INTERNATIONAL COURT OF JUSTICE

TIMOR-LESTE v. AUSTRALIA

WRITTEN OBSERVATIONS OF AUSTRALIA ON TIMOR-LESTE'S REQUEST FOR PROVISIONAL MEASURES

13 JANUARY 2014

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PART I: INTRODUCTION

1. I have the honour to refer to the Application submitted by the Government of República Democrática de Timor-Leste ("Timor-Leste") to the International Court of Justice ("the Court") instituting proceedings against the Commonwealth of Australia ("Australia") and Timor-Leste's Request for Provisional Measures ("Request"), both of which were submitted on 17 December 2013. Australia is pleased to avail itself of the opportunity to submit these Written Observations on Timor-Leste's Request.

2. In essence, the provisional measures requested by Timor-Leste are:

(a) that the documents and data removed from 5 Brockman St, Narrabundah, in the Australian Capital Territory on 3 December 2013 ("the materials") be sealed and delivered into the custody of the Court;

(b) that Australia deliver to Timor-Leste and to the Court a list of the materials that it has disclosed or transmitted, or the information contained in the materials which it has disclosed or transmitted, to any person, and a list of the identities or descriptions of and current positions held by such persons;

(c) that Australia deliver within five days to Timor-Leste and to the Court a list of any and all copies that it has made of any of the materials;

(d) that Australia destroy beyond recovery any and all copies of the materials, and use every effort to secure the destruction beyond recovery of all copies that it has transmitted to any third party, and inform Timor-Leste and the Court of all steps taken in pursuance of that order for destruction, whether or not successful; and

(e) that Australia give an assurance that it will not intercept communications between Timor-Leste and its legal advisers.[1]

3. In response to Timor-Leste's Request, Australia submits that the Court should not indicate the provisional measures requested by Timor-Leste, or any other provisional measures. Australia's Written Observations are structured as follows:

(a) In Part II, Australia provides the Court with the relevant factual background and legal context.

[1] This measure appears unrelated to the removal of documents and data from 5 Brockman St, Narrabundah.

(b) In Part III, Australia sets out the relevant provisions of Australian law concerning the removal of the materials on 3 December 2013, and explains the procedures that are available under Australian law to challenge the validity of the search warrants and to assert any legal professional privilege that might attach to the materials.

(c) In Part IV, Australia outlines the principles and law that should be applied by the Court in considering Timor-Leste's Request, as well as some of the factors which should lead the Court to conclude that it is not appropriate to indicate provisional measures in this case.

4. Against this background, Australia submits that the Court should reject the provisional measures requested by Timor-Leste, because:

(a) The issues raised by Timor-Leste should be dealt with by an Australian court, pursuant to the comprehensive framework established under Australian law.

(b) To the extent that Timor-Leste seeks any interim measures of protection under international law – which Australia strongly submits is unnecessary – such protection should be sought from the Arbitral Tribunal already constituted in the proceedings that Timor-Leste has commenced against Australia under Article 23 of the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* ("the Timor Sea Treaty").[2]

(c) Timor-Leste's request for the indication of provisional measures does not satisfy the requirements of Article 41 of the Statute of the International Court of Justice ("the ICJ Statute") such as to require the making of any orders by this Court.

PART II: FACTUAL BACKGROUND AND LEGAL CONTEXT

5. In considering Timor-Leste's Request, it is important that the Court be informed of the factual background to these proceedings. It is evident that Timor-Leste's brief Application and Request deal in only the most superficial way with that background. In support of its Application and Request, Timor-Leste merely states that:

> On 3 December 2013, officers of the Australian Security Intelligence Organisation ('ASIO'), acting under warrants issued by the Attorney-General of Australia attended an office / residence in Canberra at 5 Brockman Street, Narrabundah, in the Australian Capital Territory, Australia and seized

[2] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, [2003] ATS 13, 2258 UNTS 3 (entered into force 2 April 2003) ("Timor Sea Treaty").

documents, data and other property which belong to Timor-Leste and / or which Timor-Leste has the right to protect under international law ('the documents and data') from those premises. The owner of the above-mentioned office / residence is Legal Adviser to and a Legal Representative of the Government of East Timor.[3]

6. Timor-Leste further states that the materials removed include "documents and data containing correspondence between the Government of Timor-Leste and its Legal es [*sic*], among them documents relating to the conduct of the pending Arbitration under the Timor Sea Treaty between Timor-Leste and Australia."[4]

7. Timor-Leste's present Request is thus made in the context of and relates directly to the Timor Sea Treaty arbitration proceedings. In those proceedings, which were commenced by Timor-Leste on 23 April 2013 by way of a Notice of Arbitration,[5] Timor-Leste claims that a separate treaty, the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* ("the CMATS Treaty"),[6] is invalid because Australia, by allegedly engaging in espionage, did not conduct the CMATS Treaty negotiations in good faith.[7] In accordance with long-standing policy, Australia neither confirms nor denies Timor-Leste's allegations of espionage. But it denies Timor-Leste's claim that the CMATS Treaty is invalid.

8. Shortly after the commencement of the Timor Sea Treaty arbitration proceedings, a number of allegations made by Timor-Leste and representatives of Timor-Leste were reported in the media:

(a) In a media report published by the Australian Broadcasting Corporation ("ABC") on 29 May 2013, Mr Collaery specifically alleged that: "The operation was conducted by [ASIS] and of course it operated and reported at the relevant times to foreign minister Downer."[8]

(b) In a press report published in *The Australian* on 29 May 2013, Mr Collaery further alleged that Australia's then Minister for Foreign Affairs knew of the alleged

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[3] Request, para. 2.
[4] Request, para. 3.
[5] Notice of Arbitration, Timor-Leste, dated 23 April 2013 [Annex 1].
[6] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, [2007] ATS 12, 2483 UNTS 359 (entered into force 23 February 2007) ("CMATS Treaty").
[7] "Arbitration under the Timor Sea Treaty", Joint Media Release by Senator the Hon. Bob Carr, Minister for Foreign Affairs and Trade, and the Hon. Mark Dreyfus QC MP, Attorney-General, dated 3 May 2013, available at: http://foreignminister.gov.au/releases/2013/bc_mr_130503.html.
[8] Sara Everingham, "East Timor Defends Gas Treaty Challenge", ABC, dated 29 May 2013, available at: http://www.abc.net.au/pm/content/2013/s3770299.htm.

operation, stating that: "Downer certainly knew … It was a carefully premeditated, involved, very lengthy operation with premeditated breaches of the Vienna Convention on the Law of Treaties, and premeditated breaches of the Vienna Convention on Diplomatic Relations."[9]

(c) In another report published by the ABC on 29 May 2013, Mr Collaery alleged that Timor-Leste had "irrefutable" evidence to support the allegations.[10]

(d) As for the source of Mr Collaery's alleged evidence, the *Jornal Independente*, a newspaper published in Timor-Leste, reported on 31 May 2013 that "revelations that [the Australian Secret Intelligence Service ("ASIS")] broke into and bugged Timorese cabinet rooms nine years ago were brought to light by a former ASIS employee currently unwell in an Australian hospital", who allegedly made the disclosure to Timor-Leste or its representatives "in a bid to clear his conscience."[11]

(e) In a report published in *The Economist* on 8 June 2013, Timor-Leste's Foreign Minister, Alfredo Pires, is reported as repeating Mr Collaery's claim that Timor-Leste had "irrefutable proof" that ASIS had "illegally obtained information".[12]

9. Australia submitted a Response to the Notice of Arbitration on 19 June 2013, notifying Timor-Leste of its party-appointed arbitrator.[13] The International Bureau of the Permanent Court of Arbitration has been appointed by Australia and Timor-Leste to act as Registry in the arbitration.[14]

10. Australia is actively and constructively engaged in those international arbitration proceedings. Australia has cooperated with Timor-Leste in the establishment of the Tribunal, and has provided assistance to the Tribunal to ensure a proper and effective hearing of the dispute. Australia produced a draft of the Rules of Procedure and forwarded those to Timor-

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[9] Leo Shanahan, "Aussie Spies Accused of Bugging Timor Cabinet", *The Australian*, dated 29 May 2013, available at: http://www.theaustralian.com.au/national-affairs/policy/aussie-spies-accused-of-bugging-timor-cabinet/story-fn59nm2j-122665259904.

