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CR 2014/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Tuesday 21 January 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le mardi 21 janvier 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

***en l'affaire relative à des* Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie)**

COMPTE RENDU

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

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
M. Bhandari, juges
MM. Callinan
Cot, juges *ad hoc*

M. Couvreur, greffier

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as Agent;

H.E. Mr. José Luís Gutteres, Minister for Foreign Affairs and Co-operation;

H.E. Mr. Nelson dos Santos, Ambassador of the Democratic Republic of Timor-Leste to the Kingdom of Belgium and the European Union;

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Sir Michael Wood, K.C.M.G., Member of the International Law Commission, member of the English Bar,

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Mr. Andrew Legg, Ph.D., member of the English Bar,

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Le Gouvernement du Timor-Leste est représenté par :

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comme agent ;

S. Exc. M. José Luís Guterres, ministre des affaires étrangères et de la coopération de la République démocratique du Timor-Leste ;

S. Exc. M. Nelson dos Santos, ambassadeur de la République démocratique du Timor-Leste auprès du Royaume de Belgique et de l'Union européenne ;

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M. Vaughan Lowe, Q.C., professeur émérite de droit international à l'Université d'Oxford, membre du barreau d'Angleterre,

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Ms Esme Shirlow, Acting Senior Legal Officer, Attorney-General's Department,

Ms Vicki McConaghie, Legal Adviser, Attorney-General's Department,

Mr. Todd Quinn, First Secretary, Embassy of Australia in the Kingdom of the Netherlands,

Mr. William Underwood, Third Secretary, Embassy of Australia in the Kingdom of the Netherlands,

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comme conseillers ;

Mme Nathalie Mojsoska, administrateur, services de l'*Attorney-General*,

comme assistante.

The PRESIDENT: Good morning. Please be seated. The sitting is now open. The Court meets today to hear the first round of oral observations of Australia on the Request for the indication of provisional measures submitted by Timor-Leste. I now call on Mr. John Davidson Reid, Agent of Australia. You have the floor, Sir.

Mr. REID:

Introduction

1. Mr. President, Members of the Court, it is a great privilege for me to appear before this Court as Agent for the Government of Australia. In doing so, I wish to place before the Court my Government's high regard and respect for this Court and the system of international justice in which it exercises its functions.

2. But it is with mixed feelings that Australia appears today. On the one hand, we are pleased to be given the opportunity to reaffirm our support for this Court's role in the peaceful settlement of disputes according to the rule of law. On the other hand, we are disappointed by the circumstances by which we find ourselves before the Court and the serious allegations which were made against us yesterday. Australia's actions now in issue before you were lawful. They were justified. And they were respectful of the strong and positive relationship our two nations share.

Outline of Australia's case

3. Australia has, in the past, sought to avail itself of the Court's provisional measures jurisdiction and indeed was the beneficiary of such measures. However, in achieving those measures, we were held to a certain standard, and it is a standard which Timor-Leste simply does not meet here.

4. In considering whether to indicate provisional measures in this case, the Court must balance the "respective rights" of the Parties. On that issue, Australia has already provided ample undertakings to protect any legitimate right said to reside in Timor-Leste in this case. In light of those undertakings, the indication of provisional measures sought in this case can only have the effect of impeding Australia's lawful and legitimate protection of its national security.

Nature and force of undertakings given

5. Mr. President, our friends yesterday made argument from the Bar table concerning the nature, force and relevance of various written undertakings made by the Attorney-General of Australia, Senator the Honourable George Brandis Q.C. Those submissions cannot go unremarked. We were — to say the least — surprised to hear it argued that the material in question may have been under continuous review since 3 December 2013, notwithstanding a clear and unambiguous undertaking from the Attorney-General to the contrary.

6. Mr. President, the Attorney-General of the Commonwealth of Australia has the actual and ostensible authority to bind Australia as a matter of both Australian law and international law.

7. We have included in your folders — you do not need to go to them now — two documents received overnight from the Attorney-General in Canberra. These documents include a new and broader undertaking made by the Attorney overnight in direct response to the matters raised — for the first time — by our friends at the Bar table yesterday. You will be taken to these shortly by the Solicitor-General.

8. To question the veracity of these undertakings, and to suggest from the Bar table that the undertakings have either not been implemented or are somehow without legal force, as our friends did yesterday, is both wrong as matter of law and, frankly, offensive. Australia has made the undertakings. Australia will honour them.

Structure of Respondent's oral pleadings

9. Mr. President, following my short statement, the oral submissions of the Respondent will be presented in the following order:

10. Mr. Justin Gleeson S.C., Solicitor-General for the Commonwealth of Australia, will address the essential factual and legal background to this Request that was simply not properly exposed to you yesterday.

11. Second, Mr. William Campbell Q.C. will deal with the preconditions for provisional measures. He will demonstrate that the absolute international law rights sought to be protected by Timor-Leste — essentially amounting to a new form of extraterritoriality — are implausible and, as such, do not meet the test established by your jurisprudence.

12. Third, Mr. Henry Burmester Q.C. will highlight the Applicant's inability to satisfy the Court as to the link between the alleged "rights" that form the basis for Timor-Leste's principal Application and the provisional measures being sought. He will deal also with questions of requisite urgency and irreparable harm which we would submit are plainly not met in this Request.

13. Finally, Professor James Crawford S.C. will show that Timor-Leste has brought to this Court a matter of which another tribunal is already properly seised, and as to which that tribunal is already the constituted arbiter. In such circumstances, it is simply not appropriate for the Court to exercise its discretion to indicate provisional measures.

Final comments

14. Mr. President, the sum of these Submissions is that this Court plainly should not entertain the Applicant's Request to indicate provisional measures in this matter. The Applicant has not identified plausible rights sought to be protected. There will be no irreparable harm. And there is no urgency.

15. Mr. President, Members of the Court, thank you for your attention. I now ask you to call upon Mr. Gleeson, Solicitor-General for the Commonwealth of Australia, to continue our presentation.

The PRESIDENT: Thank you, Mr. Agent, and I give the floor to the Solicitor-General of Australia. You have the floor, Sir.

Mr. GLEESON:

The true factual and legal background to Timor-Leste's Request

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of Australia, even though it may be one that I did not expect to come so soon.

2. Yesterday you heard an impassioned, and I must say inflammatory, address by Sir Elihu Lauterpacht on behalf of Timor-Leste. He told you that standards had dropped in Australia since 1975 when he was a senior legal adviser in our country. He impugned the integrity and conduct of the Attorney-General of Australia and of unnamed Australian officers acting under

his responsibility. You will recall that he described our conduct as unprecedented, inexplicable, improper and unconscionable.

3. Coming from an authority such as Sir Elihu, those remarks wound. We would much have preferred that Timor-Leste had taken up this Court's invitation to file written observations so that the charges made yesterday could have been made with precision and with the usual reference to supporting fact and law. That did not occur. Had that course been followed, it would have enabled the Attorney-General of Australia — who has been giving this matter his most conscientious attention — to consider in advance of the hearing whether the comprehensive package of measures he has put in place which balance two interests — the national security of Australia and the proper international dealings between Australia and Timor-Leste — needed supplementation.

4. We have, with the Attorney-General overnight, carefully considered what was said yesterday. Australia proposes to respond constructively, to assist this Court in dealing with the Request before you. In summary, in all but one respect, the complaints of Timor-Leste remain unfounded. There was one concern, explained yesterday, for the first time clearly, that should be met by Australia. I will come later in my address to explain how that concern has been met by the undertakings you now have before you this morning. With that supplementation, no provisional measures should be indicated.

5. I propose to structure my address around six points. The subsequent presentations for Australia will build on those six points, within the framework of your jurisprudence on provisional measures. I propose to establish that Australia's conduct in this matter has been and remains of the same high standard that Sir Elihu deposed to yesterday from his time in Australia in 1975.

1. Timor-Leste's assertion of an absolute right of property at international law is unsupported

6. Let me come to my first point. Timor-Leste's assertion of an absolute, unqualified right of property at international law is unsupported. Yesterday most of the case hinged on this proposition. Each State has an absolute right of property in all documents produced by it or its agents in the territory of another State, and such property is inviolable and immune from any judicial or executive action in that other State; in effect a new form of extra-territoriality should be recognized. Mr. President, Members of the Court, that assertion, if accepted at the final hearing, or

even if accepted provisionally today, would amount to a quantum leap in the expansion of public international law. It would render superfluous the range of conventions currently in place — the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, customary international law of sovereign immunity, the United Nations Convention on the Jurisdictional Immunities — all are to be swept aside according to the thesis of Timor-Leste.

7. The thesis would allow a State adventitiously to expand its sovereignty into the territory of other States. Mr Campbell will come back to this first matter, but let me say now the thesis is novel, it is implausible, and a highly dangerous basis upon which to grant the drastic provisional measures as in the present case.

2. Correcting the factual record

8. Many assertions were made yesterday which were wrong or unsupported by evidence. The record must be corrected. Let me take but four matters.

9. Firstly, it was asserted that the CMATS Treaty was "seriously disadvantageous" to Timor-Leste. But what you were not told was that that Treaty provided Timor-Leste with a substantial improvement in its position under the earlier Sunrise Unitisation Agreement (United Nations, *Treaty Series (UNTS)*, 2483 at 317). Under the earlier agreement, revenues were shared in the Sunrise-Troubador field: 18.1 per cent Timor-Leste, 81.9 per cent Australia. Under CMATS, that was altered to fifty-fifty.

10. A second matter. You will recall the bold, unqualified and unsupported by evidentiary foundation statement by Sir Elihu that Australia's Secret Intelligence Service engaged in acts of espionage during the negotiation of the CMATS Treaty. He asserted that this conduct was a breach of the criminal law of Timor-Leste and possibly also of Australia. That matter is not an issue before you, although it is before the Arbitral Tribunal. No evidence was offered for that irrelevant assertion. It should be dismissed by you.

11. Thirdly, Sir Elihu's assertions concerning the manner of execution of the search warrant at 5 Brockman Street, Narrabundah bear little resemblance to the version of events as understood by our Government. No evidence was provided to support those assertions and you should dismiss them.

12. Fourthly, you will recall that he made a number of assertions about the contents of the removed material. He placed no proof before you as to those assertions. We, as the Australian legal team, as you know, are properly precluded from inspecting those documents. We simply do not know whether those unsupported assertions are true.

