INTERNATIONAL COURT OF JUSTICE

QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA

TIMOR-LESTE v AUSTRALIA

MEMORIAL OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE

28 APRIL 2014

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CHAPTER I: INTRODUCTION

A. Procedural background

1.1 This is the Memorial of the Democratic Republic of Timor-Leste ("**Timor-Leste**"), filed pursuant to the Order of the Court of 28 January 2014.

1.2 On 17 December 2013, Timor-Leste instituted proceedings against the Commonwealth of Australia ("**Australia**") with respect to a dispute concerning the inspection and seizure, on 3 December 2013, and retention 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"[1].

1.3 On the same day, Timor-Leste submitted a request for the indication of provisional measures (the "**Request**"), pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court[2]. On 3 March 2014, the Court issued a provisional measures Order in which it indicated the following provisional measures:

> "(1) Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded"[3];
>
> "(2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court"[4];
>
> "(3) Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court."[5]

1.4 Following the oral argument on the Request, Australia requested, *inter alia*, that the Court stay the proceedings in the current case until the Arbitral Tribunal, established under Article 23 of the Timor Sea Treaty of 20 May 2002 to adjudicate on a dispute between Timor-Leste and

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[1] Application of the Democratic Republic of Timor-Leste instituting proceedings against the Commonwealth of Australia, 17 December 2013 (the "**Application**").

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

[3] *Questions relating to the seizure and detention of certain documents and data (Timor-Leste* v. *Australia)*, Request for the indication of provisional measures, Order of 3 March 2014.

[4] *Ibid.*

[5] *Ibid.*

Australia, had rendered its decision. In its Order of 28 January 2014 fixing time-limits, the Court decided not to accede to Australia's request for a stay[6].

B. Jurisdiction

1.5 As indicated in the Application instituting these proceedings[7], the jurisdiction of the Court is based on the declarations made by Timor-Leste and by Australia pursuant to Article 36, paragraph 2, of the Statute of the Court. In Timor-Leste's submission, it is clear that none of the exceptions in Australia's declaration applies in the present case. The Court therefore has jurisdiction over the present dispute and there are no reasons why it should decline to exercise that jurisdiction.

1.6 During the oral argument on Timor-Leste's Request, counsel for Australia said that "Australia may well contest the jurisdiction and admissibility of Timor-Leste's Application commencing the proceedings at the merits phrase"[8]. Timor-Leste will respond to any such arguments if and when Australia contests the Court's jurisdiction or the admissibility of the application, but does not consider it necessary or appropriate to do so in the present Memorial.

C. Importance of the case for Timor-Leste

1.7 The resources of the Timor Sea are of the greatest economic importance for Timor-Leste, one of the newest and poorest developing countries. Timor-Leste's exercise of its sovereign rights in relation to the resources of the continental shelf adjacent to its coasts has been frustrated by the refusal of Australia to negotiate a maritime delimitation agreement, compounded by the terms of the series of treaties which Australia made concerning the Timor Sea (first, purportedly with Indonesia; then with the United Nations Transitional Administration in East Timor ("**UNTAET**"); then - on the very day of its independence - with Timor-Leste itself), and by Australia's refusal to settle the dispute through other peaceful means such as arbitration or judicial settlement.

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[6] *Questions relating to the seizure and detention of certain documents and data (Timor-Leste* v. *Australia)*, Request for the indication of provisional measures, Order of 28 January 2014.

[7] Application, paras 7-9.

[8] CR 2014/2, p. 21, para. 3 (Campbell).

1.8 As will be set out more fully below, Timor-Leste has commenced proceedings to challenge the validity of the most harmful of the treaties applicable to the exploitation of the resources of the Timor Sea, on the ground that in the negotiations leading to it Australia spied on the premises of the Government of Timor-Leste so as to make itself privy to the internal discussions of the Timor-Leste Government. This conduct by Australia is the subject of an arbitration commenced by Timor-Leste (the "**TST Arbitration**"). The TST Arbitration is quite separate from the present case.

1.9 In connection with the eventual settlement of its dispute with Australia over maritime delimitation in the Timor Sea, Timor-Leste has sought and obtained legal advice from and through its lawyer in Canberra, Australia. It is the inspection, seizure and retention of the documents and other material relating to that legal advice which is the subject of the present proceedings before this Court. That inspection, seizure and retention violates Timor-Leste's rights under international law and places Australia in a position in which it could cause damage to Timor-Leste's interests.

D. Organisation of this Memorial

1.10 **Chapter II** sets out the factual background to the case, including a brief account of the history and geography of Timor-Leste, and of the Timor Sea and its resources. This chapter also introduces, by way of background, the various treaties concerning the Timor Sea entered into by Australia with Indonesia and by Australia with Timor-Leste.

1.11 **Chapter III** briefly describes the TST Arbitration referred to above.

1.12 **Chapter IV** then describes the inspection and seizure of documents and data from the offices of Timor-Leste's lawyer in Canberra on 3 December 2013 and their subsequent retention, as well as the exchanges that then took place between the Parties in relation to that inspection, seizure and retention.

1.13 **Chapter V** explains that by inspecting, seizing and retaining Timor-Leste's documents and data, Australia has violated Timor-Leste's rights under international law in respect of its property. In particular, the inspection, seizure and detention breach the inviolability and immunity to which Timor-Leste is entitled in respect of those documents and data.

1.14 **Chapter VI** contends that by inspecting, seizing and retaining the documents and data from the offices of Timor-Leste's lawyer, Australia has violated Timor-Leste's rights under international law to conduct negotiations and arbitration proceedings without interference.

1.15 The Memorial concludes with Timor-Leste's **Final Submissions.**

CHAPTER II: HISTORICAL AND OTHER BACKGROUND FACTS

2.1 The present Chapter provides some of the factual background to the case. It describes briefly the geography of Timor-Leste (**Section A**). It continues with a short historical account of Timor-Leste (**Section B**) and of international developments relating to the Timor Sea (**Section C**).

A. Geography of Timor-Leste (and Australia)

2.2 Timor-Leste is located in Southeast Asia, northwest of Australia and at the eastern end of the Indonesian archipelago. Timor-Leste consists of the eastern half of the island of Timor, plus the Oecussi-Ambeno region on the northwest portion of the island of Timor, and the off-shore islands of Atauro and Jaco. The geographical location of Timor-Leste, including its relation to Australia, is shown on **Figure 1**.

2.3 Timor-Leste and the north-western coast of Australia face each other across the Timor Sea, about 250 nautical miles apart at the closest point and nowhere more than 400 nautical miles apart. The general directions of the two coasts are roughly parallel, trending in a north-easterly direction.

2.4 The seabed of the Timor Sea is rich in mineral resources, particularly petroleum. These are the only resources that Timor-Leste possesses of major economic significance. The whole of Timor-Leste's economic development is dependent upon the arrangements for the use of those resources. Major commercial fields have been located, some of which are expected to have a commercial life of around 40 years, with capacity for continued production until about 2056[9].

[9] Expert Report of Gaffney, Cline & Associates submitted in the TST Arbitration, Section 1.1, para. 3 (**Annex 1**).

B. History of Timor-Leste

2.5 The colonial period of Timor-Leste's history can be traced back to the early sixteenth century, when Dutch and Portuguese traders and missionaries made their first contact with the island of Timor[10]. In the mid-nineteenth century, Portugal, which occupied the east of the island of Timor, conducted negotiations with the Netherlands, which occupied the west of the island, to settle the boundary between their territories and rationalise various enclaves. The boundary demarcation was determined by the Permanent Court of Arbitration in 1914, effectively formalising Portuguese sovereignty over what is now the territory of Timor-Leste[11].

2.6 Portugal invested little in Timor-Leste and in 1974 it began a gradual decolonisation process. On 28 November 1975, the Frente Revolucionária de Timor-Leste Independente ("**Fretilin**") unilaterally declared Timor-Leste an independent State.

2.7 Nine days later, Indonesian military forces invaded and subsequently occupied Timor-Leste and remained in control of it until 1999.

2.8 In a series of resolutions[12], the United Nations Security Council and General Assembly deplored Indonesia's armed invasion of Timor-Leste and rejected Indonesian claims of sovereignty over the territory. Notwithstanding the position of the United Nations, on 15 December 1978 the Australian Foreign Affairs Minister announced that treaty negotiations were about to begin between Australia and Indonesia for the delimitation of the continental shelf between Australia and East Timor. The Australian Foreign Affairs Minister declared that when the negotiations start, "[they] will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor."[13]

2.9 In 1989, Australia and Indonesia concluded the Timor Gap Treaty 1989 (the "**Timor Gap Treaty**"), under which both Australia and Indonesia could jointly exploit petroleum resources in a part of the Timor Sea seabed. The treaty established a zone of cooperation (the "**Zone of**

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[10] Great Britain Foreign Office, Historical Section, Peace Handbooks: *Portuguese Timor*, (1920) 13(80) London, HM Stationery Office, p. 6.

[11] *Boundaries in the Island of Timor (Netherlands v Portugal),* Award of the Permanent Court of Arbitration dated 25 June 1914, XI RIAA 481 (http://legal.un.org/riaa/cases/vol_XI/481-517.pdf).

[12] United Nations General Assembly resolution 3485 (XXX) of 12 December 1975 (http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/98/IMG/NR000198.pdf?OpenElement) and United Nations Security Council resolution 384 (1975) of 22 December 1975 (http://unscr.com/en/resolutions/doc/384); the UN political organs expressly deplored the military intervention of the armed forces of Indonesia in Timor-Leste and called upon Indonesia to withdraw without delay its armed forces from Timor-Leste.

[13] Australian National University, Recognition, (1980) 8 *Aust YBIL* 274.

Cooperation") within which exploitation of petroleum resources could take place. **Figure 2** shows the Zone of Cooperation thus established.

2.10 On 22 February 1991, Portugal commenced proceedings against Australia before the International Court of Justice, arguing *inter alia* that Australia had infringed "the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources"[14] by entering into the Timor Gap Treaty. The Court found that it could not exercise the jurisdiction conferred upon it, because of the absence of Indonesia from the proceedings[15]. The Court's Judgment also contains a summary of the tragic story of Timor-Leste up to that time, and Australia's role therein[16].

2.11 In 1999, Indonesia, responding to internal pro-democracy moves to support self-determination for Timor-Leste, and bowing to intense international pressure, agreed to a popular consultation in Timor-Leste on autonomy from Indonesia. The ballot took place on 30 August 1999; and on 4 September UN Secretary-General, Kofi Annan, announced that 78.5% of voters opposed the proposal for special autonomy under Indonesia and favoured independence[17]. Pro-Indonesia anti-independence militia engaged in a campaign of violence, resulting in widespread bloodshed and damage to property and infrastructure in Timor-Leste[18].

2.12 On 25 October 1999 Indonesia ended its control over Timor-Leste. UNTAET was established to manage the country during its transition to nationhood[19].

2.13 As full independence for Timor-Leste grew closer, the country continued to suffer the after-effects of a quarter of a century-long struggle against Indonesian occupation. Its infrastructure

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[14] *Case concerning East Timor (Portugal* v. *Australia)*, *Judgment,* ICJ Reports 1995, p. 90, at p. 94, para. 10 (point (2)(a)) (http://www.icj-cij.org/docket/files/84/6949.pdf).

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

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

[17] United Nations Security Council Press Release SC/6721, '*Secretary-General Informs Security Council People of East Timor Rejected Special Autonomy Proposed by Indonesia*', 3 September 1999 (http://www.un.org/News/Press/docs/1999/19990903.sc6721.html).

[18] Details of the damage and destruction caused by pro-Indonesian militia following the announcement of the referendum results were published by the United Nations Office of the High Commissioner for Human Rights in Robinson, G., '*East Timor 1999 Crimes Against Humanity - A Report Commissioned By The United Nations Office Of The High Commissioner For Human Rights*' (University of California Los Angeles, July 2003) (http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf).

[19] United Nations Security Council resolution S/RES/1272 (1999), 25 October 1999, set out UNTAET's mandate (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/312/77/PDF/N9931277.pdf?OpenElement).

was severely damaged and 42.4% of the population was living below the national poverty line ($0.88 per person per day)[20].

2.14 In its Strategy Report, the World Bank described Timor-Leste at the time of attaining independence:

> "Timor-Leste, the world's newest nation, was created out of ashes... An estimated 70 percent of private homes and public buildings were burned to the ground. Bridges and power lines were demolished, and the telecommunications system was rendered inoperable. Valuable files, including land and property titles, civil registry, and education records were destroyed. Following the ballot, most Indonesian citizens left the territory, resulting in a severe shortage of qualified and experienced professionals."[21]

2.15 The United Nations Development Programme also painted a picture of a devastated country following the referendum:

> "In 1999, the country's Gross Domestic Product (GDP) declined by 40 percent. About 25 percent of the population was forced across the border into Indonesian Timor. Education and health services collapsed, and the country had little or no trained personnel. Eighty percent of the country's primary schools were destroyed. A large number of people have been traumatized by their experience of the Indonesian rule and the violence that they saw in 1999."[22]

2.16 The levels of investment and know-how required for Timor-Leste's petroleum sector were beyond the financial capability of the country.

2.17 It was against this background that UNTAET embarked upon negotiations with Australia in respect of petroleum resources.

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[20] United Nations Development Programme, *The Millennium Development Goals, Timor-Leste*, March 2009, p.18 (http://www.undg.org/docs/10339/Timor-Leste-MDG-Report-2009.pdf).

[21] The World Bank Report No 32700-TP, Timor-Leste Country Management Unit East Asia and the Pacific Region, 'Country Assistance Strategy for the Democratic Republic of Timor-Leste for the Period FY06-FY08', 22 June 2005, p. I. (http://siteresources.worldbank.org/INTLICUS/Resources/Timor_CAS.pdf).

[22] United Nations Development Programme, *Timor-Leste Human Development Report 2011: Managing Natural Resources for Human Development - Developing the Non-Oil Economy to Achieve the MDG*s (2011), p. 11. (http://www.laohamutuk.org/econ/HDI10/TLHDR2011En.pdf).

C. Relations between Timor-Leste and Australia in relation to the Timor Sea: the various treaties

2.18 On 19 October 1999, the Indonesian People's Consultative Assembly voted formally to renounce sovereignty over Timor-Leste. In February 2000, the Indonesian Government announced that following the separation of Timor-Leste from Indonesia, the area covered by the Timor Gap Treaty was now outside Indonesia's jurisdiction and that the Timor Gap Treaty ceased to be in force as between Australia and Indonesia when Indonesian authority over Timor-Leste was transferred to the United Nations[23].

2.19 Concerned about securing investments and encouraging further exploration, UNTAET agreed with Australia to continue the terms of the Timor Gap Treaty until Timor-Leste attained independence[24].

2.20 On 5 July 2001, UNTAET and the Government of Australia finalised the terms upon which Timor-Leste and Australia could continue existing exploitation of petroleum resources in the Timor Sea (the "**Timor Sea Arrangement**"). On this date, UNTAET and the Government of Australia signed a Memorandum of Understanding in which they agreed that the Timor Sea Arrangement would be adopted as an agreement upon Timor-Leste's independence[25].

2.21 When, on 20 May 2002, Timor-Leste became an independent State, its Government and the Government of Australia formally agreed to the terms of the Timor Sea Arrangement, which was renamed the Timor Sea Treaty between the Government of Timor-Leste and the Government of Australia (the "**2002 Treaty**"). This treaty entered into force on 2 April 2003.

2.22 Like the Timor Gap Treaty that preceded it, the 2002 Treaty was a provisional arrangement, pending boundary delimitation, made pursuant to Article 83 of the 1982 United Nations Convention on the Law of the Sea ("**UNCLOS**")[26]. It is an interim agreement without

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[23] A. Downer and N. Minchin, Joint Media Release, Timor Gap Agreement Reached with UNTAET, 10 February 2010.

[24] Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, 10 February 2000 [2000] ATS 9 (http://www.austlii.edu.au/au/other/dfat/treaties/2000/9.html).

[25] Memorandum of Understanding of Timor Sea Arrangement between Australia and East Timor, 5 July 2001 (http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html).

