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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Monday 20 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 lundi 20 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

The Government of Timor-Leste is represented by:

H.E. Mr. Joaquim A.M.L. da Fonseca, Ambassador of the Democratic Republic of Timor-Leste to the United Kingdom,

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;

*

Sir Elihu Lauterpacht, C.B.E., Q.C. Honorary Professor of International Law, University of Cambridge, member of the Institut de droit international, member of the English Bar,

Mr. Vaughan Lowe, Q.C., Emeritus Professor of International Law, University of Oxford, member of the English Bar,

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

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Ms Janet Legrand, Partner, DLA Piper UK LLP,

Ms Emma Martin, Associate, DLA Piper UK LLP,

Ms Jolan Draaisma, Senior Associate, Collaery Lawyers,

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

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Mr. Andrew Sanger, Lauterpacht Centre for International Law, University of Cambridge,

Mr. Eran Sthoeger, LL.M., New York University School of Law,

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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,

sir Michael Wood, K.C.M.G., membre de la Commission du droit international, membre du barreau d'Angleterre,

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Mme Emma Martin, collaboratrice au Cabinet DLA Piper UK LLP,

Mme Jolan Draaisma, collaboratrice principale au Cabinet Collaery Lawyers,

M. Andrew Legg, ~~Ph.D~~ DPhil., membre du barreau d'Angleterre,

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The Government of Australia is represented by:

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H.E. Mr. Neil Mules, A.O., Ambassador of Australia to the Kingdom of the Netherlands,

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Ms Camille Goodman, Principal Legal Officer, Attorney-General's Department,

Ms Stephanie Ierino, Senior Legal Officer, Attorney-General's Department,

Ms Amelia Telec, Senior Legal Officer, Attorney-General's Department,

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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Le Gouvernement de l'Australie est représenté par :

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M. Bill Campbell, Q.C., *General Counsel* (droit international), services de l'*Attorney-General* d'Australie,

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Mme Camille Goodman, juriste principal, services de l'*Attorney-General*,

Mme Stephanie Ierino, juriste hors classe, services de l'*Attorney-General*,

Mme Amelia Telec, juriste hors classe, services de l'*Attorney-General*,

Mme Esmeé Shirlow, juriste hors classe par intérim, services de l'*Attorney-General*,

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M. William Underwood, troisième secrétaire, ambassade d'Australie au Royaume des Pays-Bas,

comme conseillers ;

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

comme assistante.

The PRESIDENT: Good morning. Please be seated. The sitting is open. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by the Democratic Republic of Timor-Leste in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*.

For reasons which she has duly conveyed to me, Judge Sebutinde is unable to be present on the Bench today.

Each of the Parties in the present case, the Democratic Republic of Timor-Leste and Australia, has availed itself of the possibility afforded to it by Article 31 of the Statute of the Court to choose a judge *ad hoc*. Timor-Leste has chosen Mr. Jean-Pierre Cot, and Australia, Mr. Ian Callinan.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that Mr. Jean-Pierre Cot has been a judge *ad hoc* in the past and made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court provides that he shall make a new solemn declaration for the purpose of these newly initiated proceedings.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Ian Callinan, of Australian nationality, is a retired Justice of the highest Court of Australia, its High Court. He was admitted to the Queensland Bar in 1965 and subsequently appointed Queen's Counsel in 1978. Mr. Callinan served as President of the Queensland Bar Association from 1984 to 1986 and as President of the Australian Bar Association in 1986. He was appointed Justice of the High Court of Australia in 1997 and continued to serve in that capacity until his retirement in 2007. During his illustrious career, both as advocate and as judge, Mr. Callinan has dealt with wide-ranging cases covering, *inter alia*, constitutional, commercial and criminal law. In addition, he has appeared on several occasions before Royal Commissions, the High Court of Australia and the Privy Council. He continues to practise as a qualified arbitrator

and mediator. Mr. Callinan is an adjunct Professor of Law at the University of Queensland and is the author of numerous law reviews and articles. Mr. Callinan is an Honorary Life Member of several Bar Associations.

M. Jean-Pierre Cot, de nationalité française, est membre du Tribunal international pour le droit de la mer. Il est également professeur émérite de l'Université Paris-I (Panthéon-Sorbonne) et chercheur associé au Centre de droit international de l'Université libre de Bruxelles. Entre 1981 et 1982, il a été ministre chargé de la coopération et du développement au sein du Gouvernement français, avant d'être élu au Conseil exécutif de l'UNESCO, en 1983. Pendant 17 ans, M. Cot a été membre du Parlement européen, au sein duquel il a exercé d'éminentes fonctions, notamment celles de président de la commission des budgets, de président du groupe socialiste au Parlement européen, et de vice-président du Parlement européen. Il a aussi été député à l'Assemblée nationale française. M. Cot a déjà exercé les fonctions de juge *ad hoc* dans quatre affaires dont a connu la Cour. Il est arbitre dans une affaire concernant la délimitation maritime entre le Bangladesh et l'Inde. M. Cot est l'auteur de nombreuses publications dans le domaine du droit international, du droit européen et des sciences politiques. Il a également été président de la Société française pour le droit international de 2004 à 2012.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Ian Callinan to make the solemn declaration prescribed by the Statute, and I would request all those present to rise. Mr. Callinan, you have the floor.

Mr. CALLINAN: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. J'invite maintenant M. Jean-Pierre Cot à faire la déclaration solennelle prescrite par le Statut. M. Cot, vous avez la parole.

M. COT: «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Je vous remercie. Please be seated. I take note of the solemn declarations made by Mr. Callinan and Mr. Cot, and declare them duly installed as judges *ad hoc* in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*.

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The proceedings in the present case were instituted on 17 December 2013 by the filing in the Registry of the Court of an Application by the Democratic Republic of Timor-Leste against Australia concerning the alleged seizure and subsequent detention by "the agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law". Timor-Leste alleges that Australia has seized, in particular, documents relating to a pending arbitration under the 2002 Timor Sea Treaty between Timor-Leste and Australia.

To found the jurisdiction of the Court, Timor-Leste relies on the declaration it made on 21 September 2012 under Article 36, paragraph 2, of the Statute, as well as on the declaration Australia made on 22 March 2002 under the same provision.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in the Application of Timor-Leste. Monsieur la greffier, vous avez la parole.

The REGISTRAR: Merci.

"Timor-Leste requests the Court to adjudge and declare:

First, [t]hat the seizure by Australia of the documents and data violated (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

Second, [t]that continuing detention by Australia of the documents and data violates (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

Third, [t]hat Australia must immediately return to the nominated representative of Timor-Leste any and all of the aforesaid documents and data, and destroy beyond recovery every copy of such documents and data that is in Australia's possession or

control, and ensure the destruction of every copy that Australia has directly or indirectly passed to a third person or third State;

Fourth, [t]hat Australia should afford satisfaction to Timor-Leste in respect of the above-mentioned violations of its rights under international law and any relevant domestic law, in the form of a formal apology as well as the costs incurred by Timor-Leste in preparing and presenting the present Application."

The PRESIDENT: Thank you. On the same day as the filing of the Application, Timor-Leste submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court. In its Request for the indication of provisional measures Timor-Leste alleges, *inter alia*, that there is a risk that "the [above-mentioned] papers will be inspected and copied and that Australia will acquire confidential information that it will in practice thereafter be free to use for its own advantage and to the disadvantage of Timor-Leste" both in the pending arbitration and with regard to other matters relating to the Timor Sea and its resources. It further adds that Australia "may pass such information to third parties".

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of Timor-Leste is asking the Court to indicate. Monsieur le Greffier, vous avez la parole.

The REGISTRAR: Merci.

"Timor-Leste respectfully requests that the Court indicate the following provisional measures:

(a) [t]hat all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice;

(b) [t]hat Australia immediately deliver to Timor-Leste and to the International Court of Justice (i) a list of any and all documents and data that it has disclosed or transmitted, or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (ii) a list of the identities or descriptions of and current positions held by such persons.

(c) [t]hat Australia deliver within five days to Timor-Leste and to the International Court of Justice a list of any and all copies that it has made of any of the seized documents and data;

(d) [t]hat Australia (i) destroy beyond recovery any and all copies of the documents and data seized by Australia on 3 December 2013, and use every effort to secure

the destruction beyond recovery of all copies that it has transmitted to any third party, and (ii) inform Timor-Leste and the International Court of Justice of all steps taken in pursuance of that order for destruction, whether or not successful.

(e) [t]hat Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste."