3. Australia's conduct was in conformity with the law

13. Let me move to my third point: Australia's conduct was in conformity with the law, domestic and international. When Sir Elihu yesterday described our conduct as "inexplicable", "improper", "unprecedented", "unconscionable", he chose to ignore — saying he would await our oral argument — the detailed statutory framework which underpinned the issue of the warrant. We offered you that framework in our Written Observations. Unlike Timor-Leste, we were forthcoming with Written Observations. We do not believe in ambush. Let me highlight some of the key features of that statutory framework we have outlined for you.

14. Firstly, you know that the materials were removed pursuant to the operations of Australia's security intelligence agency, "ASIO". ASIO operates consistently with widespread State practice and under tight domestic legal control. Could I invite you to go to the judges' folder, at tab 6, where you will find a table summarizing the practice of a range of States who maintain such agencies[1].

15. You will also see from that table a range of States have foreign intelligence agencies, some States have agencies which perform both functions on a unified basis.

16. Timor-Leste, for example, on p. 18, has a national intelligence service concerned with domestic and foreign intelligence.

17. It follows from this brief review of State practice that there is nothing unusual about the fact that Australia has an intelligence agency such as ASIO, or that it should be given powers such as the present to collect intelligence, and there is certainly nothing unlawful about this, under domestic law or international law.

[1]Judges' folder, tab 6, "Extracts from Municipal Legislation establishing Intelligence Organisations".

18. A second matter is to take you more specifically to the key provisions of the ASIO Act which bear on this matter[2] . Section 17 (1) sets out the functions of ASIO (tab 8). You have them before you[3]. [Screen on] Critical to those functions is the concept of security, and you have before you the definition of security in section 4 of the ASIO Act[4], a broad but appropriate definition given the range of security threats to States in our time.

19. Thirdly, let me now look more closely at ASIO's rights and, indeed, responsibilities in relation to the removed material. The materials were removed because of a warrant issued by under section 25 of the Act, for the purpose of collecting intelligence on a matter affecting the security of Australia, concerning possible espionage[5].

20. The warrant was made after a request from the Director-General of ASIO, subject to rigorous internal consideration and following a decision by the Attorney-General, a personal decision, that he was satisfied — within section 25 (2) — that there were reasonable grounds for believing that access by ASIO to records or other things on the premises would "substantially assist the collection of intelligence in respect of a matter that is important in relation to security".

21. Those were the matters that Senator Brandis was satisfied were present in this case. In the judges' folder at tab 12, you have the search warrant[6] and you can see that the Attorney-General made the declaration in the terms required by the Act and he proceeded to give the appropriate authorizations to ASIO, consistent with the Act.

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[2]Australian Security Intelligence Organisation Act 1979 (Cth) [judges' folder, tab 7].

[3]Australian Security Intelligence Organisation Act 1979 (Cth), Section 17(1) [judges' folder, tab 8].

[4]Australian Security Intelligence Organisation Act 1979 (Cth), Section 4 provides in part that "security" means:

"(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
(i) espionage;
(ii) sabotage;
(iii) politically motivated violence;
(iv) promotion of communal violence;
(v) attacks on Australia's defence system;
(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not." [judges' folder, tab 7].

[5]Australian Security Intelligence Organisation Act 1979 (Cth), s 25 (1) provides in relevant part that: "If the Director-General requests the Minister to do so, and the Minister is satisfied as mentioned in subsection (2), the Minister may issue a warrant in accordance with this section." [Judges' folder, tab 7.]

[6] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25" [judges' folder, tab 12].

22. Let me return to something else said then by Sir Elihu yesterday, which was that it would be up to Australia to explain to you the precise details of the national security consideration that drove the warrant. It is not for Australia to disclose — further than I already have — the precise security interest that drove the warrant; nor, of course, is it for this Court to attempt in some way to pronounce upon the value of that national security interest.

23. If Timor-Leste is suggesting that there is some international law norm that States cannot collect intelligence, without making public the particular security issue, that would be to invite you to pronounce upon matters of espionage generally which, Sir Elihu yesterday correctly said, were not before you.

24. What is critical from what your heard yesterday is that Timor-Leste has made no effort before an Australian court, or before you, to establish any breach of Australian law in the issue of this warrant. There is no basis for this Court to do other than accept that a proper security interest has been identified as the basis for the warrant, that the warrant was issued and executed in accordance with Australian law, and that Australian law is consistent with State practice in these matters. There is one other aspect of this third point which is the structure of the ASIO Act.

25. The ASIO Act goes on to strictly regulate the period for which the materials may be held, you find that in Section 25 (4C), the effect of which is that ASIO never acquires ownership of the material. It has only a right of use — use limited by time and purpose [7].

26. And further to that, the Act strictly regulates the disclosure of intelligence and information by virtue of sections 17 and 18; they are found in the ASIO Act which is reproduced at tab 7. The repeated suggestions or insinuations yesterday that material may have left ASIO and may have been closely considered by Australian officers were unfounded and they should be withdrawn.

4. Timor-Leste, probably, lost any claim to legal professional privilege over the documents

27. Let me turn to my fourth point. Timor-Leste, probably, has lost any claim to legal professional privilege it might otherwise have over the seized material. You gathered yesterday that Timor-Leste is invoking, perhaps in the alternative, a claim to legal professional privilege — in

[7] Australian Security Intelligence Organisation Act 1979 (Cth), s 25 (4C) [judges' folder, tab 7].

some or all of the removed material. As a matter of Australian law, as is the case with the law of most countries, legal professional privilege does not exist where the communications are produced in pursuance of a criminal offence, fraud or other improper purpose. If I could invite you to turn to tab 14, you will see an extract from the decision of the High Court of Australia in the *Commissioner of Australian Federal Police* v. *Propend Finance Pty Ltd.* We have extracted, at p. 514, the statement of principle from the judgment of the Chief Justice of Australia, Chief Justice Brennan, concerning the crime/fraud exception. I invite you to read that statement of principle and I invite you to note, from the footnotes, its sources lie in English law[8]. You were referred, yesterday, to *Halsbury's Laws of England* on legal professional privilege. The passage you were *not* referred to from *Halsbury*, consistent with Chief Justice Brennan, is found at tab 15; it is said this simply: "the privilege does not extend to communications [made] for the purpose of committing a fraud or crime".

28. That is Australian law, that is English law and you will see at tab 16 of your folder, from a brief survey of State practice: many States recognize either the crime/fraud exception, or other appropriate exceptions such as for national security.

29. Let me turn from the principle to this case. Australia has reasonable grounds to invoke the crime/fraud exception to privilege. Those grounds rest in the public statements of representatives of Timor-Leste. Let me go to but some of them. At tab 17 you have a report in a Timorese journal which includes statements made by Minister Pires of Timor-Leste. He was reported as alleging: "ASIS [had broken] into and bugged East Timorese cabinet rooms". You will see in the journal article, at tab 17, this reported at the foot of the first column and into the second column. You will also see Minister Pires attributing the source of his information to an ex-ASIS employee, currently unwell in an Australian hospital[9].

30. [Next slide: tab 18] You will also see in that article, in the third column, in the last two paragraphs that Minister Pires's lawyer, Bernard Collaery, the man described yesterday as an eminent lawyer, said the evidence is "irrefutable "and the Australian authorities "are well aware we

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[8] *Commissioner of Australian Federal Police* v. *Propend Finance Pty Ltd* (1997) 188 *CLR* 501, 514 (Brennan CJ) [judges' folder, tab 14].

[9] Julio da Silva, "Xanana still Waiting for Response from Australia about CMATS", *Jornal Independente*, 31 May 2013, [judges' folder, tab 17].

are in a position to back that up". It would appear that Mr. Collaery is referring to disclosures he says were made to him by an ex-ASIS officer[10].

31. To complete this picture, could I ask you to go to tab 19, which is Mr. Collaery's letter of 5 December, where he records the material removed. If you could go to page two, you will see that the first item is a document described as the affidavit of . . . The person's name is anonymized. And you will see the last item is untitled document, with handwritten comments stating "this is a statement of" . . . Person's name anonymized. As I have said, the Australian legal team does not have access to that material, properly so.

32. On the basis, however, of what I have just taken you to, there are reasonable grounds to consider that the materials over which Timor-Leste asserts privilege may include written statements, or affidavits, by a former ASIS officer, made to Mr. Collaery on behalf of Timor-Leste, disclosing national security information of Australia. If that be the case, those disclosures would involve the commission of serious criminal offences under the law of Australia, and I reference sections 39 and 41 of the *Intelligence Services Act 2001* (Cth), section 70 of the *Crimes Act 1914* (Cth), and section 91.1 of Schedule 1 to the *Criminal Code Act 1995* (Cth), which you have at tabs 20-22.

33. Not only that: Australia is not alone in prohibiting the disclosure of State secrets, including intelligence obtained in the course of employment with intelligence agencies. We have provided you at tab 23, a brief review of State practice which indicates that similar prohibitions exist in the United States, Canada, the United Kingdom, France, New Zealand, Slovakia, Morocco, Russia, Somalia, and India, amongst others You will note from that table at page 21, that — unsurprisingly — Timor-Leste has a similar criminal prohibition with punishments of up to 15 years for breach of State secrets. If, as asked by Timor-Leste, you were to order the materials to be delivered into your custody for a period of time, that would prevent two things happening. Firstly, an Australian court could inspect the documents and decide whether the crime/fraud exception applies to any privilege claim. Secondly, it would prevent ASIO carrying out its functions to protect Australia's security by reference to these documents. It may well — I put it no

[10]Julio da Silva, "Xanana still Waiting for Response from Australia about CMATS", *Jornal Independente*, 31 May 2013; judges' folder, tab 17.

higher than that — it may well also allow the continued perpetration of disclosures which breach Australia's criminal law as they would — in like circumstances — breach the law of Timor-Leste. For that reason alone, you would not grant the provisional measures sought.

5. There is no "distortion" of the Arbitration

34. My fifth point is that, contrary to the assertions repeatedly made yesterday, there has been no distortion or litigation advantage obtained in respect to the undertaking. The Attorney-General's package of undertakings is comprehensive and it meets any real concern.

