



INTERNATIONAL COURT OF JUSTICE

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Press Release

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Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)

The Court finds that Australia shall ensure that the content of the seized material is not used to the disadvantage of Timor-Leste

THE HAGUE, 3 March 2014. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today issued its Order on the Request for the indication of provisional measures submitted by Timor-Leste on 17 December 2013 in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia). That Request followed 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”. According to Timor-Leste, the material seized includes 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.

In its Order the Court indicates the following provisional measures:

- it decides, by twelve votes to four, that Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded;
- it also decides, by twelve votes to four, that Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;
- it further directs, by fifteen votes to one, that Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.

Reasoning of the Court

1. Prima facie jurisdiction (paras. 18-21)

The Court notes that Timor-Leste seeks to base the jurisdiction of the Court in the case on the declaration made by it on 21 September 2012 under Article 36, paragraph 2, of the Statute and on the declaration made by Australia on 22 March 2002 under the same provision. Considering that these declarations appear, prima facie, to afford a basis on which it might have jurisdiction to rule on the merits of the case, the Court finds that it may entertain the Request for the indication of provisional measures submitted to it by Timor-Leste.

2. The rights whose protection is sought and the measures requested (paras. 22-30)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court begins by observing that the principal claim of Timor-Leste is that a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and possible future negotiations on maritime delimitation between Timor-Leste and Australia. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means. The Court accordingly considers that at least some of the rights for which Timor-Leste seeks protection — namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality and of non-interference in its communications with its legal advisers — are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. It concludes that a link exists between Timor-Leste's claimed rights and the provisional measures sought, since these, by their very nature, are intended to protect Timor-Leste's claimed rights to conduct, without interference by Australia, arbitral proceedings and future negotiations, and to communicate freely with its legal advisers, counsel and lawyers to that end.

3. Risk of irreparable prejudice and urgency (paras. 31-48)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings before it. That power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

The Court is of the view that the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its Agents on 3 December 2013. In particular, the Court considers that there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration, and in future maritime negotiations

with Australia, should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia.

The Court notes, however, that the Attorney-General of Australia gave an undertaking on 21 January 2014 which included commitments to the effect that the seized material will not be made available to any part of the Australian Government for any purpose in connection with the exploitation of resources in the Timor Sea or related negotiations, or in connection with the conduct of the current case before the Court, or of the proceedings of the Timor Sea Treaty Tribunal. The Court further notes that the Agent of Australia stated that “the Attorney-General of the Commonwealth of Australia [had] the actual and ostensible authority to bind Australia as a matter of both Australian law and international law”. The Court considers that, once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed. The Court therefore has no reason to believe that the written undertaking of 21 January 2014 will not be implemented by Australia.

The Court nevertheless notes that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material. The Court further observes that the commitment of Australia to keep the seized material sealed has only been given until the Court’s decision on the Request for the indication of provisional measures. The Court accordingly concludes that, while the written undertaking of the Attorney-General of 21 January 2014 makes a significant contribution towards mitigating the imminent risk of irreparable prejudice created by the seizure of the above-mentioned material to Timor-Leste’s rights — particularly its right to the confidentiality of that material being duly safeguarded — it does not remove that risk entirely.

The Court concludes from the foregoing that the conditions required by its Statute for it to indicate provisional measures have been met.

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Composition of the Court

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; Judges ad hoc Callinan, Cot; Registrar Couvreur.

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Judge Keith appends a dissenting opinion to the Order of the Court; Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judge Greenwood appends a dissenting opinion to the Order of the Court; Judge Donoghue appends a separate opinion to the Order of the Court; Judge ad hoc Callinan appends a dissenting opinion to the Order of the Court.

A summary of the Order appears in the document “Summary No. 2014/2”, to which summaries of the dissenting and separate opinion are annexed. In addition, this press release, the summary of the Order and the full text of the Order can be found on the Court’s website (www.icj-cij.org) under “Cases”.

Note: The Court’s press releases do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the “World Court”, it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the International Criminal Tribunal for the former Yugoslavia (ICTY, an ad hoc court created by the Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an independent judicial body composed of Lebanese and international judges, which is not a United Nations tribunal and does not form part of the Lebanese judicial system), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

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