

# ICJ Order on Timor-Leste's request for provisional measures against Australia and its implications on investor-state arbitration

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In *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Order of 3 March 2014 on a Request for the Indication of Provisional Measures), the International Court of Justice (ICJ) considered a request from Timor-Leste for provisional measures against Australia.

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## Speedread

On 3 March 2014, the International Court of Justice (ICJ) delivered its decision on Timor-Leste's request for provisional measures in its case against Australia. The ICJ issued provisional measures, ordering that materials seized by the Australian security services (ASIO) from one of Timor-Leste's legal advisors be sealed, that their content must not be used to the disadvantage of Timor-Leste, and that Australia must not interfere with communications between Timor-Leste and its legal advisors relating to ongoing procedures concerning maritime delimitation.

The case gives an interesting perspective on the existence of a right under international law to the protection of communications between a party to arbitration and its counsel, the status of a state's undertakings and interim orders pending the decision on a provisional measures request. Each of these topics is likely to be relevant to arbitral tribunals adjudicating investor-state disputes. (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Order of 3 March 2014 on a Request for the Indication of Provisional Measures).)

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## Background

### Legal framework for the Order

The Statute of the International Court of Justice (1945) (1 UNTS 993) (ICJ Statute) governs the composition, organisation, competence and fundamental procedure of the Court. It is annexed to and forms an integral part of the United Nations Charter. Provisions relevant to this update include:

- Article 36(2): "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation."

- Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations; ..."
- Article 41(1): "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

The ICJ's Rules of Court provide a detailed supplement to the ICJ Statute. Article 74(4) provides:

"Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."

Article 2 of the United Nations Charter of 1945 (1 UNTS XVI) details certain fundamental aspects of the international legal order. Article 2 provides:

"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. (1) The Organization is based on the principle of the sovereign equality of all its Members. ... (3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. ..."

## Equivalent powers in investor-state arbitration

Neither the *ICSID Convention* ([www.practicallaw.com/5-205-5234](http://www.practicallaw.com/5-205-5234)) nor the *ICSID Arbitration Rules* ([www.practicallaw.com/9-505-1315](http://www.practicallaw.com/9-505-1315)) contain a power to issue interim orders pending the decision on a request for provisional measures (that is, there is no equivalent to Article 74(4) of the ICJ's Rules). However, the practice of arbitral tribunals indicates that they are empowered to make such orders nevertheless.

An example can be found in the *Decision on Provisional Measures in Perenco v Ecuador (ICSID Case No ARB/08/6)*. In that case the tribunal records how it had requested that the parties refrain from taking action that would modify the *status quo* between them until it had heard full submissions on the provisional measures request (*Decision, para 28*). It took the view that this "request" had "the same authority as a *recommendation*" for provisional measures (*Decision, para 35*). The tribunal explained the rationale for making such requests in the following terms:

"if, having been served with an application for interim measures, a party could act in the period intervening between the application's filing and the filing of its response to upset the status quo which the application sought to maintain, ... a disputing party would have the power to prevent the Tribunal from exercising fully its jurisdiction" (*Decision, para 64*)

A similar approach can be found in the *Directions of 13 June 2012* issued by the President of the conjoined tribunals in *Bernhard von Pezold & Ors v The Republic of Zimbabwe (ICSID Case No ARB/10/15)* and *Border Timbers Limited & Ors v The Republic of Zimbabwe (ICSID Case No ARB/10/25)*. As recorded in the decision, the action complained of by the claimants was due to take

place shortly after the claimants learned of it. Consequently, an urgent request for provisional measures was made. The claimants also requested that an "interim order to preserve the status quo, pending further observations of the parties [on the provisional measures request]" be issued in light of the urgency of the matter (*Directions, para 3*). The President considered that an interim order in such circumstances was "an appropriate course of action, especially given the potential consequences that might result from the respondent's proposed actions" (*Directions, para 7*). Zimbabwe was directed to take no steps in relation to the matter pending the final determination of the provisional measures request.