[26] *Timor Sea Treaty between the Government of East Timor and the Government of Australia,* East Timor-Australia, signed 20 May 2002 and entered into force 2 April 2003, 2258 UNTS 3, Preamble and Article 2, both of which refer to Article 83 of UNCLOS (https://treaties.un.org/doc/Publication/UNTS/Volume%202258/v2258.pdf).

prejudice to the position of either country in respect of its maritime boundary claims. It does not prejudice or affect either country's position on or rights relating to the seabed delimitation, or their respective seabed entitlements[27]. Following conclusion of the 2002 Treaty, the Governments of both countries embarked upon negotiations to try to resolve the issue of rights to petroleum revenue from gas and oil fields that lie partly or wholly outside the JPDA (explained further below).

2.23 The 2002 Treaty created an area called the Joint Petroleum Development Area (the "**JPDA**") in the 'Timor Gap' left by Australia and Indonesia under the Timor Gap Treaty[28], depicted on **Figure 3**. The 2002 Treaty provides that Australia and Timor-Leste shall jointly control, manage and facilitate the exploration, development and exploitation of the petroleum resources of the JPDA for the benefit of the people of Australia and Timor-Leste[29]. The 2002 Treaty further provides that, of the petroleum found in the JPDA, 90% shall belong to Timor-Leste and 10% shall belong to Australia[30].

2.24 The 2002 Treaty established an organisational structure in respect of the management of on-going petroleum activities by creating (i) a Designated Authority, (ii) a Joint Commission to establish policies and regulations to oversee the work of the Designated Authority, and (iii) a Ministerial Council to consider any matter referred to it by either country.

2.25 The duration of the 2002 Treaty is either 30 years from the date of its entry into force, or until a seabed boundary is established, whichever is sooner:

> "Article 22: Duration of the Treaty
>
> This Treaty shall be in force until there is permanent seabed delimitation between Australia and East Timor or for thirty years from the date of its entry into force, whichever is sooner. This Treaty may be renewed by agreement between Australia and East Timor. Petroleum activities of limited liability corporations or other limited liability entities entered into under the terms of the Treaty shall continue even if the Treaty is no longer in force under conditions equivalent to those in place under the Treaty."[31]

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[27] *Ibid.,* Article 2.

[28] I.e., the gap between points A16 and A17 in the 1972 Australia–Indonesia Seabed Boundary (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1972TA.pdf). See **Figure 2**.

[29] *Ibid.,* Article 3(b).

[30] *Ibid.,* Article 4(a).

[31] *Ibid.,* Article 22.

2.26 Discussions on the issue of seabed delimitation were complicated by the discovery of petroleum-rich deposits known as the Greater Sunrise fields ("**Greater Sunrise**"). Greater Sunrise is the most significant petroleum deposit discovered in the Timor Sea. The issue that arose was that only part of Greater Sunrise is located within the JPDA, with the remaining part of the field lying to the east of the JPDA. Greater Sunrise is illustrated on **Figure 4**. Timor-Leste contended that the part of Greater Sunrise that was not within the JPDA was located within the exclusive economic zone or continental shelf to which Timor-Leste is entitled under international law, whereas Australia contended that it fell within an area to which it was entitled as part of its own exclusive economic zone or continental shelf.

2.27 On 20 May 2002, Australia and Timor-Leste concluded a Memorandum of Understanding concerning an International Unitization Agreement for Greater Sunrise (the "**Sunrise Memorandum**")[32]. The Sunrise Memorandum provides as follows:

> "The Government of Australia and the Government of the Democratic Republic of East Timor, reinforcing their wish to cooperate in the development of the petroleum resources of the Timor Sea in accordance with the Timor Sea Treaty ("the Treaty"), will work expeditiously and in good faith to conclude an international unitization agreement ("the Agreement") for certain petroleum deposits in the Timor Sea known as Greater Sunrise by 31 December 2002."[33]

2.28 Australia and Timor-Leste then embarked upon negotiations in relation to the unitization of Greater Sunrise, in order to determine the percentage of Greater Sunrise that fell within the JPDA. The negotiations reached a denouement in March 2003 when the Government of Australia threatened to withhold ratification of the 2002 Treaty, notwithstanding the fact that the royalties provided for in it were needed by the impoverished Timor-Leste[34]. It was in these circumstances that Timor-Leste accepted an agreement under which only 20.1% of the resources of Greater Sunrise would be regarded as lying within the JPDA. Consequently, although Timor-Leste was entitled to receive 90% of the revenue from the JPDA, it effectively was only going to receive 18.1% of the revenue from Greater Sunrise. This agreement was

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[32] Memorandum of Understanding between the Government of the Democratic Republic of East Timor and the Government of Australia concerning an International Unitization Agreement for the Greater Sunrise field, 20 May 2002 (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-TLS2002SUN.PDF).

[33] *Ibid.*

[34] During the Senate debates on 6 March 2003 at the Parliament of the Commonwealth of Australia Senator Bob Brown said: "Last night, as the newspaper reports tell us, the Prime Minister phoned his opposite number in East Timor to deliver blackmail. What the Prime Minister effectively did was to coerce a poor and weak neighbour, through blackmail, into accepting an agreement to develop the fossil fuels" (Commonwealth of Australia, Parliamentary Debates, Senate, '*Petroleum (Timor Sea Treaty) 2003, Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003, Passenger Movement Charge (Timor Sea Treaty) Amendment Bill 2003, Second Reading*', 6 March 2003 (Senator Bob Brown), p. 9384) (**Annex 2**). See also: P. Cleary, *Shakedown: Australia's Grab for Timor Oil,* (Australia, Allen & Unwin, 2007), pp.84-87 (**Annex 3**).

named the International Unitization Agreement for Greater Sunrise 2003 (the "**IUA**")[35]. The Greater Sunrise Unit Area that was established by the IUA is depicted in **Figure 5**. The IUA was eventually ratified in February 2007.

2.29 As a matter of international law, Timor-Leste was and is entitled to claim that a much greater part of Greater Sunrise was within Timor-Leste's own exclusive economic zone or continental shelf. It was and is entitled to claim both that the Timor Gap left by Australia and Indonesia under the Timor Gap Treaty is much too narrow, and also (as the course of the 1997 Indonesia-Australia EEZ boundary suggests)[36] that the west-east boundary is much too far north. If the delimitation with Australia were to be effected on the basis of the median line, Timor-Leste would have a far greater share of the valuable resources of the Timor Sea. Consequently, Timor-Leste's Prime Minister Mari Alkatiri delayed Timor-Leste's ratification of the IUA and engaged in talks with the Government of Australia intended, *inter alia*, to renegotiate the distribution between both States of revenues derived from Greater Sunrise[37]. These talks culminated in the conclusion of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (the "**2006 Treaty**")[38].

2.30 The substantive terms of the 2006 Treaty were negotiated during formal rounds of talks between Australia and Timor-Leste, between April and October 2004, leading to an in-principle agreement in early 2005.

2.31 Before and after the round of negotiations in Dili on 24 to 27 October 2004, Prime Minister Alkatiri and Secretary of State José Teixeira outlined to their cabinet colleagues the negotiating position of Timor-Leste and the importance of the issues affecting their country. In the TST Arbitration, Timor-Leste will show that the Australian Government arranged for these cabinet discussions to be clandestinely monitored, recorded, and transcribed by the Australian Secret Intelligence Service working closely with elements of the Australian Embassy in Dili and the Australian negotiation team (see further, Chapter III below).

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[35] Agreement between the Government of the Democratic Republic of East Timor and the Government of Australia relating to the Unitisation of the Sunrise Troubador Fields, 6 March 2003, UNTS Vol. 2483, No. 44576, (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

[36] See **Figure 4**.

[37] Australian Broadcasting Corporation Online, 'Aust on Political Collision Course with East Timor', 19 April 2004 (**Annex 4**).

[38] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Australia-Timor-Leste, signed 12 January 2006 and entered into force 27 June 2006, 2483 UNTS 359 (the "2006 Treaty") (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

2.32 During further discussions between representatives of the two Governments in Canberra between 8 and 10 March 2005, which resumed on 20 April 2005 and 13 May 2005 in Sydney, a formula was devised for revenue sharing and a deferral of maritime boundary issues.

2.33 The 2006 Treaty was signed in Sydney by the two Governments on 12 January 2006. The 2006 Treaty and the IUA were ratified by both States on 23 February 2007.

2.34 The 2006 Treaty was the culmination of negotiations with Australia concerning the Greater Sunrise field lying across the JPDA boundary. It provides for the equal distribution of revenue derived from two identified petroleum reservoirs in Greater Sunrise[39].

2.35 Like the 2002 Treaty, the 2006 Treaty is an interim arrangement in the absence of boundary delimitation pursuant to Article 83 of UNCLOS[40].

2.36 The impact of the 2006 Treaty upon the development of Timor-Leste is, however, much more extensive than that of the 2002 Treaty. Article 3 of the 2006 Treaty purports to extend the duration of the 2002 Treaty. Article 3 provides:

> "Article 3: Duration of the Timor Sea Treaty
>
> The text of Article 22 of the Timor Sea Treaty relating to the duration of that Treaty is replaced by the following:
>
> "This Treaty shall be in force for the duration of the Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea. This Treaty may be renewed by agreement between Australia and East Timor. Petroleum activities of limited liability corporations or other limited liability entities entered into under the terms of the Treaty shall continue even if the Treaty is no longer in force under conditions equivalent to those in place under the Treaty."[41]

2.37 Article 3 of the 2006 Treaty thus purports to replace the text of Article 22 of the 2002 Treaty, so that the latter shall be in force as long as the 2006 Treaty is in force. Article 12 of the 2006 Treaty provides that the 2006 Treaty will remain in force for fifty years after its entry into

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[39] 2006 Treaty (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

[40] The provisional nature of the 2006 Treaty is affirmed in the Preamble and Article 2 (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

[41] 2006 Treaty, Article 3 (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

force, or until the date five years after the exploitation of the Unit Area ceases, whichever occurs earlier.

2.38 This 24-year extension of the 2002 Treaty (which is, by reference to the dates of entry into force of the 2002 and 2006 Treaties, from 2 April 2033 to 23 February 2057) would be of great significance because it is very likely to extend the application the 2002 Treaty throughout the whole of the commercial life of the Unit Area Greater Sunrise and Troubadour Fields[42]. In other words, the 2002 Treaty would in effect be much more than a provisional arrangement of a temporary character, adopted pending agreement upon the delimitation of the Timor Sea. It would become, for practical purposes, the permanent regime governing the whole economic life of the resources of the Unit Area.

2.39 Moreover, the 2006 Treaty sought, by the far-reaching provisions of its Article 4, to insulate the 2002 Treaty from change.

"Article 4: Moratorium

1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.

2. Paragraph 1 of this Article does not prevent a Party from continuing activities (including the regulation and authorisation of existing and new activities) in areas in which its domestic legislation on 19 May 2002 authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil.

3. Notwithstanding paragraph 2 of this Article, the JPDA will continue to be governed by the terms of the Timor Sea Treaty and associated instruments.

4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.

[42] Expert Report of Gaffney, Cline & Associates submitted in the TST Arbitration, Section 1.1, para. 3 (**Annex 1**).

6. Neither Party shall raise or pursue in any international organisation matters that are, directly or indirectly, relevant to maritime boundaries or delimitation in the Timor Sea.

7. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty."[43]

2.40 Articles 4 and 12(1) of the 2006 Treaty thus seek to prevent either Party from asserting or pursuing a claim to sovereign rights, jurisdiction and maritime boundaries until the Greater Sunrise Unit Area is either fully exploited, or until 23 February 2057.

2.41 Although the Parties have the option of terminating the 2006 Treaty if (as is the case) no development plan has been approved for the Unit Area by 23 February 2013, the Treaty provides that if, subsequent to the termination, petroleum production takes place in the Unit Area, all of the terms of the Treaty are revived.

2.42 The adverse effects of the 2006 Treaty upon Timor-Leste do not stop there. Following the signing of the 2006 Treaty, Australian Minister for Foreign Affairs, Alexander Downer MP, wrote to Timor-Leste Senior Minister and Minister for Foreign Affairs and Cooperation, José Ramos-Horta, a Side Letter to the 2006 Treaty dated 12 January 2006, stating that:

"As at 19 May 2002, Australian legislation applying to the [JPDA] authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil. That legislation included the *Petroleum (Submerged Lands) Act 1967* (Cth) and the *Offshore Minerals Act 1994* (Cth). Accordingly, Australia will continue activities (including the regulation and authorisation of existing and new activities) in that area.

I seek your confirmation that, as at 19 May 2002, Timor-Leste had no legislation applying to that area giving rise to the application of paragraph 2 of Article 4."[44]

2.43 By Side Letter dated 12 January 2006, Minister Ramos-Horta confirmed that:

"As at 19 May 2002, the Democratic Republic of Timor-Leste had no legislation applying to that area giving rise to the application of paragraph 2 of Article 4."[45]

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[43] 2006 Treaty, Article 4 (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

[44] Side letter from A. Downer to J. Ramos-Horta dated 12 January 2006 (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

[45] Side letter from J. Ramos-Horta to A. Downer dated 12 January 2006 (https://treaties.un.org/doc/Publication/UNTS/Volume%202483/v2483.pdf).

2.44 The effect of Article 4(2) of the 2006 Treaty in combination with the Side Letters is that Australia is permitted to continue exploration and exploitation in any of the areas outside of the JPDA in which on 19 May 2002 it had legislation permitting such activities, notwithstanding the fact that these areas could be claimed by Timor-Leste as subject to its sovereign rights pursuant to UNCLOS and international law. Timor-Leste, on the other hand, has no such right: it did not become independent until one day after the 19 May 2002 deadline.

2.45 Thus, by virtue of Article 4(2) of the 2006 Treaty and Side Letters, Australia is permitted to explore and exploit the rich commercial resources of areas to the west and east of the JPDA[46] to which Timor-Leste considers that it is entitled as a matter of international law.

2.46 It is clear that if Timor-Leste's maritime boundaries with Australia and Indonesia were delimited in accordance with international law, a significant portion of the area outside of the JPDA would be subject to Timor-Leste's sovereign rights. It is this area that is given away entirely to Australia by the Side Letters to the 2006 Treaty. This area encompasses almost all of the Greater Sunrise and Troubadour fields.

2.47 The effect of the 2006 Treaty is, therefore, that Australia is permitted to continue exploration and exploitation in an area that is disputed between Timor-Leste and Australia, and that Timor-Leste (as a result of the 50-year duration of the 2006 Treaty and moratorium) would be prevented from taking any action to prevent this from occurring, and prevented *from even asserting its claim* to this area, for a period that will probably outlast the life of the commercially-exploitable petroleum deposits in the area.

[46] See **Figure 4**.

CHAPTER III: THE TST ARBITRATION

A. Introduction

3.1 This Chapter describes the present position in the TST Arbitration, which is currently being conducted under the auspices of the Permanent Court of Arbitration in The Hague. It does so because the TST Arbitration forms part of the background to the Application before this Court. This Chapter respects the confidentiality of the TST Arbitration[47] and only discusses the TST Arbitration to the extent that it is relevant for a background understanding of the matters at issue in these proceedings.

3.2 It will be recalled that Australia has set out for the Court its view of the TST Arbitration proceedings in its Written Observations on Timor-Leste's Request for Provisional Measures[48], and it has provided the Court with a number of documents relating to the TST Arbitration as annexes to those Observations[49]. Australia also elaborated on its position in the Written Observations in its oral pleadings at the Provisional Measures stage[50].

B. The TST Arbitration

3.3 On 23 April 2013, Timor-Leste served an Arbitration Notice on Australia[51]. The TST Arbitration is brought under Article 23 of the 2002 Treaty, which provides that any dispute (with the exception of disputes within the scope of the taxation code) concerning the application or interpretation of the 2002 Treaty shall, as far as possible, be settled by consultation or negotiation. Article 23(b) provides that any dispute not settled in that way may be submitted by either State to arbitration.