The PRESIDENT: Merci. On 17 December 2013, immediately after the filing of the Application and Request for the indication of provisional measures, the Registrar, in accordance with Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court, transmitted certified copies thereof to the Government of Australia. He also notified the Secretary-General of the United Nations of the filing of these documents by Timor-Leste.

By a letter dated 18 December 2013, referring to Article 74, paragraph 4, of Rules of Court, in my capacity as President of the Court, I called upon Australia "to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings".

According to Article 74 of the Rules of Court, a Request for the indication of provisional measures shall have priority over all other cases. The date of the hearing must be fixed in such a way as to afford the parties an opportunity of being represented at it. Consequently, following consultations, the Parties were informed that the date for the opening of the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the Request for the indication of provisional measures, had been set at 20 January 2014, at 10 a.m.

I note the presence before the Court of the Agents and counsel of the two Parties. I also note the presence of the Foreign Minister for the Democratic Republic of Timor-Leste for these hearings. The Court will hear Timor-Leste, which has submitted the Request for the indication of provisional measures, this morning until 25 minutes past noon. It will hear Australia tomorrow morning, at 10 a.m.

For the purposes of this first round of oral arguments, each of the Parties will have available to it a full two-hour sitting.

After the first round of oral arguments, the Parties will have the possibility to reply, if they deem it necessary, on Wednesday 22 January 2014; Timor-Leste at 10 a.m. and Australia at 5 p.m. Each of the Parties will have a maximum time of one hour in which to present its reply.

Before giving the floor to His Excellency Ambassador Joaquim da Fonseca, Agent of the Democratic Republic of Timor-Leste, I wish to draw the attention of the Parties to Practice Direction XI, which states *inter alia* that parties should

> *"[i]n their oral pleadings on requests for provisional measures . . . limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose."*

No italics.

I now call upon His Excellency Mr. Joaquim da Fonseca, Agent of the Democratic Republic of Timor-Leste. Excellency, you have the floor, please.

Mr. DA FONSECA:

INTRODUCTORY STATEMENT

1. Thank you, Mr. President. Mr. President, Members of the Court. It is an honour for me to represent my country, the Democratic Republic of Timor-Leste, in these proceedings.

2. The Government and people of Timor-Leste place their trust in international law, which played an important role in our struggle for independence, and in this Court, the principal judicial organ of the United Nations. That trust is shown by our acceptance, in September 2012, of the compulsory jurisdiction of this Court.

3. This is, of course, not the first time that matters related to the permanent sovereignty of Timor-Leste over its natural resources have been considered by this Court, but it is the first time that relief has been sought by Timor-Leste as an independent State. In the 1990s Portugal, as the administering power of the territory of Timor-Leste, commenced proceedings here in The Hague, also against Australia, arguing *inter alia* that Australia had infringed upon "the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty

over its wealth and natural resources"[1] by entering into the so-called "Timor Gap Treaty" with Indonesia for the exploration and exploitation of sea-bed petroleum resources belonging to Timor-Leste. The Court found that it could not exercise the jurisdiction conferred upon it, because of the absence of Indonesia from the proceedings[2]. That decision is a significant part of the series of legal (and illegal) steps that have brought us to the present proceedings. The 1995 Judgment also contains the Court's summary of the tragic story of Timor-Leste up to that time, and Australia's role therein[3]. The dissenting opinions of Judge Weeramantry and Judge *ad hoc* Skubiszewski contain more detailed background[4].

4. Mr. President, let me say at the outset that present-day relations between Timor-Leste and Australia, two neighbouring countries, are close and friendly and they will remain so in the future. In the words of the Foreign Minister of Australia, in terms of the relationship between the two countries, "the best is yet to come". Australia played an important and very constructive role leading up to and at the time of our independence in 2002 and, subsequently, as a part of United Nations efforts. We remain grateful for that.

5. But natural resources of the sea that both unite and divide us remain a serious bone of contention. Those resources are, in the words of a former judge of this Court, "the principal economic asset of the East Timorese people"[5]. The Government and people of Timor-Leste feel a real sense of grievance at the manner in which they have been treated by our large neighbour in this respect. To their credit, there are many in Australia who share our discontent. By an amendment to its Optional Clause declaration in 2002, Australia has sought to block our access to this Court. Timor-Leste has now initiated arbitration under Article 23 of the Timor Sea Treaty. Then, in complete disregard and disrespect of our sovereignty, Australian secret agents have seized papers relating to the arbitration proceedings as well as other important legal matters between Timor-Leste and Australia. That has caused deep offence and shock in my country.

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[1] Case concerning *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 94, para. 10.

[2] *Ibid.*, p. 106, para. 38.

[3] *Ibid.*, pp. 95-98, paras. 11-18.

[4] *Ibid.*, pp. 144-149, dissenting opinion of Judge Weeramantry; pp. 226-34, paras. 3-32, dissenting opinion of Judge *ad hoc* Skubiszewski.

[5] *Ibid.*, p. 151, dissenting opinion of Judge Weeramantry.

6. It is that that brings us here, to this Great Hall of Justice, to seek justice from the World Court over the seized documents and data. This case concerns a serious infringement, by Australia, of the inviolability of official documents of the Democratic Republic of Timor-Leste, and their immunity from measures of constraint, as property of a sovereign State. The potential injury to Timor-Leste flowing from that internationally wrongful act is grave. And contrary to Australia's position, as a sovereign State, the most appropriate forum for Timor-Leste to seek justice in this matter is before the World Court.

7. We are grateful to the Court for swiftly arranging this hearing, and we are grateful to you, Mr. President, for your prompt action under Article 74, paragraph 4, of the Rules of Court.

8. Mr. President, Members of the Court, Timor-Leste's case will be presented by its counsel in the following order:

— Sir Elihu Lauterpacht will first address you on the importance of the case and the factual background, and outline our legal case for provisional measures.

— He will be followed by Sir Michael Wood, who will elaborate on the application of the law and practice to the circumstances of our case.

9. Mr. President, I thank you for your attention, and request that you invite Sir Elihu Lauterpacht to the podium.

The PRESIDENT: Thank you very much, Excellency. I give the floor to Professor Sir Elihu Lauterpacht. You have the floor, Sir. Welcome back, Sir Elihu.

Sir Elihu LAUTERPACHT:

Introduction

1. Mr. President and Members of the Court, I have the honour to appear before you once again, together with Sir Michael Wood. Professor Lowe QC has also been working with us but unfortunately he is committed to act as an arbitrator elsewhere this week, and he asks me to convey his apologies.

2. May I begin with a few words of reassurance — and I hope comfort — despite the circumstances surrounding the present case, this is not a case about spying and espionage. The

Court will not have to pronounce on such activities generally. Rather, the case is a relatively simple one. One State has taken the property of another, and should be required to give it back, untouched and without delay. That is essentially all that Timor-Leste asks and it prays the assistance of the Court in putting right the wrong that has been done. So I now turn to the substance of what I have to say. But first, I must observe that it is not without regret that I am now appearing in a case against Australia. For three years from 1975 to 1977 I served as the principal Legal Adviser of the Australian Department of Foreign Affairs. During that time, I conceived a deep affection and high regard for that country. So it is saddening for me that in this case I am obliged to confront Australia in respect of conduct which inexplicably falls so far short of the high standards that prevailed in my time. Permit me to explain.

3. This is a request for the grant of provisional measures of protection in a case brought by Timor-Leste against Australia. The case is one which, I venture to suggest, is likely to lie outside the direct experience of many Members of this Court. This is not an ordinary dispute about title to territory or about maritime limits or about expropriation. It is, rather, about the seizure by Australia of confidential and privileged materials and data belonging to Timor-Leste. These materials include details of the legal advice received by it and, no less importantly, of considerations of strategy in connection with the as yet unsettled maritime delimitation between Timor-Leste and Australia. It hardly needs saying that these are matters of the highest importance to Timor-Leste. The documents relate to issues such as Timor-Leste's negotiating positions and strategy in relation to Australia. As Mr. Burmester, one of the counsel for Australia, said in the course of argument in the *Whaling* case before you, the issue between Australia and Timor-Leste is not a simple one. The details of the proposed arrangements with Timor-Leste, he said, are "complex".

He continued that they go far beyond a straightforward delimitation and involve the negotiation of resource-sharing arrangements that, at an earlier stage, took the form of three treaties between Australia and Timor-Leste (28 June 2013, CR 2013/11, p. 45, paras. 23-24). The materials seized also relate to Timor-Leste's preparations for the international arbitration I have just mentioned, separate from this case, an arbitration that Timor-Leste has been obliged to commence before an international tribunal that will sit here in The Hague. This Australian conduct

manifestly distorts the character of the future negotiations by placing Timor-Leste at a considerable negotiating and litigating disadvantage. This unprecedented and improper, indeed inexplicable, conduct, compounded at various times by self-contradictory statements on behalf of Australia, is not the behaviour of some State that does not subscribe to normal standards of international legal behaviour. Rather, it is the behaviour of a State of considerable international standing. Its behaviour in the present situation defies understanding.