## Facts

Timor-Leste instituted arbitral proceedings against Australia in April 2013 pursuant to the Timor Sea Treaty's dispute settlement provisions. Those proceedings relate to the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea, which defines the distribution of revenue between Australia and Timor-Leste in respect of the exploitation of certain oil and gas deposits in the Timor Sea. Timor-Leste alleges that Australian espionage during the negotiation of the 2006 treaty renders it void. (For further details, see *Professor Anton's ASIL Insight of 26 February 2014*.)

In December 2013, ASIO agents seized documents from the Australia-based workplace of a legal representative to Timor-Leste in the arbitration. Its action led to proceedings being instituted at the ICJ. It was not disputed that part of the seized property included material relating to the arbitration and to possible future negotiations on maritime delimitation between the parties, and communications between Timor-Leste and its legal advisers. Timor-Leste applied to the ICJ for a determination of the rights applicable to the matter and requested that the ICJ grant provisional measures.

Timor-Leste's principal claim was that there had been a violation of its right to communicate confidentially with its counsel regarding issues forming the subject-matter of pending arbitral proceedings and future negotiations. Timor-Leste asserted that legal professional privilege is a general principle of law, and therefore a right with a binding international legal character under Article 38(1)(c) of the ICJ's Statute.

However, Australia's Attorney-General had given undertakings that:

- The material would not be used except for national security purposes.
- It would not be used by Australia for any purpose relating to the exploitation of resources in the Timor Sea or related ongoing dispute settlement processes.
- The material would be sealed until the conclusion of the hearing on the provisional measures request. (See *Order, paras 36-7*.)

## Decision

The ICJ granted the order for provisional measures.

Consistent with its earlier jurisprudence, the ICJ required that three conditions be met to enable the issuance of provisional measures.

The first condition is that *prima facie* jurisdiction over the merits of the dispute must exist. Since Timor-Leste and Australia had issued declarations accepting the ICJ's compulsory jurisdiction under Article 36(2) of the ICJ's Statute, the ICJ was satisfied that this was met.

The second condition is that the ICJ may only exercise its power to grant provisional measures where "it is satisfied that the rights asserted by the requesting party are at least plausible" and linked to the requested provisional measures (*Order, para 22*).

The third condition is that there must be a "real and imminent risk that irreparable prejudice" will be caused to the rights which are the subject of the merits proceedings before the ICJ (*Order, para 32*).

The ICJ's application of the Second and Third Conditions is considered in the following sections.

### **The right to the protection of communications with legal advisors**

With regard to the second condition, the question was whether Timor-Leste's claimed right to confidential communications with its counsel was a plausible right. The ICJ considered such a right as being derived from the sovereign equality of states, a fundamental principle of the international legal order reflected in Article 2(1) of the United Nations Charter. It considered that the equality of states must be preserved when they are in the process (required by Article 2(3) of the Charter) of peacefully settling an international dispute. In the ICJ's view, the combination of these two fundamental principles is such that a state "engaged in the peaceful settlement of a dispute with another State ... would expect to undertake [that process] without interference by the other party in the preparation and conduct of its case" (*Order, para 27*). Consequently, in such situations there is a "plausible right" to the protection of states' communications with counsel, which extends to documents prepared by counsel for the purpose of advising their client (*Order, para 27*).

### **Real and imminent risk of irreparable prejudice and the value of voluntary undertakings to counter such risk**

In considering the third condition, the ICJ accepted that a breach of the confidentiality of the seized materials would cause irreparable prejudice to Timor-Leste's claimed rights (*Order, para 42*). (That conclusion appears to be inevitable given the nature of the rights claimed in the proceedings before the ICJ.) The issue was whether there was a real and imminent risk of such a breach. Australia had argued that no such risk existed because the claimed rights were sufficiently protected by undertakings its Attorney-General had made.

The ICJ described these undertakings as a "significant contribution towards mitigating the imminent risk of irreparable prejudice ... to Timor-Leste's rights" (*Order, para 47*). However, in the ICJ's opinion some risk remained (*ibid*), because: Australia's undertakings permitted the use of the seized materials for national security purposes and "once disclosed to any designated officials in [such] circumstances ..., the information ... could reach third parties, and the confidentiality of the materials could be breached"; and Australia had not committed to sealing the materials until the ICJ's final decision on the merits (*Order, para 46*). Accordingly, provisional measures were necessary to address the residual risk of irreparable harm.

