

INTERNATIONAL COURT OF JUSTICE

YEAR 2014

**2014
3 March
General List
No. 156**

3 March 2014

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

(TIMOR-LESTE *v.* AUSTRALIA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *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.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed with the Registry of the Court on 17 December 2013, the Democratic Republic of Timor-Leste (hereinafter “Timor-Leste”) 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.

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 H.E. Joaquim 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: H.E. 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.

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.

*

* *

I. Prima facie jurisdiction

18. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, pp. 17-18, para. 49).

19. Timor-Leste seeks to found the jurisdiction of the Court in this case 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 (see paragraph 3 above).

20. In the course of the oral pleadings, Australia stated that, while reserving its “right to raise questions of jurisdiction and admissibility at the merits stage”, it would not be “raising those matters in relation to Timor-Leste’s Request for provisional measures”.

21. The Court considers that the declarations made by both Parties under Article 36, paragraph 2, of the Statute appear, prima facie, to afford a basis on which it might have jurisdiction to rule on the merits of the case. The Court thus finds that it may entertain the Request for the indication of provisional measures submitted to it by Timor-Leste.

II. The rights whose protection is sought and the measures requested

22. The power of the Court 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. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53).

23. 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 (*ibid.*, para. 54).

* * *

24. Timor-Leste states that the rights which it seeks to protect are the ownership and property rights which it holds over the seized material, entailing the rights to inviolability and immunity of this property (in particular, documents and data), to which it is entitled as a sovereign State, and its right to the confidentiality of communications with its legal advisers. Timor-Leste moreover holds that confidentiality of communications between legal counsel and client is covered by legal professional privilege, which it states is a general principle of law.

25. Australia, for its part, contends that, “[e]ven assuming that the material removed from 5 Brockman Street, Narrabundah does belong to Timor-Leste — a matter which is yet to be established”, there is no general principle of immunity or inviolability of State papers and property, and therefore the rights asserted by Timor-Leste are not plausible. It also contends that, if there is a principle in international law whereby any State is entitled to the confidentiality of all

communications with its legal advisers, that principle (akin to legal professional privilege) is not absolute and does not apply when the communication in question concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interests of a State, or undermines the proper administration of justice.

26. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which Timor-Leste wishes to see protected exist; it need only decide whether the rights claimed by Timor-Leste on the merits, and for which it is seeking protection, are plausible.

27. The Court begins by observing that it is not disputed between the Parties that at least part of the documents and data seized by Australia relate to the Timor Sea Treaty Arbitration or to possible future negotiations on maritime delimitation between the Parties, and that they concern communications of Timor-Leste with its legal advisers. 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 future negotiations between the Parties. 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 legal 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. If a State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case. It would follow that in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context.

28. Accordingly, the Court 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 of and non-interference in its communications with its legal advisers — are plausible.

*

29. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

30. The provisional measures requested by Timor-Leste are aimed at preventing further access by Australia to this seized material, at providing the former with information as to the scope of access of Australia to the documents and data seized, and at ensuring the non-interference of Australia in future communications between Timor-Leste and its legal advisers (see paragraph 5 above). The Court considers that these measures by their 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. The Court thus concludes that a link exists between Timor-Leste's claimed rights and the provisional measures sought.

III. Risk of irreparable prejudice and urgency

31. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings before it (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 21, para. 63).

32. The power of the Court to indicate provisional measures 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 (*ibid.*, para. 64). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

* *

33. Timor-Leste claims that Australia's actions in seizing confidential and sensitive material from its legal adviser's office create a real risk of irreparable prejudice to its rights. Timor-Leste asserts that it is highly probable that most of the documents and data in question relate to its legal strategy, both in the context of the Timor Sea Treaty Arbitration and in the context of future maritime negotiations with Australia. According to Timor-Leste, these "matters are crucial to the future of Timor-Leste as a State and to the well-being of its people". It states that the confidential material includes advice of counsel, legal assessments of Timor-Leste's position and instructions given to counsel and to geological and maritime experts. Timor-Leste adds that it may already have been seriously harmed given that Australia has admitted that some of the hard-copy materials were briefly inspected during the search. In view of the sensitive nature of the seized material, Timor-Leste contends that, by its conduct, "Australia has placed itself in a position of considerable advantage, both in the pending Arbitration and in a whole range of matters involved in relations between Timor-Leste and Australia".

34. Timor-Leste affirms that the risk of irreparable prejudice is imminent because it is currently considering which strategic and legal position to adopt in order to best defend its national interests vis-à-vis Australia in relation to the 2002 Timor Sea Treaty and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea. Given that the preparations for the Timor Sea Treaty Arbitration are well underway, with oral proceedings due to begin at the end of September 2014, Timor-Leste states that time is of the essence if irreparable damage is to be avoided. Timor-Leste contends that, if the protection of its rights is deferred until the close of the proceedings on the merits in the current case, the prejudice it would suffer would be increased.