[10] Karen Barlow, "East Timor's Accusations of Australian Espionage Have Not Damaged Relations, Says Bob Carr", ABC, dated 29 May 2013, available at: http://www.abc.net.au/news/2013-05-29/australia-accused-of-spying-on-east-timor-government/4720466.

[11] Julio da Silva, "Xanana still Waiting for Response from Australia about CMATS", *Jornal Independente*, dated 31 May 2013, p. 9 [Annex 2].

[12] "Timor-Leste and Australia: Bugs in the Pipeline", *The Economist*, dated 8 June 2013, available at: http://www.economist.com/news/asia/21579074-timorese-leaders-push-better-deal-their-offshore-gas-fields-bugs-pipeline.

[13] Response to the Notice of Arbitration, Australia, dated 19 June 2013 [Annex 3].

[14] Terms of Appointment in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, dated 5 December 2013 [Annex 4].

Leste for comment on 1 October 2013,[15] with a view to reaching agreement on those Rules to aid the Tribunal.

11. Although both Australia and Timor-Leste are under obligations of confidentiality concerning the Timor Sea Treaty arbitration proceedings,[16] the Tribunal has agreed that this requirement shall not apply insofar as is required for either Party to submit copies of correspondence, pleadings, and transcripts relating to the arbitration in the proceedings initiated by Timor-Leste before this Court.[17]

12. On 3 December 2013, the day on which the materials were removed by ASIO, and shortly before the Tribunal's First Procedural Meeting, Mr Collaery made further allegations in an interview on the "Lateline" programme which was broadcast by the ABC.[18] Specifically, he alleged that:

(a) The Director-General of ASIS had "ordered a team into Timor to conduct work which was well outside the proper functions of ASIS".

(b) Timor-Leste's witness was "not some disaffected spy", but was the "director of all technical operations of ASIS … a senior, experienced, decorated officer".[19]

13. On 4 December 2013, the Attorney-General of Australia, Senator the Hon. George Brandis QC, made a Ministerial Statement on the execution by ASIO of the search warrants. This is a statement made to the Parliament of Australia, and the making of such a statement reflects the Attorney-General's ministerial responsibility to Parliament (and to the whole of Australia) in the performance of his public duties. In his Ministerial Statement, the Attorney-General explained that the search warrants had been issued by him "at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to national security matters."[20] He further explained that the search warrants, which were issued under section 25 of the *Australian Security Intelligence Organisation Act 1979*

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[15] Letter to HE Mr Jose Luis Guterres, Minister of State for Foreign Affairs and Cooperation, dated 1 October 2013 [Annex 5].

[16] Procedural Order No. 1 (Rules of Procedure) in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, dated 6 December 2013, Article 26(5) [Annex 6].

[17] Procedural Order No. 2 (Waiver of Confidentiality Requirements), Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, dated 7 January 2014 [Annex 7].

[18] "Bernard Collaery, Lawyer for East Timor", Lateline, ABC, dated 3 December 2013, available at: http://www.abc.net.au/lateline/content/2013/s3904428.htm.

[19] "Bernard Collaery, Lawyer for East Timor", Lateline, ABC, dated 3 December 2013, available at: http://www.abc.net.au/lateline/content/2013/s3904428.htm.

[20] Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", dated 4 December 2013, p. 1 [Annex 8].

(Cth) ("the ASIO Act"), can only be issued "by the Attorney-General at the request of the Director-General of ASIO, and only if the Attorney-General is satisfied as to certain matters."[21] In that statement to the Parliament, the Attorney-General expressly addressed, and rejected, Timor-Leste's claim that the search warrants were issued in order to subvert or impede the Timor Sea Treaty arbitration proceedings, stating that:

> I have given an instruction to ASIO that the material taken into possession in execution of the warrants is not under any circumstances to be communicated to those conducting the proceedings on behalf of Australia.[22]

That instruction was subsequently reiterated in the letter to ASIO referred to in paragraph 23 below.

14. The Tribunal constituted under the Timor Sea Treaty arbitration convened on 5 December 2013 in The Hague for its First Procedural Meeting. At the First Procedural Meeting, counsel for Timor-Leste raised the substance of the matter now before this Court.[23] Among other things, Timor-Leste requested that Australia advise what would be done with the materials removed under warrant on 3 December 2013,[24] and on what date they would be returned.[25] Timor-Leste also tendered to the Tribunal a letter setting out a list of the materials removed on 3 December 2013.[26] The materials identified in the letter are consistent with the ASIO Property Seizure Record of 3 December 2013, [27] a copy of which was provided to a member of Mr Collaery's staff on that date.

15. In response to Timor-Leste's requests, the Agent for Australia informed the Tribunal that the materials would be dealt with in accordance with Australian law, and would not be communicated to any persons conducting the Timor Sea Treaty arbitration proceedings on

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[21] Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", dated 4 December 2013, p. 1 [Annex 8].
[22] Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", dated 4 December 2013, p. 2 [Annex 8].
[23] Transcript, First Procedural Meeting in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, dated 5 December 2013 ("Transcript") [Annex 9].
[24] Transcript, p. 29, lines 9 to 17 [Annex 9].
[25] Transcript, p. 36, lines 6 to 17; p. 37, lines 1 to 14; p. 39, line 8 to p. 40, line 15; and p. 41, lines 6 to 8 [Annex 9].
[26] Letter from Bernard Collaery to Ambassador Joaquim AML da Fonseca, dated 5 December 2013 [Annex 10]. See also Transcript, p. 42, line 20 to p. 43, line 3 [Annex 9].
[27] ASIO Property Seizure Record, dated 3 December 2013 [Annex 11].

behalf of Australia. The Agent informed the Tribunal that the Attorney-General of Australia had made this clear in his earlier Ministerial Statement on 4 December 2013.[28]

16. The Agent for Australia also advised that the materials were unable to be returned at that time, and that no undertaking could then be made as to the date of return, which was governed by domestic legislation.[29] A written copy of the statement made by the Agent on these issues was tendered to the Tribunal.[30]

17. Although Timor-Leste asserts in its Request that its "ability to prepare for the pending Arbitration is materially impaired",[31] Timor-Leste agreed at the First Procedural Meeting that its preparation for the arbitration would not be prevented or substantially delayed by the seizure of the materials.[32] Timor-Leste suggested that it needed an additional two weeks to prepare its Statement of Claim in the matter,[33] and this suggestion was incorporated in the agreed timetable of pleadings leading to a hearing in September 2014.[34]