Background

4. I should go no further without elaborating on what I have just said by providing the Court with a sketch of the background to the present request. It arises out of differences between two close neighbours, one very large, powerful, well-established, rich in natural resources, and evidently capable of mustering legal forces of considerable strength and standing. The other party is newer, much smaller, and much poorer.

The Arbitration under the Timor Sea Treaty

5. Timor-Leste has commenced an arbitration against Australia. It concerns a treaty concluded in 2002 dealing with the division between the two Parties of interests in the Timor Sea. For convenience I will henceforth refer to this Treaty simply as "the Timor Sea Treaty". I will not burden you with the details of this Treaty, which are not relevant for present purposes. The full text can be found in United Nations, *Treaty Series (UNTS)*, Volume 2258 (p. 4). The duration of this Treaty was prescribed by Article 22 to be 30 years, expiring in 2033. In 2006, a further treaty on the same general subject was concluded between the two Parties. I will call this 2006 treaty "the CMATS Treaty" after its name "Treaty Concerning Certain Maritime Arrangement in the Timor Sea". Again, I need not trouble you with the details of the Treaty, of which the text is printed in *UNTS*, Volume 2483 (p. 359). This included an extension of the duration of the Timor Sea Treaty, the earlier treaty, to a total of 50 years and also, in Article 4, headed "Moratorium", precludes Timor-Leste from seeking during the whole of that period to re-open negotiations for the division of maritime rights between the two sides. This limitation is seriously disadvantageous to Timor-Leste, but was accepted by it at the time in the belief that it was proposed by Australia in good faith as being in the best interests of both parties. In fact, one of the major disadvantages to

Timor-Leste of the CMATS Treaty is that, by the time that the area is restored to Timor-Leste at the conclusion of the extended period, it is likely that the resources of oil and gas in the area will have been seriously depleted, if not exhausted.

6. Some years later Timor-Leste learned that during the whole of the central period of the negotiations leading to the CMATS Treaty, Australia had clandestinely been intercepting the internal discussions of the Timorese Government by means of bugging devices and hidden microphones that had been secretly installed in the Timor-Leste Government premises by officers of the Australian Secret Intelligence Service (which I shall call hereinafter ASIS). The precise benefit to Australia of the acquisition of the information thus obtained cannot be estimated by Timor-Leste. It undoubtedly must have given Australia an important negotiating advantage and enabled it to develop its own position accordingly. Otherwise, we must ask, why would Australia have done it?

7. On learning of this behaviour by Australia, Timor-Leste realized that it had been the victim of a serious international wrong and gave Australia notice that it considered the Australian conduct to have rendered the CMATS treaty invalid in international law as an act evidently not performed in good faith. This carried with it the invalidation of the attempt to alter the duration established in the Timor Sea Treaty, the earlier treaty. A dispute under the Timor Sea Treaty thus arose. Timor-Leste called for the negotiations or consultations in relation to this issue. Australia took the position that there was no dispute and declined to enter into serious discussions. In consequence, Timor-Leste commenced arbitration proceedings under the dispute settlement provisions of the Timor Sea Treaty, Article 23. This matter is now before a distinguished international arbitral tribunal composed of Lord Collins of Mapesbury, appointed by Timor-Leste, Professor Michael Reisman, appointed by Australia, and Professor Tullio Treves as Chairman, selected by the two party-appointed arbitrators. That arbitration is being administered by the Permanent Court of Arbitration.

The seizure by Australia of Timor-Leste's property in the possession of its lawyer

8. Advice on Timor-Leste's international legal affairs has for many years largely been in the hands of a distinguished and experienced Australian lawyer, Mr. Bernard Collaery. Mr. Collaery's

principal law offices are in Canberra, in the Australian Capital Territory. Through his office Mr. Collaery conducts his legal activities covering a number of matters for the Government of Timor-Leste, as well as for other clients. In that office, Mr. Collaery regularly keeps, on behalf of the Government of Timor-Leste, many confidential documents relating to the international legal affairs of Timor-Leste. Some cover such very important and delicate matters as the negotiations between the two countries regarding access to the maritime resources of the Timor Sea.

9. On 2 December 2013, the Australian Attorney-General issued a warrant seemingly authorizing the Australian Security Intelligence Organisation (ASIO) to conduct a search of Mr. Collaery's office and to remove unspecified material from it. The warrant is at tab 1 in the folder before you. On 3 December, while Mr. Collaery was in The Hague engaged in the preparations for the Arbitration, a number of officers of ASIO, as well as some members of the Australian Federal Police, arrived at Mr. Collaery's office in Canberra. One of Mr. Collaery's legal assistants, Ms Preston, was alone in the office at the time. The officers presented the warrant authorizing the entry and seizure of documents, but never told Ms Preston what exactly they were seeking, or why. In the pressure of the moment Ms Preston sought to read the warrant but felt so intimidated by the presence of over a dozen ASIO personnel that she could not finish it. Moreover, many of the words in it were blacked out. Her request for a copy was refused on the grounds that it was a matter of national security. The officers remained on the premises for several hours. They inspected many files. We do not know to what extent they made notes or otherwise copied what they found, as they were authorized to do by the sweeping terms of the search warrant — "to . . . inspect or otherwise examine any records or things so found, and to make copies or transcripts". They left taking with them a number of packages of documents, as well as a laptop and a USB stick. These are listed in the "property ~~served~~ seizure records" that are before the Court in tab 2 of Timor-Leste's judges' folder. Mr. Collaery, whose premises were thus invaded, cannot specify exactly what was in the documents taken, but it is certain that many of them related not only to the Arbitration and to the development of Timor-Leste's negotiating position in the bilateral discussions that should eventually take place between Timor-Leste and Australia regarding the division of the resources of the Timor Sea lying between the two States and its delimitation. That Australia regards the prospect of such negotiations with some disfavour can be seen from the fact

that it secured the imposition upon Timor-Leste in the CMATS Treaty — that is, the later Treaty — of an undertaking not to press for negotiations for the period of that Treaty, namely fifty years. Nonetheless, in anticipation of an earlier start, Timor-Leste has commissioned technical studies on which to base its case. A number of these documents were in the possession of Mr. Collaery and were taken away under the warrant. It may be noted that although the Australian Attorney-General has undertaken that the material seized on 3 December will not be seen by persons involved in the Arbitration, his undertakings are silent upon the availability of these very sensitive and confidential documents to those Australian officials involved in maritime delimitation matters.

The Government of Timor-Leste's ownership of the seized material

10. The ASIO officers left at Mr. Collaery's offices a "property seizure record". This is the list of material taken which you will find this at tab 2 in the folders. The property seizure record provides some indication in general terms of the possible scope of the material seized. You will see, for example, at the items numbered [0]01, [0]02 and [0]03, an iPhone, a laptop and a USB thumb drive; these may contain a very wide and miscellaneous range of materials. The remaining items are documents, some of the contents of which can be recalled, and others not. They too go well beyond the Arbitration. For example,

— Item LPP[0]04 is described as "Document entitled 'Challenging the Validity of the certain Maritime arrangements in the Timor Sea Treaty'" (23 pages). That document is a "brief to counsel to advise" dated 7 March 2011. It contains detailed consideration of various legal options and strategies for challenging the CMATS Treaty. It is not related to the ongoing arbitration proceedings, but ranges much wider, setting out the strengths and weaknesses of the various delimitation options.

— Other items, as can be seen, refer expressly to "correspondence" with Professor Vaughan Lowe concerning the Timor Sea Treaty and boundary matters. During the years to which the seizure records suggest that these documents relate — that is, from 2010 onwards — Professor Lowe has received many papers from Mr. Collaery, including copies of detailed legal and technical opinions and reports concerning the Timor Sea and the likelihood, indeed the probability is that Mr. Collaery retained copies of the documents that he sent to Professor Lowe.

— Still others consist of correspondence between Mr. Collaery's law office and the Prime Minister of Timor-Leste.

