia*, that the dispute before it between Timor-Leste and Australia is sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal in the Timor Sea Treaty Arbitration. The Court therefore, after having taken into account the views of the Parties, proceeded to fix time-limits for the filing of the written pleadings.

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