18. Timor-Leste also raised a concern that Australia had put itself in a position of advantage with respect to the arbitration, and asked how that would be handled. In particular, Timor-Leste sought an undertaking regarding the management of a perceived ministerial conflict of interest in the arbitration, which turned on the role played by Australia's Attorney-General in both the arbitration and the execution of the search warrants on 3 December 2013.[35] The Agent for Australia undertook to respond to that matter in writing by 19 December 2013.[36]

19. The Attorney-General of Australia subsequently provided a written undertaking to the Tribunal dated 19 December 2013. In that undertaking, the Attorney-General declared that:

> I have given an instruction to ASIO that the content of the Material or any information derived from the Material, is not under any circumstances to be communicated to those conducting these proceedings on behalf of the Commonwealth of Australia.[37]

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[28] Transcript, p. 29, line 19, to p. 36, line 5 [Annex 9].
[29] Transcript, p. 29, line 19 to p. 36, line 5; p. 38, line 13 to p. 39, line 6; and p. 40, line 20 to p. 41, line 9 [Annex 9].
[30] "Statement on Domestic Legal Processes", dated 5 December 2013 [Annex 12] and Transcript, p 38, line 7 to line 12 [Annex 9].
[31] Request, para. 9.
[32] Transcript, p. 39, line 8 to p. 40, line 15; and p. 42, line 3 to p. 43, line 20 [Annex 9].
[33] Transcript, p. 42, lines 11 to 19 [Annex 9].
[34] Transcript, p. 51, lines 17 to 19; and p. 55, lines 11 to 16 [Annex 9].
[35] Transcript, p. 49, line 8 to p. 51, line 3 [Annex 9].
[36] Transcript, p. 72, line 10 to p. 73, line 9 [Annex 9].
[37] Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, dated 19 December 2013 [Annex 13].

20. He also declared that:

> The Material will not be used by any part of the Australian Government for any purpose related to this arbitration.[38]

21. The Attorney-General made the following undertaking:

> I UNDERTAKE to the Tribunal that:
>
> I will not make myself aware or otherwise seek to inform myself of the content of the Material or any information derived from the Material; and
>
> Should I become aware of any circumstances in which it may become necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Tribunal, at which time further undertakings will be offered.[39]

22. Regrettably, without waiting to receive the Australian Attorney-General's written undertaking, and two days before the agreed time for Australia's response on this point, Timor-Leste instituted the present proceedings before the Court and requested the indication of provisional measures.

23. The Attorney-General subsequently wrote to the Director-General of Security on 23 December 2013, directing that the measures set out in the 19 December undertaking (in relation to the Timor Sea Treaty arbitration proceedings) be implemented equally in relation to the proceedings instituted before this Court.[40]

24. Timor-Leste has since sought before the Tribunal a clarification of a matter arising out of the Attorney-General's written undertaking.[41] That request has been responded to. Suffice to say the undertaking is clear and comprehensive on its face. If Timor-Leste had any continuing concern, it could be expected to raise it before the Tribunal which would have ample authority to deal with it.

25. Timor-Leste has advanced no reason why the Court should not be satisfied with the Attorney-General's undertaking or why the Attorney-General's instruction to ASIO in relation to the handling of the material is not a sufficient manner of dealing with any legitimate concerns.

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[38] Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, dated 19 December 2013 [Annex 13].
[39] Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, dated 19 December 2013 [Annex 13].
[40] Letter from Senator the Hon. George Brandis QC, Attorney-General, to Mr David Irvine AO, Director-General of Security, dated 23 December 2013 [Annex 14].
[41] Letter from the Agent for Timor-Leste to the Agent of Australia, dated 23 December 2013 [Annex 15].

26. Following the First Procedural Meeting on 5 December 2013, the Tribunal adopted Rules of Procedure for the conduct of the arbitration.[42] Those Rules include Article 21, which provides:

> *Article 21. Interim Measures of Protection*
>
> 1. Unless the Parties otherwise agree, the arbitral tribunal may, at the request of either party, take any interim measures it deems necessary to preserve the respective rights of either party.
>
> 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
>
> 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

27. Timor-Leste has not availed itself of the possibility of requesting interim measures before the Tribunal, which is, in Australia's submission, the proper forum for consideration of any such request. However, it is Australia's strong submission that the issues raised in Timor-Leste's request are comprehensively addressed in Australian law, which provides the most effective and appropriate framework for resolving them.

PART III: THE POSITION UNDER AUSTRALIAN LAW

28. Timor-Leste's Request concerns ASIO's removal under a search warrant of materials from the premises at 5 Brockman St, Narrabundah, Australian Capital Territory, on 3 December 2013, and ASIO's retention of those materials. A list of the materials removed is at Annex 11. ASIO officers acting under warrant attended other premises in Canberra at the same time and removed documents and other material. The documents and material removed from those other premises are not the subject of the proceedings commenced by Timor-Leste before the Court.

29. This Part sets out the Australian legal framework governing the powers and functions of ASIO, the issue and execution of search warrants, and matters relating to legal professional privilege under Australian law. It also outlines the application of this framework to the circumstances raised in Timor-Leste's Request.

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[42] Procedural Order No. 1 (Rules of Procedure) in the Matter of an Arbitration pursuant to the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, dated 6 December 2013, dated 6 December 2013 [Annex 6].

A. POWERS AND FUNCTIONS OF ASIO

30. As was explained by the Australian Attorney-General in his Ministerial Statement of 4 December 2013, and by the Agent of Australia at the First Procedural Meeting of the Tribunal on 5 December 2013, the search warrant was issued by the Attorney-General under the ASIO Act. This legislation establishes ASIO under legislation,[43] section 17(1) identifies its functions as including the following:

> (a) to obtain, correlate and evaluate intelligence relevant to security;
>
> (b) for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes"; and
>
> (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities;
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> [...]
>
> (e) to obtain within Australia foreign intelligence pursuant to section 27A or 27B of this Act or section 11A, 11B or 11C of the Telecommunications (Interception and Access) Act 1979, and to communicate any such intelligence in accordance with this Act or the Telecommunications (Interception and Intelligence) Act 1979.[44]

31. The term "security" is defined in section 4 of the ASIO Act as meaning:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
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> espionage;
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> sabotage;
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> politically motivated violence;
>
> promotion of communal violence;
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> attacks on Australia's defence system;
>
> acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).[45]

32. As is made clear in the Attorney-General's "Guidelines in relation to the performance by ASIO of its function of obtaining, correlating, evaluating and communicating intelligence

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[43] Australian Security Intelligence Organisation Act 1979 (Cth) ("ASIO Act"), s 6 [Annex 16].
[44] ASIO Act, s 17(1) [Annex 16]; Telecommunications (Interception and Access) Act 1979 (Cth), ss 11A, 11B and 11C [Annex 17].
[45] ASIO Act, s 4 [Annex 16].

relevant to security (including politically motivated violence)", which were issued under section 8A of the Act, ASIO's functions under section 17 require it, *inter alia*:

