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ICJ orders provisional measures in proceedings between East Timor and Australia

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The International Court of Justice (**ICJ**) has handed down its decision in respect of provisional measures sought by East Timor in a pending case before the Court. The principal claim relates to documents and data seized by the Australian Security Intelligence Organisation (**ASIO**) from the office of an Australian lawyer representing East Timor in an upcoming arbitration with Australia.¹

At least some of the materials seized relate to a pending arbitration between East Timor and Australia concerning allegations by East Timor that Australia engaged in spying during negotiations to sign the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (**CMATS**). In that arbitration, East Timor contends that Australian espionage invalidates CMATS, a A\$40 billion gas and oil treaty, as the treaty was not negotiated in good faith.

The ICJ has ordered that Australia:

- ensure that the content of the seized material is not used to the disadvantage of East Timor before the principal claim is determined;
- keep the seized materials and any copies thereof under seal; and
- not interfere in any way in communications between East Timor and its legal advisors in relation to the CMATS arbitration.

However, the Court did not order that Australia deliver the seized materials into the custody of the ICJ or deliver to East Timor and the ICJ a list of the materials seized in the raid that have been disclosed to any person and a list of those to whom the materials had been disclosed, as requested in East Timor's request for provisional measures.

The ICJ's findings

The Court noted that its power to order provisional measures could only be exercised if it was satisfied that:

- it had prima facie jurisdiction to rule on East Timor's principal claim;
- the rights asserted by East Timor were plausible;
- a link existed between the rights forming the subject of East Timor's principal claim and the provisional measures sought; and
- there was a sense of urgency in the sense that there was a real and imminent risk that irreparable prejudice would be caused to the rights in dispute before the Court delivered its final decision in respect of the principal claim.

Jurisdiction

East Timor invoked declarations made by Australia and East Timor pursuant to Article 36(2) of the ICJ Statute as the basis for the ICJ's jurisdiction to hear its claim in relation to the seized documents. The Court held that it had jurisdiction to rule on East Timor's request for provisional measures as the declarations prima facie afforded a basis on which it could have jurisdiction to rule on the merits of East Timor's principal claim.

Australia reserved its right to raise questions of jurisdiction and admissibility at the merits stage in its submissions relating to provisional measures.

Plausibility of the rights asserted

In relation to the plausibility of the rights asserted by East Timor, the Court observed that East Timor's principal claim was that 'a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and possible future negotiations on maritime delimitation'. The Court held that the right asserted by East Timor was plausible as it was derived from the principle of the sovereign equality of states and the preservation of the equality of parties involved in the settlement of international disputes by peaceful means.

Link between rights and the measures sought

A majority of the Court was satisfied that there was a link between the rights claimed by East Timor and the provisional measures sought, as the measures sought were 'intended to protect Timor-Leste's claimed rights to conduct, without interference by Australia, arbitral proceedings and future negotiations, and to communicate freely with its legal advisers, counsel and lawyers to that end'.

Risk of irreparable prejudice and urgency

The Court held that a failure to safeguard the confidentiality of the seized materials would have a 'serious detrimental effect' on East Timor's position, both in relation to the CMATS arbitration and other future maritime negotiations, if the material was divulged to any person involved in the arbitration or negotiations on behalf of Australia's behalf. This meant that East Timor's right to conduct arbitral proceedings and negotiations without interference could suffer irreparable prejudice.

The Court acknowledged that the Australian Attorney-General, Senator George Brandis, had given an undertaking Australian officials involved in the arbitration would not have access to the seized material. The Court commented that 'once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed' and the ICJ therefore had no reason to believe that the

undertaking would not be honoured. However, the Court concluded that the undertaking did not remove the risk of irreparable prejudice caused by the seizure of the documents entirely. This was because the undertaking given by Senator Brandis envisaged the possibility of making use of the seized documents in circumstances involving national security, and the undertaking was expressed to be given only until the ICJ's decision on provisional measures was delivered.

The Australian Government's response

The Australian Government has stated that the ICJ's decision 'is a good outcome for Australia'. A brief press release issued in response to the ICJ's decision states that the Court's orders would be complied with, and had the effect of extending the undertakings offered by Australia during the course of the hearing.²

Implications

The ICJ's decision is notable in that it imposes restrictions on Australia's national intelligence agency at a time of significant controversy over allegations of espionage by western countries against their foreign counterparts. Interestingly, the order that Australia not interfere in any way with communications between East Timor and its legal advisors was supported by all but one of the judges of the Court, with Ian Callinan, the ad hoc judge appointed by Australia, the only judge in dissent. Those in support of the order included judges from the United States and Britain.

The provisional measures ordered by the Court will remain in force until the principal case on the merits of East Timor's claim is determined. A date for the hearing on the merits of East Timor's principal claim is yet to be announced.

This article was written by Leon Chung, Partner and Alexandra Payne, Solicitor, Sydney.

Endnotes

1. For a detailed overview of the background to the hearing on provisional measures and the conduct of the oral proceeding refer to our earlier posts [here](#) and [here](#).
2. The Australian Government's press release is available [here](#).

More information

For information regarding possible implications for your business, please contact Leon Chung.

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