11. It is thus clear that among the material taken were many files relating to matters on which Mr. Collaery's office was working on behalf of the Government of Timor-Leste. All these files are thus the property of the Government of Timor-Leste and were held as such by Mr. Collaery in the course of his duties on behalf of the Government of Timor-Leste. This is fully in line with the generally accepted proposition that the client — in this case the Government — has proprietary ownership of documents that have been brought into existence, or received, by a lawyer acting as agent on behalf of the client, or that have been prepared for the benefit of the client and at the client's expense, such as, letters of advice, memoranda and briefs to counsel. The ownership by Timor-Leste of these materials in the possession of Mr. Collaery is further attested by the Contractual Provisions in Mr. Collaery's retainer to the effect that the copyright title in all the material prepared by Mr. Collaery on behalf of the Government of Timor-Leste belongs to the Government. The expression "copyright title" covers also the physical ownership of the documents containing the copyright material. The general rule about the ownership of property through an agent is well reflected in certain passages from the judgments of the House of Lords in the case of *Rahimtoola* v. *Nizam of Hyderabad* [1958] *A.C.* 379. I will read only a few passages. Fuller extracts appear at tab 21 of your folder.

Thus, Viscount Simonds said:

> "No doubt, if a defendant, by whatever name he is called, can be identified with the Sovereign State, his task is easy: he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject-matter of the action the defendant is the agent of a Sovereign State, that, in other words, the interests or property of the State are to be the subject of adjudication, the same result is reached."

Now, of course, I am sure the Court will appreciate that this is a case about State immunity, but it does not differ in substance as regards the matter before the Court now, from the present case which is about the property of the State.

Lord Simonds continued:

> "'Two propositions of international law,' said Lord Atkin [he has, here, Lord Simonds quoting from Lord Atkin in the so-called *Christina* case] (*Compania Naviera Vascongado* v. *S.S. 'Cristina'):* '[are] engrafted into our domestic law which seems to me to be well established and to be beyond dispute. The first is [I am still quoting

from Lord Atkin] that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to (the) legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. And the second [again quoting from Lord Atkin] is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.'"

Lord Atkin said later:

> "'If property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign Sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it.'"

In his speech, Lord Reid quoted from the decision of the Privy Council in the case of *Juan Ysmael & Co. Inc.* v. *Indonesian Government* [1954] 3 *WLR* 531. And the quotation is:

> "In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective."

The Detention by the Government of Australia of the Government of Timor-Leste's Material

12. This confidential material has been in the hands of the Australian Government for seven weeks. Despite the undertakings of the Attorney-General, it seems hardly likely that they have not been closely examined by Australian officials. I repeat, these materials are relevant to any future maritime negotiations, consisting as they do of the advice of counsel, including assessments of Timor-Leste's position and the instructions given to counsel and to geological and maritime experts and the opinions and advice that they have prepared — clearly all of a highly confidential nature.

13. Another way of approaching the question of ownership is through the law relating to legal professional privilege. For this purpose it is sufficient to refer to part of the passage in *Halsbury's Laws of England*, Volume 66, dealing with this question in section 1146. I will read three short passages:

First:

> "Confidential communications passing between a barrister and his professional or lay client for the purpose of requesting or giving legal advice, such as instructions to counsel and counsel's advice, are privileged from disclosure; the court will not, at the instance of a third party, compel the client, and will not allow the barrister, to disclose them. The privilege is not confined to such communications as are made in the course of, or in anticipation of, litigation, but the communications must be made in a professional capacity; and the communications must be of a confidential character."

Second quote:

> "The right to the confidentiality of communications between lawyer and client is also protected by Community law and by the Convention for the Protection of Human Rights and Fundamental Freedoms."

Third quotation:

> "Where no waiver of privilege has taken place, an injunction may be granted to compel another party into whose hands a privileged document has come to deliver up the document and any copies or notes of it and not to disclose or make any use of any information contained in the document."

This is the position in English law and, I would guess, no doubt also in Australian law if, which is not admitted, that should be relevant.

The Australian Defence of "National Security"

14. The basis on which this search was carried out, and the grounds given for the refusal to return the material, were said by the ASIO officers to concern a matter of "national security". To what extent, if at all, "national security" may be a relevant consideration in the circumstances of this case will presumably be argued by Australia. It is not for Timor-Leste to anticipate Australia's arguments and it will wait until it hears them. But in anticipation of those arguments, whatever they may be, it should be borne in mind that national security is a two-sided matter. To the extent that national security has any relevance to Australia's case, which is denied, national security is also relevant to the position of Timor-Leste. The seizure of the documents held by Mr. Collaery on behalf of the Government of Timor-Leste is undoubtedly a violation of the national security of Timor-Leste.

15. It is appropriate to recall in connection with the constant reference by Australia to "national security", that there is persuasive international authority qualifying the extent to which this factor may be taken into account. In *Prosecutor* v. *Blaškić*, the International Tribunal for the Former Yugoslavia was confronted by a plea that the documents sought from Croatian State officials were protected by "national security". The Tribunal explained:

> "[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and defeat its essential object and purpose . . . To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal

proceedings: . . . The very raison d'être of the International Tribunal would then be undermined."

The present case is not to be confused with the Arbitration

16. It is against this background that the present case has been commenced in this Court. It is important that the two cases should not be confused. The Arbitration relates to Timor-Leste's contention that Australia's conduct during the negotiations for the CMATS Treaty has rendered that treaty invalid. This would necessarily carry with it a finding that the duration article of the Timor Sea Treaty — the later treaty — remains unchanged. It is this consequence that is in dispute between the two Parties. The present case is quite distinct. It is one in which Timor-Leste is complaining of the seizure of its property and is seeking the recovery of the documents that were held on its behalf by Mr. Collaery. The reason for the present request for provisional measures is that Timor-Leste objects to any further time being given for the study of the documents by the Australian authorities with unforeseeable detrimental consequences and associated irreparable harm. To that end, Timor-Leste seeks either the immediate return of the materials and of any copies that Australia may have made of them, or that they should all be sealed immediately and made inaccessible to the Australian authorities, including of course those concerned with the conduct of the pending Arbitration. These ends could be furthered either by forthwith returning the documents to Mr. Collaery's office or by depositing them for safe keeping elsewhere as may be prescribed by the Court.

The consequence of the seizure

17. The consequence of the initial seizure is undoubtedly that Australia has placed itself in a position of considerable advantage, both in the pending Arbitration and in a whole range of matters involved in relations between Timor-Leste and Australia. Notable amongst these in the foreseeable future will, as I have already mentioned, be the negotiations that must take place between Timor-Leste and Australia regarding maritime delimitation and access to maritime resources. It needs to be emphasized that the present proceedings impact only incidentally on the ongoing Arbitration about the effect on Article 23 of the Timor Sea Treaty on the terms of the CMATS Treaty. They extend in their significance much further into the future. It is simply unconscionable that one party to negotiations or litigation should be able to place itself by these

means in such a position of advantage over the other. What has happened violates fundamental principles governing the conduct of negotiations and litigation. It totally destroys the equality and good faith that must prevail between the Parties. And I venture to hope that the Court will say so.

18. This concludes what I have to say about the background to the present request. I must now turn to the substantive aspects of this request for interim measures of protection. Some aspects of what I am about to say will also be elaborated by Sir Michael Wood. I have not got very far to go but I would be very grateful if the Court would give me a two minute respite to collect myself. Thank you.

The PRESIDENT: Thank you, Sir Elihu. In view of your request, I suspend the sitting for five minutes. The Court is going to retire.

The Court adjourned from 11.20 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Sir Elihu to continue. You have the floor, Sir.

Sir Elihu LAUTERPACHT: Mr. President, I thank the Court and yourself for allowing me this brief break. I must now turn to the substantive aspects of the request. Some aspects of what I am about to say will also be elaborated by Sir Michael Wood.

Jurisdiction

19. The first item to be mentioned relates to the jurisdiction of the Court. Both Parties have made declarations under the Optional Clause of Article 36 of the Statute of the Court. They have thus conferred on the Court compulsory jurisdiction to deal with this matter. Although Australia has made certain reservations to its acceptance, none of them are relevant to the present case. It is not a case about maritime delimitation and it has not been commenced by Timor-Leste within the twelve months after the filing of its own declaration. The jurisdictional link appears to be fully effective. I need not take further time of the Court in connection with it. Although Sir Michael Wood will say a bit more about it presently.

I move to the important heading of the "Irrelevance of the Rule Relating to the Exhaustion of Local Remedies".

Irrelevance of the Rule Relating to the Exhaustion of Local Remedies

20. Australia has given great prominence in its Written Observations to the availability of remedies in the Australian legal system. This persistent assertion of the relevance of local remedies calls for a clear and emphatic rejection. This rule has no application here. The rule relates to cases in which a State seeks to protect the interests of one of its nationals with a view to ensuring that the national concerned has exhausted such remedies as may be available to him under the law of the State which has harmed him. It has no relevance where a State asserts its own rights against the State that has harmed it. For example, in the *Corfu Channel* case, in which Britain brought proceedings against Albania in respect of the damage done to British warships in Albanian territorial waters, no suggestion was made that Britain should first pursue a remedy in the Albanian courts. Observations to the same effect may also be found in the *Arrest Warrant* case where, in response to the Belgian argument that the Congo should have exhausted remedies in Belgium, the Court said:

> "[a]s the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies . . . Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2002*, pp. 17-18, para. 40.)