> (a) to undertake inquiries to determine whether a particular subject or activity is relevant to security;
>
> (b) to investigate subjects and activities relevant to security;
>
> (c) to develop and maintain a broad understanding of the security environment; and
>
> (d) to analyse and assess information obtained, and to provide intelligence and advice to relevant authorities.[46]

33. The Attorney-General's Guidelines further provide that, in performing its functions, ASIO may:

> (a) collect, maintain, analyse and assess information related to inquiries and investigations;
>
> (b) collect and maintain a comprehensive body of reference material to contextualise intelligence derived from inquiries and investigations; and
>
> (c) maintain a broad database, based on the above, against which information obtained in relation to a specific inquiry or investigation can be checked and assessed.[47]

34. The Attorney-General's Guidelines clarify that information obtained by ASIO is "relevant to security" where it may assist in determining whether:

> (a) there is a connection or possible connection between a subject and activities relevant to security, irrespective of when such activities have occurred or may occur;
>
> (b) the activities of a subject are not relevant to security; or
>
> (c) a person, group or entity other than the subject has a connection or possible connection to activities relevant to security.[48]

35. Australia's maintenance of an organisation such as ASIO is consistent with the practice of many other States which have national security intelligence services with similar functions to ASIO.[49] Australia also has ASIS, which is Australia's foreign intelligence

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[46] Attorney-General's Guidelines in relation to the performance by ASIO of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence), para. 6.1 [Annex 18].

[47] Attorney-General's Guidelines in relation to the performance by ASIO of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence), para. 6.2 [Annex 18].

[48] Attorney-General's Guidelines in relation to the performance by ASIO of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence), para. 10.1 [Annex 18].

[49] See, e.g., the United States, where the FBI is provided for under 28 USC Chapter 33; the United Kingdom, where the Security Service is provided for under the Security Services Act 1989 (UK); France, where the Central Directorate of Homeland Intelligence is provided for under Decree 2008-609 relating to the role and organisation of the Central Directorate of Homeland Intelligence of 27 June 2008; the Russian Federation, where Federal Law No. 40-FZ on Organs of the Federal Security Service in the Russian Federation of 22 February 1995 provides for the Federal Security Service; Italy, where the Internal Security and Intelligence Agency operates under Law No. 124 of 8 March 2007 (Intelligence System for the Security of the Republic and New Provisions Governing Secrecy); Mexico, whose Centre for Research and National Security is created under the National Security Act of 31 January 2005; and Uganda, whose Internal Security Organisation operates under the Security Organisations Act 1987. The relevant legislative provisions are set out in the table at Annex 19.

service, and many States also have a foreign intelligence agency.[50] Some States appear to have a single intelligence service covering both functions.[51] Timor Leste's Decree Law No. 03/2009 establishes the "National Intelligence Service" ("SNI"), which has a "Department of Internal Intelligence".[52] The SNI's functions include the production of "intelligence that contributes towards the safeguarding of national independence, national interests and external security, including the guarantee of internal security".[53] Specific functions include promoting "research, collection, analysis, interpretation and storage of intelligence and data", and informing "the competent authorities … of news and intelligence that come to its knowledge relating to internal security and to crime prevention and repression."[54]

B. ISSUE AND EXECUTION OF ASIO SEARCH WARRANTS

36. The search warrants that were executed by ASIO on 3 December 2013 were issued by the Attorney-General as the Minister referred to in section 25 of the ASIO Act. Section 25 provides in relevant part as follows:

> (1) If the Director-General requests the Minister to do so, and the Minister is satisfied as mentioned in subsection (2), the Minister may issue a warrant in accordance with this section.
>
> (2) The Minister is only to issue the warrant if he or she is satisfied that there are reasonable grounds for believing that access by the Organisation to records or other things on particular premises (the subject premises) will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the security matter) that is important in relation to security.

37. As is clear from the search warrant that was issued by the Attorney-General on 2 December 2013 in respect of the "subject premises" at 5 Brockman St, Narrabundah,

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[50] ASIS operates under the Intelligence Services Act 2001 (Cth). Other States with a foreign intelligence agency include, e.g., France, whose Directorate-General of External Security operates under the Defence Code, Decree No. 2008-1210 of 25 November 2008 (as amended by Decree No. 2012-1391 of 11 December 2012); Italy, where the External Security and Intelligence Agency is provided for under Law No. 124 of 8 March 2007 (Intelligence System for the Security of the Republic); Russia, whose Foreign Intelligence Service operates under Federal Law No. 5-FZ of 10 January 1996 on Foreign Intelligence; the United Kingdom, where the Secret Intelligence Service operates under the Intelligence Services Act 1994 (UK); and the United States, where the Central Intelligence Agency is established under the National Security Act of 1947. The relevant legislative provisions are set out in the table at Annex 19.

[51] See e.g., New Zealand, where the New Zealand Security Intelligence Service operates under the New Zealand Security Intelligence Service Act 1996 (NZ); Slovakia, whose Slovak Information Service is provided for by the Act of the National Council of the Slovak Republic dated 21 January 1993 on the Slovak Information Service; Brazil, where the Brazilian Intelligence Agency is established under Law No. 9883 of 7 December 1999 that establishes the Brazilian System of Intelligence and creates the Brazilian Agency of Intelligence - ABIN. The relevant legislative provisions are set out in the table at Annex 19.

[52] Timor-Leste Decree Law No. 03/2009 (National Intelligence Service), Arts 1, 13 [Annex 20].

[53] Timor-Leste Decree Law No. 03/2009 (National Intelligence Service), Art 3 [Annex 20].

[54] Timor-Leste Decree Law No. 03/2009 (National Intelligence Service), Art 5[Annex 20].

Australian Capital Territory,[55] the Attorney-General was satisfied as to the matters indicated in section 25(2) of the ASIO Act. Specifically, the Attorney-General declared that he was satisfied that:

> there are reasonable grounds for believing that access by the Organisation to records or other things on the subject premises will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the security matter) that is important in relation to security.[56]

38. In the search warrant, the Attorney-General authorised ASIO to do as follows, in accordance with section 25(4) of the ASIO Act:

> a. enter the subject premises 5 Brockman St, Narrabundah ACT 2604.
>
> b. search those premises for the purpose of finding records or other things relevant to the security matter and, for that purpose, opening any safe, box, drawer, parcel, envelope or any other container in which there is reasonable cause to believe that any such records or other things may be found.
>
> c. inspect or otherwise examine any records or any other things found in the premises, and to make copies or transcripts of any record so found that appears to be relevant to the collection of intelligence by the Organisation in accordance with the Act.
>
> d. remove and retain any record or other thing so found for the purposes of inspecting or examining it, and, in the case of a record, for the purposes of making copies or transcripts of it, in accordance with the warrant.
>
> e. do any thing reasonably necessary to conceal the fact that any thing has been done under the warrant.
>
> f. any other thing reasonably incidental to the above.[57]

39. In addition, the Attorney-General declared that he was satisfied that there was:

> reasonable cause to believe that data relevant to the security matter may be accessible by using a computer, other electronic equipment or data storage device brought to, or found on the subject premises or carried by Bernard Joseph Edward Collaery and those of any persons present on the residence.[58]

40. Under section 25(5) of the ASIO Act, the Attorney-General thus also authorised ASIO to:

> a. use any computer, or other electronic equipment or data storage device brought to or found in the subject premises for the purpose of gaining access to data relevant to the security matter, and, if necessary to achieve that purpose, to add, delete or alter other data in the computer or electronic or equipment.
>
> b. use any computer, or other electronic equipment or data storage device brought to or found in the subject premises to do any of the following:
>
> (i) inspect and examine any data to which access has been obtained;

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[55] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25" [Annex 21].
[56] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25", para. 2 [Annex 21].
[57] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25", para. 3 [Annex 21].
[58] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25", para. 4 [Annex 21].