35. The package of undertakings includes:

(a) on 4 December the Attorney-General made his Ministerial Statement to Parliament, which you have at tab 24[11], directing that the material was not to be communicated to those conducting the Arbitration on behalf of Australia;

(b) next, you have at tab 25[12], the direction to the Director-General of ASIO which has two relevances to your proceedings. You will see in the fifth paragraph on the first page he extended his direction once these proceedings had commenced such that the material was not to be communicated to the lawyers for Australia in this proceeding before you, and on the second page, you will see in the third paragraph a reference to the President's notification to Australia under Article 74 (4) and the Attorney-General in the last paragraph put in place a direction to ensure that, pending this hearing, the materials would not be accessed by anyone and he instructed me to communicate those arrangements to you.

(c) you will see, next to that, the undertaking provided as of 23 December 2013.

36. Let me come back to the matter I raised at the outset. A point raised yesterday by Timor-Leste for the first time clearly, was a concern that the materials removed include documents which relate to maritime boundary negotiations, beyond any issue in the Arbitration. Associated with this was a fear expressed, with no clear foundation, that Australian officials, engaged in maritime boundary negotiations, would look at the material. Leaving aside the lack of a basis for

[11]Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", 4 Dec. 2013; judges' folder, tab 24.

[12]Letter dated 23 December 2013 from the Attorney-General, Senator George Brandis QC to Mr David Irvine AO, Director-General of Security; judges' folder, tab 25.

those propositions, the Attorney-General of Australia, being informed of these matters overnight, has determined and provided you now with the undertaking which is at tab 27[13]. I will invite you to place close reliance upon that document as it meets — and more than meets — any legitimate concern raised by Timor-Leste in this action. You will note two things:

— firstly, under the declarations on page 1, the third declaration is that the appropriate direction has been given to ASIO that the material is not to be communicated to any person for any purpose other than national security purposes, including potential law enforcement referrals and prosecutions, until final judgment in this proceeding or until further or earlier order from this Court. That direction, as is expressed, continues until the final judgment on the Application, not merely until your judgment on the Request and you will see from the Attorney-General's four undertakings, on page 2, that he will not make himself aware of the materials. If that circumstance changes he will first bring it to your attention; the material will not be used by any part of the Australian Government for any purposes other than national security purposes, including potential law enforcement referrals and prosecutions and without limitation. They will not be used for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or for the purpose of this action, or for the purpose of the arbitral proceedings.

— the direction to the Director-General is found at the previous tab — tab 26 — and could I observe one other aspect of that direction. On page 1 of the letter, in the fourth paragraph, the Attorney-General has indicated, quite properly, that the current direction to ASIO to keep the material sealed for all purposes until you can rule on provisional measures, will continue until you give a judgment on provisional measures.

6. The relevance of Australian domestic remedies

37. My sixth and last point is the relevance of Australian domestic remedies. It is not to suggest that this is a diplomatic protection claim. It is, rather, that in the context of provisional measures where the criteria include urgency, real risk of irreparable harm, and balancing of rights,

[13]Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis Q.C., Attorney-General of the Commonwealth of Australia, 19 Dec. 2013; judges' folder, tab 27.

the failure to pursue obvious remedies in an Australian court should bear heavily on the caution with which you should consider the grant of provisional measures.

Concluding remarks

38. The relevant Australian domestic remedies have been set out in our Written Observations. Let me conclude. A critical matter at the heart of this dispute is that, based upon what Timor-Leste says publicly, Australia is entitled to have a legitimate concern that a former intelligence officer may have disclosed and may threaten further to disclose national security information, which would be a serious crime. Australia is entitled to be concerned that Timor-Leste may be encouraging the commission of that crime.

39. Those disclosures threaten our security interests. The security interests are broader than the fate of the Arbitration. To place classified information in the hands of a foreign State is a serious wrong to Australia, as it would be with any nation.

40. The true object of this Request for provisional measures may be exposed as this. Timor-Leste seeks to prevent Australia taking steps properly available to us under our domestic law, law which is consistent with international law, to protect ourselves from a threat to security apparently posed by a disaffected former officer.

41. In the light of these matters, upon which the following presentations will build, we would ask the Court to decline the Request for provisional measures.

42. Mr. President, Members of the Court, could I now ask you to call upon Mr. Campbell.

The PRESIDENT: Thank you very much, Mr. Gleeson, I give the floor to Mr. Campbell. You have the floor, sir.

Mr. CAMPBELL:

THE ESSENTIAL PRECONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES ARE NOT MET (PART I)

Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of Australia, albeit in a slightly different capacity. It now falls to me, together with my colleagues

Mr. Burmester and Professor Crawford, to demonstrate that Timor-Leste's Request does not satisfy the essential preconditions for the indication of provisional measures specified in the Statute of the Court, the Rules and your jurisprudence. In particular we will together deal with three aspects of the Request.

— First, the international law rights claimed by Timor-Leste are not plausible, as required by your jurisprudence.

— Secondly, the measures requested by Timor-Leste lack any link with the rights Timor-Leste asserts under international law, nor (in the light of the undertakings given by Australia) is there any risk of irreparable prejudice or any urgency to the measures sought;

— and thirdly, another forum is already constituted, is already exercising jurisdiction in relation to the subject-matter of the Request, and is doing so on a timetable that should lead to a decision by the end of this year. In these circumstances, the Court should not take on the responsibility of ordering provisional measures.

More generally, and very importantly, it will be our submission that the measures sought by the applicant State would circumscribe Australia's ability to deal with matters essential to its national sovereignty, including its ability to protect its national security interests and to enforce its domestic criminal law.

2. I will deal with the first of the issues that I just mentioned, Mr. Burmester will deal with the second, and Professor Crawford the third.

3. Before turning to the question of the plausibility of the rights asserted by Timor-Leste, I would mention two matters. First, I wish to draw the Court's attention to the general principles concerning the indication of provisional measures set out in Australia's Written Observations[14]. We ask you to keep these principles in mind when considering the present Request. Secondly, while Australia may well contest the jurisdiction and admissibility of Timor-Leste's Application commencing the proceedings at the merits phase, or earlier, it will not be raising those matters in relation to Timor-Leste's Request for provisional measures.

[14]WOA, paras. 59-68.

The rights upon which Timor-Leste purports to rely are not plausible

4. Mr. President, Members of the Court, I now move to the question of "plausibility". As noted by counsel for Timor-Leste yesterday, it is now accepted that the Court may only indicate provisional measures if "the rights asserted by the requesting party are at least plausible"[15].

5. It would be fair to say that until yesterday, Timor-Leste had provided only a very sketchy outline of the rights it is seeking to protect. Paragraph 10 of its Application merely referred to "rights existing under customary international law and any relevant domestic law and as a consequence of the sovereignty of Timor-Leste under international law"[16]. The lack of specificity is palpable. However, to the uninitiated, this lack of specificity was cured by counsel for Timor-Leste yesterday. Or was it? Even a cursory examination of the rights put forward by Timor-Leste yesterday which Australia is alleged to have breached, reveals that very specific rights — for example those relating to the inviolability and immunity of certain documents in certain circumstances — have been recast into alleged rights of a more general and widespread nature suitable for the purposes of Timor-Leste's case and beyond that previously recognized under international law.

6. These expansive rights pay no attention to the realities of the equality of States and the sovereign rights of States to control their own affairs and they bear of no exception. As expressed yesterday, they are indeed implausible.

7. For example, we have this statement by counsel on behalf of Timor-Leste:

> "given the nature of the principal claim and the indubitable fact that Timor-Leste is a sovereign State recognized by Australia, its property rights are entitled to full respect on the international plane in whatever State they may be located . . . The Timorese rights are, moreover, entitled to recognition no matter what special provisions may be asserted by Australian law against them."[17]

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[15]CR 2014/1, p. 27, para. 22 (Lauterpacht). *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, Request presented by Nicaragua for the Indication of Provisional Measures, Order of 13 December 2013, para. 15; *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. 545, para. 33; *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; *Questions relating to the Obligation to Prosecute or Extradi*te (*Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[16]Application, para. 10.

[17]CR 2014/1, pp. 27-28, para. 25 (Lauterpacht).

And I repeat that "no matter what special provisions may be asserted by Australian law against them". We find that a startling statement. This is, as the Solicitor-General said, a new form of extra-territoriality which, if it existed, would have astonishing implications for international law and domestic law, and the relationship between the two.

8. The rights as stated yesterday lead to a result that, no matter how carefully supported by contrived reasoning, simply cannot be correct. For example, Timor-Leste's counsel stated:

> "So our . . . point is that seizure was carried out pursuant to a warrant issued by a 'court' within the meaning of customary international law on State immunity as reflected in the United Nations Convention."[18]

9. Mr. President, Members of the Court, according to Timor-Leste, the Attorney-General was the alleged "court" in question. It hardly bears stating that the Attorney-General is not a "court" — not for the purposes of the 2004 UN Convention on the Jurisdictional Immunities of States and their Property[19] as alleged — or any other purpose. As with most other countries, Australia respects the separation of powers between the Parliament, the Executive and the Judiciary. In that respect, the Attorney-General is part of the Executive and is not a court.

10. This overstatement of rights also led to overstatements of effect that are simply unsustainable. For example, counsel for Timor-Leste stated:

> "The Australian Observations fail to recognize that the seizure of another State's property is as much a violation of international law as would be the seizure of any part of another State's territory."[20]

Australia does not deny that the seizure of a State's property in certain circumstances may be in breach of international law, but to equate it, without qualification, with an illegal seizure of territory is an attempt at colour, and does not reflect reality.

11. These instances demonstrate the lengths to which the applicant has to go to demonstrate that it has alleged rights of which Australia is allegedly in breach. In fact, they demonstrate how implausible the alleged rights are.

12. Now let me move to the particular rights mentioned by Timor-Leste yesterday and their plausibility.

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[18]CR 2014/1, p. 38, para. 22 (Wood).

[19]2 December 2004, Ann., UN doc. A/RES/59/38.

[20]CR 2014/1, p. 31, para. 34 (1) (Lauterpacht).

13. Counsel for Timor-Leste summarized the alleged rights at issue in this case as "the inviolability and immunity of its property, and in particular of its documents and data . . ."[21].

14. Even assuming that the material removed from 5 Brockman Street, Narrabundah does belong to Timor-Leste — a matter which is yet to be established — the applicant must then demonstrate that the alleged international law rights of inviolability and immunity as they relate to that property are plausible. So I will move to the question of inviolability.