In arriving at this determination, the ICJ noted that it had "no reason to believe that the [undertakings] will not be implemented by Australia", reasoning that "[o]nce a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed" (*Order, para 44*).

### **Request Under Article 74(4) of the ICJ Rules**

While the provisional measures request was pending, Timor-Leste had invited the President of the ICJ to exercise his powers under Article 74(4) of the ICJ's Rules. Timor-Leste requested that the President call on Australia to produce a list of all the seized materials, to seal them and any copies, and to deliver them to the ICJ or return them to Timor-Leste.

The President of the ICJ decided to exercise his power under Article 74(4), calling on Australia to maintain the *status quo* so that any provisional measures ordered would have the appropriate effect, and particularly to refrain from any act which might cause prejudice to the rights claimed by Timor-Leste in the proceedings. Consequently, Australia directed ASIO to seal the seized materials until the conclusion of the provisional measures proceedings.

## **Comment**

### **The right to the protection of communications with legal advisors**

In relation to the second condition referred to by the ICJ, by basing Timor-Leste's right on the sovereign equality of states in an inter-state dispute, the ICJ's reasoning is less readily applicable in disputes between states and non-state actors, including investor-state arbitrations. However, this is not of significant concern to investor-state arbitration; at least one investor-state arbitral tribunal has already considered the issue. The tribunal in *Libananco v Turkey (ICSID Case No ARB/06/8)* considered that "respect for confidentiality and legal privilege" and the right of disputing parties "to seek advice and to advance their respective cases freely and without interference" were fundamental tenets at the heart of the ICSID arbitral process (*Decision on Preliminary Issues, para 78*). The tribunal stated that disputing parties have "an obligation to arbitrate fairly and in good faith" and that "an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with" (*ibid*). Further, confidentiality and legal privilege are covered by Article 9 of the *IBA Rules on the Taking of Evidence in International Arbitration 2010* ([www.practicallaw.com/4-502-4254](http://www.practicallaw.com/4-502-4254)), which are often applicable in investor-state arbitral proceedings by the agreement of the parties.

### **The status of a state's undertakings**

The ICJ's commentary on the status of the undertakings given by Australia's Attorney-General begs the question as to the legal effect of a state acting in breach of its undertakings. Since Australia accepted that its Attorney-General has authority to bind Australia as a matter of international law (*Order, para 44*), it would appear to accept that any breach of its undertaking would be a breach of international law. Such an undertaking would appear to be no less binding than a provisional measures order. Logically, this must be a prerequisite for such undertakings to be seen as mitigating the risk of irreparable harm.

Accordingly, a potential imminent breach of the undertaking could be addressed in a subsequent provisional measures application, and an actual irreparable breach could be addressed in the final decision.

### **Interim orders pending a decision on a request for provisional measures**

While the purpose of provisional measures is to preserve the claimed rights pending the decision on the merits in relation to those rights, the object of Article 74(4) of the ICJ's Rules is to preserve such rights pending the decision on a provisional measures request. This is an entirely logical power. Its use can prevent the allegedly irreparable harm being committed before the ICJ has the opportunity to issue an order provisionally prohibiting such acts. Indeed, domestic courts often have powers to issue interim measures on an *ex parte* basis for this very purpose. The practice of both the ICJ and investor-state arbitral tribunals is such that interim orders pending a decision on a request for provisional measures are a permissible instrument within their respective competences. The ICJ's competence rests in its rules. While neither the ICSID Convention nor the ICSID Arbitration Rules expressly provide such a power, the practice of arbitral tribunals (see *Background*) indicates that such a power falls within the inherent competence of an ICSID tribunal; for a textual basis, one might look to the residual discretion under Article 44 of the ICSID Convention (which provides: "... If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.").

#### **Case**

*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order of 3 March 2014 on a Request for the Indication of Provisional Measures).*

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