(ii) convert any data to which access has been obtained, that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act, into documentary form and remove any such document;

(iii) copy any data to which access has been obtained, that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act, to a storage decide and remove the storage device.

c. do any other thing reasonably necessary to conceal the fact that any thing has been done under the warrant.

d. do any other thing reasonably incidental to any of the above.[59]

41. The search warrant in respect of 5 Brockman St, Narrabundah, Australian Capital Territory, was issued and executed in compliance with applicable Australian law.

42. Should either Timor-Leste or Mr Collaery wish to challenge the validity of the search warrant that was issued by the Attorney-General on 2 December 2013 or its execution by ASIO on 3 December 2013, there are appropriate procedures available to them under Australian law. Under section 75(v) of the *Constitution of Australia*, the High Court of Australia has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. In addition, under section 39B(1) of the *Judiciary Act 1903* (Cth), the Federal Court of Australia also has original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth. Timor-Leste or Mr Collaery thus have the right to approach the Australian courts for remedies.[60]

43. Specifically, if it is asserted or even just implied – which Australia would most vigorously refute – that there was some improper or collateral purpose attached to the issue or execution of the search warrant at 5 Brockman St, Narrabundah, then there is a constitutionally guaranteed right to make such assertions in proceedings brought before the Federal Court of Australia. Any such proceedings, if seriously contemplated, would have been brought with expedition and certainly before now. Timor-Leste's failure to bring any such proceedings for what is now some six weeks speaks volumes to its acceptance that it has no such legitimate legal grievance. Certainly, while domestic remedies remain unexhausted, this Court should not allow its procedures to be used, directly or indirectly, as a forum to air this grievance.

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[59] "Australian Security Intelligence Organisation Act 1979 (Cth) – Search Warrant under Section 25", para. 5 [Annex 21].

[60] See, e.g., Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 [Annex 22]; AWB Ltd v Cole (No. 5) (2006) 155 FCR 30 [Annex 23]; and Baker v Evans (1987) 77 ALR 565.

44. As any question of improper purpose in the issue or execution of the warrant in question is not or should not be before this Court, that leaves the question of any claim to legal professional privilege.

45. Timor-Leste has not sought to avail itself of remedies available under Australian law. Its failure to do so should be taken into account in the exercise of any discretion whether to indicate provisional measures.

C. FRAMEWORK GOVERNING LEGAL PROFESSIONAL PRIVILEGE

46. Timor-Leste asserts in its Request that the materials that were removed from the subject premises on 3 December 2013 consist of "privileged advice" which Timor-Leste has "the right to protect under international law".[61] Australia does not accept that such a right exists under international law, at least not without substantial qualifications to the right, some of which will be referred to below.

47. Here it is important to note that Timor-Leste, as was perfectly within its rights to do, engaged Australian legal counsel (DLA Piper) to advise on a possible claim to legal professional privilege. By letter dated 10 December 2013, Timor-Leste's legal representatives asserted that the materials removed by ASIO "will, in all likelihood, include documents that are subject to legal professional privilege," and (*inter alia*) demanded the return of the materials.[62]

48. What is critical to note is that Australia has at all times acted responsibly and appropriately to ensure that Timor-Leste could effectively exercise its rights under Australian law to seek to assert that it had legal professional privilege in any of the removed materials. Thus, in executing the search warrant on 3 December 2013, ASIO recognised the possibility that a claim to legal professional privilege might be made over some of the materials removed. Accordingly, a legal officer accompanied the ASIO search team, and hard copy materials which were removed from the subject premises were only briefly inspected, in order to be able to identify their relevance to the subject matter of the search warrant and to identify them on the property seizure record which was completed at the time of the execution of the search warrant. A copy of the property seizure record was provided to a member of Mr Collaery's staff present at the premises at 5 Brockman Street, Narrabundah.

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[61] Request, paras. 2, 6.

[62] Letter from DLA Piper to Senator the Hon. George Brandis QC, Attorney-General, dated 10 December 2013 [Annex 24].

With one exception, all materials were then placed in sealed envelopes and have remained sealed to the present day.[63]

49. Whether the documents have been treated in accordance with Australian law can be tested in Australian courts. For this purpose, there are procedures available to resolve disputes between the Commonwealth and Timor-Leste or Mr Collaery as to how these documents should be handled, whether legal professional privilege exists or whether any privilege which might otherwise exist is lost through one of the exceptions (most relevantly, the fraud / crime exception, which is explained below). This matter is capable of determination in judicial review proceedings or a declaratory or other suit before an Australian court expeditiously.[64] Indeed, had Timor-Leste acted swiftly, the matter could have now been well on its way to resolution in an Australian court. As such the appropriate forum for the determination of any claim to legal professional privilege is an Australian court. Plainly this issue is not to be decided by the unilateral assertion of one of the parties.

50. Further to this, in correspondence with the legal representatives for Timor-Leste, Australia has made a procedure available to Timor-Leste for it to assert any legal professional privilege that might attach to the materials. Thus:

(a) By letter dated 16 December 2013, the Australian Government Solicitor informed the legal representatives of Timor-Leste in Australia (DLA Piper) that, although Australia did not accept that privilege was available in respect of the materials, Australia was prepared "to take no steps now" in relation to the materials. Australia also invited Timor-Leste to provide, by 5.30pm on 19 December 2013, Australia with details of the material over which a claim for legal professional privilege was made; details of the basis of such a claim; and any draft proposed application or pleading.[65]

(b) By letter dated 18 December 2013, the legal representatives of Timor-Leste noted that Australia had failed to address its various requests, including the return of the materials. Timor-Leste did not take up Australia's proposed procedure for the determination of legal professional privilege, but informed Australia that it had commenced proceedings before the Court. It also asked Australia to confirm that it

[63] A mobile phone found not to be relevant to the investigation was returned on 6 December 2013.
[64] See, e.g., AWB Ltd v Cole (No. 5) (2006) 155 FCR 30 [Annex 23]; see also Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 [Annex 22]; and Baker v Evans (1987) 77 ALR 565.
[65] Letter from the Australian Government Solicitor to DLA Piper, dated 16 December 2013 [Annex 25].

would not take any steps in relation to the materials, pending the resolution of this matter by the Court.[66]

(c) By letter dated 19 December 2013, Australia stated that it would take no steps in relation to the materials while it considered its position in light of the institution of the proceedings before the Court, and reiterated its invitation to Timor-Leste to make "any claim under domestic law" with respect to the materials, stating that the deadline for this was now 5.30pm on 20 December 2013.[67]

(d) By letter dated 21 December 2013, the legal representatives of Timor-Leste "reserved its rights" with respect to any claim under domestic law, and reiterated that Timor-Leste had initiated separate proceedings before the Court.[68]