3.4 The issues in the TST Arbitration have been summarised in the Statement of Claim dated 18 February 2014, attached to this Memorial as **Annex 5**, as follows:

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[47] On 7 January 2014, in its Procedural Order No. 2 (Waiver of Confidentiality Requirements), the TST Arbitral Tribunal ordered that: "The requirement of confidentiality imposed by Article 26(5) of the Rules of Procedure shall not apply insofar as is required for either Party to submit copies of correspondence, pleadings, and transcripts relating to this arbitration in the proceedings initiated by Timor-Leste before the International Court of Justice". Australia's Written Observations on Timor-Leste's Request for Provisional Measures, 13 January 2014 ("**Australia's WO**"), Annex 7.

[48] Australia's WO, paras. 7, 9-11, 14-21, 24, 26.

[49] Australia's WO, Annexes 1, 3,4, 5, 6, 9, 13, 47, 48, 49, 50, 51, 52 and 53.

[50] CR 2014/2, pp. 37-47 and CR 2014/4, pp. 8-10.

[51] Australia's WO, Annex 1.

"1.3. This case is brought by Timor-Leste against Australia seeking a declaration that the Timor Sea Treaty 2002 ('the 2002 Treaty') remains in force in the form and with the text as it stood when the Treaty was signed by the Parties on 20 May 2002. Specifically, Timor-Leste seeks from the Tribunal a declaration that Article 22 of the 2002 Treaty remains valid and operative in its original terms notwithstanding the provisions of Article 3 of the Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea 2006 ('the 2006 Treaty'). Timor-Leste submits that the amendments to the 2002 Treaty that the 2006 Treaty purported to make are void and inapplicable due to the ineffectiveness of the 2006 Treaty.

1.4. The circumstances… are that during the negotiation of the 2006 Treaty between Timor-Leste and Australia in 2004, Australia covertly spied on the Timor-Leste negotiating team by means of listening devices surreptitiously and unlawfully placed by Australian personnel in the Timor-Leste government offices. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and of its position in relation to various issues arising in connection with the 2002 Treaty and the attempt to amend it by the drafting of the 2006 Treaty. The extent to which the Australian team made use of this illicitly obtained information cannot be determined, but in any case that is not an issue. It is enough that Australia put itself in a position to anticipate the negotiating stance of Timor-Leste, and the reasoning underlying that stance, and to benefit from that knowledge.

1.5. This conduct on the part of Australia violated customary international law in that it was manifestly done in bad faith, contrary to the requirement of good faith which is a fundamental legal principle governing relations between States. Such behaviour is analogous to fraud or corruption, grounds which are specifically recognised in the Vienna Convention on the Law of Treaties 1969 ('the VCLT') as bases for vitiating the apparent consent of a State to be bound by a treaty. These rules and principles of international law apply to the provisions in the 2006 Treaty that purported to amend the 2002 Treaty, with the result that those provisions are void and without legal effect and are thus incapable of amending the 2002 Treaty.

1.6. The Australian conduct also violated international law because it was carried out on the territory of Timor-Leste by Australian officials and/or governmental personnel who had entered the territory of Timor-Leste while concealing the true and unlawful purpose of their visit, and with the intent to violate the law of Timor-Leste. This was a violation of Timor-Leste's sovereignty no different in quality, but only in scale, from an invasion of Timor-Leste territory. Moreover, the complicity of the Australian Embassy in Dili in these actions was incompatible with the Vienna Convention on Diplomatic Relations 1961 (the 'VCDR'). This compounded the illegality of Australia's conduct. Furthermore, the 2006 Treaty violates a peremptory norm of international law in having the effect of depriving Timor-Leste of access to its natural resources.

1.7 More specifically, the consequence of the invalidity and lack of legal effect of the provisions in the 2006 Treaty that purport to amend the 2002 Treaty is that the provision (Article 3) which purports to replace Article 22 of the 2002 Treaty by another provision relating to the duration of that Treaty, has no legal force. The duration of the 2002 Treaty as agreed at the time of its signature in 2002 remains unchanged.

> 1.8. Similarly, Article 4 of the 2006 Treaty which, in effect, seeks to extinguish the ability of Timor-Leste to seek adjustments in the terms of the 2002 Treaty and to assert or pursue or further by any means any claims against Australia to sovereign rights and maritime boundaries for a period of 50 years, also falls. Accordingly, Timor-Leste submits that it retains its freedom to put forward proposals on matters such as the limits of the respective maritime claims of Timor-Leste and of Australia, and arrangements for the exploitation of the natural resources lying in or beneath the sea between them, and of the submission of such matters, if necessary, to international adjudication."[52]

3.5 The validity of the 2006 Treaty is important because without the amendments which it purported to make to the 2002 Treaty the latter would expire after 30 years, in 2033, or when a seabed boundary is established, whichever was sooner. The 2006 Treaty extends that period to 2057, by which time it is likely that any commercial petroleum resources will have been exhausted, so that the establishment of a maritime boundary in accordance with what Timor-Leste maintains is its entitlement under international law would serve only to give Timor-Leste additional areas of seabed that had already been drained of its resources by Australia.

3.6 As was noted in Chapter II[53], the 2006 Treaty reinforced Australia's position by the far-reaching provisions of Article 4. That Article left Australia free to exploit the resources in areas on its side of the temporary boundary that Timor-Leste claimed were part of Timor-Leste's entitlement under international law, while Timor-Leste, in contrast, was forbidden even to "assert, pursue or further by any means" its claim to those areas.

3.7 This was the effect of the 2006 Treaty, in relation to the negotiation of which the Government of Timor-Leste was made the target of the Australian spying.

C. Relevance of the TST Arbitration to the dispute before this Court

3.8 The Tribunal in the TST Arbitration must consider the effect on the 2002 Treaty of arguments that the 2006 Treaty is invalid. This is relevant because some of the documents and data inspected and seized by Australia include material prepared by Timor-Leste's legal counsel for the TST Arbitration. For example, some of the documents inspected and seized contain legal advice on the interpretation and application of the 2002 Treaty and the 2006 Treaty, and the relevant rules of the law of treaties, legal advice on instituting an arbitration to resolve this legal dispute, possible locations for that arbitration and potential arbitrators, and arguments

[52] **Annex 5**.

[53] Para. 2.39 of this Memorial.

that could be advanced to secure Timor-Leste's position in the arbitration, including an analysis of Timor-Leste's legal position.

D. Procedural Position

3.9 On 31 January 2014, Australia filed with the Arbitral Tribunal an Application for An Order to Disallow the Giving of Potential Evidence, specifically the evidence of Witness K[54]. The Order sought is as follows:

> "(1) that the Tribunal disallow the giving of any testimony, whether written or oral, the disclosure of which would constitute a criminal offence under the *Intelligence Services Act 2001* (Cth) s 39 or s 41, the *Crimes Act 1914* (Cth) s 70, the *Criminal Code Act 1995* (Cth) schedule 1 s 91.1, or another provision of Australian law relating to intelligence or national security; and
>
> (2) in particular,
>
> > (a) that the Tribunal disallow production of the affidavit of K deposited by Timor-Leste with the secretariat of the Permanent Court of Arbitration and the production of any other written evidence by K;
> >
> > (b) that the Tribunal disallow the giving of any oral testimony by K, whether in person in The Hague or by electronic or other means; *and*
> >
> > (c) that the Tribunal disallow the giving of any evidence obtained as a result of disclosures already made to Timor-Leste or others by K, the further disclosure of which may constitute a criminal offence under Australian law".

3.10 A hearing on this Application was held on 29 March 2014. On 18 April 2014, the Tribunal issued Procedural Order No. 3, in which it decided that the evidence of Witness K is provisionally admitted and that the final disposition of Australia's application is deferred until the issue of the Tribunal's final award.

[54] **Annex 6**. Witness K is explained further at paragraph 4.12 below.

CHAPTER IV: INSPECTION AND SEIZURE OF DOCUMENTS AND DATA ON 3 DECEMBER 2013 AND THEIR RETENTION

A. Introduction

4.1 This Chapter begins by describing the role of the Australian law firm, Collaery Lawyers, in advising Timor-Leste *inter alia* in relation to matters including the negotiations with Australia over the continental shelf resources of the Timor Sea and the current arbitration under the 2002 Treaty (**Section B**). It next describes the execution of the search warrant on 3 December 2013 (**Section C**) and, so far as possible in view of the absence of precise knowledge of what was taken, the documents and data inspected and seized and Timor-Leste's property rights therein (**Section D**). **Section E** refers the Australian Attorney-General's Ministerial Statement of 4 December 2013 and refers to subsequent correspondence between Timor-Leste's lawyers (DLA Piper) and the Australian authorities.

B. Collaery Lawyers' legal advice to Timor-Leste

4.2 The documents and data at issue in this case were inspected and seized at the offices of Collaery Lawyers, whose address is Branchfield Chambers, 5 Brockman Street Narrabundah, in the Australian Capital Territory ("**ACT**")[55]. Mr Collaery is an Australian lawyer, admitted to the Roll of Barristers of the Supreme Court of New South Wales in 1970, and having the right to practise in all Australian State and Territory jurisdictions. He is also a solicitor of the Supreme Court of Northern Ireland. Mr Collaery has appeared as Counsel in many superior court jurisdictions.

4.3 Mr Collaery was Attorney-General for the ACT from 1989 to 1991.

4.4 Mr Collaery has acted for the Government of Timor-Leste for several years. Under the current retainer agreement, Collaery Lawyers, represented by Mr Collaery is, *inter alia*, to provide assistance on the development of international legal services required by the Government of Timor-Leste (referred to in the retainer as "**RDTL**"), coordinate the advisory team and oversee the provision of legal advice to the Office of the Prime Minister and/or any relevant

[55] Since 2013, Collaery Lawyers has also had an office at 8B Beauchamp Road, London, United Kingdom, from which its international litigation is run.

Ministry/Secretary of State of the Government of Timor-Leste. A redacted version of the retainer agreement appears as **Annex 7** to this Memorial.

4.5 The retainer addresses the question of confidential information, which is defined in Clause 1:

> "**Confidential Information** means all information that is not public knowledge at the Commencement Date [sc., of the retainer agreement] or comes into existence at a later date (whether that information is written or unwritten) relating to the business interests, methodology or affairs of RDTL or any person or entity with which it deals or is concerned, including:
>
> (a) the terms of this agreement;
>
> (b) all information, documents, materials or items of any nature and in any format which are provided by RDTL to the Consultant;
>
> (c) all information, documents, materials or items which are designated by RDTL as confidential or otherwise imparted in circumstances in confidence to the Consultant by RDTL;
>
> (d) all information of a confidential character which has been communicated to RDTL by any other person".

4.6 Clauses 8 and 9, read as follows:

> "**8. Confidentiality**
>
> **8.1 Confidentiality Obligations**
> The Consultant must:
>
> (a) keep confidential all Confidential Information; and
>
> (b) not disclose the Confidential Information to any person except:
> (i) as required by law;
> (ii) with the prior written consent of RDTL; or
> (iii) to its employees for the purposes of this agreement.
>
> **8.2 Confidential Information in the Public Domain**
> If Confidential Information is lawfully within the public domain, then to the extent that the Confidential Information is public the Consultant's obligations under **clause 8.1** in relation to that Confidential Information ceases.
>
> **8.3 Use of Confidential Information**
> The Consultant must not use, permit the use of or modify any Confidential Information except for the purposes of and in accordance with this agreement.
>
> **8.4 Security**
> The Consultant must:
>
> (a) maintain proper and secure custody of all Confidential Information; and
>
> (b) prevent the disclosure of the Confidential Information to third parties.

8.5 Delivery

The Consultant must immediately deliver all Confidential Information including any copies to RDTL:

(a) at the expiration or earlier termination of this agreement; or

(b) at any time at the request of RDTL.

8.6 Employees

Notwithstanding any other clause of this agreement:

(a) the Consultant undertakes to ensure that all of its employees and any other person to whom Consultancy Services have been delegated in accordance with **clause 3.5** who use or have access to the Confidential Information are informed of the confidential nature of the Confidential Information and keep the Confidential Information strictly confidential in accordance with **clause 8** and **clause 9**; and

(b) the Consultant must indemnify RDTL against any loss or damage which RDTL may sustain or incur as a result of any failure of the Consultant to comply with its undertaking under paragraph (a).

8.7 Breach of confidence

The Consultant must promptly notify RDTL if it becomes aware of any breach of confidence by any person to whom it has divulged all or any part of the Confidential Information and must give RDTL all reasonable assistance in connection with any action, demand, claim or proceeding which RDTL may institute against any such person for breach of confidence.

8.8 Obligation to disclose

Where the Consultant creates or develops any Confidential Information, the Consultant must immediately disclose that Confidential Information to RDTL.

8.9 Equitable relief

The Consultant acknowledges that RDTL shall be entitled to equitable relief against the Consultant (in addition to any other rights available under this agreement or at law) if the Consultant breaches the Consultant's obligations contained in this **clause 8**.

8.10 Obligations to continue

The obligations of the Consultant under this **clause 8** shall survive the expiration or termination of this agreement and shall be enforceable at any time at law or in equity and shall continue for the benefit of and be enforceable by RDTL."

9. Intellectual Property

9.1 Ownership of Intellectual Property

(a) The Consultant assigns to RDTL all right, title and interest, in all intellectual property rights and other proprietary rights (**Rights**) in all works, documents, computer programs, items or things produced or created by the Consultant, the Principal Employees or created on behalf of the Consultant in the course of providing the Consultancy Services (**Works**). The Consultant also agrees that it will not, without written authority from RDTL, provide the

Works to any other person or use the Works except in providing the Consultancy Services to RDTL.

(b) The Rights include patent, copyright, trademark, design and eligible layout rights including any applications or rights to apply for registration of the same.

(c) The Consultant must sign all documents and do anything reasonably required by RDTL to give effect to the assignment of the Rights.

(d) The Consultant warrants that the Works:

(i) are not copies taken wholly or substantially from other work, document, computer program, item or thing anywhere in the world;

(ii) do not infringe any other person's rights in any other work, document, computer program, item or thing anywhere in the world; and

(iii) have not had any right in them granted, transferred or assigned by the Consultant to any third party.

(e) If the Consultant is unable, for any reason, to assign the Rights to RDTL, the Consultant or the Principal Employees must, prior to producing or creating any works, notify RDTL in writing. The Consultant must describe each of the Works and give RDTL reasons as to why it cannot assign the Rights in them to RDTL.

(f) RDTL will then decide whether it will insist on the assignment of the Rights in those Works or whether it will be satisfied with a licence to use the relevant Works. RDTL will notify the Consultant, in writing, of its decision. If RDTL decides that a licence will be satisfactory, the Consultant agrees to assist RDTL in negotiating the terms of the licence with the owner of the Rights of the Work.

9.2 Licence of background Consultant intellectual property

(a) The Consultant grants to RDTL a perpetual, non-exclusive, royalty-free and transferable licence of all its background Rights, which are in existence prior to the commencement of the Consultancy Services and which for part of the Works, including any template documents or databases.

(b) In addition to any other terms of this agreement intended to survive expiration or termination, this provision survives the expiration or termination of this agreement".

4.7 Pursuant to the retainers, Mr Collaery has provided advice on a range of matters. These include, but are not limited to, matters concerning agreements between Timor-Leste and Australia relating to the Timor Sea. Those agreements include the 2002 Treaty and the 2006

Treaty. Mr Collaery sought advice from, *inter alia*, Professor Sir Elihu Lauterpacht CBE QC LLD and Professor Vaughan Lowe QC, barristers practising from Chambers in London.

C. Execution of the Search Warrant on 3 December 2013

4.8 On 1 December 2013, Mr Collaery departed from Melbourne, Australia for the first procedural hearing in the TST Arbitration at the Permanent Court of Arbitration in The Hague.

4.9 On 2 December 2013, the Attorney-General of the Commonwealth of Australia issued a search warrant[56] under section 25 of the Australian Security Intelligence Organisation Act 1979 (Cth)[57].

4.10 Shortly after he arrived at The Hague on 3 December 2013, Mr Collaery was informed by Ms Chloe Preston, a solicitor employed in his Chambers, that between 10 and 15 persons, who described themselves as agents of the Australian Secret Intelligence Organisation ("**ASIO**"), had, on 3 December 2013 (Australian time), searched his home/office premises and inspected and seized documents and office electronic equipment. The agents had shown her, but not allowed her to keep, a redacted search warrant. A redacted copy of that warrant has since been produced by Australia in the present proceedings, and appears as Annex 21 to Australia's Written Observations.

