

DISSENTING OPINION OF JUDGE KEITH

1. I regret that I cannot agree with two of the measures the Court has adopted. My regret is the greater for I do have some understanding of the “deep offence and shock” felt in Timor-Leste about the actions of ASIO to which the Agent of Timor-Leste referred at the outset of this proceeding. I do not however consider that grounds for adopting the measures have been established.

2. In its Application, Timor-Leste listed as its main legal grounds its property and other rights in the documents and data sent to, held by, received from or prepared by its legal representatives and legal advisers, (a) generally, (b) in the course of the provision of legal advice to it, and (c) in the course of preparation for litigation in which it is engaged as a party. “These rights exist under customary international law and any relevant domestic law, and as a consequence of the sovereignty of Timor-Leste under international law.” The Request for provisional measures adopts a broader position, going beyond the arbitration, by including among the consequences it seeks to avoid Australia being able to inform itself of (1) privileged advice given to Timor-Leste by its advisers relating to the Timor Sea and its resources, (2) Timor-Leste’s position in relation to those matters, and (3) other matters, confidential to Timor-Leste, treated in the documents and data.

3. The undertaking of non-communication of the material seized, given by the Australian Attorney-General on 4 December 2013, related only to those individuals involved in the arbitration, as did that of 19 December to the Arbitral Tribunal; on 23 December that undertaking was extended to these proceedings (paragraph 37 of the Order). However, at this point, the undertakings did not extend to the other matters included by Timor-Leste in its Request and listed at the end of the last paragraph.

4. While it is not surprising that the broader claims made by Timor-Leste in its Request filed on 17 December were not addressed in the undertakings given by Australia just two and six days later on 19 and 23 December, it is not the case, as Australia claimed in the hearings, that those matters were raised “for the first time” at the beginning of the hearings. Australia was equally in error when it stated that it would much have preferred that Timor-Leste had taken up the Court’s invitation to file written observations so that the charges it made the previous day could have been made with precision. The Court issued no such invitation.

5. Timor-Leste, in the first round of the hearings on 20 January 2014, emphasized the additional matters listed in its Request and, as well, what it saw as the lack of binding force, at least at the international level, of the undertakings given by the Attorney-General. That led to the filing the next day by Australia of a further undertaking, dated 21 January 2014, by the Attorney-General (quoted in part in paragraph 10 below). The undertaking of non-communication now (1) applies until final Judgment or until further or earlier Order of the Court and (2) extends to “any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations”.

6. In the second round of the oral hearings, the Agent of Timor-Leste and both of its counsel addressed the new undertaking. One counsel said that “only now does it extend to maritime delimitation matters”. He asked that it be backed by an Order of the Court that deals with the treatment of the materials. He made no comment about any specific gap in the coverage of the undertaking. The second counsel stated that they would look at the new undertaking with interest in the light of Australia’s responses to the questions put to it by Members of the Court. He made

no reference to the widened scope of the new undertaking. It would be good, he said, to hear the Agent of Australia say unambiguously that Australia accepts that the undertaking given on 21 January is binding on Australia, vis-à-vis Timor-Leste, under international law. The Agent of Timor-Leste repeated that they awaited with interest Australia's answers to the questions.

7. In the second round Australia answered the questions put to it by Members of the Court. Further, its Agent repeated that the Attorney-General has the actual and ostensible authority to bind Australia as a matter of national law and international law. He continued: "Australia has made the undertakings, Australia will honour them". The last relevant step in this process is that Timor-Leste, in exercise of its opportunity to comment in writing on the answers given by Australia, said, in its letter of 27 January 2014, that, except in one respect, it did not find it necessary to comment on the answers at the provisional measures stage. The exception was to state its understanding of the scope of one particular undertaking given in those answers. Australia has not questioned that understanding.

8. The important points for me arising from those events are that Timor-Leste sought and received a broader undertaking, both temporally and substantively, and a clear acknowledgment, as I read Australia's statements, that the undertakings are binding on Australia as a matter of international law. I consider the two matters in turn.

9. In respect of the first, so far as the temporal scope of the undertaking is concerned, the undertakings have two different elements, the second of which runs into the latest undertaking's substantive scope. The first is that the undertaking of 21 January 2014 now applies "until final Judgment or until final Order or earlier Order of the Court". That extent exactly meets the incidental, interim and conservatory function of provisional measures of protection in relation to the principal proceeding. To turn to the second element, the principal relevant undertaking is one of non-communication whereas on 23 December 2013 the Attorney-General had instructed that the material would be sealed, but only until 22 January 2014. That difference between non-communication to certain persons for certain purposes and sealing for all purposes leads into the substantive scope of the undertaking.

10. Like the Court, I proceed on the basis that the plausible right in issue in this case is the right of a State to enjoy a confidential relationship with its legal advisers, in particular, in respect of disputes with another State which are or may be the subject of litigation or negotiation or other form of peaceful settlement. The State should not in principle be at risk of that relationship being interfered with by the other Party to the dispute (see Order, paragraph 27). In this case, to return to the elaboration which Timor-Leste provided in the course of the proceedings and to repeat it, the confidential relationship relates to (1) privileged advice given to Timor-Leste by its advisers relating to the Timor Sea and its resources, (2) Timor-Leste's position in relation to those matters, and (3) other matters, confidential to Timor-Leste, treated in the documents and data. The most relevant part of the undertaking given by the Attorney-General in his letter of 21 January reads as follows:

"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 [seized from the law firm] 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].”

Paragraph 4 is the critical part of the undertaking. In so far as its introductory phrase may be seen as referring to national security purposes (subparagraph 3), the Solicitor-General provided the clarification that the matters included in subparagraph 4 “fall outside the ‘national security’ purpose referred to in subparagraph 3” (CR 2014/4, p. 20, see also p. 21 in respect of any criminal proceeding). When subparagraph 4 is read in accordance with that clarification, it seems to me to match in full the scope of the particular interests which Timor-Leste considers to be at risk of irreparable prejudice. Accordingly, I am not surprised that Timor-Leste in its letter of 27 January did not identify any gaps in the coverage of the new undertaking. It did not point to any remaining element of risk of irreparable prejudice to its rights and interests.

11. There remains the question whether the undertaking binds Australia as a matter of international law. I have no doubt that it does. As the Court says, Australia’s good faith in complying with that commitment is to be presumed (Order, paragraph 44).

12. Given both the scope of the undertaking and its binding character, for me the matter of weighing Australia’s concerns and its rights and interests relating to the disclosure of its agents’ identities and intelligence methods does not arise. Any imminent risk of irreparable prejudice to Timor-Leste is removed by the most recent undertaking given by the Attorney-General on behalf of Australia, read with the clarifications provided by its Solicitor-General.

13. My votes on this Order in no way prejudice the positions I may take on questions concerning the jurisdiction of the Court, the admissibility of the Application or the merits as they arise later in these proceedings. As the Court says, the Order does not affect the rights of the Parties to submit arguments on those matters.

(Signed) Kenneth KEITH.