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)

Similarly, in the *Avena* case the Court said:

> "Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36 (1) *(b)*. The duty to exhaust local remedies does not apply to such a request." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 36.)

Object of the Present Request

21. I venture to suggest that the object of the present request is pretty obvious. It is to prevent with immediacy Australia from deriving any further benefit from the internationally illegal

seizure pending the Court's final determination of the application in the principal action commenced in December.

Plausible Character of the Rights for which Protection is being Sought

22. As the Court has stated in the past, the Court must be concerned to preserve by the provisional measures the rights which may subsequently be adjudged by the Court. To this end, the Court must exercise its power only if it is satisfied that the rights asserted by a party are at least plausible. Moreover, "a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought" (*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. 16).

23. The rights claimed by Timor-Leste in the principal action consist of the protection of its title to the material held in Mr. Collaery's office on behalf of Timor-Leste relating to legal issues of concern to Timor-Leste and related to specific issues on which Timor-Leste has asked Mr. Collaery to act or advise. Some of the issues in question are ones between Timor-Leste and Australia stretching back to Timor-Leste's accession to independence in 2002. As I have already said, these are principally issues relating to the resources of the Timor Sea and their division between Timor-Leste and Australia, as well as by no means unimportant associated issues relating to the construction of pipelines and the disposal of helium gas.

24. There can be no real doubt that these documents belong to the Government of Timor-Leste. Although in the custody of Mr. Collaery, they were generated in implementation of either general or particular instructions given to Mr. Collaery by the Timor-Leste Government. As I have already said, they were not materials over which Mr. Collaery had any right to dispose, or the contents of which he was free to divulge to others, save with the authority of the Timor-Leste Government.

25. As to plausibility, 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. It is therefore submitted that the Timorese claim to title satisfies the requirement of plausibility required by the Court. The Timorese claim to entitlement to protection is not dependent upon Australian law but on international law. It is an aspect of Timorese sovereignty. The status of the documents is analogous to documents in the possession of a foreign diplomatic or consular mission. The Timorese rights are, moreover, entitled to recognition no matter what special provisions may be asserted by Australian law against them.

The Link between the Measures Sought and the Rights which form the Subject of the Present Case

26. The Court has also stressed that there must exist a link between the rights for which protection is sought and the rights which are the subject of the principal claim. In the present case, such a link is virtually self-evident. The principal action is one in which Timor-Leste seeks the return of the materials seized on 3 December 2013. The claim that Timor-Leste now advances in the present request is closely related. It is set out in paragraph 10 of the Request filed on 17 December. I need only read subparagraphs *(a)*, *(b)* and *(e)* of paragraph 10..

— Subparagraph *(a)*: "That all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice."

— Subparagraph *(b)*: "That Australia immediately deliver to Timor-Leste and to the International Court of Justice (i) a list of any and all documents and data that it has disclosed or transmitted, or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (ii) a list of the identities or descriptions of and current positions held by such persons."

— Subparagraph *(e)*: "That Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste."

Accordingly, Timor-Leste submits that there exists the necessary link between the rights now asserted in the present proceedings and rights claimed in the principal action.

Risk of irreparable prejudice and injury

27. I turn now to those terms of Article 41 of the Statute of the Court that grant to the Court the power to indicate provisional measures when irreparable damage could be caused to the rights which are the subject of the principal case.

28. The reason why the principal action has been brought is that Australia should not be allowed to study the contents of the documents that have been seized. Timor-Leste is entitled to recognition and protection of its interests. It will require no exercise of imagination on the part of the Court to envisage the disadvantage at which Timor-Leste is placed by the fact that Australia may have learned the specifics of the advice that Timor-Leste may have been given in recent years regarding the factors relevant to the assertion of its claims to an acceptable maritime boundary between it and Australia and especially the terms on which, if at all, a compromise might be reached.

29. If Australia has already obtained from these materials information bearing on these matters it is, to say the least, unfortunate and any knowledge so gained should be sanctioned. The same is true if Australia has copied the materials. The purpose of the present proceedings is to secure the protection of the Court against these risks now. If such protection is deferred until the close of the main proceedings, perhaps a year or more away at the very least, the harm done to Timor-Leste becomes even more grave. It is possible that the harm that could be done has already been done but that cannot be assumed. Moreover, in so far as harm can yet be done, it will be irreparable. It is to be hoped that the Court may even now order the return of the documents and prohibit the making of any copies, in this way some of the harm might be mitigated.

Urgency

30. To echo the words of the Court in the *Costa Rica* case[6] the Court can exercise its power to indicate provisional measures if there is urgency "in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision".

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[6]*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. 21, para. 64.

31. It is submitted that urgency of this kind evidently exists in the present case. Australia should not learn the contents of the materials seized. It cannot be said on behalf of Australia that it has already studied the material and gathered from it all the knowledge that it requires of Timor-Leste's position in relation to the issues already or potentially in dispute. That would be for Australia to admit that prejudice has already been caused to Timor-Leste. If the Court were to overlook this fact and to hold that what has been done cannot be undone and is therefore beyond the reach of the Court this would amount to condonation of an illegal act. This, I respectfully suggest, is an impression which this Court is unlikely to wish to convey. Nor would there be room for reparation by Australia in the form of payment of damages. A monetary penalty would simply not be enough and would be read worldwide as a licence to commit many other types of wrong. I venture to submit that what is required is a clear, firm and severe condemnation of what Australia has done, coupled with a requirement that everything it has taken from Mr. Collaery's office should immediately be listed and securely placed in boxes or bags. These boxes or bags should themselves be sealed and then, at the expense of the Australian Government, promptly delivered into the customary of the International Court of Justice. Timor-Leste's needs are urgent.

32. Before I close I should perhaps devote a few more words to the relationship between the measures sought in the present request and the relief sought in the principal action. It may perhaps be said against Timor-Leste that if the Court grants the relief now sought in the present ~~Application~~ Request there will be little if anything left for the Court to decide in the principal action. That is simply not the case. The provisional measures that Timor-Leste seeks are quite different from the remedies sought in the main proceedings. In ~~this~~ the Application, Timor-Leste seeks declaratory relief, declarations that the seizure and continuing detention of the documents and data violates international law[7]. Timor-Leste seeks the immediate return of all the documents and data to Timor-Leste[8]. It may be appropriate to recall that the Application in the main case contains a request that Australia should afford satisfaction in the form of a formal apology and costs[9].

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[7]Application, para. 11, *First* and *Second.*

[8]Application, para. 11, *Third.*

[9]Application, para. 11, *Fourth.*

33. It cannot be argued that the present request should be disregarded and that Timor-Leste should be left to the relief that it seeks in the principal action. The facts do not permit this conclusion to be drawn. Having regard to the current pressure on the Court's time, the principal case is unlikely to be heard and decided in less than a year to 18 months, that is before the middle of 2015. If the seized materials are left in Australian hands and open to study for all that period, the rights of Timor-Leste will inevitably suffer. The alternatives are, therefore, the following. First, the Court may accept the force of the present request and grant Timor-Leste the immediate protection which it seeks and needs. Or, second, the Court may reject the request, in which case the wrong done to Timor-Leste will persist until the judgment in the main case. By then it will be virtually too late for the judgment to provide the protection now sought by Timor-Leste.

Summary and conclusions

34. So, Mr. President at this point, I reach my summary and conclusions, but it may be convenient if I turn in summary fashion to certain aspects of the Australian Written Observations which require comment.

(1) Australia fails to give any consideration to the fact that the materials seized are the property of Timor-Leste. 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. It is a matter of scale, not of quality.

(2) Secondly "national security" cannot be invoked to preclude consideration of the matter without some specification of the nature of the national security interest said to be involved, thus giving the Court the opportunity to make its own decision about that aspect of the matter.

(3) It should not be overlooked that the Australian conduct in Timor-Leste in 2004-2006 was itself a major breach by the Australian participants of the criminal law of Timor-Leste. Indeed, it may even also have been a violation of the Australian law itself governing the behaviour of its security services.

(4) The suggestion that Timor-Leste might have sought interim measures from the arbitral tribunal sitting in the Arbitration is not really to the point as the jurisdiction of the arbitral tribunal is

limited to the matters in issue in that arbitration. They do not extend to the issue of maritime delimitation between the two States.