*

35. According to Australia, there is no risk of irreparable prejudice to Timor-Leste's rights. It states that the comprehensive undertakings provided by the Attorney-General of Australia demonstrate that any rights which Timor-Leste may be found to possess are sufficiently protected pending final judgment in the current case. In this regard, Australia refers to various instructions and undertakings given by its Attorney-General on 4, 19 and 23 December 2013 and, in particular, to a further written undertaking of the Attorney-General given on 21 January 2014.

36. Australia explains that on 4 December 2013 the Attorney-General of Australia made a Ministerial Statement to Parliament on the execution by Australia's security intelligence agency ("ASIO") of the search warrants on the business premises of a legal adviser to Timor-Leste in Canberra. In his Statement, the Attorney-General indicated that the search warrants had been issued by him "at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to national security matters". He emphasized "that the material taken into possession in execution of the warrants [was] not under any circumstances to be communicated to those conducting the [arbitration] proceedings on behalf of Australia". Australia further notes that, following the first procedural meeting of the Timor Sea Treaty Arbitral Tribunal convened on 5 December 2013, the Attorney-General of Australia provided a written undertaking to the Tribunal, dated 19 December 2013. In that undertaking, the Attorney-General recalled the instructions given to ASIO, and declared that the material seized would not be used by any part of the Australian Government for any purpose related to the Timor Sea Treaty Arbitration. Further, the Attorney-General undertook that he would not make himself aware or otherwise seek to inform himself of the content of the material or any information derived from the material and that, should he become aware of any circumstance in which he would need to inform himself, he would first bring that fact to the attention of the Tribunal and offer further undertakings.

37. Australia informed the Court that, following the letter of the President under Article 74, paragraph 4, of the Rules of the Court (see paragraph 9 above), the Attorney-General of Australia wrote a letter dated 23 December 2013 to the Director-General of Security of ASIO, directing that

the measures set out in the undertaking to the Arbitral Tribunal on 19 December 2013 be implemented equally in relation to the proceedings instituted before the Court. In his letter, the Attorney-General stated, in particular, that

“it would be desirable and appropriate for Australia to satisfy the President’s request by ensuring that, from now until the conclusion of the hearing on 20-22 January, the material is sealed, that it is not accessed by any other officer of ASIO, and that ASIO ensure that it is not accessed by any other person”.

38. At the start of Australia’s first round of oral argument on the Request for the indication of provisional measures, the Attorney-General provided the Court with a written undertaking dated 21 January 2014. Australia points out that this written undertaking contains comprehensive assurances that the confidentiality of the seized documents will be safeguarded. It points, in particular, to the following declarations made by the Attorney-General in his written undertaking:

“that until final judgment in this proceeding or until further or earlier order of the Court:

1. I will not make myself aware or otherwise seek to inform myself of the content of the Material or any information derived from the Material; and
2. Should I become aware of any circumstance which would make it necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Court, at which time further undertakings will be offered; and
3. The Material will not be used by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions); and
4. Without limiting the above, the Material, or any information derived from the material, will not be made available to any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or relating to the conduct of:
 - (a) these proceedings; and
 - (b) the proceedings in the Arbitral Tribunal [constituted under the 2002 Timor Sea Treaty].”

In its oral pleadings, Australia affirmed that the Attorney-General’s written undertaking, dated 21 January 2014, would protect Timor-Leste’s rights “pending final judgment in these proceedings”.

39. Moreover, during the oral proceedings, with reference to the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of Security of ASIO (see paragraph 37 above), the Solicitor-General of Australia stated that “ASIO to date has not inspected any of the documents”. He noted that ASIO “[had] not commenced its task because the documents [were] being kept under seal for all purposes until [Australia had] this Court’s decision on provisional measures”, adding that, “to date, no information [had] been obtained from the documents.”

*

40. With respect to the undertakings given by the Attorney-General of Australia on 4, 19 and 23 December 2013, Timor-Leste argues that they are “far from adequate” to protect Timor-Leste’s rights and interests in the present case. According to Timor-Leste, in the first place, they lack binding force, at least at the international level; secondly, they are in serious respects more limited than the provisional measures requested by Timor-Leste, as they do not address the wider issues going beyond the Timor Sea Treaty Arbitration; and thirdly, the instructions set out in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO are given only until the conclusion of the hearings in the present phase of the case.

41. With reference to the written undertaking dated 21 January 2014, Timor-Leste asserts that it does not suffice to prevent the risk of irreparable harm, nor does it remove the urgency of Timor-Leste’s Request for the indication of provisional measures. While Timor-Leste acknowledges that this written undertaking goes further than the previous assurances in that it extends “to maritime delimitation matters”, it contends that the written undertaking “should be backed up by an order of the Court that deals with the treatment of the materials”.