(e) By letter dated 24 December 2013 to the legal representatives of Timor-Leste, Australia observed that it had had "ample opportunity to commence domestic proceedings" to make any claims, and that it had not done so "despite 20 days having passed since the execution of the warrant on 3 December 2013." Australia informed Timor-Leste's legal representatives that, in response to the direction made by the President of the Court under Article 74(4) of the Rules of Court, "Australia will take no steps in relation to … the material seized from Mr Collaery's premises on 3 December 2013 … until the International Court of Justice has heard the request for provisional measures on 20-22 January 2014", and that if Timor-Leste intended to make any claim under domestic law "it should do so well prior to 22 January 2014."[69]

51. To be clear, Australia has assured Timor-Leste that it shall take no steps in relation to the materials until the Court has heard the request for provisional measures. But the Attorney-General's declaration as made in his Ministerial Statement on 4 December 2013,[70] which was repeated in his undertaking on 19 December 2013[71] – that the materials are not under any circumstances to be communicated to those conducting the Timor Sea Treaty arbitration proceedings on behalf of Australia – has no temporal limitation. Similarly, the Attorney-General's letter to the Director-General of Security of 23 December 2013 – directing that the materials are not to be communicated to those conducting the proceedings

[66] Letter from DLA Piper to the Australian Government Solicitor, dated 18 December 2013 [Annex 26].
[67] Letter from the Australian Government Solicitor to DLA Piper, dated 19 December 2013 [Annex 27].
[68] Letter from DLA Piper to the Australian Government Solicitor, dated 21 December 2013 [Annex 28].
[69] Letter from the Australian Government Solicitor to DLA Piper, dated 24 December 2013 [Annex 29].
[70] Senator the Hon. George Brandis QC, Attorney-General, "Ministerial Statement: Execution of ASIO Search Warrants", dated 4 December 2013 [Annex 8].
[71] Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, dated 19 December 2013 [Annex 13].

on behalf of Australia before this Court – is without temporal limitation.[72] In addition, the Attorney-General's undertaking to the effect that he would not seek to inform himself of the contents of the materials is also unlimited in time with a proper recognition that the Tribunal would be informed if circumstances were to change.[73]

52. Timor-Leste has instituted proceedings before the Court in circumstances where the most appropriate forum for the determination of whether some or all of the materials may be protected by legal professional privilege is an Australian court. Australian courts provide a forum for the expeditious resolution of such questions, and Australian legislation provides appropriate protections to safeguard national security in proceedings which raise national security matters.[74]

53. Nevertheless, Australia disputes Timor-Leste's claim that the materials removed from the subject premises at 5 Brockman Street, Narrabundah, Australian Capital Territory can benefit from any such privilege. Under Australian law, legal professional privilege attaches to confidential communications between clients and lawyers for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation.[75] There is a range of bases open to Australia to deny any assertion by Timor-Leste that the materials are subject to legal professional privilege. In particular, Australian law – like that of many other countries – recognises an exception to legal professional privilege where any such communication is made or prepared in furtherance of a fraud or a criminal offence;[76] the law

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[72] Letter from Senator the Hon. George Brandis QC, Attorney-General, to Mr David Irvine AO, Director-General of Security, dated 23 December 2013 [Annex 14].

[73] Arbitration under the Timor Sea Treaty, Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia, dated 19 December 2013 [Annex 13].

[74] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) [Annex 30].

[75] See, e.g., Esso Australia Resources Ltd v Commissioner for Taxation (1999) 201 CLR 49; see also Evidence Act 1995 (Cth), ss 118-119, and see also s 120, which extends the privilege to unrepresented litigants [Annex 31].

[76] For the position in Australian law, see, e.g., Evidence Act 1995 (Cth), s 125, which reflects the position at common law [Annex 31]; see further AWB Ltd v Cole (No. 5) (2006) 155 FCR 30, 87-94 [Annex 23]; Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 [Annex 22]; and Attorney-General (NT) v Kearney (1985) 158 CLR 500, 511-515 (Gibbs CJ). The legal systems of other countries recognise a similar exception to legal professional privilege, or the protection from disclosure of confidential information. In this regard, the position in Belgium, Denmark, France, Germany, India, Indonesia, Morocco, New Zealand, Russia, Slovakia, Switzerland, Uganda, the United Kingdom, and the United States is summarised in the table at Annex 32. Notably, a similar exception is recognised in the legislation of Timor-Leste [Annex 33]. International courts and tribunals have also recognised the existence of exceptions (including a fraud / crime exception) to legal professional privilege or the protection of confidential information: see, e.g., Robathin v Austria (European Court of Human Rights, Judgment of 3 July 2012), para. 42; Wieser and Bicos Beteiligungen GmbH v Austria (European Court of Human Rights, Judgment of 16 October 2007), para. 55; Smirnov v Russia (European Court of Human Rights, Judgment of 7 June 2007), paras. 43-44; St Marys VCNA, LLC v Government of Canada (Arbitration under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), Expert Report on Inadvertent Disclosure of Privileged Documents of 27 December 2012), p. 4; and also William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of

of some countries also recognises an exception where there is an overriding public interest to the maintenance of the privilege or confidentiality.[77]

54. Any assertion on the part of Timor-Leste that legal professional privilege attaches to the materials should therefore be considered against the background facts of the present dispute, as set out in Part II above, including in particular the various public statements made by and on behalf of Timor-Leste. Australia recalls that these statements included assertions that Timor-Leste was in possession of "irrefutable proof"[78] that ASIS had "[broken] into and bugged Timorese cabinet rooms".[79] The evidence for these claims was asserted to be provided by "a former ASIS employee".[80]

55. On the basis of these and other public statements by Timor-Leste and its legal representatives, there are reasonable grounds to consider that the materials over which Timor-Leste now asserts legal professional privilege may concern the disclosure of national security information and therefore involve the commission of a serious criminal offence under Australian law. Such conduct may be contrary to, for instance, sections 39 and 41 of the *Intelligence Services Act 2001* (Cth),[81] section 70 of the *Crimes Act 1914* (Cth),[82] and section 91.1 of Schedule 1 to the *Criminal Code Act 1995* (Cth).[83]

56. Such prohibitions on the disclosure of State secrets, including with respect to intelligence obtained in the course of employment with a State intelligence agency, can also be found in the legislation of other States. These States include the United States, Canada, the United Kingdom, France, New Zealand, Slovakia, Morocco, Russia, Somalia, and India.[84] Notably, they also include Timor-Leste.[85]

Delaware Inc v Government of Canada (NAFTA, Procedural Order No. 16 of 15 November 2012), para. 3,where the NAFTA tribunal recognised that legal professional privilege was not absolute.

[77] See, e.g., the position in Belgium, Denmark, and Switzerland, summarised in the table at Annex 32.

[78] "Timor-Leste and Australia: Bugs in the Pipeline", *The Economist*, dated 8 June 2013, available at: http://www.economist.com/news/asia/21579074-timorese-leaders-push-better-deal-their-offshore-gas-fields-bugs-pipeline.

[79] Julio da Silva, "Xanana still Waiting for Response from Australia about CMATS", *Jornal Independente*, dated 31 May 2013, p. 9 [Annex 2].

[80] Julio da Silva, "Xanana still Waiting for Response from Australia about CMATS", *Jornal Independente*, dated 31 May 2013, p. 9 [Annex 2].

[81] Intelligence Services Act 2001 (Cth), ss 39 and 41 [Annex 34].