(5) Australia's whole case founders on its insistence that Australian law governs the matter and that the Australian legal system is well equipped to deal with it. As already stated, Timor-Leste's rights are founded in international law. No disrespect to Australia is intended by Timor-Leste's insistence that the present case is one to be determined solely as a matter of international law. A sovereign State is not required to submit to the law of another State for the maintenance of its property rights. It is of course open to Australia itself, if it thinks that it has anything to gain by doing so, to 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 the arbitral tribunal. But most unlikely.

(6) Timor-Leste may already have been seriously harmed by the fact that Australia admits that some of the hard-copy materials were briefly inspected.

35. So Mr. President, Members of the Court, with your leave, I would now wish to give way to Sir Michael Wood who will develop the authorities supportive of the submissions I have made. I would be grateful if you would now call upon Sir Michael.

The PRESIDENT: Thank you very much, Professor Lauterpacht, and I give the floor to Sir Michael Wood. In view of the break the Court took, Sir Michael, I would appreciate if you could finish by 30 minutes past noon. Please.

Sir Michael WOOD:

APPLICATION OF THE LAW AND PRACTICE ON PROVISIONAL MEASURES

1. Mr. President, Members of the Court, it is a very great honour to appear before you and to do so on behalf of the Democratic Republic of Timor-Leste.

I. Introduction

2. There are three principal points that I wish to bring out. First, as Sir Elihu has just explained, that the rights of Timor-Leste at issue in this case are rights under international law.

They are rights under international law to the inviolability and immunity of its property, ~~and~~ in particular ~~of~~ its documents and data ~~(electronic data)~~. This being the case, references to remedies under Australian law are irrelevant.

3. Second, the urgency of the provisional measures sought. The undertakings given so far on behalf of Australia are inadequate to safeguard Timor-Leste's important interests pending the Court's final decision, interests that go far wider than the arbitration proceedings described by my colleague, friend and mentor, Sir Elihu Lauterpacht.

4. And, third, that the provisional measures we seek are appropriate to safeguard those interests, without interfering with the proper requirements of Australia's national security.

5. I shall consider in turn the conditions for provisional measures: prima facie jurisdiction, there is very little more to say; the rights in need of protection; and risk of irreparable prejudice. Then I shall address, briefly, what little Australia has to say on international law in its Written Observations.

6. Mr. President, the Registrar has read out the precise terms of the provisional measures[10]. In brief, we ask the Court to indicate that all documents and data — electronic data, that is, and I will refer to them as "documents" for short — seized from its lawyer's offices in Canberra on 3 December 2013 should be sealed and delivered into the hands of this Court[11]; that Australia should inform Timor-Leste of all and any disclosures and copies it has made of the documents[12]; that Australia should use every effort to destroy such copies[13]; and that Australia should give an assurance that it will not intercept communications between Timor-Leste and its legal advisers[14].

7. It will, of course, be for the Court to decide the precise terms of the measures so ordered. The essence of what we seek is to ensure that the illegally seized materials should not be made available to any person having any role in connection with Australian diplomatic or commercial

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[10]Request for the indication of provisional measures submitted by the Government of Timor-Leste, 17 December 2013, para. 10.

[11]*Ibid.*, para. 10 *(a)*.

[12]*Ibid.*, paras. 10 *(b)* and *(c)*.

[13]*Ibid.*, para. 10 *(d)*.

[14]*Ibid.*, para. 10 *(e)*.

relations with Timor-Leste over the Timor Sea and its resources. This includes, but is not limited to, any person having any role in relation to the Arbitration.

II. Australia's insistence upon domestic remedies

8. In its Written Observations, Australia lays great emphasis on the position under Australian law[15]. Yet — as Sir Elihu has just explained — it is, of course, international law that applies to the dispute between Timor-Leste and Australia, the subject of these proceedings. Australia's view that its domestic law has priority over international law was foreshadowed in its letter of 24 December, which is at tab 10 in the folders, in which the Australian Government Solicitor ("AGS") said:

> "The Government of Timor-Leste has had ample opportunity to commence domestic proceedings to make any claims it wishes to make and has not done so despite 20 days having passed since the execution of the warrant on 3 December 2013. If it does intend to make any claim under domestic law it should do so well prior to 22 January 2014."[16]

Apparently a reference to the present hearing. In its letter of 14 January 2014, it says much the same thing.

9. Australia appears to be saying that a sovereign State, the Democratic Republic of Timor-Leste, must place itself in the hands of the Australian authorities or courts to vindicate its sovereign rights to the inviolability of its State documents, rights that, we say, have been violated by the Australian State acting through its Attorney-General and its Security and Intelligence Organization.

10. There is, of course, no requirement under international law that Timor-Leste should subject itself to Australian domestic processes in order to uphold its rights under international law. As Sir Elihu has explained, this is not a situation where the rule of exhaustion of local remedies applies, even if such remedies might offer an effective remedy, which must be highly questionable in this case[17]. Nor, with respect, is the possible availability of an action under Australian law, a relevant "factor" in the decision whether or not to indicate provisional measures, as Australia seems to suggest in its Written Observations[18].

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[15]See for example, Written Observations of Australia (WOA), paras. 4 *(a)*, 42-43, 45, 49-57, 75 *(f)*.

[16]AGS letter of 24 December 2013, para. 5.

[17]WOA, paras. 53-57, 75

[18]*Ibid.*, paras. 48, 52, 57, 75.

III. Conditions for the indication of provisional measures

11. Mr. President, I shall turn quickly to the conditions necessary for the indication of provisional measures.

12. This Court and its predecessor, the Permanent Court, have long recognized

> "the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79,* p. 199)[19].

(a) Prima facie *jurisdiction*

13. The Court will first wish to satisfy itself that it has prima facie jurisdiction. In its Written Observations, Australia refers to this requirement[20], and does not suggest that it is not fulfilled. It does, however, hint at an "admissibility" issue[21], but does not develop the point. In any event, we would submit that your case law requires prima facie jurisdiction; there is no case law to the effect that prima facie admissibility is also required. The authorities cited by Australia on this point are, in our submission, at best equivocal[22].

14. Australia's illegal actions of 3 December 2013 have given rise to a breach of an international obligation having a continuing character. They were raised by Timor-Leste during the Procedural Hearing of the Arbitral Tribunal on 5 December 2013[23], in so far as they related to those proceedings. But, as we have explained, it is important to note that the documents seized go far beyond those relating to the arbitral proceedings. So Timor-Leste wrote on 10 December 2013 to the Australian Attorney-General — that is at tab 3. And as you can see, the letter requested *inter alia* the return of the originals of the documents seized from its lawyer's office on 3 December 2013, documents that Timor-Leste had "the right to protect under international law", together with a complete schedule of the seized documents; and to confirm that it had "destroy[ed]

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[19] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 503, para. 103.

[20] WOA, para 70.

[21] WOA, para 70.

[22] The references to Thirlway do not support the proposition for which they are cited. At p. 936 Thirlway is entirely inconclusive, as he is at p. 1779 (which Australia omits to mention in its Note 97).

[23] WOA, para. 14 and Ann. 9.

beyond recovery any and all copies of the [seized] Documents and Data that ha[d] already been made". A Note Verbale was also sent on 11 December to which no satisfactory response has been received.

15. The present dispute crystallized at the latest when, in its reply letter of 16 December, which is at tab 6, the Australian Government Solicitor ("AGS") asserted that the material was not seized from the Government of Timor-Leste, and that Timor-Leste had "pointed to no legal entitlement which would warrant" the return of the material to that Government. Timor-Leste was given until 19 December to take action to enforce any legal rights "failing this, our client [that is Australia] will take such steps as it considers appropriate in relation to the Seized Material without further notice". It was at this point that Timor-Leste decided that, in view of the seriousness and urgency of the situation, it was left with no option but to institute the present proceedings, invoking the declarations of the two States under the Optional Clause. In our submission — and Australia does not appear to dispute this — it is clear that the Court has prima facie jurisdiction under the Optional Clause, which covers the whole of the dispute submitted to the Court in these proceedings. Sir Elihu has already said what needs to be said on this matter.

(b) ***The rights whose protection is sought and the measures requested***

16. Mr. President, Members of the Court, I now turn to the second condition for provisional measures described most recently at paragraph 15 of your Order of 13 December last year in *Nicaragua* v. *Costa Rica*.