4.11 The ASIO officers were observed by Ms Preston to spend more than six hours going through many ring binders of records that relate to Mr Collaery's advice to the Government of Timor-Leste, and to more recent correspondence including that with Professors Sir Elihu Lauterpacht CBE QC LLD, Professor Vaughan Lowe QC, the Agent for Timor-Leste in the Arbitration proceedings, and certain maritime boundary experts that Collaery Lawyers has, pursuant to its retainers, employed for advice to Timor-Leste.

4.12 The documents seized include earlier versions of an affidavit made by Witness K, a former officer of the Australian Secret Intelligence Service, and a client of Collaery Lawyers[58]. The affidavit describes the covert bugging in 2004 of the Timor-Leste Cabinet room on the

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[56] Australia's WO, Annex 21.

[57] Australia's WO, Annex 16.

[58] Witness K had approached the Australian Inspector-General of Intelligence and Security ("**IGIS**") concerning a grievance he had in relation to his former employment at ASIS, in accordance with Australian government procedures. The IGIS was aware that Mr Collaery was acting as K's lawyer in that matter. Copies of correspondence between Mr Collaery and IGIS, redacted only as to the witness' identifying personal particulars, are attached as **Annexes 8-9**.

instructions of the Australian authorities. This affidavit is the key evidence in the TST Arbitration. It has now been released to the Australian Government.

4.13 A laptop, which Mr Collaery believes to contain matters relating to Timor-Leste, and a USB stick, which may contain matters relating to Timor-Leste, were also seized.

D. The documents and data seized

4.14 The documents and data inspected and/or seized by Australia are not limited to materials connected to the TST Arbitration. Among the materials inspected and/or seized that do not relate to the TST Arbitration are legal advice and legal drafts concerning Timor-Leste's entitlements to areas of the Timor Sea, and the legal routes by which Timor-Leste might pursue its claim (including, but not limited to, arbitration), the legal arguments that Timor-Leste might put forward and their relative strengths.

4.15 Timor-Leste asserts that the bulk of the items seized are actually and in law the property of Timor-Leste and that no third party, e.g. the Australian Government, has any rights to or in respect of them. Timor-Leste is entitled to confidentiality in respect of all of these materials, both those that relate to the TST Arbitration and those that do not. Timor-Leste is, moreover, entitled to respect for its legal advisers' claims to legal professional privilege in respect of all of these materials. The section that follows is devoted to the proposition that most of the material, in so far as it can be identified without actually having been reviewed by Timor-Leste's legal advisers, is in law the property of Timor-Leste. This is an application of a widespread rule in national legal systems, including that of Australia, that material generated by a solicitor on the instructions of, or by the account of, a client is the property of the client.

E. Timor-Leste's property rights in the documents and data seized

4.16 In international law[59], as in various domestic jurisdictions[60], the law applicable to determining the ownership of movables is the *lex situs*. Applying the *lex situs*[61], the law governing the

[59] A. Flessner, 'Choice of Law in International Property Law – New Encouragement from Europe' in R. Westrik and J. Van der Weider (eds 2011), *Party Autonomy in International Property Law,* (Sellier European Law Publishers, 2011), p. 11: "International property law invokes the law of the place where the asset is situated, the *lex rei sitae* or *lex situs,* to control the creation, content, exercising and transfer of property rights in the asset".

[60] E.g. Dicey, Morris & Collins (eds.), *The Conflict of Laws* (15th ed., 2012), Rules 128-129; Austrian International Private Law Act, Section 31, cited in footnote 1 of A. Flessner, 'Choice of Law in International Property Law – New Encouragement from Europe' in R. Westrik and J. Van der Weider (eds., 2011) ; and German Introductory Act to the Civil Code, Article 43 (**Annex 10**).

ownership of the seized documents and data would be Australian law as they were in Australia at the date of their seizure.

4.17 The leading authority in Australian law in relation to the ownership of materials in the possession of a solicitor is *Wentworth v De Montfort* (1988) 15 NSWLR 348[62]. In that case a client sought an order for the return of documents in the possession of her solicitors, and argued that the solicitor was holding them as agent for the client. The following principles were decided by the New South Wales Court of Appeal, at page 353 of the report:

a. First, if a solicitor is acting purely as agent for a client, the ordinary rules of agency apply and documents brought into existence or received by the solicitor when so acting belong to the client.

b. Secondly, if a solicitor is not acting purely as agent for a client then it is relevant to consider the purpose of the creation of the document, taking into account the principles referable to the relationship between a professional person and client[63], i.e. whether the document was created for the benefit and protection of the client, and whether the client had paid for its production[64].

4.18 That case thus provides guidance as to the ownership in Australian law of the seized documents and materials:

a. A solicitor's trust account records, photocopying or cheque requisition forms and financial records will normally be considered the property of the solicitor and not the client[65];

b. The client would own a statement taken by the solicitor from a third party witness[66];

c. Notes made by a solicitor of attendances on other persons may be the property of either the solicitor or the client depending on the nature and content of the attendance,

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[61] According to the learned editors of Dicey, Morris & Collins (eds.), *The Conflict of Laws* (15th ed., 2012) from Rules 129 at §22R-023: "a chattel is situate in the country where it is at any given time".

[62] **Annex** 14. Cited with approval in *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 10 (**Annex 11**) and *Breen v Williams* (1994) 35 NSWLR 522 (**Annex 12**).

[63] Pursuant to the principles in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286, 292-293 (**Annex 13**), which was a case involving whether a chartered accountant could be ordered to documents produced by way of preparation of a final audit.

[64] **Annex 14**.

[65] *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 357-359 (**Annex 14**).

[66] *Ibid.,* at 358 (**Annex 14**).

and whether the note was made for the primary benefit or purposes of the solicitor or the client[67];

d. Internal records and memoranda of a solicitor as to work done or work to be done are documents which are created by the solicitor for his own benefit and not for the benefit of his client and are, therefore, likely to be the property of the solicitor[68];

e. Generally, documents involving counsel, including briefs, are documents created or received for the benefit of the client (save for discussions about barristers fees), even though they may also be for the benefit of the solicitor[69]; and

f. Any correspondence between a solicitor and officers of the court, and any notes of conversations by someone on the part of the solicitor and an officer of the court belong to the client[70].

4.19 Further support for the principles articulated in *Wentworth v De Montfort* can be found in the Legal Profession (Solicitors) Rules 2007 (ACT)[71]. These are the professional conduct rules that govern Mr Collaery's practice of law in the ACT.

4.20 Rule 6 of these Rules deals with what should be done with documents on the termination of the solicitor's retainer with a client[72]. Rule 6.2 provides that upon completion or termination of a solicitor's retainer, the solicitor must, when requested to do so by the client, give to the client any documents to which the client is "entitled" (subject to the solicitor's right to claim a lien over the documents for outstanding costs payable by the client)[73].

4.21 Importantly, Rule 6.4 provides guidance as to the documents to which the client is "entitled". It provides:

"Documents to which a client of a practitioner should be entitled will usually include:

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[67] *Ibid.,* at 359-360 (**Annex 14**).

[68] *Ibid.,* at 359 (**Annex 14**).

[69] *Ibid.,* at 360 (**Annex 14**).

[70] *Ibid.,* at 361 (**Annex 14**).

[71] **Annex 15**.

[72] *Ibid*.

[73] *Ibid*.

> (a) documents prepared by a practitioner for the client, or predominantly for the purposes of the client, and for which the client has been, or will be, charged costs by the practitioner; and
>
> (b) documents received by a practitioner from a third party in the course of the practitioner's retainer for or on behalf of the client or for the purposes of a client's business and intended for the use or information of the client."[74]

4.22 Therefore, applying the above principles of Australian law, in order to consider ownership of the documents seized by Australia from Mr Collaery's offices it is necessary to consider:

a. Whether the documents or data were produced by Mr Collaery in his capacity as agent for Timor-Leste; and

b. If not, whether they were produced for the benefit and protection of Timor-Leste and at Timor-Leste's expense.

4.23 Applying this approach, and without prejudice to its claims based upon international law, Timor-Leste has the following observations as to the ownership of the items seized and retained by Australia:

a. Item 002: ACER Aspire Laptop, black in colour, bearing S/N 116Ø03ØØ725 and power supply. This item belongs to Mr Collaery's law practice. Some of the documents on the computer are likely to have belonged to Timor-Leste and other clients, but Mr Collaery is not able to establish this firmly. The laptop's hard drive will contain extensive correspondence with Timor-Leste, including item "q" in this list.

b. Item 003: 4 GB USB Verbatim thumb drive, black in colour, NGØ4G2513ØØ8819 DML. This item belongs to Mr Collaery's law practice. Some of the documents on the thumb drive may have belonged to Timor-Leste and other clients, but again Mr Collaery is not able to establish this firmly.

c. Item LPP001: Document entitled Memorandum re: the 2006 CMATS dated 17 February 2012 (sealed in yellow envelope). Since, from the description of this item,

[74] *Ibid*.

it appears to be legal advice prepared for Timor-Leste, at Timor-Leste's expense, it must belong to Timor-Leste.

d. Item LPP002: Document titled Memorandum to Counsel (sealed in yellow envelope). The document description indicates that this is a note to counsel, probably to counsel on behalf of Timor-Leste. Generally, as a matter of Australian law, documents involving counsel belong to the client.

e. Item LPP003: Document entitled Timor Sea Treaty, Dili 20 May 2002 (sealed in yellow envelope). This document description does not clearly indicate its contents. Either it would be a document belonging to Timor-Leste, or a document owned by Mr Collaery as solicitor for Timor-Leste. Given its title it is likely that it belongs to Timor-Leste.

f. Item LPP004: Document titled "Challenging the Validity of the certain Maritime arrangements in the Timor Sea Treaty (23 pages)" (sealed in yellow envelope). This is manifestly a substantial piece of legal advice given to Timor-Leste. Therefore it belongs to Timor-Leste, since it was prepared for Timor-Leste, and at Timor-Leste's expense.

g. Item LPP005: Document titled "Correspondence to Lowe QC re: Timor Sea Maritime boundary issues" (sealed in yellow envelope). The document description indicates that it is correspondence with counsel. Generally, as documents involving counsel are client documents, this must therefore belong to Timor-Leste.

h. Item LPP006: Folder labeled ICT product containing document titled "Protocol for the operation of base stations". This document does not appear from its description to relate to Timor-Leste.

i. Item LPP007: Document titled "Correspondence to Professor Lowe re Australia - East Timor treaty 2 pages" (sealed in yellow envelope). The document description indicates that it is correspondence with counsel advising Timor-Leste on matters of international law. Generally, documents involving counsel are client documents as a matter of Australian law. This document must therefore belong to Timor-Leste.

j. Item LPP008: Document titled "Correspondence with Professor Lowe re Australia - East Timor treaty". Stamp copy sent. (sealed in yellow envelope). The same considerations apply to this document as to the previous item.

k. Item LPP009: Document titled "Negotiations in London dated 28 November 2012 and addressed to the Office of the Prime Minister, Government of Timor-Leste". Given the likely nature of this item, it would appear to be the property of Timor-Leste.

l. Item LPP010: Document: Letter to Prime Minister re Dispute with Australia. As it is probable that this item contains legal advice, it is likely to be the property of Timor-Leste.

m. Item LPP011: Document Letter to Prime Minister re Dispute with Australia. The same considerations apply to this item as to the previous one.

n. Item LPP012: Untitled document with hand written comments stating "This is the statement of [ ]". The description of this document indicates that it is the draft of a statement of a third party taken for legal proceedings involving Timor-Leste. It therefore belongs to Timor-Leste.

o. Item LPP013: Brief to Counsel (3 pages) re: Timor-Leste v Australia Dated 19 November 2013. It is believed that this document does not belong to Timor-Leste. The document description indicates that this is a brief to counsel, but it is thought to be a brief to Mr Bernard Gross QC in respect of Witness K in the TST Arbitration.

p. Item LPP014: Documents: Affidavit of [ ] related itineraries, diplomatic courier document and photo of sign saying "Welcome to Central Maritime Hotel Dili". The description of this document appears to show that it is the draft of a statement of a third party taken for legal proceedings involving Timor-Leste. It therefore belongs to Timor-Leste.

q. Item LPP015: Seven letters of varying stages of draft addressed to Ambassador Joaquim AML de Fonseca from B Collaery dated 20 November 2013. Addressed, as they are, to Ambassador da Fonseca, who is the Agent for Timor-Leste in the Arbitration and these proceedings, these letters must be the property of Timor-Leste.

4.24 Applying the above analysis of Australian law, the majority of the documents seized by Australia belong to Timor-Leste.

4.25 The ownership by Timor-Leste of these materials 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[75]. The expression 'copyright title' covers also the physical ownership of the documents containing the copyright material.

4.26 Moreover, it is probable that the courts of other countries would recognize Timor-Leste's claims to property in the documents and data inspected and seized. The general rule about the ownership of property through agency is well reflected in certain passages from the judgments of the British House of Lords in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379. 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."[76]

He continued:

> "'Two propositions of international law,' said Lord Atkin in *Compania Naviera Vascongado v. S.S. 'Cristina'* "[are] engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is 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 legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second 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.""[77]

He said a little later:

> "If property locally situated 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

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[75] Paragraph 4.6 of this Memorial.

[76] *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 393-394.

[77] *Ibid.,* at 394.

to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it."[78]

4.27 There can be no real doubt that the majority of the seized documents belong to 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 Government of Timor-Leste.

F. The Attorney-General's Ministerial Statement of 4 December 2013 and subsequent correspondence

4.28 On 4 December 2013, the Australian Attorney-General, the Honourable George Brandis QC, made a Ministerial Statement about the execution of the ASIO search warrants at Mr Collaery's Office (and at the home of Witness K) the previous day, and his role in issuing them[79]. Both the terms of the legislation, and the statement, make it clear that in issuing the warrants the Attorney-General was acting quasi-judicially.

4.29 The Attorney-General said that "in the course of the execution of those warrants, documents and electronic data was taken into possession" and that the warrants had been issued, at the request of ASIO, "on the grounds that the documents and electronic data contained intelligence relating to security issues". He explained that:

> "When the Director-General makes [a request for a warrant], a search warrant may only be issued by the Attorney-General if the conditions set out in section 25(2) are fulfilled. That provision requires that the Attorney-General be satisfied that there are reasonable grounds for believing that access by ASIO to records or other things on the subject premises will substantially assist the collection of intelligence in accordance with the *Act* in respect of a matter that is important in relation to security. …
>
> On the basis of the intelligence put before me by ASIO, I was satisfied that the documents and electronic media identified did satisfy the statutory tests, and I therefore issued the warrants".

4.30 The Attorney-General went on to say:

> "I do not know what particular material was identified from the documents and electronic media taken into possession in the execution of the warrants. That will be a matter for ASIO to assess in the coming days. …, I have given an instruction to ASIO

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[78] *Ibid.,* at 395.

[79] Ministerial statement by Senator G. Brandis QC, 4 December 2013 (http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/4-December-2013---Ministerial-Statement---Execution-of-ASIO-Search-Warrants.aspx).

that the material … is not under any circumstances to be communicated to those conducting the [TST arbitral] proceedings on behalf of Australia".

4.31 Following the inspection and seizure of the documents and data on 3 December 2013, there was a protracted exchange of correspondence between lawyers for Timor-Leste (DLA Piper) and Australian officials, in the course of which the dispute now before the Court crystallised, and various (inadequate) assurances were given on behalf of Australia. In addition, Australia repeatedly said that Timor-Leste should seek a remedy through the Australian courts. This correspondence has been largely overtaken by the present proceedings, and in particular by the undertaking given by the Attorney-General to Timor-Leste and to the Court and by the provisional measures prescribed by the Court in its Order of 3 March 2014.