[82] Crimes Act 1914 (Cth), s 70 [Annex 35].

[83] Criminal Code Act 1995 (Cth), Schedule 1, s 91.1(1); see also ss 91.1(2), 91.1(3), and 91.1(4) [Annex 36].

[84] The relevant legislative provisions are set out in the table in Annex 37.

[85] Timor-Leste Decree Law No. 19/2009, Penal Code, Article 200, and Timor-Leste Decree Law No. 03/2009, National Intelligence Service, Arts 21, 29 and 30 [Annex 38].

57. Thus the position on legal professional privilege in the materials is as follows:

(a) Whether there is legal professional privilege in the materials has not been established under Australian law.

(b) Australian law provides an appropriate forum in which to decide this issue expeditiously, yet Timor-Leste, inexplicably, has not pursued those local remedies.

(c) Whether or not public international law recognises some right of legal professional privilege which is independent of domestic law doctrines, it is implausible to think it could operate free from the various qualifications evident in most domestic systems.

(d) In particular, there is no reason to think that the balance which Australian law draws between the confidentiality of legal communications and the need not to facilitate crime or fraud and not to harm security does not reflect, at least broadly, the balance drawn by most other domestic systems, and that which would accord with any international law right of legal professional privilege that might come to be recognised in the future.

(e) Accordingly, this Court should, in Australia's submission, be very slow to allow itself to be drawn into deciding questions of the existence and scope of legal profcssional privilege, let alone indicating provisional measures in advance of any such examination, when the claimant State refuses to expose its claim to the jurisdiction of the courts of the country in which it chose, it says, to engage in the communications and bring into existence the materials.

PART IV: THE POSITION UNDER INTERNATIONAL LAW

58. In this Part, Australia will outline the principles to be applied by the Court in considering the application for provisional measures. Australia will also list in a summary form the factors which should lead the Court to conclude that it is not appropriate to indicate provisional measures in this case, let alone the detailed provisional measures sought by Timor-Leste.

A. GENERAL PRINCIPLES APPLYING TO PROVISIONAL MEASURES

59. Article 41, paragraph 1 of the ICJ Statute provides:

> The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

60. As noted by the Court in *Interpretation of the Temple of Preah Vihear Judgment*, Order of 18 July 2011:

> [T]he power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party.[86]

61. A number of essential elements can be drawn from the Statute and jurisprudence of this Court. First, as noted by Judge *ad hoc* Cot in the *Interpretation of the Temple of Preah Vihear Judgment* case:

> The indication of provisional measures is always an exceptional measure, since the Court limits the free exercise of the parties' rights before ruling on its own jurisdiction, that is before satisfying itself that it has the consent of the parties to the proceedings. This power must be exercised wisely and with discretion under the circumstances.[87]

That quality of discretion involves the element of what is judicious and prudent in the prevailing circumstances. It is closely linked also to the other element of discretion which the Court has – that is, the freedom according to its own judgment as to whether it should or should not grant provisional measures; in short, the power to grant provisional measures is a discretionary one to be exercised with prudence.

62. The second point which flows from the text of Article 41 itself is that, subject to the Court's overriding discretion, it is the circumstances which prevail at the time the request is made and considered which should necessitate the grant of provisional measures for the purposes stated in that Article. It is not past circumstances or possible future circumstances. The time for making a request for provisional measures is when those circumstances have arisen or are about to arise.

63. Thirdly, in considering a request for provisional measures the Court should consider and balance the rights of both parties. This principle flows from Article 41 itself: "...measures which ought to be taken to preserve the respective rights of either party". As noted in the Commentary on the ICJ Statute:

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[86] *Request for Interpretation of the Judgment of 15 June 1962 in the* Case *concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, 537 ("*Interpretation of the Temple of Preah Vihear Judgment*").

[87] *Interpretation of the Temple of Preah Vihear Judgment,* Dissenting Opinion of Judge *ad hoc* Cot, 627.

> The rights concerned are the rights of both parties and therefore it is vital for the Court to consider what action is called for in order to ensure that none of the parties is put at a disadvantage…[88]

64. Further, in his separate opinion in the *Pulp Mills* case, Judge Abraham noted:

> When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties, and it cannot avoid weighing those rights against each other … In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise … I find it unthinkable that the Court … should order a State to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.[89]

65. It follows that the Court in considering the provisional measures requested by Timor-Leste, must have regard to the rights of Australia that would be impacted by any order that the Court makes, particularly if those rights go to the very heart of the national security of Australia and its ability to enforce its criminal law. The weight to be accorded to a respondent's rights is necessarily greater where proceedings could last a long time[90] and where the underlying issue is capable of being dealt with in another forum in a much shorter timeframe.

66. Fourthly, the binding character of provisional measures should lead to caution, not only in deciding whether or not to indicate provisional measures but also as to their content. Again, as noted by Judge Abraham in the *Pulp Mills* case:

> Where a mere suggestion is being made to a State, there is hardly any need to ensure that it is not liable to trespass upon the sovereign rights of the State: the recipient of the recommendation is free to act upon it as it deems appropriate and, in determining its response, can factor in its assessment of the strength of its position and the importance of the interests at stake … With the Judgment of 27 June 2001 [LaGrand] … [i]t is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some

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[88] Zimmermann, Tomuschat, Oellers-Frahm and Tams, *The Statute of the International Court of Justice – A Commentary* (2nd ed, Oxford University Press, 2012) ("ICJ Commentary"), p. 1035 [Annex 39]. See also Kolb, *The International Court of Justice* (Hart Publishing, Oregon, 2013) ("Kolb"), pp. 621-2 [Annex 40]; Thirlway, *The Law and Procedure of the International Court of Justice, Fifty Years of Jurisprudence* (Oxford University Press, 2013) ("Thirlway"), Volume II, pp. 1782, 1785 [Annex 41].

[89] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* 113 ("*Pulp Mills*"), 139; see also *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, I.C.J. Reports 1991,* 12 ("*Passage through the Great Belt*"), Separate Opinion of Judge Shahabuddeen, 29; Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Grotius Publications Ltd, 1987), p. 273 citing *Cie d'Électricité de Sofia et de Bulgarie* (1923) 2 T.A.M. 924, pp. 926-7 [Annex 42].

[90] Kolb, p. 614 [Annex 40].

> minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated – and irreparably so …[91]

67. Fifthly, the Court needs to be wary of the misuse of provisional measures requests particularly when the request appears to be the *raison d'etre* of the whole proceedings[92] or where it forms part of an applicant's litigation strategy "with a view to obtaining a moral and legal 'victory' by putting pressure on the Respondent State".[93] This factor is particularly relevant if another court or tribunal is already seised of the matter and would be able to deal promptly with an application for binding provisional measures of the sort requested.

68. In this respect, the Court is not an alternative forum for seeking provisional measures where the provisional measures sought are clearly capable of being considered in another tribunal which is already seised of the matter. This is to be contrasted with the position of the International Tribunal for the Law of the Sea which may prescribe provisional measures pending the constitution of an arbitral tribunal under the 1982 United Nations Convention on the Law of the Sea.[94]

B. CRITERIA APPLIED BY THE COURT IN CONSIDERING REQUESTS FOR PROVISIONAL MEASURES

69. The Court in recent cases[95] has considered requests for provisional measures by reference to three matters, though there may be additional other factors that are highly relevant.