Inviolability

15. The absolute inviolability of a State and papers were stated by Sir Michael yesterday to be an aspect of sovereignty, the sovereign equality of States and non-intervention. However, Timor-Leste does not provide any authority for this general principle of inviolability of State papers and property — it only supports the principles by drawing upon analogies to documents in the possession of a foreign diplomatic mission or consulate[22], or by stating that it is a "general principle that underlies . . . many rules in particular fields, such as State immunity and diplomatic and consular immunities"[23].

16. In reality, Timor-Leste has in fact done the inverse — it has sought to create a general principle of the inviolability of state papers and property out of defined immunities that apply to such property in strictly defined circumstances. The assertion of that general principle is without a legal basis — indeed, as noted by the Solicitor General, it renders otiose the particular principles which do exist.

17. Moreover, Timor-Leste does not concede of any exceptions, even in circumstances where the documents and property in question could be part of the unlawful enterprise in the State in which they are located, or be evidence of such an enterprise. In short, the right, so broadly stated as it is, is implausible.

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[21]CR 2014/1, p. 33, para. 2 (Wood).

[22]CR 2014/1, p. 28, para. 25 (Lauterpacht).

[23]CR 2014/1, p. 37, para. 19 (Wood).

Immunity

18. I will now move to the question of immunity. Australia accepts that the property and papers of a State could be immune from seizure in another State in defined circumstances, those circumstances principally being defined as jurisdictional immunity and diplomatic and consular immunity. However, counsel for Timor-Leste sought to create a larger immunity out of these accepted and well-defined immunities or, instead, extend these immunities to circumstances, such as those in this case, to which they were not intended to extend.

19. In relation to the jurisdictional immunities of States and their property, reliance was placed on the provisions of the 2004 Convention. However, as this Court noted in the *Jurisdictional Immunities* case, the 2004 Convention only has a very limited acceptance by States[24] and has not yet entered into force. At present, only 14 countries have become parties to the Convention — well short of the 30 ratifications required for entry into force. Neither Australia nor Timor-Leste are parties to the 2004 Convention, though Timor-Leste has signed it. It would be difficult to conclude, if it was so boldly asserted, that the 2004 Convention generally represents customary international law.

20. Leaving the question of whether the provisions of that Convention represent customary international law, leaving that aside, counsel for Timor-Leste stretched its provisions beyond credulity. It is fundamental to jurisdictional immunity both under the 2004 Convention, customary international law and indeed the practice of States that it is an immunity from the Courts of another State. Indeed, Article 5 of the 2004 Convention provides – and it appears before you now (tab 34):

Article 5 — State immunity

> "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."

21. Counsel for Timor-Leste cited this very article in support of the proposition — "the basic rule laid down in the 2004 Convention is that a State and its property enjoy immunity"[25] — but without mentioning the major qualification "from the jurisdiction of the Courts of another State".

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[24] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 122, para. 53.

[25] CR 2014/1, p. 38, para. 23 (Wood).

The latter qualification being very inconvenient to the application of the principle of jurisdictional immunity to the current circumstances.

22. Let us be clear, jurisdictional immunity is not, and never has been, a general immunity of one State from the laws of another State if it is carrying out transactions in that other State — it is a prima facie immunity from jurisdiction of courts, then subject to stated exceptions. As I mentioned earlier, the reasons put forward by counsel on behalf of Timor-Leste yesterday in support that the Attorney-General of Australia is a "court" within the meaning of the 2004 Convention and customary international law on jurisdictional immunity is totally implausible.

23. There is no judicial proceeding when the Attorney issues a warrant under the ASIO Act. It is an executive act taken pursuant to Australian legislation in the course of protecting Australia's security. It is not the subject of jurisdictional immunity under international law. If there is no jurisdictional immunity applied to these circumstances, one does not even get to the question of whether there are exceptions.

24. The principle of jurisdictional immunity is of course plausible as a right generally. However, the real issue here is that the principle simply does not apply to the circumstances of the Attorney-General issuing a warrant for removal of property under the ASIO Act. In short, it is an implausible right in the sense that it is clear beyond doubt that it has no application in this case. Or put another way, if the right does not apply to these circumstances, the question of its plausibility is not even reached.

25. Counsel for Timor-Leste also stated "the inviolability and immunity of State property and papers is explicitly set forth in international conventions, in particular fields, such as diplomatic and consular law, the law of special missions, and the law of international organizations . . ."[26]. Australia of course accepts that these conventions apply according to their terms. And this extends to the immunities set out in those conventions — I stress, set out in those conventions. However, what those conventions do not mandate is a form of general immunity and inviolability applicable to the actions of States or to their property and papers. They apply

[26]CR 2014/1, pp. 38-39, para.24 (Wood).

immunities in defined circumstances and those circumstances do not extend to the documents removed from the premises at 5 Brockman Street, Narrabundah.

26. Timor-Leste mentioned in support of such a general rule qualified statements made by US State Department Legal Adviser Taft[27]. Leaving aside the completely different circumstances being considered by Mr. Taft — matters relating to embassy construction — when considering whether documents given to a third party retain immunity, he stated that this was a "novel and complex question" — and I suspect that is a euphemism for a conclusion that there was no applicable prohibition. The quoted statement from *Oppenheim* yesterday that official papers in the hands of non-diplomatic agents "are presumably entitled to immunity" is equivocal to say the least[28]. The general conclusion of Timor-Leste that there is a fundamental principle that inviolability applies to State documents generally, wherever they may be[29] is one for which Timor-Leste gives no judicial support and, given the import of the general application of such a principle, it is implausible.

Legal professional privilege

27. Mr. President, Members of the Court, I now turn to legal professional privilege, and Timor-Leste's assertion that a principle akin to such privilege constitutes a "general principle of law"[30]. The authorities cited by Sir Michael yesterday are in no way authority for the proposition that there exists an international law principle of general application which protects absolutely the confidentiality of communications between a State and its legal advisers[31]. Even if one were to accept that a privilege exists at international law, such a privilege inevitably would be qualified, as it is in domestic jurisdictions.

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[27]CR 2014/1, pp. 39-40, para. 26 (Wood).

[28]CR 2014/1, p. 40, para. 27 (Wood).

[29]CR 2014/1, p. 40, para. 29 (Wood).

[30]CR 2014/1, pp. 40-1, 43, paras. 30 and 37 (Wood).

[31]CR 2014/1, pp. 40-43 (Wood).

28. Those qualifications include that the communication in question concerns the commission of a crime or fraud, that it constitutes a threat to national security, or that recognition of the principle would conflict with higher, more important public interests[32].

29. Sir Michael also referred you yesterday to a number of cases decided by international arbitral tribunals. In response, I need only make two points. First: this case law does not provide support for the proposition that a broad and unqualified principle of legal professional privilege exists as a general principle of international law[33]. Second: even where they recognize its existence as a matter of international law, international tribunals themselves recognize exceptions to the principle. As stated by the independent expert James Spigelman, appointed in the NAFTA arbitration of *St Marys VCNA LLC* v. *Government of Canada* (tab 35):

> "[privilege] does not extend to communications which undermine the integrity of, or otherwise constitute an abuse of, the administration of justice. Documents that came into existence for such an improper purpose are not entitled to attorney-client privilege from the outset. This is a widely accepted proposition in the domestic law of many jurisdictions."[34]

30. Mr. President, Members of the Court, Australia's comprehensive survey of the approaches taken under municipal law and international law to issues of legal professional privilege — referred to previously by the Solicitor General — highlights the implausible nature of the expansive and unqualified rights of privilege which Timor-Leste submits extends to communications between States and their legal advisers.

31. Mr. President, let me conclude on the question of the plausibility of these rights and that conclusion is that the Court should find that the rights upon which Timor-Leste purports to rely in its Application are not sufficiently plausible to justify relief.

32. Mr. President, Members of the Court, thank you for your attention. I now ask you to call upon Mr. Burmester.

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[32]See the Summary of Municipal Laws on Legal Professional Privilege/Confidentiality: Scope and Exceptions (tab 16).

[33]*Bank for International Settlements* case (PCA), Procedural Order No. 6, 11 June 2002, p. 10; cited with approval in *Vito G.Gallo* v. *Government of Canada* (PCA-NAFTA), Procedural Order No. 3, 8 April 2009; *Libananco Holdings Co. Limited* v. *Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008.* See CR 2014/1, pp. 40-43 (Wood).

[34]James Spigelman, "Report of Inadvertent Disclosure of Privileged Documents" in *St Marys VCNA LLC* v. *Government of Canada*, *St Marys VCNA LLC* v. *Government of Canada*, 27 December 2012, 4, available at: http://www.italaw.com/sites/default/files/case-documents/italaw1392.pdf.

The PRESIDENT: Thank you, Mr. Campbell. Now I give the floor to Mr. Burmester. You have the floor, Sir.

Mr. BURMESTER:

THE ESSENTIAL PRECONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES ARE NOT MET (PART II)

Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of Australia. In this presentation I intend to do two things. The first, building on the presentation just heard from Mr. Campbell, is to outline why Timor-Leste is unable to satisfy the Court as to the link between the alleged "rights" that form the subject of the proceedings and the provisional measures being sought. Establishing such a link is essential to a grant of provisional measures.

2. The second matter is to outline Australia's grounds for refuting the assertions made by Timor-Leste relating to the urgency of granting provisional measures and the irreparable prejudice that it claims it will suffer. If either irreparable prejudice or urgency are lacking, the Court cannot grant provisional measures. I will show that both characteristics are lacking.

3. Furthermore, the Court must have regard to the prejudice that would be suffered to Australia's sovereign rights to protect its national security and enforce its criminal jurisdiction in its own territory if the provisional measures were granted. Despite Timor-Leste's attempts to frame the dispute as relating solely to its claimed rights, the Court must balance those claims against the significant restriction on Australia's ability to exercise its sovereign rights. The invocation of the *Blaškić* case by Timor-Leste is not to the point. That case dealt with withholding evidence from criminal proceedings on national security grounds. That is far removed from the present situation[35]. In fact the Tribunal in that case was very mindful of legitimate State concerns related to national security, and the procedures for handling evidence recognized this[36]. A similar concern to

[35] *Prosecutor* v. *Tihomir Blaškić, Judgement on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997, ICTY Appeals Chamber*, 29 October 1997.