17. As Sir Elihu has explained, the provisional measures sought by Timor-Leste are designed precisely to protect the rights of Timor-Leste which are the subject of the proceedings: to ensure that its property should not be subjected to continuing measures that contravene its rights as a sovereign State, including the inviolability of its documents and their entitlement to immunity from measures of constraint.

18. Mr. President, Members of the Court, by issuing a warrant for the seizure of documents belonging to Timor-Leste, and by seizing and retaining such documents, the Australian authorities breached the inviolability of Timor-Leste's State papers and violated the immunity which Timor-Leste is entitled to under international law.

19. The principle of the inviolability of State property and papers is a general principle that underlies and explains many rules in particular fields, such as State immunity and diplomatic and consular immunities. So far as concerns State immunity, it will be recalled that the 2004 United Nations Convention is entitled "United Nations Convention on the Jurisdictional Immunities of States and Their Property".

20. The immunity granted to State property is intended to safeguard such property at all stages of proceedings, from their initiation and, indeed, from the investigation stage, through to the execution of judgments[24]. Moreover, Article 2.1 *(a)* of the 2004 United Nations Convention defines the term "court" as meaning "any organ of a State, however named, entitled to exercise judicial functions". The term "judicial functions" is not itself defined. This was deliberate, since, as the ILC's Commentary explains, "such functions vary under different constitutional and legal systems"[25]. The Commentary explains the term "court" broadly. In particular, it states that the definition of "court" in Article 2.1 *(a)* "may, under different constitutional and legal systems, cover the exercise of the power to order or adopt enforcement measures (sometimes called 'quasi-judicial functions') by specific administrative organs of the State"[26]. And it also explained that — this is the Commentary:

> "The expression 'jurisdictional immunities' . . . is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State, in relation to a judicial proceeding."[27]

21. The issuing of a search warrant by the Attorney-General is no different from the issuing of such a warrant by a court or other administrative body. It seems clear from article 25 of the Australian Security Intelligence Organisation Act, and from the language of the warrant itself, that in issuing the warrant the Attorney-General was acting quasi-judicially. The warrant purports to have been issued for reasons of national security and not in the course of court proceedings in a

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[24]Draft Article 1 Commentary (2), *Yearbook of the International Law Commission (YILC)*, 1991, Vol. II, Part II, p. 13.

[25]Draft Article 2 Commentary (3), *YILC*, 1991, Vol. II, Part II, p. 14; R. O'Keefe, C. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, 2013, pp. 45-46.

[26]Draft Article 2 Commentary (4), *YILC*, 1991, Vol. II, Part II, p. 14.

[27]Draft Article 1 Commentary (2), *YILC*, 1991, Vol. II, Part II, p. 13.

narrow sense (though Australia does now seem to suggest that intelligence acquired under the warrant may be relevant also for a criminal investigation)[28]. But this does not make the search and seizure any less a breach of the inviolability and immunity to which Timor-Leste is entitled under international law.

22. So our first point is that the seizure was carried out pursuant to a warrant issued by a "court" within the meaning of the customary international law on State immunity as reflected in the United Nations Convention. Even if this were not so, the seizure would be covered by those wider principles that underlie the law of State immunity, including the inviolability of State papers. The fact that practice relating to State immunity mostly concerns ordinary court proceedings does not mean that interference by the Executive, including in respect of State property, is not precluded by the inviolability to which a State is entitled under international law. The underlying principle of international law prohibits one State from interfering with property of another State.

23. Inviolability and immunity apply without question to a State's documents in the possession of its lawyer. The basic rule laid down in the 2004 United Nations Convention is that a State and its property enjoy immunity[29]. The Convention then goes on to list exceptions to the rule. None apply in this case. There is no exception for property in the possession of a lawyer representing the State, or property created for legal purposes in consultation with legal counsel.

24. Australia claims that seizure of its property in the possession of Timor-Leste's attorney was carried out in accordance with Australian law, and that any challenge should therefore be under Australian law. But that is not how the law of State immunity works. Article 6 of the United Nations Convention — again, reflecting customary law — is clear that in these circumstances Australia is obliged to "ensure that its courts determine on their own initiative that the immunity of that other State under Article 5 is respected"[30]. When the authority executing quasi-judicial functions is the Attorney-General, a government minister, the fulfilment of that task should be straightforward. Mr. President, the inviolability and immunity of State property and papers is explicitly set forth in international conventions in particular fields, such as diplomatic and consular

[28]WOA, para. 55.

[29]Art. 5.

[30]Art. 6.1.

law, the law of special missions, and the law of international organizations, the provisions of which reflect customary international law. Article 24 of the Vienna Convention on Diplomatic Relations provides that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." And Article 27, paragraph 2 provides that "[t]he official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions." The Vienna Convention on Consular Relations and the New York Convention on Special Missions make similar provision[31]; the former contains in its article 1, paragraph 1(k) a broad definition of consular archives, which may indicate the scope of official archives more generally[32].

26 ~~25~~. In her commentary on article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations, Professor Eileen Denza explains that "[c]orrespondence from the sending government to its mission would also at least arguably be entitled to protection as archives of a foreign state government"[33]. She goes on to make the point that "it may not be clear whether it originates from the sending government and would thus be entitled to inviolability as archives of a foreign sovereign government"[34].

27 ~~26~~. Denza refers to a case involving government papers in the hands of contractors[35]. In 2002 a United States House of Representatives Committee considered the status of government documents held by professional consultants. The consultants in question were lobbyists or public relations advisers. The State Department Legal Adviser made a statement[36], which you will find at tab 19. Among other things, Mr. Taft referred to information provided by the government to outside contractors being used for embassy construction, and said that if such contractors were pressed by the host State to provide such information

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[31] Vienna Convention on Consular Relations, art. 33; Convention on Special Missions, art. 26.

[32] E. Denza, *Diplomatic Law*, 3rd ed. 2008, p. 162; L Lee, J Quigley, *Consular Law and Practice* (3rd ed., 2008), p. 392.

[33] E. Denza, *Diplomatic Law*, 3rd ed. 2008, p. 226.

[34] *Ibid.*

[35] *Ibid.*, pp. 197-199.

[36] 2002 *Digest of United States Practice in International Law*, pp. 567-570.

> "[w]e would look seriously at asserting a claim to privilege, or inviolability, under the Vienna Convention. We would also consider other possible privileges and protections, such as state secrets, that might apply to these and other situations."[37]

And Mr. Taft continued,

> "The issue the Committee posed . . . is whether these materials retain that immunity under the Convention when they are given to, or relied upon by, third parties. . . . this is a novel and complex question."[38]

Mr. President, even though the inquiry primarily concerned embassy papers, the underlying issues raised and the position taken by the State Department Legal Adviser would seem to be applicable to government papers generally in the hands of contractors.

28 ~~27~~. The learned authors of Oppenheim, speaking of agents without diplomatic or consular character, note that, while no distinct rules concerning their privileges and immunities have grown up, in practice, "[t]heir persons and official papers are presumably entitled to immunity."[39]

29 ~~28~~. By way of a further example, I should mention a recent case. In late November 2013, Spanish officials opened bags (not, I understand it, diplomatic bags) containing British Government papers that were transiting Spain between Gibraltar and London. In a Written Statement to Parliament, on 27 November 2013, which you will find at tab 17, a Foreign Office Minister said

> "On Friday 22 November two UK Government bags containing official correspondence and communications, and clearly marked as such, were opened by Spanish officials, while the bags were in transit. This represents a serious interference with the official correspondence and property of Her Majesty's Government, and therefore a breach of both the principles underlying the Vienna convention on diplomatic relations and the principle of state immunity. We take any infringement of these principles very seriously."[40]

30 ~~29~~. These examples reflect the fundamental principle that inviolability applies to State documents generally, wherever they may be and even though they are not State archives in the narrow sense, or archives of a diplomatic mission or consular post.

31 ~~30~~. International tribunals have recognized that legal professional privilege is a general principle of law. In the *Bank for International Settlements* case, the Tribunal stated that

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[37] 2002 *Digest of United States Practice in International Law*, p. 569.

[38] *Ibid.*, p. 570.

[39] *Oppenheim's International Law*, Vol I, 9th ed., 1992, R. Jennings, A. Watts (eds.), p. 1175.

[40] Hansard, 27 November 2013, Cols. 17-18WS.

> "At the core of the attorney-client privilege in both domestic and international law is the appreciation that those who must make decisions on their own or others' behalf are entitled to seek and receive legal advice and that the provision of a full canvass of legal options and the exploration and evaluation of their legal implications would be chilled, were counsel and their clients not assured in advance that the advice proffered, along with communications related to it, would remain confidential and immune to discovery."[41]

In both domestic and international law as that Tribunal said.

