

## Timor Leste's request for provisional measures: ICJ orders materials seized by Australia sealed until further notice

Matthew  
Happold

On 3 March 2014, the International Court of Justice handed down its [order](#) on the request by Timor Leste for the indication of provisional measures in its claim against Australia relating to the seizure and detention of certain documents and data (for earlier reporting of the proceedings: see [here](#)). As predicted, Timor Leste didn't get the seized material back, but the decision of the Court did give it most of what it wanted.

The Court considered that Timor Leste had established jurisdiction *prima facie* on the basis of the declarations it and Australia had made under Article 36(2) of the Court's Statute accepting the Court's compulsory jurisdiction, and that at least some of the rights claimed by Timor Leste were plausible. A concomitant of the principle of the sovereign equality of States was equality between States when in the process of seeking peacefully to settle their disputes, which meant that States have a right of confidentiality and of non-interference in their communications with their legal advisers when engaging in arbitration proceedings or negotiations. The Court also considered that there was a link between the rights claimed and the measures sought by Timor Leste insofar as they sought to prevent interference by Australia with Timor Leste's communications with its legal advisers.

The major issue before the Court was, however, whether there was a risk of irreparable prejudice to Timor Leste's rights, and whether such a threat was urgent. Australia's argument was that there was no such risk. At the commencement of proceedings the Australian Attorney-General had stated that there had been no inspection of the documents and data seized and that they would be held under seal until the beginning of the oral hearings on Timor Leste's request for the indication of provisional measures. At the oral hearings themselves, the Australian Solicitor-General had assured the Court that the materials would remain under seal until it rendered its decision on the request. Further, a [written undertaking](#) of the Attorney-General was presented to the Court stating that until the close of the Court's proceedings the materials would only be inspected for purposes of national security, and that there would be no communication of them or their contents for any purpose in connection with the exploitation of resources in the Timor Sea or related negotiations, or in connection with the case before the Court or the Timor Sea Treaty Arbitration.

The Court considered that these undertakings went a long way to mitigate the risk facing East Timor. Such undertakings were binding on Australia (the Attorney-General having actual and ostensible authority to bind Australia as a matter of both Australian and international law) and it could not be anticipated that Australia would not comply with the commitments it had made. It did not, however, consider that they extinguished it. Given that Australia specifically reserved the right to inspect the materials, the Court considered that there was a risk of disclosure of their contents and, once disclosed and confidentiality breached, the injury suffered to Timor Leste's rights to conduct arbitral proceedings and negotiations without interference would be irreparable.

Accordingly, the Court ordered (by 12 votes to 4) Australia to ensure that there is no disclosure of the materials to any persons to the disadvantage of Timor Leste until the conclusion of proceedings. To that end, the Court further required Australia (also by 12 votes to 4) that Australia continues to hold the materials seized under seal until further decision of the Court. Finally, the Court ordered (by 15 votes to 1) that Australia not interfere in any way with communications between Timor Leste and its legal advisers in connection with the proceedings before it, the Timor Sea Arbitration, or any future bilateral negotiations.

Although little was said about the events giving rise to the application, the Court plainly thought Australia had behaved inappropriately. An order for the return of the material seized never having been a realistic option (not least because it would appear to anticipate the subject matter of the underlying claim itself), Timor Leste seems to have achieved most of what it sought from the Court. The decision cannot be said to break much new ground

legally speaking, although the statements on the content of sovereign equality in the context of the peaceful settlement of international disputes, and on unilateral undertakings are interesting. Perhaps more important is the message sent with regards to States' right not to have their communications intercepted when engaged in negotiations or legal proceedings. The Court's comments will doubtless be used by Timor Leste to support its claims in the arbitration concerning the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea, where it claims that Australia bugged Timorese cabinet discussions during negotiation of the treaty (see [here](#) for examination of the issues). In that context, and given the current wider controversies about electronic eavesdropping, one might see the composition of the minority – Judges Keith (New Zealand), Greenwood (UK), Donoghue (USA) and Judge *ad hoc* Callinan (Australia) – as interesting, albeit that all but Judge *ad hoc* Callinan voted for the final part of the order.