[36] *Prosecutor* v. *Tihomir Blaskic*, para. 67.

protect the right and duty of a State to pursue the commission of a serious crime is also evident in the *Libananco Holdings* case — a case referred to by Timor-Leste yesterday[37].

Lack of a sufficient link between alleged rights whose protection is being sought and the measures requested

4. Putting to one side the question of the plausibility (which Mr. Campbell has just dealt with), Timor-Leste must also satisfy the Court that a "sufficient connection"[38] exists between the provisional measures requested and those rights. To be sufficient, something must be adequate for a *particular purpose*[39]. The purpose the Court is concerned with is preserving the factual situation necessary to the meaningful exercise of the disputed rights in order for the Court to render an effective judgment[40].

5. Such a connection is manifestly lacking in Timor-Leste's request. Despite its assertion that this necessary link is "self-evident" and that the claims in the Application and Request are "closely related"[41], this has not in fact been demonstrated. There is a general disconnect between the Application and the provisional measures they seek. The Application is focused on Timor-Leste's claimed property and other rights in the materials that were removed. It is all about ownership of certain documents and their return. In contrast, the emphasis in the provisional measures *(a)* — *(d)* is on use of the contents of certain documents and data, and alleged ongoing prejudice that would result from Australia becoming privy to their contents.

6. To the extent that Timor-Leste seeks to link use with ownership, it must still demonstrate a sufficient link between the measures sought and the legal interest at stake. The only legal interest beyond ownership which it identifies in any detail is the right to prevent any potential advantage Australia may gain from access to the documents in relation to the arbitration and in relation to Timor Sea resources. Such a link cannot be shown in light of the explicit undertaking that the

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[37] *Libananco Holdings Co Ltd* v. *Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues,* 23 June 2008, 37, para 79.

[38] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 391-392, para. 126.

[39] *Shorter Oxford English Dictionary:* Vol. 2, Oxford University Press, Oxford, 2007, 6th ed., 3097.

[40] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005: Volume III Procedure,* Martinus Nijhoff Publishers, Leiden, 2006, 1412.

[41] CR 2014/1, 28, para. 26 (Lauterpacht).

material removed will not be made accessible to those connected with the arbitration or to anyone other than intelligence and criminal law enforcement personnel[42].

7. The lack of a sufficient link with the rights claimed is particularly apparent with regard to requested provisional measure *(e)*. There is a complete absence of any link between that measure and the rights which form the subject of the proceedings before the courts on the merits.

8. This measure about interception, in its terms applies to all communications between Timor-Leste and its legal advisers. Despite its broad wording it is directed principally at such communications in relation to the conduct of the Arbitration[43]. In contrast, the Application and the remedies sought in it, relate solely to its claimed rights arising from the documents and data removed.

9. The requested measure in relation to surveillance would not therefore preserve any right alleged to exist in the Application. Rather, it would preclude conduct with no connection to the Application, conduct which Timor-Leste alleges — without substantiation — will or may occur in the future. None of the remedies sought by Timor-Leste in its Application and the alleged rights contained therein, would be affected if the measure relating to surveillance is not granted.

10. Even if a sufficient connection could otherwise be shown, an order relating to surveillance would be extraordinary, far-reaching and unprecedented. It would be unsupported by any firm basis in international law and would protect no plausible right. The ICSID decision in *Libananco Holdings*[44], referred to by Sir Michael Wood, does not establish the contrary. In that case, the apparently general order of the Tribunal prohibiting interception of communications as between legal counsel and representatives of the claimant was qualified by the express recognition, in clause 1.2 that Turkey could conduct investigations into suspected criminal activities. What was prohibited was the transfer of any information so obtained to any person involved in the

[42]Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, 19 December 2013 (tab 5); *Timor-Leste* v. *Australia*, Undertaking by the Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, 21 January 2013 (tab 27).

[43]Request for the Indication of Provisional Measures, para. 7.

[44]*Libananco Holdings Co Ltd* v. *Republic of Turkey, ICSID Case No. ARB/06/8,Decision on Preliminary Issues*, 23 June 2008.

arbitration[45]. So the prohibition on interception was significantly qualified. In that case, in the event, Turkey won the arbitration, in part because of evidence questioning the authenticity of the key documents sought to be relied upon by the claimant to establish the jurisdiction of the Tribunal[46].

11. In our submission, the Court should decline to find a sufficient link between the provisional measures sought and the rights which form the subject of the Application.

1. Irreparable prejudice; urgency

12. Mr. President, Members of the Court, I turn now to the requirement that the measures ordered must be *necessary* to preserve the respective rights of either Party, in the sense that there would otherwise be irreparable prejudice and urgency[47].

13. The first point in relation to this requirement is that the Court, in its examination of irreparable prejudice, must consider the rights and interests of both Parties. This is so, even though a request has been made by one party only. Indeed, the rights of Australia, as Respondent, are not dependent on how Timor-Leste has formulated its Request[48]. Those rights possessed by Australia must also be considered by the Court.

14. The Court's power allows it to indicate measures that restrict sovereign freedom at a time when the Court has not yet decided either that it has jurisdiction, or that the claim is well-founded[49]. The Court must therefore weigh carefully the conflicting alleged rights[50], and ensure that neither of the Parties is put at a serious disadvantage[51]. For these reasons, the Court

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[45]*Libananco Holdings Co Ltd* v. *Republic of Turkey, ICSID Case No. ARB/06/8,Decision on Preliminary Issues, 23 June 2008*, 42, order 1.2.

[46]*Libananco Holdings Co Ltd* v. *Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011*, 173, para. 534.

[47]*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)*, declaration of Judge Greenwood, p. 48, para. 7.

[48]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, pp. 3, 10-11, para. 28-9.

[49]Robert Kolb, *The International Court of Justice*, Hart Publishing, Great Britain, 2013, 630.

[50]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, 113*, separate opinion of Judge Abraham, p. 139; see also *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, separate opinion of Judge Shahabuddeen, p. 29; Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Grotius Publications Ltd., 1987, 273 citing *Cie d'Électricité de Sofia et de Bulgarie* (1923) 2 *T.A.M.* 924, 926-7.

[51]Karin Oellers-Frahm, "Article 41" in Zimmerman, Tomuschat and Oellers-Frahm (eds.) *The Statute of the International Court of Justice: A Commentary*, 1035.

should approach the exercise of its power to impose provisional measures judiciously, with a view to finding the appropriate balance between the rights of each Party.

15. Australia has sovereign authority over the maintenance of the security of Australia and the exercise of legitimate law enforcement functions in its own territory. The provisional measures requested by Timor-Leste, if granted, would severely prejudice those central rights. Given this, a high bar needs to be met by Timor-Leste in seeking to preclude Australia's ability to exercise its rights.

16. This is particularly so where the materials from which Timor-Leste's claimed rights are said to arise were all brought into being or created within Australia. Australian-based lawyers may and do advise foreign Governments, but in doing so they remain subject to Australian law, including the law of legal professional privilege which strikes a balance between the needs for confidentiality and other public interests. A Government which comes to Australia and seeks legal advice there cannot and does not at the same time exempt itself or its advisers from the application of relevant Australian civil and criminal law. 5 Brockman Street, Narrabundah did not become a foreign enclave because Mr. Collaery acted as adviser to Timor-Leste. Timor-Leste has done nothing to rebut the presumption that Australia has a right to exercise prescriptive and enforcement jurisdiction within its own territory.

17. If the requested provisional measures were granted, Australia would be precluded for a significant period of time from exercising its rights in relation to the security of intelligence information and the investigation of crime, until the Court is available to hear Timor-Leste's principal Application. The requested measures would effectively preclude the Australian Security Intelligence Organisation from undertaking its duties for the course of the present proceedings in relation to the documents removed.

18. The Court should place significant weight on these matters and exercise extreme caution before indicating any measures that would affect adversely the ability of the State to take action in these areas. This is particularly so where Australia has given significant undertakings that restrict access to the documents in a manner which does least harm to the ability to protect Australia's national interest and at the same time directly addresses the identified concerns of Timor-Leste as

to access to the material by persons who may be involved in dealings with Timor-Leste in relation to the Timor Sea treaties or future negotiations.

19. This brings me to the two aspects of the third requirement, namely irreparable prejudice and urgency.

20. Timor-Leste has not satisfied either.

(a) ***No irreparable prejudice***

21. The test for irreparable prejudice is not met in this case, as the circumstances of most concern to Timor-Leste, when carefully considered, will simply not occur. Timor-Leste's Request for provisional measures centres on its concerns relating to Australia inspecting the removed materials and informing itself as to their contents[52].

22. From what we can discern, this concern is based on two types of prejudice: that related to the Arbitration and that related more broadly to the Timor Sea and its resources.

23. In relation to the first category, the Attorney-General has provided a number of undertakings to the Tribunal in relation to the material. The Attorney-General has now provided even wider undertakings to this Court. Most importantly, the content of the material removed by ASIO is not under any circumstances to be communicated to those conducting the Arbitration on behalf of Australia and it will not be used by any organ or agent of the Australian Government for any purpose unrelated to national security or law enforcement purposes until the determination of those proceedings. The Court has accepted that appropriate undertakings can render a grant of provisional measures unnecessary on the ground that there is no longer irreparable prejudice or urgency[53]. Australia's undertakings to the Tribunal mean that there will be no irreparable harm in relation to Timor-Leste's rights relating to the Arbitration, because the principal concern to Timor-Leste cannot arise in fact. The suggestion made yesterday that provisional measures are necessary because undertakings are not binding should be dismissed for the furphy it is. Unilateral undertakings by States can give rise to legal consequences, as the *Nuclear Tests* case

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[52]Request for the indication of provisional measures, para. 6.

[53]*Certain Activities carried out by Nicaragua in the Border Area, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 24, para. 74; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, para. 69; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, pp. 17-18, para. 24 and para. 27.

demonstrates[54], and the most recent undertaking given by Australia to this Court — and that previously given to the Tribunal — are of that nature.