CHAPTER V: TIMOR-LESTE'S RIGHT TO INVIOLABILITY AND IMMUNITY IN RESPECT OF THE DOCUMENTS AND DATA INSPECTED AND SEIZED

5.1 This Chapter explains that, the inspection, seizure and retention of Timor-Leste's documents and data violates the rules of customary international law concerning the inviolability of State property and State immunity.

5.2 **Section A** briefly recounts the development of the customary international law on the inviolability of State property and on State immunity, culminating in the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "**UN Convention**"). **Section B** considers the rules of customary international law on State immunity, including the inviolability of State property, as they pertain to the present proceedings. Finally, the inviolability enjoyed in respect of Timor-Leste's property will be placed in the wider context of immunities under international law afforded to the State and its agents (**Section C**).

A. The development of inviolability of State property and State immunity under customary international law

5.3 State immunity has long been accepted as a basic rule of customary international law[80]. The Court recognised this in its judgment in *Germany* v. *Italy*:

> "56. …practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.
>
> 57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign

[80] R. Jennings and A. Watts, *Oppenheim's International Law,* Vol I (9th ed., 1992), p. 343; Restatement (Third) of the Foreign Relations Law of the United States (American Law Institute, 1987), Vol 1, Ch. 5, at p. 390; C.H. Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press, 1988), p. 168; C.J. Lewis, *State and Diplomatic Immunity* (3rd rev. ed., Informa Publishing, 1990) at p. 11; H. Fox and P.Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013) at pp. 1-2.

equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[81]

5.4 The development of the customary law on State immunity has been assisted by the adoption by the UN General Assembly in 2004 of the UN Convention[82]. The UN Convention, and the various studies prepared and discussed during the work of the International Law Commission on the topic, have clarified important aspects of the subject.

5.5 The UN Convention has 28 signatories and 15 States have ratified or acceded. Timor-Leste signed the UN Convention on 16 September 2005; Australia has neither signed nor acceded. The UN Convention has not yet entered into force[83], although many of its provisions are considered to reflect the rules on State immunity that apply as between the Parties to the present case as a matter of customary international law.

5.6 The preamble to the UN Convention states that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law", as was recently confirmed by the Court in *Germany* v. *Italy*[84]. It further affirms that "the rules of customary international law continue to govern matters not regulated by the provisions of the present UN Convention"[85].

5.7 Article 3 states that the UN Convention is without prejudice to privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of its diplomatic missions, consular posts, special missions, missions to international organisations or delegations to organs of international organisations or to conferences and persons connected with them; to privileges and immunities accorded to heads of State *ratione personae*; and to immunities with respect to aircraft or space objects owned or operated by a State. The drafters clearly recognised that the various immunities enjoyed by a State and its representatives are interrelated in their scope and rationale.

5.8 Article 1 on the scope of the UN Convention states that it applies "to the immunity of a State and its property from the jurisdiction of the courts of another State". "Court" is given a wide

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[81] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening*), *Judgment,* ICJ Reports 2012, p. 99 at pp. 123-124, paras. 56-57 (http://www.icj-cij.org/docket/files/143/16883.pdf).

[82] R. O'Keefe, C. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), p. xlii.

[83] The Convention will come into force upon its ratification by 30 States.

[84] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment,* ICJ Reports 2012, p. 99, at p. 123, para. 56 (http://www.icj-cij.org/docket/files/143/16883.pdf).

[85] *Ibid.*

definition in Article 2.1(a) as "any organ of a State, however named, entitled to exercise judicial functions" ["*tout organe d'un Etat, quelle que soit sa dénomination, habilité à exercer des fonctions judiciaires*"].

5.9 Article 5 sets the basic principle, that "a State enjoys immunity, in respect of itself and its property … subject to the provisions of the present Convention".

5.10 Article 6.1 stipulates that a State has the positive obligation to give effect to another State's immunity by refraining from exercising jurisdiction in a proceeding before its courts, and "to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected". This obligation applies if either (a) the other State is named a party to the proceeding[86] or (b) the proceeding seeks to affect the property, rights, interests or activities of that other State[87].

5.11 Reflecting customary international law, the UN Convention makes a fundamental distinction between immunity from jurisdiction and immunity from measures of constraint[88]. Immunity from measures of constraint is dealt with in a separate Part (Part IV), and is subdivided into pre- and post-judgment measures.

5.12 Post-judgment measures of constraint may, generally speaking, only be taken against State property where "it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes…."[89]

5.13 In the case of pre-judgment measures of constraint, the position is even more restrictive: no such measure of constraint, such as attachment or arrest, may be taken against property of a State "unless and except to the extent that (a) the State has expressly consented … or (b) the State has allocated or earmarked property for the satisfaction of the claim…."[90]

5.14 These provisions, which relate to measures of constraint in connection with judicial proceedings, reflect the particular sensitivity that attaches to the seizure of State property.

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[86] United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (2 December 2004), Article 6.2(a) (https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf).

87 *Ibid.*, at Article 6.2(b).

[88] R. O'Keefe, C. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), pp. 13-18 (M. Wood), 287-347 (C. Brown, R. O'Keefe).

[89] United Nations Convention on the Jurisdictional Immunities of States and Their Property, Article. 19 (https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf).

B. Principles of customary international law of State immunity and their application in the present case

5.15 The UN Convention may be seen as "a catalyst for the development of the modern customary international law of State immunity"[91]. As has recently been written, "both national and international courts have already looked to the UN Convention as persuasive evidence of today's customary rules"[92]. The Court relied on certain provisions of the UN Convention in its judgment in *Germany* v. *Italy*. In a series of cases the European Court of Human Rights has applied the Convention as customary international law[93].

5.16 The UN Convention and the drafts that preceded it have also been regarded as influential expressions of customary law in national jurisdictions[94], even in States that have not ratified or acceded to the Convention[95]. This Section will apply these customary principles to the inspection, seizure and retention of documents and data – the property of Timor-Leste – by Australian agents.

5.17 Article 5 of the UN Convention sets out the general customary rule that a State and its property enjoy immunity unless one of the exceptions enumerated in the Convention applies. Thus, the default rule is one of immunity[96]. In the past, under the absolute doctrine of immunity, State immunity was applicable with very limited exceptions. Today, under the restrictive doctrine of immunity, several exceptions to State immunity may be found in international law, all of which are related to civil and commercial proceedings in which the State is acting in a capacity similar to that of a private actor; but those exceptions are not relevant in the present context.

5.18 The rules of customary international law on measures of constraint are at least as restrictive as the rules under the UN Convention. As described above, measures of constraint may not be taken against State property except in the most limited circumstances, particularly in the case

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[90] *Ibid.*, at Article 18.

[91] R. O'Keefe, C. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), p. xlii.

[92] *Ibid.,* at p. xli,

[93] *Oleykinov v Russia*, App. No. 36703/04, 14 March 2013, para 66 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117124); *Cudak v. Lithuania* [GC], App. No. 15869/02, ECHR 2010, paras. 67-74 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97879); *Sabeh El Leil v. France* [GC], App. No. 34869/05, 29 June 2011, paras. 58-67 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105378); Wallishauser v Austria, 17 July 2012, App. No. 156/04 paras 69-72 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112194); *Jones and Others v. the United Kingdom,* App. Nos. 34356/06 and 40528/06*,* 14 January 2014, para. 192 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140005).

[94] E.g, UK State Immunity Act, 1978 (**Annex 19**), Australian Foreign States Immunities Act 1985 (**Annex 16**), US Foreign Sovereign Immunity Act 1976 (**Annex 17**).

[95] E.g Israel State Immunity Act, 2008 (**Annex 18**).

of pre-judgment measures. While the UN Convention itself does not apply to criminal matters, the principles it reflects are most certainly applicable to administrative measures of constraint such as those taken under the search warrant in the present case. Were this not the case State property would be in the absurdly paradoxical position of being inviolable and immune from judicial measures, but at the mercy of administrative or executive actions.

5.19 None of the customary exceptions to State immunity enumerated in Part III of the UN Convention applies in the present case. There is no exception to immunity with respect to State property in the hands of its legal advisers. This holds true regardless of the nature (civil, criminal, administrative or other) of the proceedings initiated by the issue of a search warrant by the Australian Attorney-General. As explained in Chapter IV above, the bulk of the documents and data seized are the property of Timor-Leste[97], and are therefore 'state property' within the meaning of the UN Convention, being documents and/or archives of Timor-Leste.

5.20 This basic approach to immunity under customary international law is, as one would expect, reflected in the domestic laws on State immunity. The basic rule is that States are granted immunity unless a stipulated exception is applicable[98]. For instance, Article 9 of the Australian Foreign States Immunities Act 1985, entitled "General immunity from jurisdiction", makes clear that a State and its property are immune from jurisdiction "[e]xcept as provided by or under this Act."[99] Nowhere in the Act does it say that State property in the hands of legal counsel is an exception to the rule of State immunity.

5.21 Customary law on the immunity of the State and its property has developed so as to allow for exceptions only in civil proceedings.

5.22 During the oral proceedings on the request for provisional measures, Australia made clear the legal context and framework, in terms of prospective judicial proceedings, under which the warrant for seizure of property was issued in the face of alleged disclosure of national security related information:

> "[T]hose disclosures would involve the commission of serious criminal offences under the law of Australia, and I reference Sections 39 and 41 of the *Intelligence*

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[96] X. Yang, *State Immunity in International Law* (Cambridge University Press, 2012), p. 34.

[97] See Chapter IV of this Memorial.

[98] UK State Immunity Act 1978, Section 1(1) (**Annex 19**); US Foreign Sovereign Immunity Act 1976, Section 1604 (**Annex 17**); Israel Foreign States Immunity Law 5769-2008, Article 2 (**Annex 18**); India Code of Civil Procedure 1908, Section 86 (**Annex 20**).

[99] **Annex 16**.

Services Act 2001 (Cth), section 70 of the *Crimes Act 1914* (Cth), and section 91.1 of Schedule 1 to the *Criminal Code Act 1995* (Cth)."[100]

5.23 During its second round of oral pleadings Australia elaborated on the application of its criminal law:

> "Let me then identify – so there is some precision in my answer – the crime that potentially is in question. One crime is under Section 39 of the Intelligence Services Act 2001 of the Commonwealth. It is a crime if a present or former officer of ASIS communicates information concerning the performance of the functions of ASIS acquired as an officer unless the approval of the Director General is obtained. And I emphasize, that is the qualification permitted under the Act. The second key provision is Section 41, which makes it a state crime to make public the identity of officers of ASIS, or information from which identity can be inferred, again without the approval of the Director General."[101]

5.24 Counsel for Australia then laid down the prospective procedure that would follow the investigation already under way:

> "Firstly, an Australian court would inspect the documents and decide whether the crime/fraud exception applies to any privilege claim."[102]

5.25 In fact, Counsel for Australia went as far as asserting – based on this procedural premise – that:

> "Well, it is quite clear that the 2004 Convention does not apply to criminal proceedings. The ILC Commentary makes this clear: "the draft articles do not define the term 'proceeding', it should be understood that they do not cover criminal proceedings.""[103]

5.26 Two things are thus clear from Australia's position. First, the acts of ASIO done in the name of national security may be precursors to criminal proceedings. And second, Australia agrees that the UN Convention does not apply to criminal proceedings.

5.27 As for the latter point, it is clearly customary international law on State inviolability and immunity that applies between the Parties. Although many of the terms used in the UN Convention are highly relevant to this case, it is clearly noted in its preamble that matters that "are not regulated by the provisions of the present Convention" shall continue to be governed by the rules of customary law. That includes matters of criminal law. The comments of the

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[100] CR 2014/2, p.17, para. 32 (Gleeson).

[101] CR 2014/4, p.11, para. 13 (Gleeson).

[102] CR 2014/2, p.17, para. 33 (Gleeson).

[103] CR 2014/4, p.25, para. 17 (Campbell).

Chinese delegate to the Sixth Committee of the General Assembly on the understanding are on point:

> "Regarding immunities in criminal proceedings, there had been a general understanding at the Ad Hoc Committee that a more appropriate placement for that issue was a General Assembly resolution. His delegation had no objection to that view. While the draft Convention did not cover the issue, it was without prejudice to the immunities that States enjoyed in criminal proceedings under customary international law."[104]

5.28 As shown above, the customary international law on State immunity has developed exceptions to what was once a rule of absolute immunity. They have evolved and expanded, but only in the context of civil proceedings. In relation to criminal (and any other non-civil) proceedings, customary international law dictates the absolute inviolability and immunity of a State and its property from domestic jurisdiction, whatever its nature, whenever the customary exceptions are not applicable.

5.29 Finally on this point, it must be emphasised that as a matter of fact Timor-Leste did not solicit or induce or procure the commission of a crime. Australia's statement alluding to Timor-Leste's possible responsibility for encouraging a crime committed by others under Australian jurisdiction highlights the dangers inherent in implicating a State – and its property – in criminal proceedings[105]. As Fox and Webb note:

> "The general understanding that UNCSI [the Convention] does not apply to criminal proceedings is in line with the received position of jurists and courts that a State has the capacity to incur state responsibility for its acts but as an independent State cannot be held criminally liable under the municipal law of another State and hence enjoys absolute immunity in respect of criminal proceedings."[106]

5.30 As to the suggestion by Australia, that the acts involved may lead to further proceedings later in time, as Australia itself contends this touches upon a basic premise in the law of the immunity of the State and the inviolability of its property. Whether or not Australia's current conduct leads to further legal proceedings is ultimately immaterial. This is because the immunity of the State and its property comes into effect from the earliest stages of any investigation or procedure. The International Law Commission drew attention to this aspect of State immunity in its Commentary upon the draft articles that became the 2004 Convention.

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[104] United Nations General Assembly, Sixth Committee, Summary Records of the 13th Meeting, A/C.6/59/SR.13, 25 October 2004, para. 50 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/569/30/PDF/N0456930.pdf?OpenElement).

[105] H. Fox and P. Webb, *The Law of State Immunity* (3rd ed., Cambridge University Press, 2013).

[106] *Ibid.,* at p. 311.

5.31 The inviolability granted to State property is intended to safeguard such property at all stages of proceedings, from their very initiation and indeed from the investigation stage to execution:

> "The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered or their suspension and further exemption."[107]

5.32 Hence, the immunity of Timor-Leste and its property from the jurisdiction of Australia was operative when the warrant for the inspection, search and seizure of its property was issued, regardless of whether or not there were any future proceedings.

5.33 It is also important to bear in mind that the law of State immunity applies both when the State is a party to a proceeding and also when the State's property rights may be affected. As is reflected in Article 6 of the UN Convention, international law requires Australia positively to ensure that the immunity of the State and its property are not violated in each case[108].

5.34 Australia contended that, when issuing the search warrant the Attorney-General was not acting as a "court", and therefore State immunity did not arise in this case. As stated by Australia's counsel during the oral hearings on the request for provisional measures:

> "[T]he Attorney-General is not a "court" – he certainly does not look like one anyway."[109]

5.35 Appearances can be deceptive. Article 2.1(a) of the UN Convention defines a court as "any organ of a State, however named, entitled to exercise judicial functions" and the Commentary explains:

> "this definition *[that is, 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."[110]

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[107] Draft Article 1 Commentary (2), *Yearbook of the International Law Commission*, 1991, Vol. II, Part II, p. 13 (http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf).

[108] X. Yang, *State Immunity in International Law* (Cambridge University Press, 2012), at para. 34.

[109] CR 2014/4, p.26, para. 17 (Campbell).

[110] Draft Article 2 Commentary (4), *Yearbook of the International Law Commission*, 1991, Vol. II, Part II, p. 14 (http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf).

5.36 As O'Keefe and Tams have commented, to say "that the term [jurisdiction] is limited for the purposes of the Convention to the exercise of authority by a State's courts … is not in fact accurate."[111] They go on to note the broad scope of the term in the UN Convention[112].

5.37 Similarly, the term 'judicial functions' is not itself defined in the UN Convention. This was deliberate, since, as the ILC Commentary explains, "such functions vary under different constitutional and legal systems"[113] ["*ces fonctions varient selon les systèmes constitutionelles et juridiques*"].

