


Report of the International Court of Justice

1 August 2013-31 July 2014

Excerpt discussing case of Timor-Leste v. Australia



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

184. On 17 December 2013, Timor-Leste filed an application instituting proceedings against Australia concerning the seizure 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”.

185. In particular, Timor-Leste contends that, on 3 December 2013, officers of the Australian Security Intelligence Organization, allegedly acting under a warrant issued by the Attorney-General of Australia, attended the business premises of a legal adviser to Timor-Leste in Canberra and seized, inter alia, documents and data containing correspondence between the Government of Timor-Leste and its legal advisers, notably documents relating to a pending arbitration under the 2002 Timor Sea Treaty between Timor-Leste and Australia.

186. Timor-Leste accordingly requested 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 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.”

187. As basis for the jurisdiction of the Court, the applicant invokes the declarations made by Timor-Leste and Australia pursuant to Article 36, paragraph 2, of the Statute of the Court.

188. On 17 December 2013, Timor-Leste also filed a request for the indication of provisional measures. It stated that the purpose of the request was to protect its rights and to prevent the use of seized documents and data by Australia against the interests and rights of Timor-Leste in the pending arbitration and with regard to other matters relating to the Timor Sea and its resources.

189. Timor-Leste accordingly requested that the Court 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.”

190. Timor-Leste further requested that, pending the decision of the Court on its 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 to act in such a way as will enable any order the Court may make on the said request to have its appropriate effects.

191. On 18 December 2013, acting in accordance with the above-mentioned provision, the President of the Court addressed the following communication to the Prime Minister of Australia:

“I have the honour to refer to the Application filed on 17 December 2013 by the Democratic Republic of Timor-Leste instituting proceedings against the Commonwealth of Australia and to the Request for the indication of provisional measures filed by the Applicant on the same date.

The convening of the Court for purposes of proceeding to a decision on a Request for the indication of provisional measures should be dealt with as a matter of urgency (Article 74, paragraph 2, of the Rules of Court). At the same

time, the date[s] for the hearings should be fixed so as to afford Parties an opportunity of being represented at [them] (Article 74, paragraph 3, of the Rules of Court).

In the light of these considerations the hearings on the Request made by the Democratic Republic of Timor-Leste for the indication of provisional measures have now been fixed for 20-22 January 2014.

The Court will at this juncture have to decide whether the conditions for the indication of provisional measures are met.

As President of the International Court of Justice, acting in conformity with Article 74, paragraph 4, of the Rules of Court, I hereby draw the attention of Your Government to the need 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.”

192. Public hearings on Timor-Leste’s request for the indication of provisional measures were held from 20 to 22 January 2014.

193. At the end of the second round of oral observations, Timor-Leste confirmed the provisional measures it had requested the Court to indicate; the agent of Australia, for his part, presented the following submissions on behalf of his Government:

“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*.”

194. On 3 March 2014, the Court made its order on the request for the indication of provisional measures submitted by Timor-Leste, the operative clause of which reads as follows:

“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, Cançado 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, Cançado 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, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; Judge ad hoc Cot;*

AGAINST: *Judge ad hoc Callinan.*”

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

195. By an order of 28 January 2014, the Court fixed 28 April 2014 and 28 July 2014 as the respective time limits for the filing of a memorial by Timor-Leste and a counter-memorial by Australia. Those pleadings were filed within the time limits thus fixed.

196. On 17 June 2014, the Registrar transmitted to the parties the schedule for the public hearings adopted by the Court. These hearings were due to take place from 17 to 24 September 2014. By a joint letter dated 1 September 2014 from the agent of the Democratic Republic of Timor-Leste and the agent of Australia, the parties requested the Court “to adjourn the hearing set to commence on 17 September 2014, in order to enable [them] to seek an amicable settlement”. On 3 September 2014, the Court decided “to grant the parties’ request to postpone the oral proceedings ... to a period to be determined in due course”.