24. In addition, Timor-Leste's ability to prepare for the Arbitration is not materially impaired by the removal of documents, or failure to grant provisional measures, despite its claims to the contrary[55]. Timor-Leste has stated in the media that it has copies of the documents that were removed and that its ability to conduct the Arbitration will not be impaired. Mr. Bernard Collaery was quoted in the media as saying the removal of materials from his home will do "very little" to hinder Timor-Leste's case in the Arbitration — and that can be found at tab 36 in the folder[56]. At the First Procedural Hearing convened by the Tribunal, Timor-Leste agreed that their preparation for the Arbitration would not be fatally undermined by the absence of the documents removed. Professor Lowe stated in that context that the removal of documents and data "is not going to cripple our case"[57]. (Tab 4)

25. Instead it was argued by Timor-Leste that an appropriate remedy for any inconvenience to the arbitral case was an extra two weeks to prepare its Statement of Claim. Australia agreed to that time-limit and that is incorporated in the Procedural Order. There was no suggestion then of any irreparable prejudice and there can be no suggestion now, in that respect.

26. In any case, the provisional measures requested would not assist Timor-Leste in this regard, as the documents would be held by the Court and would not be made available to Timor-Leste.

27. As to the second claim of prejudice in relation to matters relating to the Timor Sea more generally, Timor-Leste has sought to identify this prejudice as relating to Timor-Leste's legal strategy "including the Arbitration and any *future* maritime negotiations"[58] (emphasis added). Until the Arbitration concludes, it is mere speculation to identify any potential prejudice to broader

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[54]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43.

[55]Request for the indication of provisional measures, para. 9.

[56]Australian Broadcasting Corporation, "East Timor spying scandal: Tony Abbott Defends ASIO raids on lawyer Bernard Collaery's offices", 4 Dec. 2013, available at: <http://www.abc.net.au/news/2013-12-04/asio-arrests-key-witness-in-east-timor-spying-scandal/5132954>.

[57]Transcript, First Procedural Meeting in the Matter of the Timor Sea Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, 5 Dec. 2013, 40, lines 3-4 (V. Lowe).

[58]CR 2014/1, p. 43, para. 41 (Wood).

concerns about the Timor Sea and its resources. At present the régime of exploitation is governed by the 2002[59], 2003[60] and 2006[61] Treaties. There are currently no boundary negotiations, nor proposals for them. For a provisional measure, one must put forward material that is not just remote, speculative or contingent argument about future possibilities. And in any event, the most recent undertaking by the Attorney-General ensures there can be no prejudice in this second area.

(b) ***No urgency***

28. If there is no irreparable prejudice, *a fortiori* there can be no urgency that requires the grant of provisional measures. An assessment of urgency by this Court is contextual, in the sense that the Court must take into account the general relationship between the parties, including the pursuit or otherwise of other parallel procedures for resolving the dispute[62].

29. Timor-Leste has demonstrated a lack of urgency by its behaviour in relation to the materials in question and its failure to avail itself of other prompt and effective avenues in relation to the materials. Timor-Leste and its legal advisers have had the ability to bring a claim under Australian domestic law for legal privilege, as outlined by the Solicitor-General. Timor-Leste also has the ability to seek Interim Protection from the Tribunal since 5 December 2013. This failure to seek recovery through the other viable avenues demonstrates there is no urgency requiring the giving of relief in this Court.

30. Timor-Leste has manifestly failed to demonstrate either irreparable prejudice or urgency, and has failed satisfy the necessary criteria for the granting of provisional measures.

31. I would now ask that you give the floor to Professor Crawford. Thank you for your attention.

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[59]*Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 *UNTS* 3 (entered into force 2 Apr. 2003); tab 1.

[60]*Agreement between the Government of Australia and the Government of the Democratic Republic of Timor Leste relating to the Unitisation of the Sunrise and Troubadour Fields*, Dili, 6 March 2003, 2483 *UNTS* 317 (entered into force 23 Feb. 2007).

[61]*Treaty on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 Jan. 2006, 2483 *UNTS* 359 (entered into force 23 Feb. 2007); tab 2.

[62]Robert Kolb, *The International Court of Justice*, Hart Publishing, Great Britain, 2013, 631.

The PRESIDENT: Thank you, Mr. Burmester. I give the floor to Professor Crawford, who is the last one to plead this morning for Australia. You have the floor, Sir.

Mr. CRAWFORD:

THE REQUEST SHOULD NOT BE ENTERTAINED GIVEN THE PENDENCY OF THE CASE BEFORE THE TRIBUNAL

Introduction

1. Thank you, Mr. President. Mr. President, Members of the Court, even if Timor-Leste could establish the other conditions for the indication of provisional measures — which it cannot do — there would be a compelling reason to reject its Request. The reason is this. The Court cannot, or in any event should not, take on the responsibility of ordering provisional measures in circumstances where another forum — the Arbitral Tribunal constituted under the Timor Sea Treaty — has already convened, is already exercising its powers in relation to the subject matter of the present Request, and is exercising jurisdiction on a timetable settled with the parties which should lead to a decision on all pending questions by the end of the year. This means that, even if you have jurisdiction to do so, it is not necessary in the circumstances for this Court to indicate the provisional measures requested by Timor-Leste, or indeed *any* provisional measures.

2. I will begin by establishing that the present Request is, either in whole or very substantial part, within the competence of the Tribunal to grant or to deny, and more generally that the Tribunal is actively dealing with the issues of due process arising. In that context I will deal with Timor-Leste's assertion yesterday that the removed materials "go well beyond the Arbitration"[63]. I will outline the position the Court should take consistently with Articles 33 and 95 of the Charter, in relation to matters pending before another international tribunal. Finally I will show the impact of these points in terms of the requirements of irreparable prejudice and urgency of the exercise of your provisional measures jurisdiction.

[63] CR 2014/1, p. 20, para. 10 (Lauterpacht).

A. Availability of interim measures before the Tribunal

3. Mr. President, Members of the Court, international courts and tribunals have power to regulate matters between the parties that might affect the integrity of their process in pending proceedings[64]. But in any case, the Tribunal has an *express* power to order interim measures if it sees it necessary. Article 21 (1) of the Rules of Procedure of the Tribunal is taken from the PCA Optional Rules[65]. It provides: "Unless the parties otherwise agree, the arbitral tribunal may, at the request of either party, take any interim measures it deems necessary to preserve the respective rights of either party."[66] They would include due process rights. This provision empowers the Tribunal to prescribe provisional measures such as those requested by Timor-Leste, provided Timor-Leste can show that the various requirements for such measures are fulfilled. Timor-Leste *could* have requested that it exercise that power. Instead it chose to initiate these parallel proceedings two weeks later.

4. I should mention certain other features of the arbitral proceedings to put this tactic of parallel litigation into context.

5. First, the Timor Sea Treaty of 2002, under which the arbitral proceedings are brought, stipulates that proceedings must be concluded within six months of the convening of the Tribunal[67]. The Tribunal convened on 5 December last year. The reason for the time-limit is that the Treaty provides a framework for exploitation and exploration of hydrocarbons in the interests of both States; uncertainty in that regard is costly and it was evidently intended that any dispute under the Treaty should be rapidly settled and not allowed to proliferate. But the Tribunal expressed its concern at the time-limit of six months in view of its obligation to ensure due process to both Parties[68]. Australia, in response to that expression of concern, showed flexibility, provided only that the case was heard and resolved promptly. The result was an agreed timetable with a

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[64]*Legality of the Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, I.C.J. Reports 2004*, pp. 338–339, separate opinion of Judge Higgins.

[65]PCA Optional Rules for Arbitrating Disputes between Two States, 20 October 1992, Art. 26 (1).

[66]Procedural Order No. 1 in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, 6 Dec. 2013 (Rules of Procedure, Art. 21 (1)); tab 3.

[67]Timor Sea Treaty between the Government of East Timor and the Government of Australia, Dili, 20 May 2002, (entered into force 2 Apr. 2003); ATS 13, 2258 *UNTS* 3: ("Timor Sea Treaty") Ann. B, Art. (i); tab 1.

[68]Transcript, First Procedural Meeting in the Matter of the Timor Sea Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, 5 Dec. 2013; tab 4: p. 47, lines 12-13, Chairman. .

hearing finishing on 2 October 2014. The Tribunal has not given a fixed date for its award but it has undertaken to produce the award expeditiously[69].

6. Secondly, the Tribunal was made fully aware of the events of 3 December 2013, and it received a factual description of those events by Australia[70]. In return there was no suggestion that those events created any irreparable prejudice in terms of the presentation of Timor-Leste's Memorial.

7. But concern was expressed on one point. At Timor-Leste's request the Tribunal called on Australia to address the potential conflict arising from the fact that the Attorney-General is the Minister for both the Australian Security Intelligence Organisation and responsible for Australia's legal team in this Arbitration[71]. By a letter from its Agent dated 19 December 2013, Australia provided a written undertaking by the Attorney-General to address that potential conflict[72] and that undertaking has been confirmed and extended today.

8. Thirdly, there is the important issue of confidentiality. Timor-Leste asked the Tribunal to allow the whole Arbitration, including the written and oral procedure, to be conducted in public — with only limited safeguards for the identity of witnesses. It wanted the process to be subject to unrestricted comment by the parties in the media[73]. Australia objected and the Tribunal agreed with Australia's position. The proceedings, oral and written, are to be confidential, although the parties can issue brief factual statements at relevant intervals, for example, on the filing of pleadings[74]. The Award itself, subject to any necessary redactions, will be public. Given these confidentiality protections instituted by the Tribunal for good cause, it is a fair inference that one reason for these proceedings is to skirt around the confidentiality provisions and maximize the opportunity for publicity and comment prejudicial to Australia.

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[69]Transcript: tab 4, p. 47, lines 9–18, Chairman.

[70]Transcript: tab 4, p. 31, lines 3–17, J Reid.

[71]Transcript, tab 4, pp. 50, lines 9–24, (Lowe), 72, lines 8–9, (Chairman).

[72]Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis Q.C., Attorney-General of the Commonwealth of Australia, dated 19 Dec. 2013; tab 5.

[73]Transcript, tab 4, pp. 7, lines 5–17 (da Fonseca), 74, lines 8–14, (Lowe).

[74]Procedural Order No. 1, tab 3, Art. 26; Transcript, tab 4, pp. 83, lines 14–21, (Lowe), 84, lines 8–10, (Reid).