32 31. *Libananco* v. ~~Turkey~~ Turkey, another case, was an investment treaty case, and the company *Libananco* was suing the Government of Turkey. The distinguished tribunal was faced with allegations of interception of communications, by Turkey, of communications between the Claimant and its legal advisers, allegations which — in its own words — "the Tribunal was bound to treat with the utmost seriousness"[42].

33 32. We have included an extract from the *Libananco* Decision on Preliminary Issues at tab 18. We can see from the decision that counsel for the Government behaved entirely properly, and refused to look at any of the intercepted material (which included a draft of the Claimant's Memorial)[43]. One would expect no less, which is why the assurances given so far by Australia in respect of the legal papers seized in the present case are hardly surprising. Nevertheless, the *Libananco* Tribunal went on to recall, in the strongest terms, the fundamental principles at stake

> "basic procedural fairness, respect for confidentiality and legal privilege . . .; the right of parties both to seek advice and to advance their respective cases freely and without interference"[44].

The Tribunal further added that

> "The Tribunal would express the principle as being that 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; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers)."[45]

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[41] *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, para. 49.

[42] *Libananco Holdings Co. Limited* v. *Republic of Turkey, ICSID Case no. ARB/06/8, Decision on Preliminary Issues, 23 June 2008*, para. 74.

[43] *Ibid.*, para. 75.

[44] *Ibid.*, para . 78.

[45] *Ibid.*, para. 78.

34 ~~33~~. Moreover, rather like in our case, in *Libananco* the Respondent Government tried to claim that its actions must be excused as they were done in pursuit of legitimate exercise of its criminal law. The Tribunal answered this argument rather bluntly:

> "The right and duty to investigate crime . . . cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration."[46]

35 ~~34~~. This is precisely the point. Whether Australia is entitled to take action under its domestic law in the name of national security, or for the enforcement of its criminal law[47], is immaterial to Timor-Leste's rights under international law, both to the inviolability of its property and to its entitlement to legal privilege.

36 ~~35~~. Before leaving *Libananco*, I would draw your attention to two interesting aspects of the Orders made by the Tribunal, which you will find at the tab. At paragraph 1.1 (1) on page 40 of the Decision, the Tribunal ordered that

> "Subject to paragraph 1.2 below, the Respondent must not intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand."[48]

And at paragraph 1.2 on page 42 the Tribunal said:

> "The Tribunal recognizes that the Respondent [Turkey] may in the legitimate exercise of its sovereign powers conduct investigations into criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration."[49]

37 ~~36~~. That was of course in the context of criminal investigations and an arbitration, and State papers were not in issue. Nevertheless, the *Libananco* Tribunal's approach applies equally to a national security investigation and to legal professional privilege going wider than the arbitration proceedings. It also supports the final provisional measures sought by Timor-Leste in these proceedings, namely that Australia give an assurance that it will not intercept or cause or request

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

[47] WOA, para. 55. See also Ann. 8 to Written Observations, Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", dated 4 December 2013.

[48] *Libananco Holdings Co. Limited* v. *Republic of Turkey, ICSID Case no. ARB/06/8, Decision on Preliminary Issues, 23 June 2008*, p. 40, point 1.1(1).

[49] *Ibid.*, p. 42, point 1.2.

the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste.

38 37. That legal professional privilege is a general principle of law is further supported by the case law of the European Court of Justice, in cases dealing with limits imposed on the power of the European Commission to conduct certain investigations because of the confidentiality of written communications between lawyers and their clients[50].

(c) ***Risk of irreparable prejudice and urgency***

39 38. Mr. President, the third condition for provisional measures is urgency. There must be a risk of irreparable prejudice to the rights at issue in the proceedings. I refer you to paragraph 24 of *Nicaragua* v. *Costa Rica* Order.

40 39. I shall begin by making a short comment on Australia's curious position that when deciding on provisional measures, the Court should not be concerned with "past circumstances or possible future circumstances". Mr. President, when the Court has to determine whether "irreparable prejudice could be caused to rights", it must necessarily consider whether such prejudice may occur in the future.

41 40. In this case, as Sir Elihu has explained, the urgency is clear. Timor-Leste is currently considering, at the highest political level, as well as with its team of international lawyers, its strategic and legal position vis-à-vis Australia in relation to the 2002 Timor Sea Treaty and the 2006 CMATS.

42 41. So far as Timor-Leste can tell, and as Sir Elihu and I have described, 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. They are manifestly documents of the utmost sensitivity, in terms both of Timor-Leste's international relations, but also domestically. And they are documents that concern a matter of the highest importance, of existential importance for Timor-Leste. A very large percentage of Timor-Leste's revenues derive from the oil and gas

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[50]Case 155/79, *AM & S Europe Limited* v. *Commission of the European Communities*, Judgment of the Court of 18 May 1982; cited also in Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v. *European Commission*, Judgment of the Court (Grand Chamber) of 14 September 2010, paras. 41-42.

sector. These matters are crucial to the future of Timor-Leste as a State and to the well-being of its people.

43 42. And not only are these documents of the utmost importance, time is of the essence if irreparable damage is to be avoided. The written and oral proceedings in the Arbitration under the Timor Sea Treaty are scheduled to conclude in early October of this year. Timor-Leste's wider efforts to move forward on achieving an equitable solution in respect of the Timor Sea are being side-tracked and delayed by Australia's current actions.

44 43. Mr. President, at this point I was going to take you through the undertakings or assurances that Australian officials have given and show how far from adequate they are to protect Timor-Leste's rights and interests in the present case, but they are in the folders and I will just refer to the key provision at this stage. The key undertaking as we read it is in the letter of 24 December which is at tab 10 and if you read that undertaking at paragraphs 2 and 3 I think you will see that it really is not adequate to do what we say is needed. In the first place, those undertakings lack binding force, at least at the international level. If you make a provisional measure that would of course, as you said in *LaGrand,* be binding in character and create a legal obligation for Australia. Secondly, those undertakings are in serious respects more limited than the provisional measures we have requested, they do not address at all the wider issues going beyond the Arbitration. And thirdly, those undertakings are expressed only to last until the present hearing. Clearly that is not adequate.

IV. Australia's Written Observations

45 44. Mr. Chairman in conclusion I shall just say a few words about Australia's Written Observations. There is not much to add what Sir Elihu has already said. I would only say that we do not necessarily agree with all that is said in the brief section of the Written Observations entitled "The position under international law". A number of learned authorities are cited, but if they are examined carefully they do not actually support the propositions for which Australia contends. To take one example, Judge Treves' interesting article, read as a whole, does not support Australia's bald assertion concerning the misuse of provisional measure requests[51].

[51] WOA, para. 67. See, for example, the Treves article at pp. 476-477.

46 ~~45~~. At the end of its Written Observations[52], Australia lists eight "factors", as it calls them, or "circumstances" which, it submits, mean that "the Court is not in a position where it could or should indicate provisional measures". It will be clear from what Sir Elihu and I have said that we disagree. Turning to paragraph 75 of Australia's Observations:

— as to points *(a)* and *(b)*, the fact that the documents seized were "brought within or created within Australia" is irrelevant. It does not amount to a waiver of the rights which Timor-Leste has under international law in respect of its property. Were it otherwise, it is difficult to see any foreign State seeking advice of lawyers in Australia.

— As to *(c)*, the Court should indeed be prudent, but national security and the enforcement of criminal law are not some magic wand that make the rights and obligations of States under international law vanish.

— As to *(d)*, I hope that both in the Application and Request and in our oral presentation today we have made clear the rights that are at issue.

— As to *(e)*, Australia's Written Observations completely overlook the fact that the documents and data perused and seized extend far beyond anything that is relevant to the Arbitration. This was made absolutely clear in the Application[53] and in the Request and we have further elaborated that point today.

— As to *(f)*, the existence of remedies under Australian law, even if they could be shown to be effective, is not relevant in the present situation where a sovereign State complains about a direct interference with its rights under international law.

— As to *(g)* and *(h)*, undertakings relating to legal advisers involved in the Timor Sea Treaty Arbitration fall far short of what is required to protect Timor-Leste's rights at issue in the present proceedings.

47 ~~46~~. Mr. President, with apologies to the interpreters, I have come to the end of my intervention, I thank you very much for your attention and that concludes our first round of presentation.

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[52]WOA, para. 75.

[53]For example, Application, para. 6.

The PRESIDENT: I thank you very much, Sir Michael Wood. This ends the first round of oral observations of the Democratic Republic of Timor-Leste. The Court will meet again tomorrow, at 10 a.m. to hear the first round of oral observations of Australia. The sitting is closed.

The Court rose at 12.30 p.m.