* *

42. 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 from the office of a legal adviser to the Government of Timor-Leste. 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. Any breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.

43. The Court notes that the written undertaking given by the Attorney-General of Australia on 21 January 2014 includes 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 observes that the Solicitor-General of Australia moreover clarified during the hearings, in answer to a question from a Member of the Court, that no person involved in the arbitration or negotiation has been informed of the content of the documents and data seized.

44. 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 has no reason to believe that the written undertaking dated 21 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.

45. The Court, however, takes cognizance of the fact that, in paragraph 3 of his written undertaking dated 21 January 2014, the Attorney-General states that the seized material will not be used “by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions)”. The Attorney-General underlined in paragraph 2, that “[s]hould [he] become aware of any circumstance which would make it necessary for [him] to inform [himself] of the Material, [he] would first bring that fact to the attention of the Court, at which time further undertakings will be offered”.

46. Given that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material, the Court finds that there remains a risk of disclosure of this potentially highly prejudicial information. The Court notes that the Attorney-General of Australia has given an undertaking that any access to the material, for considerations of national security, would be highly restricted and that the contents of the material would not be divulged to any persons involved in the conduct of the Timor Sea Treaty Arbitration, in the conduct of any future bilateral negotiations on maritime delimitation, or in the conduct of the proceedings before this Court. However, once disclosed to any designated officials in the circumstances provided for in the written undertaking dated 21 January 2014, the information contained in the seized material could reach third parties, and the confidentiality of the materials could be breached. Moreover, the Court 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 (see paragraph 39 above).

47. In light of the above, the Court considers that the written undertaking dated 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, but does not remove this risk entirely.

48. The Court concludes from the foregoing that, in view of the circumstances, the conditions required by its Statute for it to indicate provisional measures have been met in so far as, in spite of the written undertaking dated 21 January 2014, there is still an imminent risk of irreparable prejudice as demonstrated in paragraphs 46 and 47 above. It is therefore appropriate for the Court to indicate certain measures in order to protect Timor-Leste's rights pending the Court's decision on the merits of the case.

IV. Measures to be adopted

49. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 551, para. 58). In the present case, having considered the terms of the provisional measures requested by Timor-Leste, the Court finds that the measures to be indicated need not be identical to those requested.

50. The Court notes that the Solicitor-General of Australia clarified during the oral proceedings that the written undertaking of the Attorney-General of 21 January 2014 "will not expire" without prior consultation with the Court. Thus, this undertaking will not expire once the Court has ruled on Timor-Leste's Request for the indication of provisional measures. As the written undertaking of 21 January 2014 does not contain any specific reference to the seized documents being sealed, the Court must also take into account the duration of Australia's commitment to keep the said material under seal contained in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO. The Court takes note of the fact that under the terms of that letter, the commitment was given until the close of the oral proceedings on the Request for the indication of provisional measures. The Court further observes that, during the oral proceedings, Australia gave assurances that the seized material would remain sealed and kept inaccessible until the Court had rendered its decision on that Request.

51. Given the likelihood that much of the seized material contains sensitive and confidential information relevant to the pending arbitration and that it may also include elements that are pertinent to any future maritime negotiations which may take place between the Parties, the Court finds that it is essential to ensure that the content of the seized material is not in any way or at any time divulged to any person or persons who could use it, or cause it to be used, to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. It is therefore necessary to keep the seized documents and electronic data and any copies thereof under seal until further decision of the Court.

52. Timor-Leste has expressed concerns over the confidentiality of its ongoing communications with its legal advisers concerning, in particular, the conduct of the Timor Sea Treaty Arbitration, as well as the conduct of any future negotiations over the Timor Sea and its resources, a matter which is not covered by the written undertaking of the Attorney-General of 21 January 2014. The Court further finds it appropriate to require Australia not to interfere in any

way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court.

*

* *

53. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

*

* *

54. The decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves. It leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

*

* *

55. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) By twelve votes to four,

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;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Xue, Gaja, Bhandari; *Judge ad hoc* Cot;

AGAINST: *Judges* Keith, Greenwood, Donoghue; *Judge ad hoc* Callinan;

(2) By twelve votes to four,

Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Xue, Gaja, Bhandari; *Judge ad hoc* Cot;

AGAINST: *Judges* Keith, Greenwood, Donoghue; *Judge ad hoc* Callinan;

(3) By fifteen votes to one,

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* between Timor-Leste and Australia, 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.

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Caçado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; *Judge ad hoc* Cot;

AGAINST: *Judge ad hoc* Callinan.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, two thousand and fourteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of Timor-Leste and the Government of Australia, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialed) P. T.

(Initialed) Ph. C.