(1) Prima facie jurisdiction

70. In its most recent order concerning provisional measures dated 13 December 2013 in response to a request by Nicaragua,[96] the Court held:

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[91] *Pulp Mills*, 139-40; Kolb, p. 650 [Annex 40]; ICJ Commentary, p. 1043 (footnote 109) [Annex 39]; Thirlway, Volume I, p. 929, Volume II,pp. 1778-9,1782, 1785, 1807-8 [Annex 41].

[92] Treves, "The Political Use of Unilateral Applications and Provisional Measures Proceedings", in Frowein *et al* (eds), *Verhandeln für den Frieden/Negotiating for Peace, Liber Amicorum Tono Eitel* (Springer, 2003), 463, p. 466 [Annex 43].

[93] Kolb, p. 615 [Annex 40]; ICJ Commentary, pp. 1072 [Annex 41].

[94] 1833 UNTS 397, Article 280.5. It would appear that the International Court of Justice could, by agreement of the parties to a dispute, also consider provisional measures pending the constitution of a tribunal under the 1982 Convention.

[95] *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 ("Construction of a Road")*; *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,* 6 ("*Certain Activities*"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009,* 147.

[96] *Construction of a Road*, para. 12.

> The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009,* p. 147, para. 40).

As part of this consideration, the Court should also conclude that the application of which it is seised is *prima facie* admissible.[97] The Court also should give the question of *prima facie* jurisdiction its "fullest consideration compatible with the requirements of urgency…"[98]

(2) Plausible character of the rights whose protection is being sought and the link between these rights and the measures requested

71. The Court in its order of 13 December 2013 in the *Construction of a Road case* stated also:

> … the Court may exercise [the power to indicate provisional measures under Article 41 of the Statute] only if it is satisfied that the rights asserted by the requesting party are at least plausible (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57)
>
> 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 (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56).[99]

72. Australia has already noted above the need for the Court to carry out some minimum review to determine whether the rights claimed actually exist and whether they are in danger of being violated.[100]

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[97] *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996,* 13, 21; see also Kolb, pp. 624-5 [Annex 40]; Thirlway, Volume I, p. 936, Volume II, p. 1771 [Annex 41].

[98] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* 169, 179. It has been noted that the rationale for this is that interference with the sovereignty of States may be the price for preserving the substantive rights and that therefore the matter of jurisdiction should be given the fullest consideration possible – see ICJ Commentary, p. 1042 [Annex 39].

[99] *Construction of a Road*, paras. 15-16.

[100] *Pulp Mills*, Separate Opinion of Judge Abraham, 140.

73. As noted by Judge Greenwood in his declaration in the *Certain Activities* case:

> ... it cannot be sufficient for a party simply to assert that it has a right; it must have some prospect of success ... The party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged to apply to that party's case.[101]

Also, sufficient material should be presented to demonstrate the possibility of the existence of the right sought to be protected, and to allow the Court to properly consider the existence of that right.[102]

(3) Risk of irreparable prejudice and urgency

74. The Court in the *Construction of a Road* case noted:

> The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are subject of the judicial proceedings (see, for example, *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. 63*).
>
> The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be cause to the rights in dispute before the Court has given its final decision (*ibid*), pp. 21-22, para. 64.[103]

The relationship between the parties, any undertakings given by the respondent and the availability of binding provisional measures in another forum are all factors highly relevant to the assessment of both irreparable prejudice and urgency. In relation to the matter of urgency, Kolb has noted:

> The decision is more contextual, and more a matter of appreciation than might at first seem to be the case. Any guarantees the respondent is able to give are obviously important; so are the general and special relations between the two disputing States, whether peaceful and happy or tense and mistrustful. The same goes for the pursuit (or non-pursuit) of other parallel procedures for resolving the dispute, whether diplomatic or institutional, especially the existence or otherwise of other provisional measures arising from such procedures, and also whether or not such procedures are binding. In short, the Court has to assess the whole context, and form an appreciation of it. It is not in the abstract, but very much in the concrete context that the urgency of the situation has to be judged.[104]

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[101] *Certain Activities*, Declaration of Judge Greenwood, 47, Separate Opinion of Judge *ad hoc* Dugard, 62; *Passage through the Great Belt*, Separate Opinion of Judge Shahabuddeen, 30; *Pulp Mills*, para. 6.
[102] *Passage through the Great Belt,* Separate Opinion of Judge Shahabuddeen, 31.
[103] *Construction of a Road*, paras. 24-25.
[104] Kolb, p. 631 [Annex 40]. See also, ICJ Commentary, pp. 1048-9 [Annex 39].

C. FACTORS IN THIS CASE RELEVANT TO THE APPLICATION OF THE PRINCIPLES AND CRITERIA IDENTIFIED IN THIS PART

75. Bearing in mind the legal principles and requirements identified above,[105] it is Australia's submission that the Court is not in a position where it could or should indicate provisional measures given the circumstances of this case which include the following:

(a) The material removed from the premises at 5 Brockman Street, Narrabundah, Australian Capital Territory was all brought within or created within Australia and is subject to Australian law. It is not the subject of any form of special protection under international law such as the protections under the Vienna Convention on Diplomatic Relations[106] or the Vienna Convention on Consular Relations.[107] Both Conventions are fully implemented under Australian law; in any event it is not suggested that the material removed is covered by either.

(b) In those circumstances it is implausible that Timor-Leste has a right as a State under international law to ownership of the materials in a manner which is immune from the processes of domestic law in the territory it chose to enter.

(c) Matters which are palpably those of national security and the enforcement of criminal law within a State are in the ordinary course matters for the State concerned. The Court should be very cautious in making orders which would affect adversely the ability of the State to act in those areas.

(d) Consideration of most of the legal prerequisites for the indication of provisional measures cannot take place as the rights that Timor-Leste seeks to protect by way of provisional measures simply have not been identified by Timor-Leste in its application or are at best speculative.

(e) The Tribunal established under the Timor Sea Treaty is effectively seised of the matter and is operating on an agreed and tight timetable in relation to the underlying dispute. Should any provisional measures be required under international law, the Tribunal is in a better position than the Court to exercise its agreed powers, both as to its own jurisdiction and as to discretionary elements.

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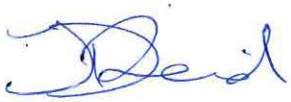
[105] Part II, sub-parts A and B.
[106] 500 UNTS 95.
[107] 596 UNTS 261.

(f) Timor-Leste has remedies available to it under Australian law. Timor-Leste has consistently refused to avail itself of those existing avenues and instead seeks to bring the matter before the Court.

(g) The undertakings referred to in Part II that have been given by Australia respectively quarantine the use of the materials which were removed from the premises at 5 Brockman Street, Narrabundah from legal advisers involved in the Timor Sea Treaty arbitration or these proceedings.

(h) Timor-Leste has advanced no ground on which the Court would conclude that either the Attorney-General's undertaking or the direction given to ASIO do not sufficiently protect the claimed rights, to the extent they are discernible or plausible.

76. Australia will provide further elaboration of the matters raised in these Written Observations in the course of the oral proceedings and reserves the right to raise additional arguments at that time.



John Reid
Agent for Australia

13 January 2014

CERTIFICATION

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

J.D. Reid

Agent of Australia

13 January 2014