9. Now, it is true that Australia contests the jurisdiction of the Tribunal, in particular on the ground that the dispute concerns the CMATS[75] and hence falls within Article 11 of that Treaty rather than the Timor Sea Treaty, of 2002, Article 23. But that question is evidently a matter for the Tribunal. Whether the Tribunal would have the jurisdiction to prescribe interim measures, such as those requested by Timor-Leste, is a different question. It is a question whether the Tribunal has, not jurisdiction *per se*, but prima facie jurisdiction sufficient to found an order for provisional measures of protection under Article 21 (1) of its Rules of Procedure. As I have shown, Australia has been flexible and reasonable on procedural issues and we accept the Tribunal's authority to preserve due process pending its Award.

10. For these reasons, Australia's jurisdictional objection did not require Timor-Leste to come to this Court rather than before the forum already constituted to decide the broader dispute.

B. Timor-Leste's argument that the removed material goes beyond the scope of the Tribunal's authority

11. Mr. President, Members of the Court, Timor-Leste argued yesterday that the removed materials — and I quote Sir Elihu — "go well beyond the arbitration"[76]; the inference is that the Tribunal lacks jurisdiction to require their return or to make other appropriate orders with respect to them. That is not how it has been expressed by Timor-Leste to date.

12. The Application before you refers specifically to "documents prepared solely or predominantly in relation to a legal dispute" currently before the Tribunal, although it also refers without any particularization to "other documents and data in which Timor-Leste has a sovereign interest protected by international law"[77].

13. The Request is even clearer. Timor-Leste describes the documents and data that constitute the subject-matter of the Request — and the subject-matter of the principal Application — as **[**screen on; tab 37]: "containing correspondence between the Government of Timor-Leste and its Legal [advisers], among them documents relating to the conduct of the pending

[75]Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, Sydney, 12 January 2006, [2007] *ATS* 12, 2483 *UNTS* 359 (entered into force 23 February 2007); tab 2.

[76]CR 2014/1, p. 20, para. 10 (Lauterpacht).

[77]Application, para. 5.

Arbitration under the Timor Sea Treaty between Timor-Leste and Australia"[78]. It goes on to assert that it is an object of the Request [next slide; tab 38]: "to end the unlawful impediment to the conduct by Timor-Leste of its affairs caused by the seizure of the documents and data *in particular* (but not exclusively) in relation to the conduct of the pending Arbitration under the Timor Sea Treaty between Timor-Leste and Australia"[79] [screen off].

14. Even if this is not the exclusive object of the Application or the Request, it is plainly its primary object. In any case, it is enough that it falls within the scope of the matter that is before the Tribunal. In fact, Timor-Leste first asked Australia to return the documents in question at the preliminary hearing before the Tribunal on 5 December 2013[80].

15. Moreover, in its response of 23 December 2013 to the written undertaking given by the Attorney-General, Timor-Leste stated[81]:

> "Timor-Leste considers that the position that Australia takes or should take (whether in the course of the Arbitration proceedings themselves, or otherwise) in relation to (i) the legal instruments that are in issue in the Arbitration under the Timor Sea Treaty, and (ii) the exploitation of the resources of the Timor Sea, and (iii) Australia's relationship with Timor-Leste more generally, *are all matters that are related to the Arbitration*."

That is Timor-Leste — "are all matters that are related to the Arbitration" — a comprehensive formula. This implies that, in Timor-Leste's view, any of the removed material that relates to those matters necessarily relates to the Arbitration.

16. Since the material is currently under embargo, it is difficult to be more precise. The property seizure record does not clearly indicate that any of the removed material is *not* related to the Arbitration[82]. At the preliminary hearing before the Tribunal, Professor Lowe said "our papers *relating to this case* have been seized by the Respondent and we do not have them"[83]. At the same hearing, he stated that the list of documents provided by Mr. Collaery to the Timor-Leste

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[78]Request for the Indication of Provisional Measures, para. 3.

[79]Request for the Indication of Provisional Measures, para. 5; emphasis added.

[80]Transcript, tab 4, pp. 36, lines 8–17, 89, lines 21–23 (Lowe).

[81]Letter from the Agent of Timor-Leste to the Agent of Australia, 23 December 2013; WOA, Ann. 15, para. 7; emphasis added.

[82]ASIO Property Seizure Record, 3 December 2013; WOA, Ann. 11.

[83]Transcript, tab 4, p. 29, lines 11–13 (Lowe); emphasis added.

Government[84] made apparent the "materiality of these documents" to Timor-Leste's preparation for the Arbitration[85]. And yesterday, Sir Michael Wood remarked that "[s]o far as Timor-Leste can tell . . . the probability is that virtually all of the seized documents relate to Timor-Leste's legal strategy, including for the Arbitration and for any future maritime negotiations"[86]. It will be recalled that the question before the Tribunal relates to the moratorium in respect of those negotiations.

17. Mr. President, Members of the Court, what it comes down to is this. The Tribunal clearly has the power to order interim measures with respect to any of the removed material that relates to the Arbitration. Since there is no positive evidence that the removed material includes material not related to the Arbitration — other than assertions made from the Bar table yesterday — and without the material being inspected by anyone, it would not be practicable for the Tribunal to make an order limited only to the material related to the arbitration. The Tribunal's jurisdiction must necessarily extend to an order that *potentially* affects material whether or *not* related to the Arbitration, even if in the event it would not otherwise have jurisdiction with respect to such material.

18. Given the lack of particularization of these documents and data and the surrounding circumstances, the Court should approach the matter on the basis that the documents removed refer predominantly to the legal dispute before the Tribunal. But for that dispute and those proceedings, we would not be here.

19. Timor-Leste is evidently and belatedly aware of this. In a letter to the Permanent Court of Arbitration of 30 December 2013, it was moved to comment that "it would not characterize the proceedings against Australia in the International Court of Justice . . . as incidental to the Arbitration under the Timor Sea Treaty"[87]. In fact, neither Australia nor the PCA had characterized the proceedings as "incidental". But that characterization is, nonetheless, correct.

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[84]Letter from B. Collaery to Ambassador J. da Fonseca, 5 December 2013; tab 19.

[85]Transcript, tab 4, pp. 42, lines 24-25, 43, lines 1–3 (Lowe).

[86]CR 2014/1, p. 43, para. 41 (Wood).

[87]Letter from the Co-Agent of Timor-Leste to the Permanent Court of Arbitration, 30 Dec. 2013; WOA, Ann. 48.

The Application and especially the Request — which is what you are concerned with here — *are* incidental to a dispute which is already before another judicial body.

C. The position of this Court in relation to other international tribunals

20. Mr. President, Members of the Court, that brings me to my third major point, which is the position of this Court in relation to other international tribunals. Here I can be mercifully brief, since the position is clear and well-defined.

21. Your Court is of course the principal judicial organ of the United Nations . But as far as concerns inter-State disputes outside the work of the United Nations — and that includes the present dispute — your Court is a court of attributed powers whose jurisdiction depends on consent. Moreover you have no inherent priority — I say this with great respect — over other forums specially consented to by States and you have no appellate or review authority, as such, over other constituted tribunals, unless such priority or authority have been expressly conferred. All that is clear from Article 33 of the Charter, which expresses the foundational rule of inter-State judicial jurisdiction, the requirement of consent, and the related principle of free choice of means.

22. That position is even clearer if possible in cases such as the present where your jurisdiction is subject to the qualification contained in paragraph *(a)* of Australia's Optional Clause declaration. Which excludes [screen on; tab 39]: "Any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement."[88] Here the parties have agreed in Article 23 of the Timor Sea Treaty to resolve disputes under that Treaty by a special régime of arbitration and under Article 11 of CMATS to do so by negotiation. Furthermore the question whether Article 23 Timor Sea Treaty or Article 11 of CMATS is the applicable provision is one of which the Tribunal is *already* seised. A statement of Australia's objection was provided to the Tribunal prior to the 5 December hearing[89], and that question is already factored in to the consolidated hearing schedule for the Tribunal's decision. Is this Court going to decide that issue for the Tribunal and, if so, when? Australia has consented to disputes

[88]Declaration of Australia dated 22 March 2002 signed by the Hon. A.J.G. Downer, Minister for Foreign Affairs [tab 39].

[89]Australia's Statement of Jurisdictional Objections in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, 28 November 2013 [WOA, Ann. 47].

under the Timor Sea Treaty being decided by arbitration on a tight schedule. Having regard to paragraph *(a)* of the Optional Clause declaration Australia has not consented to the indefinite deferral of issues in proceedings before this Court. By the time this Court addresses the Application and the issues it raises, the underlying dispute will already have been addressed and decided, with *res judicata* effect, by the Tribunal. [Screen off.]

23. And no doubt our opponents will refer to the principle of parallelism of jurisdictional instruments and rely on such decisions as *Nicaragua* v. *Colombia (Preliminary Objections)* in support[90]. But that was a case of parallel acceptances of general jurisdiction under the Optional Clause and a general regional pact for the settlement of disputes, the Pact of Bogotá[91]. It was not a case of a *clausula specialia* governing a particular situation, as Article 23 of the Timor Sea Treaty. Also, there was no equivalent in Colombia's Optional Clause declaration to paragraph *(a)* of Australia's declaration[92]. Moreover your Court was careful in that case to give full effect to the qualification in Article VI of the Pact of Bogotá, which was the material difference between the two parallel instruments. You should, with all respect, likewise recognize and give full effect to the special régime of arbitration under Article 23 of the Timor Sea Treaty and to the decisions and to the competence of the Tribunal under that Treaty.

24. So even if your Court prima facie retains concurrent jurisdiction, notwithstanding the agreement of the parties to specific modalities of dispute settlement under the bilateral Treaties of 2002 and 2006, we say with respect that jurisdiction should not be exercised at that stage, having regard to the pending proceedings elsewhere. A rigid adherence to the parallelism of jurisdictions will only encourage forum shopping, conflict and fragmentation, unduly favouring successive claimants. Is Timor-Leste to be allowed in effect to appeal the Tribunal's adverse decision on confidentiality? Is it to be allowed to drag out the proceedings for years notwithstanding the express provision for prompt resolution of disputes under the 2002 Treaty? If the Optional Clause is to be converted into a supervisory vehicle for arbitrations, then too bad for the Optional Clause!

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[90] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 872–873, paras. 132–136.