5.38 The Commentary adds that,

> "[J]udicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding."[114]

5.39 As Fox and Webb similarly explain,

> "Adjudicative jurisdiction, which is essentially the jurisdiction in respect of which State immunity is invoked, may illustrate both 'legislative' and 'enforcement' jurisdiction."[115]

5.40 This is precisely why the term "judicial functions" was preferred in the UN Convention over "adjudicatory functions", which would have been interpreted too narrowly[116].

5.41 Whether the Attorney-General of Australia looks like a court, what his title is, etc., is beside the point. What matters under customary international law is the function and nature of the act and procedures in question, and the fact that in this case, a warrant for the seizure of the property of Timor-Leste was issued and executed. The issuing of a warrant for the seizure of property is quintessentially a judicial function, because it involves a State organ being vested with authority to determine whether coercive action may lawfully be taken in respect of that

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[111] R. O'Keefe, C. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), p. 37.

[112] *Ibid.*, at pp. 37-38.

[113] Draft Article 2 Commentary (3), *Yearbook of the International Law Commission*, 1991, Vol. II, Part II, p. 14 (http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf); R. O'Keefe, C. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), pp. 45-46 (T. Grant).

[114] Draft Article 2(i) Commentary, *Yearbook of the International Law Commission*, 1991, Vol. II, Part II para. 3 (http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf).

[115] H. Fox and P. Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), p. 73.

[116] Summary record ILC 1750th meeting (n.8), 321-322, para. 34.

property. Such conduct is normally the preserve of the judiciary, but where, as in the present case, such conduct is undertaken by another organ of the State there can be no difficulty in describing that conduct as judicial or quasi-judicial. The fact that in the present case the particular power to issue a warrant lies with the Attorney-General is immaterial. Otherwise, States would be able to disregard their obligations to accord immunity to other States under customary law simply by re-hatting their officials and allowing the executive to issue warrants for the seizure of property instead of the judiciary. That cannot be the case. For this reason, the meaning of "court" in Article 2(1)(a) of the UN Convention is to be interpreted autonomously.

5.42 The Court has recognised that a warrant directly interferes with immunities. This holds whether the warrant is for arrest or for search and seizure. In the *Arrest Warrant* case, the Court held that the "mere issue" of a warrant:

> "constituted a violation …[and] failed to respect of the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."[117]

5.43 The warrant in that case, which was not enforceable on official visits, was dependent on further steps to be taken before its possible enforcement[118]. Nonetheless, the Court found its circulation infringed the immunity of the Minister[119].

5.44 Furthermore, while it is clear that the issuing of the warrant by the Attorney-General was at the very least a quasi-judicial act, on any basis it was undoubtedly an exercise of Australian jurisdiction – be it judicial, quasi-judicial or executive – and it is with this entire range of exercises of jurisdiction that the customary law of State immunity and the UN Convention, are concerned. As the Commentary on the UN Convention explains:

> "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."[120]

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[117] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment,* ICJ Reports 2002, p. 3 at p. 29, para 70 (http://www.icj-cij.org/docket/files/121/8126.pdf).

[118] *Ibid*., at para 71.

[119] *Ibid*.

[120] Draft Article 1 Commentary, *Yearbook of the International Law Commission*, 1991, Vol. II, Part II (http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf).

5.45 To illustrate by way of example, in many domestic jurisdictions, search and seizure warrants are issued by the courts. Yet many domestic laws allow an officer of the law, a member of the executive, to perform search and seizure without a warrant in cases of exceptional urgency. The fact that the former search and seizure is performed by law enforcement officers pursuant to a court-issued warrant and the latter is performed without one is immaterial as far as immunity is concerned. It is the nature of the act that gives rise to State immunity, not the issuing authority.

5.46 This is precisely the point made in the General Assembly in 2013 during the consideration of the International Law Commission's report on the work of its sixty-third and sixty-fifth sessions[121]. In discussing the immunity of heads of State from foreign jurisdiction, the American delegate made the following comment on the relevance – or lack thereof – of the character of the authority exercising jurisdiction:

> "It was unclear why the exercise of criminal jurisdiction should be restricted to acts that were linked to judicial processes. In the United States, there were limited instances in which the Executive branch could apply police powers without the prior involvement of the judicial branch, for example arrest and detention that could be lawfully undertaken by police authorities with respect to crimes committed in their presence or when necessitated by public safety. The commentary to draft article 1 should make it clear that such application of police powers constituted the exercise of criminal jurisdiction. Any immunity that existed from the exercise of criminal jurisdiction should not depend on the branch of government that applied the coercion or the stage of the process at which that coercion was applied. As stated by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters*, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". It followed that the types of exercise of criminal jurisdiction as to which a Head of State or other member of the troika might enjoy immunity were those that were coercive, regardless of the branch of government applying the coercion."[122]

5.47 The same principle applies with respect to the immunity of the State and its property. The equality of States and the principle of non-intervention are respected when State immunity is upheld (subject to the agreed exceptions) within the jurisdiction of a foreign State. The specific branch of government of the latter involved is immaterial[123].

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[121] A/C.6/68/SR.17., 8 November 2013.

[122] *Ibid.,* at para. 48.

[123] See also H. Fox and P. Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), pp. 207-208 on the practice of States to exempt other States from taxes on non-commercial transactions, clearly an executive form of exercising jurisdiction.

5.48 Australian law is compatible with international law on this point. The Australian Foreign States Immunities Act 1985 (Cth) interprets the term "court" to include:

> "a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers."[124]

5.49 In short, by issuing and implementing the warrant under the authority of the Attorney-General, and the consequent inspection, seizure and retention of Timor-Leste's property in the possession of its legal adviser, Australia has violated the inviolability and immunity owed to Timor-Leste and its property under customary international law.

C. State immunity and other immunities recognised under international law

5.50 As mentioned above, State immunity finds its rationale in the equality of States, the principle of non-intervention in domestic affairs of the State and in practical terms, in functional State diplomacy.

5.51 The origin of State immunity was the monarch who embodied the sovereign State[125]. The monarchs themselves and their property were recognised as inviolable and they were granted immunity in local jurisdictions[126]. With time, the State and its head were recognised as separate entities and the people were recognised as the sovereign, and their leaders their representatives[127]. At the same time, diplomatic immunity developed out of the necessity to protect the representatives of the sovereign State in its conduct of relations with other States. The diplomat was viewed in many ways as an extension of the monarch or prince, and his immunity and inviolability was imperative to the conduct of foreign relations[128].

5.52 International law has come to recognise additional immunities with time, such as the immunity of special missions, consular immunities, immunities owed to international organisations and their inviolability and more. What connects them as a matter of legal principle is that they all derive from the same rationale. The many developments in international law regarding

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[124] Australian Foreign States Immunities Act 1985, section 3(1) (**Annex 16**).

[125] H. Fox and P. Webb, *The Law of State Immunity* (3rd ed., Oxford University Press), p. 133.

[126] *Ibid.,* at pp. 131-132.

[127] *Ibid.,* at p. 133.

[128] *Ibid.,* at p. 132.

immunities and inviolability of persons, premises and property are intertwined and serve the same basic purpose.

5.53 In terms of substantive law, these distinct bodies of law grant similar immunity and inviolability to various individuals, property and entities acting for the State, all for the purpose of the proper and effective conduct of international relations, and in the name of equality and non-interference. As the Court stated in the *Arrest Warrant* Judgment (para 53):

> "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States… He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States."

5.54 This link between the effective performance of functions and communication with government applies with equal force to legal advisers to governments. That communication requires the same immunity from jurisdiction as that of a State official.

5.55 The inviolability and immunity of State property and papers is explicitly set forth in international conventions in particular fields, such as diplomatic and consular law, the law of special missions, and the law of international organisations. Article 24 of the Vienna Convention on Diplomatic Relations 1963 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 1963[129], and the New York Convention on Special Missions 1969[130] make similar provision; the former contains in its Article 1(k) a broad definition of consular archives, which may indicate the scope of official archives more generally[131].

5.56 Similar provisions are found in treaties concerning international organisations and headquarters agreements with such organisations. Article II of the Convention on the Privileges and Immunities of the United Nations 1946 grants the organisation wide immunity

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[129] Vienna Convention on Consular Relations 1963, 596 *UNTS* 261, entered into force 19 March 1967, Article 33 (https://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf).

[130] Convention on Special Missions 1969, 1400 *UNTS* 231, entered into force 21 June 1985, Article 26 (http://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf).

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

for its property and assets, the inviolability of its premises and archives, much like the rights accorded in the Vienna Convention on Diplomatic Relations 1963[132]. The representatives of member States are granted personal and functional immunities, and "[s]uch other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy", and their papers and documents are inviolable[133]. High ranking UN officials and their families enjoy the same privileges and immunities as diplomats and other UN officials enjoy functional immunity[134].

5.57 The Convention on the Privileges and Immunities of the Specialised Agencies 1947[135] grants these agencies immunity for their property and assets, and also provides for the inviolability of their premises and archives. Officials of specialised agencies are granted functional immunity and the executive head of each specialised agency and his or her family are too granted the privileges and immunities allotted to diplomats[136]. The essentially functional approach to State immunity, designed to secure the conduct of international diplomacy, is evident.

5.58 In the hearing on provisional measures, Australia criticised Timor-Leste's argument as "render[ing] superfluous the range of conventions currently in place" and taking "a quantum leap in the expansion of public international law"[137]. However, it is of course common for a treaty in force (or a treaty not in force or draft articles) or some of its provisions to reflect customary law in a specific field[138]. Similarly, a series of treaties with similar substance may reflect a broader principle of customary international law. In the present case, a multitude of conventions reflect a customary rule of international law that grants immunity and inviolability to State documents and archives.

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[132] 500 *UNTS* 95, adopted by the General Assembly on 13 February 1946, entered into force 19 March 1967. See also UN Charter, Article 105 (https://treaties.un.org/doc/publication/ctc/uncharter.pdf).

[133] Convention on the Privileges and Immunities of the United Nations 1946, 1 *UNTS* 13, entered into force 17 September 1946, Article IV (https://www.un.org/en/ethics/pdf/convention.pdf)

[134] *Ibid.*, at Article V.

[135] Convention on the Privileges and Immunities of the Specialised Agencies 1947, 33 *UNTS* 261, adopted on 21 November 1947, entered into force 2 December 1948 (https://treaties.un.org/doc/Treaties/1949/08/19490816%2010-43%20AM/Ch_III_2p.pdf).

[136] *Ibid.*, at Article V.

[137] CR 2014/2, p, 12, para. 6 (Gleeson).

[138] Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331, entered into force 27 January 1980 (https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf). See also *North Sea Continental Shelf Cases*, p. 39, para. 62 : "According to this Court, a treaty provision may embody accepted customary law or crystalize an emerging customary rule. In addition, a treaty provision may serve as a basis for later development of a customary rule". As this Court stated in the *North Sea Continental Shelf Cases*, a treaty article, while "conventional or contractual in its origin" can later in time become a customary rule "so as to have become binding even for countries which have never, and do not, become Parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed" (p. 42, para. 71) (http://www.icj-cij.org/docket/files/52/5561.pdf).

5.59 The customary rule of international law that grants immunity and inviolability to State documents and archives is reflected in the practice of States. For example, in her commentary on Article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations 1963, 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."[139] 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."[140] In her commentary on Article 30, Denza emphasises the protection given to diplomatic papers:

> "The justification for the inviolability of papers and correspondence is that it removes from the receiving State the temptation to search papers which may be partly official and partly private on the pretext that the search was directed to the discovery of private or personal papers or correspondence of a diplomatic agent … The effect [of Article 30] is that even where a diplomat does not have immunity from the jurisdiction of the courts – for example, in regard to a commercial activity which he has been exercising in the receiving State outside his official functions – it will not be possible to compel production of relevant papers in his possession which be crucial to the success of the case."[141]

5.60 Denza also refers to a case involving government papers in the hands of contractors[142]. In 2002, a US 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 submitted a Memorandum[143] in which he 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:

> "[w]e would look seriously at asserting a claim of 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."[144]

He continued,

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[139] E. Denza, *Diplomatic Law* (3rd ed., Oxford University Press 2008), p. 226.

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid*., at pp. 197-199.

[143] Vienna Convention on Diplomatic Relations: Saudi Arabian Embassy Documents in S.J. Cummins and D.P. Stewart (eds.), *Digest of United States Practice in International Law 2002* (International Law Institute), pp. 567-570.

[144] *Ibid*., at p. 569.

> "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."[145]

5.61 Even though the inquiry primarily concerned Embassy papers, the underlying issue raised and the position taken by the State Department would seem to be applicable to government papers generally in the hands of contractors.

5.62 The learned authors of the ninth edition of *Oppenheim's International Law*, 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 invoilable"[146].

5.63 A recent example of such a position taken by a State occurred in November 2013, when Spanish officials opened bags containing British Government papers (apparently, non-diplomatic correspondence) that were transiting Spain between Gibraltar and London. In a Written Statement in Parliament, on 27 November 2013, 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"[147] (emphasis added).

5.64 Notably, the Minister spoke not of a violation of any provisions of the Vienna Convention on Diplomatic Relations, but rather of *the principles* embodied therein and *the principle* of State immunity. Whether as a customary rule or a general principle of law, this supports the position that State documents and its other property are afforded immunity and are inviolable under general international law.

5.65 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.

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[145] *Ibid*., at p. 570.

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

[147] Foreign and Commonwealth Office, Written Statement, 27 November 2013 (**Annex 21**).

5.66 In conclusion, Australia, by inspecting, seizing and retaining the property of Timor-Leste, has violated the inviolability of its property and the immunity owed to Timor-Leste and its property under international law.

CHAPTER VI: TIMOR-LESTE'S RIGHT TO CONDUCT THE ARBITRATION PROCEEDINGS AND NEGOTIATIONS WITHOUT INTERFERENCE

6.1 This Chapter considers the violation of Timor-Leste's rights to conduct negotiations and arbitration proceedings without interference by Australia, including the rights of confidentiality of and non-interference with its communications with its legal advisers. **Section A** addresses the principle of non-interference with communications with legal advisers (legal professional privilege) under international law. **Section B** addresses the principle of good faith in the conduct of international negotiations and proceedings. **Section C** applies the principles of legal professional privilege and good faith to the seizure and detention by Australia at issue in these proceedings.

A. The principle of non-interference with communications with legal advisers (legal professional privilege) under international law

6.2 The right for a State to conduct arbitral and judicial proceedings or negotiations without interference by another, including the right of confidentiality of and non-interference in its communications with its legal advisers, forms part of international law. What is often termed 'legal professional privilege' in domestic legal systems may be seen as a customary or general principle of law within the meaning of Article 38(1)(c) of the Court's Statute. It need hardly be said that most States recognise some form of legal professional privilege to protect the professional secrecy of confidential communications between legal advisers and their clients[148].

6.3 For convenience, this Chapter refers to 'legal professional privilege' or simply 'privilege'; but the principle could also be described as professional secrecy, or the right of confidentiality and non-interference with the communications between States and their legal advisers.

6.4 The principle of legal professional privilege is fundamental to the international rule of law, as it enables States to obtain legal advice and assistance freely, without fear of outside interference, *inter alia* so as to be able to participate in dispute settlement processes, including

[148] Three non-exhaustive reviews of privilege by international law firms revealed that privilege, professional secrecy or legal confidentiality in one form or another, is recognised in all of the jurisdictions studied: see DLA Piper, *Legal Privilege Handbook 2013* (**Annex 22**), Linklaters, *Privileged*, 2009 (**Annex 23**) and Norton Rose, *Disclosure and Privilege in Asia Pacific*, 2010 (**Annex 24**). The following forty-five legal systems were reviewed in these studies: Australia, Austria, Belgium, Brazil, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, the European Union/ECJ, Finland, France, Germany, Greece, Hong Kong, Hungary, Indonesia, Ireland, Italy, Japan, Lithuania, Luxembourg, Malta, Mexico, The Netherlands, New Zealand, Norway, People's Republic of China, Poland, Portugal, Romania, Russia, Saudi Arabia, Singapore, South Africa, South Korea, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, UK, USA.

those specified in Article 33 of the UN Charter (which include those more particularly at issue in this case – negotiation, arbitration and judicial settlement). It thus underlies the principle of the pacific settlement of international disputes, enshrined in Article 2.3 of the United Nations Charter and declared in the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[149] to be one of the principles of international law.