[91] American Treaty on Pacific Settlement ("Pact of Bogotá"), 30 April 1948, OAS, *Treaty Series*, No. 17 and 61 (entered into force 6 May 1949).

[92] Declaration of Colombia dated 30 October 1937. Colombia notified the Secretary-General of the termination of this declaration on 5 December 2001.

Indeed Sir Elihu suggested that Australia "apply to the arbitral tribunal for an interim measure restraining Timor-Leste from pursuing the present request to the International Court in so far as Australia may claim that it bears on matters subject to the jurisdiction of th[is] arbitral tribunal"[93]. Of course — as Timor-Leste itself accepts — the present Request does bear on matters subject to the jurisdiction of the Tribunal. Yet this is just the sort of jurisdictional jockeying which would discredit the international dispute settlement system and which this Court would not want to see other tribunals engage in, or to engage in itself.

25. An apt illustration of the appropriate adjustment of relations between different international courts and tribunals is provided by the *MOX Plant* decision. There, a tribunal was constituted under Annex VII of UNCLOS[94]. Its jurisdiction depended on a question of European law on which the European Court of Justice would shortly be asked to rule and which, as between the parties to that case, it had exclusive power to decide[95]. That was not a case of indirect or incidental overlap, such as *Iron Rhine*[96], and unlike *Iron Rhine*, the *MOX Plant* Tribunal's jurisdiction was disputed by one of the parties on grounds of European law[97]. The *MOX Plant* Tribunal stayed its own proceedings on the ground that a procedure [screen on; tab 40] "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties"[98] — the full passage is on the screen [screen off].

26. I turn from these general remarks on the relation between your Court and pending cases in other international tribunals to the specific question of provisional measures. In the unfortunate circumstance where there are multiple procedures, an order by one judicial institution that affects the conduct of parallel proceedings before another judicial institution could result in conflict and confusion. The two judicial bodies would risk passing each other like ghosts in the corridors of the Peace Palace — corridors which, it might be thought, are already sufficiently haunted.

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[93]CR 2014/1, p. 32, para. 34 (5) (Lauterpacht).

[94]United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1836 *UNTS* 42 (entered into force 28 July 1994) ("UNCLOS").

[95]*MOX Plant*, 318–320.

[96]*In the Arbitration Regarding the Iron Rhine* ("Izeren Rijn") *Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, PCA, Award of the Tribunal, 24 May 2005.

[97]*MOX Plant*, 317-318.

[98]*MOX Plant*, 318–320 [tab 40].

27. There is one, and as far as I can discover, only one situation where an international judicial body exercises jurisdiction over provisional measures in connection with a dispute pending before another such body. This is the provision in Article 290, paragraph 5, of UNCLOS that [screen on; tab 41] "[p]ending the constitution of an arbitral tribunal", ITLOS "may prescribe, modify or revoke provisional measures . . . if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires"[99]. But there are two fundamental points to be made about Article 290, paragraph 5.

28. First, [next slide] it gives power only "[p]ending the constitution of [the] arbitral tribunal to which a dispute is [to be] submitted", in other words, ITLOS is empowered to prescribe provisional measures *only* in circumstances where the Annex VII Tribunal is not yet constituted.

29. Secondly, [next slide] once constituted, the Annex VII Tribunal has power to vary those provisional measures, which would not be the case here.

30. There is no equivalent to Article 290, paragraph 5, and a real possibility of conflict. Regardless of the content of the removed material, the purpose for which Australia has removed it and the circumstances of its removal are likely to come before the Tribunal — and indeed have already come up in the preliminary hearing. No matter how broad the removed material is in scope, there remains a real risk of parallel decisions by the Court and the Tribunal bearing on Australia's conduct with respect to that material.

31. Moreover the Tribunal is plainly a more appropriate forum for dealing with the subject-matter of the Request. Due to its compressed timetable, an agreed timetable, the Tribunal is certain to resolve the dispute before it, long before this Court will have the opportunity to decide the merits, or even its jurisdiction.

32. For the purposes of this Request, there is another reason why the Tribunal is the more appropriate forum. A court or tribunal called on to grant provisional measures needs to know something about the underlying dispute. It might even need to form a preliminary view of those facts. Here — to use Timor-Leste's term — the dispute before you is "incidental" to a broader dispute which is deliberately being held before another judicial body chosen by Timor-Leste. The

[99]UNCLOS, Art. 290 (1).

Tribunal will have before it facts that are not directly in issue before the Court but that would nonetheless be relevant to a decision to order provisional measures such as those requested.

33. And this is *necessarily* the case. The Court necessarily cannot be as cognizant of the conduct of the pending arbitration as the Arbitral Tribunal that is constituted specifically to hear it.

34. For example, the rights sought to be protected by provisional measures must be plausible[100]. This includes the alleged rights in documents and data over which Timor-Leste asserts privilege[101]. But the Solicitor-General has already established, Mr. Campbell has confirmed, that there is no international consensus on the existence of absolute professional privilege. States provide exceptions, for example in matters such as crime, fraud, conflict with a superior value, abuse of rights[102], and so on. Such exceptions depend on the underlying facts of the dispute. The Tribunal is in a much stronger position to determine whether the rights sought to be protected are plausible.

D. Consequences for the requirements of irreparable prejudice and urgency

35. Mr. President, Members of the Court, it follows inevitably from what I have said that before your Court the twin requirements of irreparable prejudice and urgency are not met.

36. There is no urgency. And certainly the matter is not *so* urgent that it is not possible for Timor-Leste to apply to the Tribunal for provisional measures and await the outcome. If it had applied on 5 December, it would have had its answer by now. If it had applied on 17 December — instead of filing the present case — it would have had its answer by now. This is the reverse of urgency, and it is Timor-Leste that has put itself into the position by electing to initiate parallel proceedings with further delay, when it had a remedy direct to hand.

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[100] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, I.C.J. Reports 2009*, p. 151. See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, I.C.J. Reports 2009*, p. 18; *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), Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33.

[101] Request for the indication of provisional measures, para. 6.

[102] Australia's Written Observations, footnote 76; Summary of Municipal Laws on Legal Professional Privilege/Confidentiality: Scope and Exceptions [WOA, Ann. 32].

E. Conclusions

37. Mr. President, Members of the Court, for the reasons given the Court should not order any of the measures requested by Timor-Leste. This is particularly so in light, amongst the other matters already raised by Australia this morning, of the irreparable prejudice that could be caused to Australia by the indication of the provisional measures sought and by the additional undertakings given by Australia.

Mr. President, Members of the Court, that brings to an end Australia's first round of oral argument. I thank you for your kind attention.

The PRESIDENT: Professor Crawford, this indeed brings to an end the first round of oral observations of Australia. Before adjourning the sitting, I give the floor to Judges Bennouna, Cançado Trindade, Yusuf, Donoghue and Greenwood, who have questions for the Parties. Monsieur le juge Bennouna, vous avez la parole.

Judge BENNOUNA: I thank you, Mr. President. My question is addressed to the Australian delegation and it is as follows:

> "Can the Australian Delegation explain to the Court why the search warrant was delivered on 2 December 2013 and executed on 3 December, i.e., two days before the first hearing of the Arbitral Tribunal, held on 5 December 2013?"

Thank you, Mr. President.

Le PRESIDENT: Je vous remercie, Monsieur le juge. Je passe la parole à Monsieur le juge Cançado Trindade. Vous avez la parole, Monsieur.

Judge CANÇADO TRINDADE: Thank you very much, Mr. President. My question is addressed to both Parties, Timor-Leste and Australia.

> "What is the impact of a State's measures of alleged national security upon the conduction of arbitral proceedings between the Parties? In particular, what is the effect or impact of seizure of documents and data, in the circumstances of the present case, upon the settlement of an international dispute by negotiation and arbitration?"

Thank you.

The PRESIDENT: Thank you, Judge Cançado Trindade. I give the floor to Judge Yusuf. You have the floor, Sir.

Judge YUSUF: Thank you, Mr. President. My question is also addressed to both Parties. I would like to ask them the following question:

> "In the view of the Parties, to whom did the individual items listed in the ASIO Property Seizure Record of 3 December 2013 and their contents belong at the time of their seizure?"

Thank you, Mr. President.

The PRESIDENT: Thank you very much, Judge Yusuf. I give now the floor to Judge Donoghue. You have the floor, Madam.

Judge DONOGHUE: Thank you, Mr. President.

> "I have two questions for Australia about the Undertaking of the Attorney-General provided to the Court today.
>
> My first question relates to the chapeau that begins the paragraph on page 2. I seek to clarify the significance of the first 'or' on line 1 of page 2. Under what circumstances would the undertaking of the Attorney-General expire prior to this Court's Judgment?
>
> My second question also relates to the paragraph on page 2. I seek to clarify the relationship between subparagraph (3) and subparagraph (4), in light of the fact that subparagraph (4) begins with the phrase 'without limiting the above'. If Australia wishes, for 'national security purposes', to provide the material or information derived from the material to a part of the Australian Government that has responsibility for the matters described in subparagraph (4), could it do so consistent with the Undertaking?"

Thank you.

The PRESIDENT: Thank you very much. I give the floor to Judge Greenwood. You have the floor, Sir.

Judge GREENWOOD: Thank you, Mr. President. My question is for Australia and it also relates to the terms of the new undertaking that was put before the Court today. The question is in two parts:

> "(1) Does Australia undertake that no information derived from the documents seized or from notes made in the course of the execution of the search warrant has already been communicated to any person involved in the arbitration proceedings or any person who might be involved in negotiations relating to the matters referred to in paragraph 4 of that undertaking?
>
> (2) In the event of a prosecution in Australia, will any of the documents seized or information derived from those documents be disclosed in court in such a way that

> those documents or that information will be likely to come to the notice of persons involved in the arbitration, in the proceedings in this Court or in any negotiations of the kind to which I have referred?"

Thank you, President.

The PRESIDENT: Thank you, Judge Greenwood. The text of these questions will be sent to the Parties as soon as possible. The Parties are invited to provide their replies to the questions orally in the course of these hearings. Timor-Leste may submit, if it so wishes, written comments on Australia's replies to the questions put today as soon as possible, but not later than by Friday 24 January 2014, 6 p.m. The Court will meet again tomorrow at 10 a.m. to hear the second round of oral observations of Timor-Leste. The sitting is closed.

The Court rose at 12.05 p.m.

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