6.5 In the particular case of arbitration or judicial settlement the principle of legal privilege is essential to the sound administration of justice, and is an outworking of the principle of the sovereign equality of States in this context[150]. It upholds the integrity of international judicial proceedings and allows parties to litigation to prepare without hindrance or the fear of disclosure of their internal deliberations. It appears that this is common ground between Timor-Leste and Australia[151].

6.6 That legal professional privilege is a general principle of law has been recognised by international tribunals. In the *Bank for International Settlements* case, the Tribunal stated that:

> "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."[152]

6.7 The Tribunal in *Libananco v Turkey*, an investment treaty case, was faced with allegations of interception, by the Respondent Government, of communications between the Claimant and its

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[149] UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970 (http://www.un-documents.net/a25r2625.htm).

[150] The Court stated at para. 27 of its Order dated 3 March 2014 in respect of Timor-Leste's request for the indication of Provisional Measures that: "The principal claim of Timor-Leste is that a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means" (emphasis added).

In the *Norwegian Shipowners' Claims (Norway v USA),* a PCA tribunal stated in 1922 that "International law and justice are based upon the principle of equality between States", *UN Reports of International Arbitral Awards*, Vol I, pp. 307-346, at p.338 (http://legal.un.org/riaa/cases/vol_I/307-346.pdf). See also A. McNair, Equality in International Law, (1927-8) 26 *Mich. L. Rev* 131, particularly at para. 136.

[151] CR 2014/4, p. 23, para. 4 (Gleeson).

[152] *Dr Horst Reineccius et al v Bank for International Settlements* (PCA), Procedural Order No. 6, 11 June 2002, p. 10 (http://www.pca-cpa.org/showfile.asp?fil_id=405); cited with approval in *Vito G. Gallo v Government of Canada* (PCA-NAFTA), Procedural Order No. 3, 8 April 2009, para. 49 (http://www.naftalaw.org/Disputes/Canada/Gallo/Gallo-Canada-Order3.pdf).

legal advisers, allegations which – in its own words – "the Tribunal was bound to treat with the utmost seriousness."[153]

6.8 In the Decision on Preliminary Issues in *Libananco*, 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)[154]. One would expect no less in circumstances where legal professional privilege is so universally accepted. Indeed the recognition and protection of the principle of legal professional privilege may be required by the domestic professional bodies supervising the legal advisers of parties to international litigation[155].

6.9 In *Libananco*, the 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; and no doubt others as well."[156]

6.10 The Tribunal 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)."[157]

6.11 That legal professional privilege is a general principle of law is further supported by the jurisprudence of the European Court of Justice, in cases dealing with limits imposed on the powers of the European Commission to conduct certain investigations because of the confidentiality of written communications between lawyers and their clients[158]. The European Court of Justice has recognised the existence of legal privilege for such communications, when certain conditions are met[159]. In doing so, the Court stated that the applicable law:

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[153] *Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case no. ARB/06/8,* Decision on Preliminary Issues, 23 June 2008, para. 74 (http://italaw.com/documents/Libanco-Decision.pdf).

[154] *Ibid*., at para. 75.

[155] See generally A. Savarian, *Professional Ethics at the International Bar* (2013).

[156] *Libananco Holdings Co. Limited v. Republic of Turkey*, para. 78 (http://italaw.com/documents/Libanco-Decision.pdf).

[157] *Ibid*., at para. 78.

[158] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, Judgment of the Court of 18 May 1982 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CJ0155&from=EN); 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 (http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0550&lang1=en&type=TXT&ancre=).

[159] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, Judgment of the Court of 18 May 1982, para. 18 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CJ0155&from=EN).

"must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognised in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it".[160]

6.12 The European Court then noted that, while the scope of this privilege may vary between the Member States,

> "there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client ….".[161]

6.13 The foundational nature of the principle of legal professional privilege for the rule of law is well demonstrated by numerous dicta of the European Court of Human Rights. Examples include:

a. *Niemietz v Germany* No. 13710/88 (1993) 16 EHRR 97 at para. 37, in relation to the seizure of documents at the home offices of a lawyer:

> "an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention."

b. *Campbell v United Kingdom* No. 13590/88 (15 EHRR 137) at para. 46:

> "It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged."

c. *Elci and Others v Turkey* No. 23145/93 (Judgment, 13 November 2003) at para. 669:

> "The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court."

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[160] *Ibid.,* at para. 18.

d. *Istratii and others v Moldova* No. 8721/05 (Judgment, 27 March 2007) at para. 89:

> "One of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers."

e. In *Iliya Stefanov v Bulgaria* No. 65755/01 (Judgment, 22 May 2008), in assessing the search and seizure of a lawyer's office, the Court observed in relation to the seizure of electronic hardware containing privileged documents the high likelihood of a violation of professional secrecy, at para. 42:

> "The Court further observes that the warrant's excessive breadth was reflected in the way in which it was executed. While there is nothing in the facts to suggest that papers covered by legal professional privilege were touched upon during the search, it should be noted that the police removed the applicant's entire computer, including its peripherals, as well as all floppy disks which they found in his office … . Seeing that the computer was evidently being used by the applicant for his work, it is natural to suppose that its hard drive, as well as the floppy disks, contained material which was covered by legal professional privilege. It is true that later the expert used keywords to sift through the data they contained, which somewhat limited the intrusion. However, this happened several days after the search, after the computer and the floppy disks had been indiscriminately removed from the applicant's office …, whereas no safeguards existed to ensure that during the intervening period the entire contents of the hard drive and the floppy disks were not inspected or copied. This leads the Court to conclude that the search impinged on the applicant's professional secrecy to an extent that was disproportionate in the circumstances."

f. Referring to the decisions in *Niemietz* and *Elci,* the Court in *Golovan v Ukraine* No. 41716/0-6 (Judgment, 5 July 2012) declared at paras. 62-63:

> "[62]. … Therefore the searching of lawyers' premises should be subject to particularly strict scrutiny. Appropriate safeguards, such as the presence and effective participation of an independent observer, must always be made available in the course of the search of a lawyer's office to ensure that material subject to legal professional privilege is not removed (see *André and Other,* …, §§ 43 and 44, 24 July 2008, and *Aleksanyan v. Russia*, no. 46468/06, § 214, 22 December 2008).
>
> [63]. The Court has held that such an observer should have requisite legal qualification in order to effectively participate in the procedure (see, for example, *Iliya Stefanov v. Bulgaria*, …, § 43, and *Kolesnichenko v. Russia*, no. 19856/04, § 34, 9 April 2009). Moreover, he should be also bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of the third persons. Lastly, the observer should be vested with requisite powers to be able to prevent, in the course of the sifting procedure,

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[161] *Ibid.,* at para. 21.

any possible interference with the lawyer's professional secrecy (see, for example, *Wieser and Bicos Beteiligungen GmbH*, …, § 62)."

g. A further example of safeguards is found in *Michaud v France* No. 12323/11 (Judgment, 6 December 2012), which concerned the requirement of French lawyers to report suspicions of money laundering and terrorist financing through the independent 'filter' of the President of the Bar Council of the *Conseil d'Etat* and the Court of Cassation, or to the chairman of the Bar of which the lawyer is a member[162].

6.14 These cases demonstrate that in relation to the search and seizure at the offices of legal representatives, as a matter of human rights law, precise procedural safeguards are required to ensure that the principle of legal professional privilege is properly upheld. Timor-Leste submits that procedural safeguards must also be adopted as a matter of international law more generally in order to preserve privilege. At a minimum such privilege is to be protected by ensuring that an independent and legally trained observer be present to ensure that privileged items are properly secured. No State should be permitted unilaterally to interfere with another State's communications with its legal advisors.

B. The principle of good faith in the conduct of international negotiations and proceedings

6.15 The fact that documents are protected as legal correspondence also requires that privilege be upheld, in accordance with the principle of good faith and the related concept of the prohibition of abuse of procedure that applies in respect of any actual or prospective international litigation or arbitration[163].

6.16 The principle of good faith is fundamental in international legal proceedings. The principle is well established in international case-law. It was spelled out with particular clarity by the ICJ in the *Nuclear Tests* cases (1974):

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and

[162] *Michaud v France*, App. No. 12323/11, Judgment, 6 December 2012 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115377).

[163] R. Kolb, 'General Principles of Procedural Law' in Zimmerman et al (eds.), *The Statute of the International Court of Justice. A Commentary* (2nd ed., Oxford University Press, 2012), pp. 903-906.

> confidence are inherent in international co-operation, in particular in an age where this cooperation in many fields is becoming increasingly essential."[164]

6.17 The Tribunal in *Methanex Corporation v United States* referred to this principle in the context of international legal proceedings as follows:

> "In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of "equal treatment" and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules."[165]

6.18 The tribunal in *EDF (Services) Ltd v Romania*, in a procedural order, also recognised the applicability of "the principles of good faith and fair dealing required in international arbitration."[166]

6.19 The principle of good faith has been reaffirmed and analysed many times in the writings of jurists[167]. Thus, *Oppenheim's International Law*, as edited by Sir Robert Jennings and Sir Arthur Watts, states:

> "A principle which has… been invoked by the Court, and is of overriding importance is that of good faith. It is incorporated in Article 2(2) of the UN Charter… The significance of this principle touches every aspect of international law."[168]

6.20 Professor Schwarzenberger included good faith amongst his list of 'seven fundamental principles' of international law[169].

6.21 The specific requirements of good faith were addressed in the Encyclopaedia of Public International Law:

> "The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to

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[164] *Nuclear Tests Case (Australia v France) (Judgment),* [1974] ICJ Reports 253, p. 268, para. 46 (http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=78&case=58&code=af&p3=4).

[165] *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, 3 August 2005, Part II, Chapter I at para. 54 (http://italaw.com/sites/default/files/case-documents/ita0529.pdf).

[166] *EDF (Services) Ltd v Romania* (ICSID Case No ARB/05/13), Procedural Order No 3 of 29 August 2008, at para. 38 (http://www.italaw.com/sites/default/files/case-documents/ita0264.pdf).

[167] See e.g., J.F. O'Connor, *Good Faith in International Law* (Dartmouth, Aldershot, 1991); E. Zoller, *La bonne foi en droit international public* (Revue Générale de Droit International Public, Publications Nouvelle Série, 1977); H. Lauterpacht, *The Development of International Law by the International Court of Justice* (London, Stevens, 1958), p.163; R. Kolb, Principles as Sources of International Law (with Special Reference to Good Faith) (2006) 53 *NILR* 1; M.N. Shaw, *International Law* (Cambridge, Cambridge University, 6th ed, 2008), p.103; M. Fitzmaurice in M.D. Evans, *International Law* (Oxford, Oxford University Press, 3rd ed, 2010), p.181; J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, Oxford University Press, 8th ed, 2012), p. 37. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1953, 2006), Part II.

[168] R. Jennings and A. Watts, *Oppenheim's International Law,* Vol I (9th ed., 1992), p.38.

[169] G. Schwarzenberger and E.D. Brown, *A Manual of International Law* (Milton, Professional Books, 6th ed, 1976), p.35-36.

refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them."[170]

6.22 In a particularly incisive analysis of the concept, the late Professor Virally wrote:

> "In many respects, it [sc., good faith] constitutes the postulate on which this order rests in its entirety. The effects attached to the expressed will, and more broadly, to the behaviour of international actors are conceivable only because it is assumed that they act in good faith and that what is apparent is in conformity with their real will. If this postulate is not taken for granted the whole fabric of international law will collapse."[171]

6.23 Later in the same article, Virally identified a function of good faith, namely, that:

> "I think that we cannot escape recognising that good faith is really a principle of international law, and that all actors in the international legal order are subjected to it and must endure its consequences, since good faith will serve to determine both the legal effects of their declarations and behaviour and the extent of their duties"[172]

and

> "Furthermore, like many general principles of law, good faith is often hidden by the more precise rules it has generated (e.g. *pacta sunt servanda*), so that it becomes no longer necessary to rely upon it expressly for ordinary practical purposes. But even in such instances, general principles retain their full value as the *ratio legis* to which one may profitably turn in difficult cases. Nobody can ignore them without running the risk of not understanding the real meaning of the rules. Nobody can ignore that good faith forms part of a foundation of the whole international structure without the risk of reducing international law to a set of hollow legal formulas."[173]

C. Application of the principles of legal professional privilege and good faith in international law to the seizure and detention by Australia

6.24 The items that were seized by Australia on 3 December 2013 were given two categories of 'Item No' on the Property Seizure Record. First, electronic computer equipment seized was labelled 001-003. Secondly, documents seized were given designations LPP001 – LPP015. (It may be that the designation 'LPP' is an abbreviation for 'Legal Professional Privilege'.)

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[170] A. D'Amato, 'Good Faith' in *Encyclopaedia of Public International Law* (North Holland, Elsevier, Vol. 2, 1995), p. 599.

[171] M. Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77(1) *American Journal of International Law* 130, at p. 132.

[172] *Ibid*., at p. 133.

[173] *Ibid*., at p. 134.

6.25 The descriptions given to these documents confirm that they are subject to legal professional privilege. For example, LPP005 is described as 'Document titled "Correspondence to Lowe QC re: Timor Sea Maritime boundary issues (sealed in yellow envelope) and LPP007 is described as 'Document titled "Correspondence to Professor Lowe re Australia - East Timor treaty 2 pages (sealed in yellow envelope)'. Each of the seized items has been considered individually in Chapter IV above[174].

6.26 The hardware containing electronic documents that was seized from the legal offices of Mr Bernard Collaery is plainly likely to have contained privileged material of numerous clients, including that of Timor-Leste. The considerations of the European Court of Human Rights in *Iliya Stefanov v Bulgaria* at para. 42 are pertinent:

> "Seeing that the computer was evidently being used by the applicant for his work, it is natural to suppose that its hard drive, as well as the floppy disks, contained material which was covered by legal professional privilege"[175].

6.27 Timor-Leste will not speculate as to precisely what documents were read, studied, or otherwise scrutinised during the course of the raid, which lasted several hours. Moreover, Timor-Leste is not able to know what search criteria were applied in relation to any items, either in electronic or paper form, that were subject to the search. Nor does Timor-Leste know what, if any, notes were taken during the raid. It may be that there were various other documents, which were not actually seized but were copied or made the subject of notes, in respect of which Timor-Leste's privilege was violated.

6.28 It is noteworthy that the warrant dated 2 December 2013[176], signed by the Attorney-General Senator George Brandis SC, does not specify any special safeguards or procedures taken in relation to protecting Timor-Leste's right to privilege. Nor has there been any subsequent indication of special procedures that were taken by ASIO in conducting the search and seizures, in order to protect Timor-Leste's privilege in the documents and data searched and taken.

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[174] Paragraph 4.23 of this Memorial.

[175] *Iliya Stefanov v Bulgaria* App. No. 65755/01, Judgment, 22 May 2008 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86449).

[176] Australia's WO, Annex 31.

D. Conclusions

6.29 One of Timor-Leste's principal complaints in these proceedings is that Australia has violated its international law rights to legal professional privilege and/or the principle of good faith in the conduct of international negotiations or proceedings. By conducting the raid on Mr Collaery's offices, and inspecting, searching, seizing and retaining highly confidential papers related to Timor-Leste's maritime delimitation negotiations with Australia, its legal correspondence and legal papers relating to, but not limited to, the TST Arbitration, Australia has plainly interfered with these rights.

FINAL SUBMISSIONS

For the reasons set out in the present Memorial, Timor-Leste requests the Court to adjudge and declare:

1. That the inspection and seizure on 3 December 2013 and subsequent detention by Australia of documents and data violated Timor-Leste's right under international law to inviolability and immunity in respect of the documents and data;

2. That the said inspection, seizure and detention also violated Timor-Leste's right under international law to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers;

3. That Australia immediately return the documents and data to Timor-Leste, and destroy beyond recovery every copy thereof that is in Australia's possession or control, and take the necessary steps to ensure the destruction of every copy thereof that Australia has directly or indirectly passed to a third person or third State;

4. That Australia afford satisfaction to Timor-Leste in respect of the above-mentioned violations of its rights in the form of an apology; and

5. That Australia reimburse all Timor-Leste's reasonable costs incurred in the conduct of the present proceedings.

Joaquim A.M.L. Da Fonseca

(Agent of the Democratic Republic of Timor-Leste)

28 April 2014

FIGURE 1: TIMOR SEA REGIONAL GEOGRAPHY

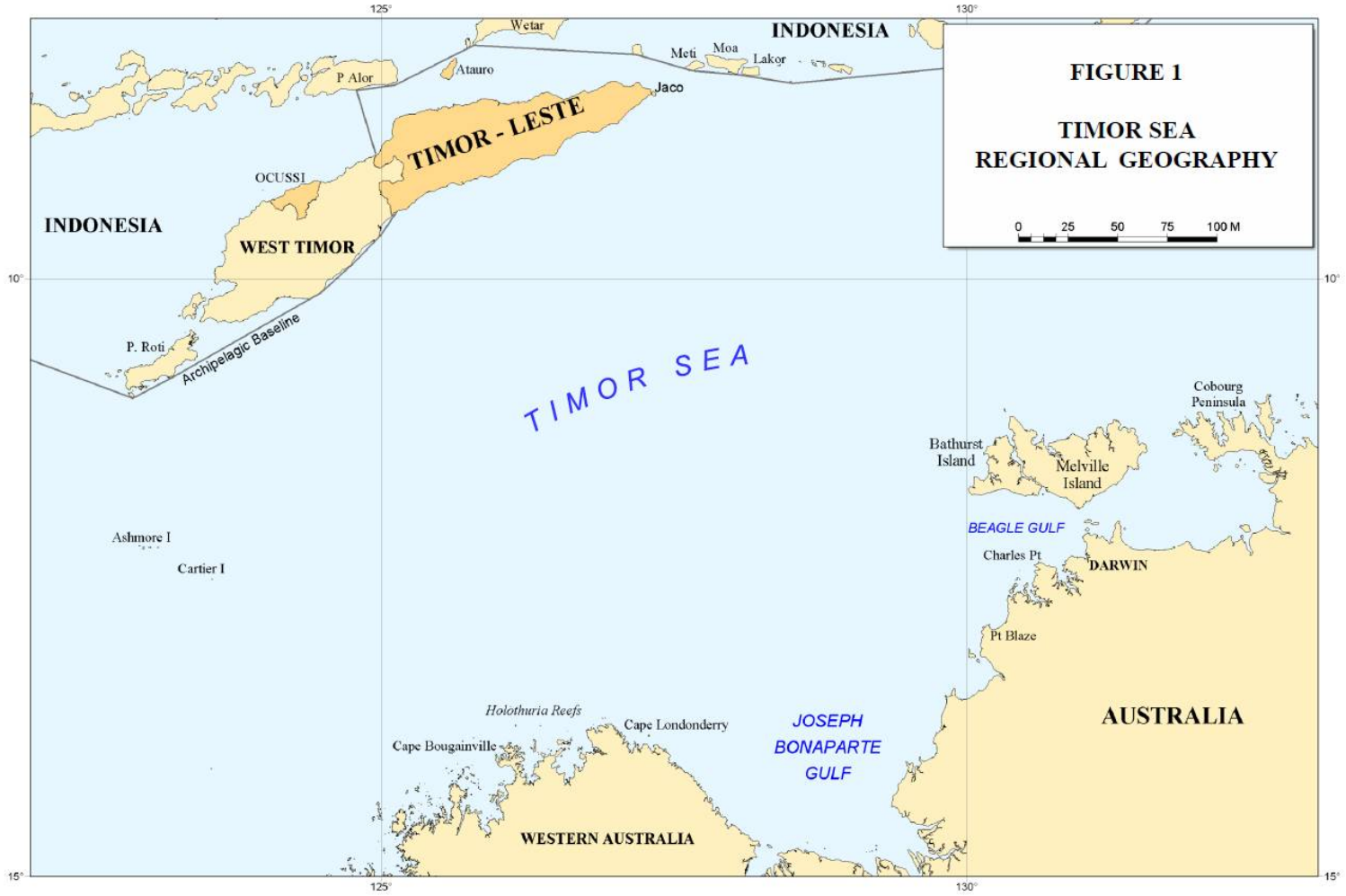


FIGURE 2: 1989 TIMOR GAP TREATY - ZONE OF COOPERATION

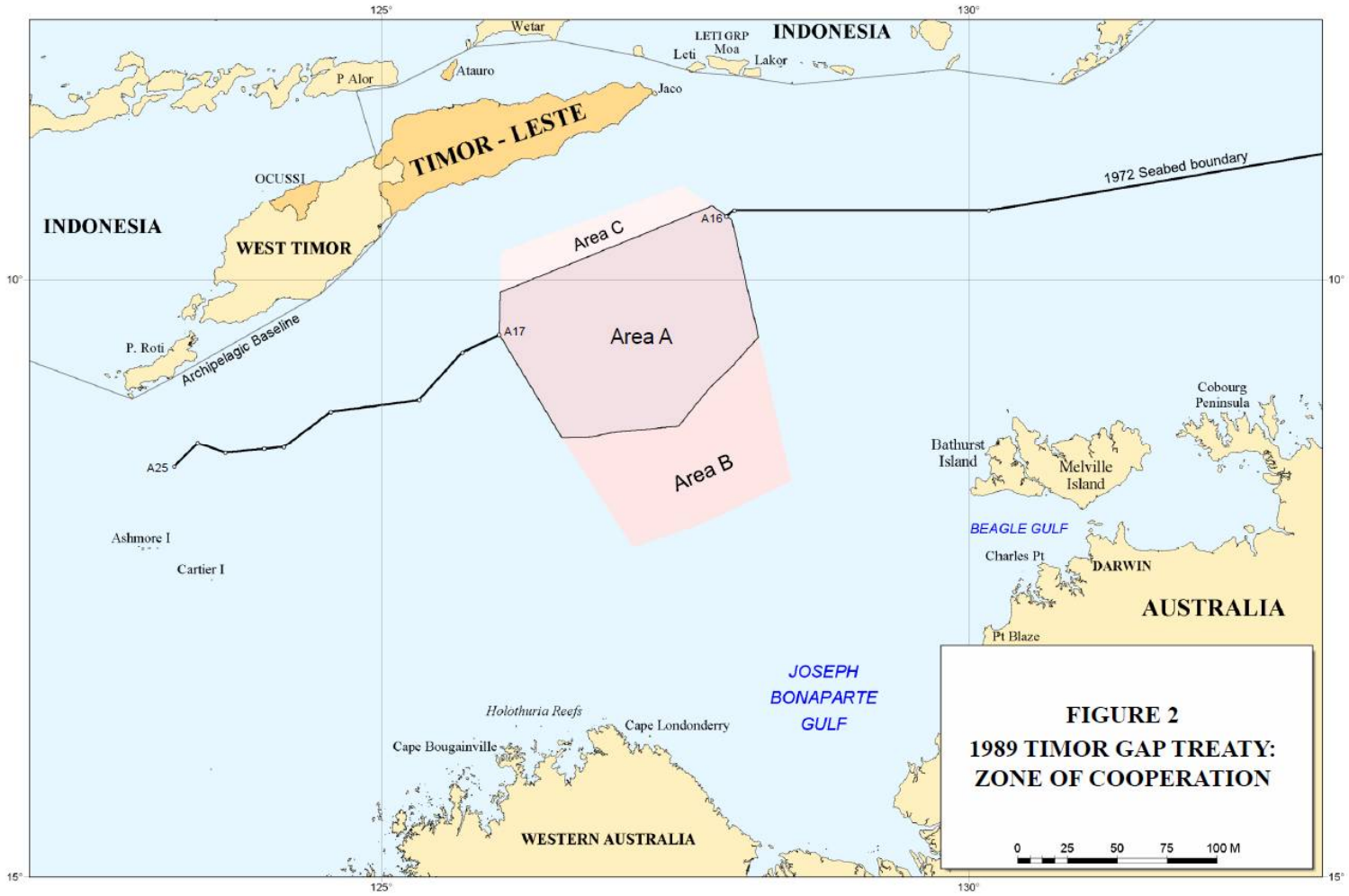


FIGURE 3: 2002 TIMOR SEA TREATY - JOINT PETROLEUM DEVELOPMENT AREA

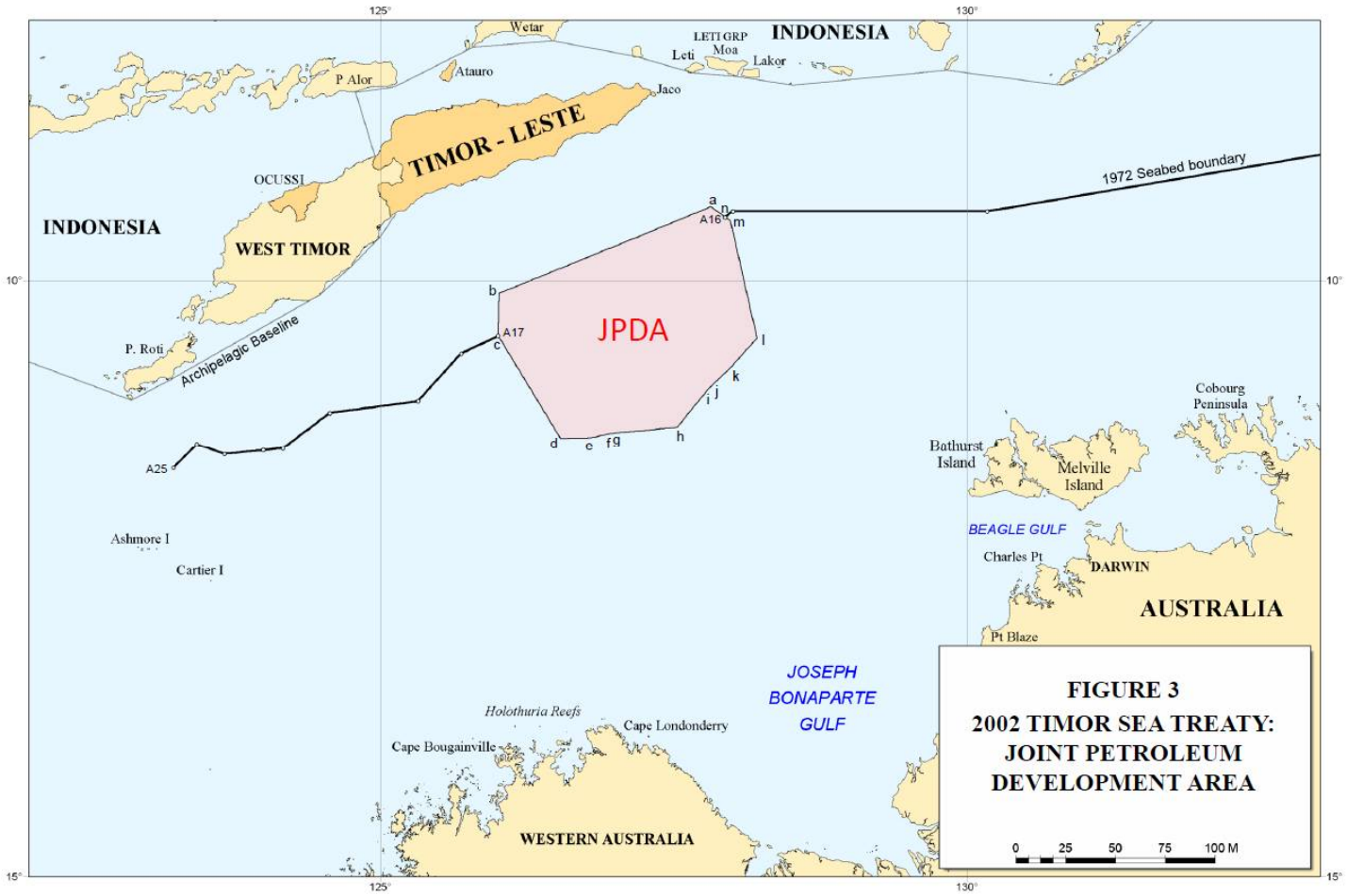


FIGURE 4: PETROLEUM FIELDS IN AND AROUND JPDA

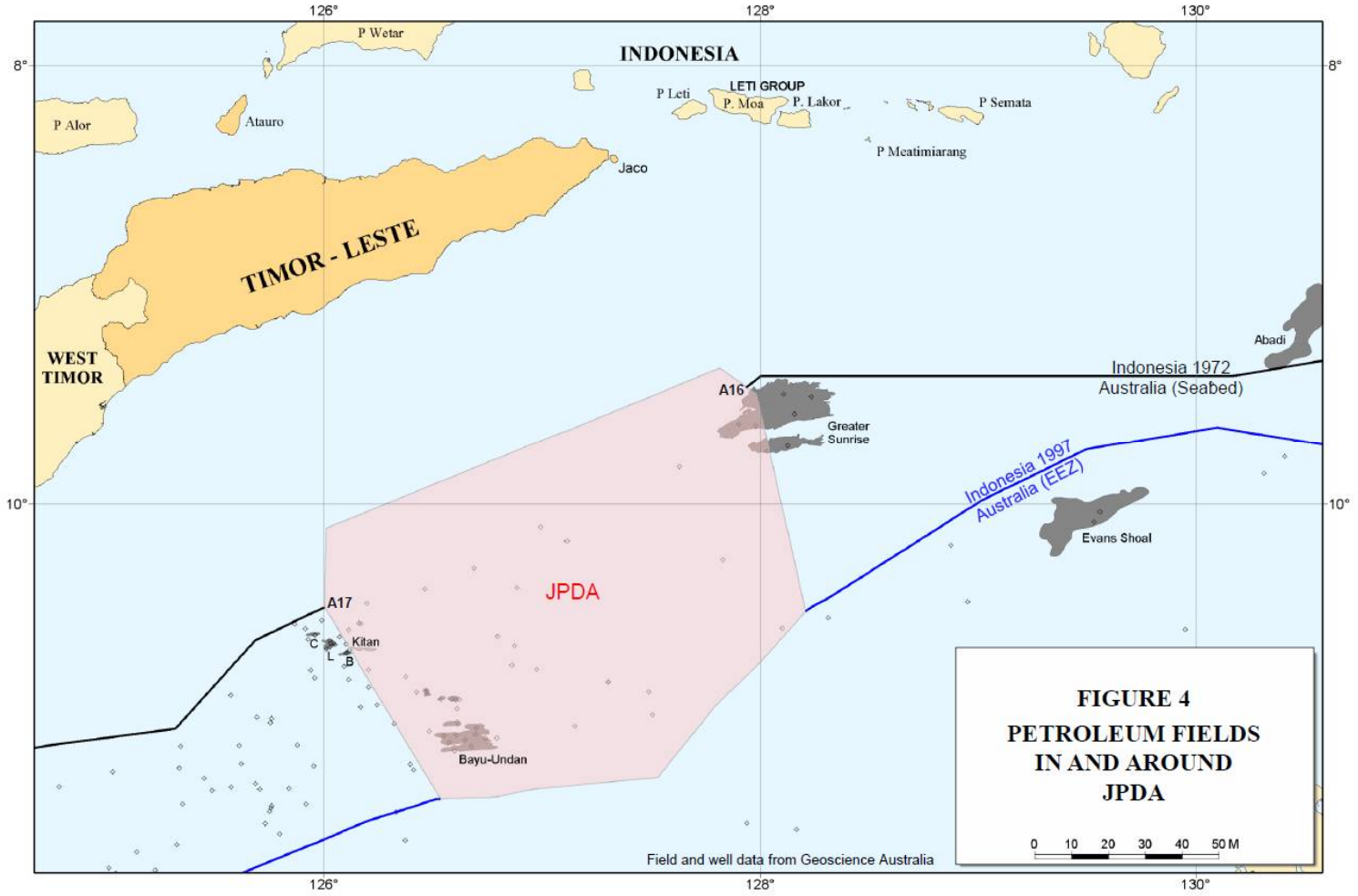
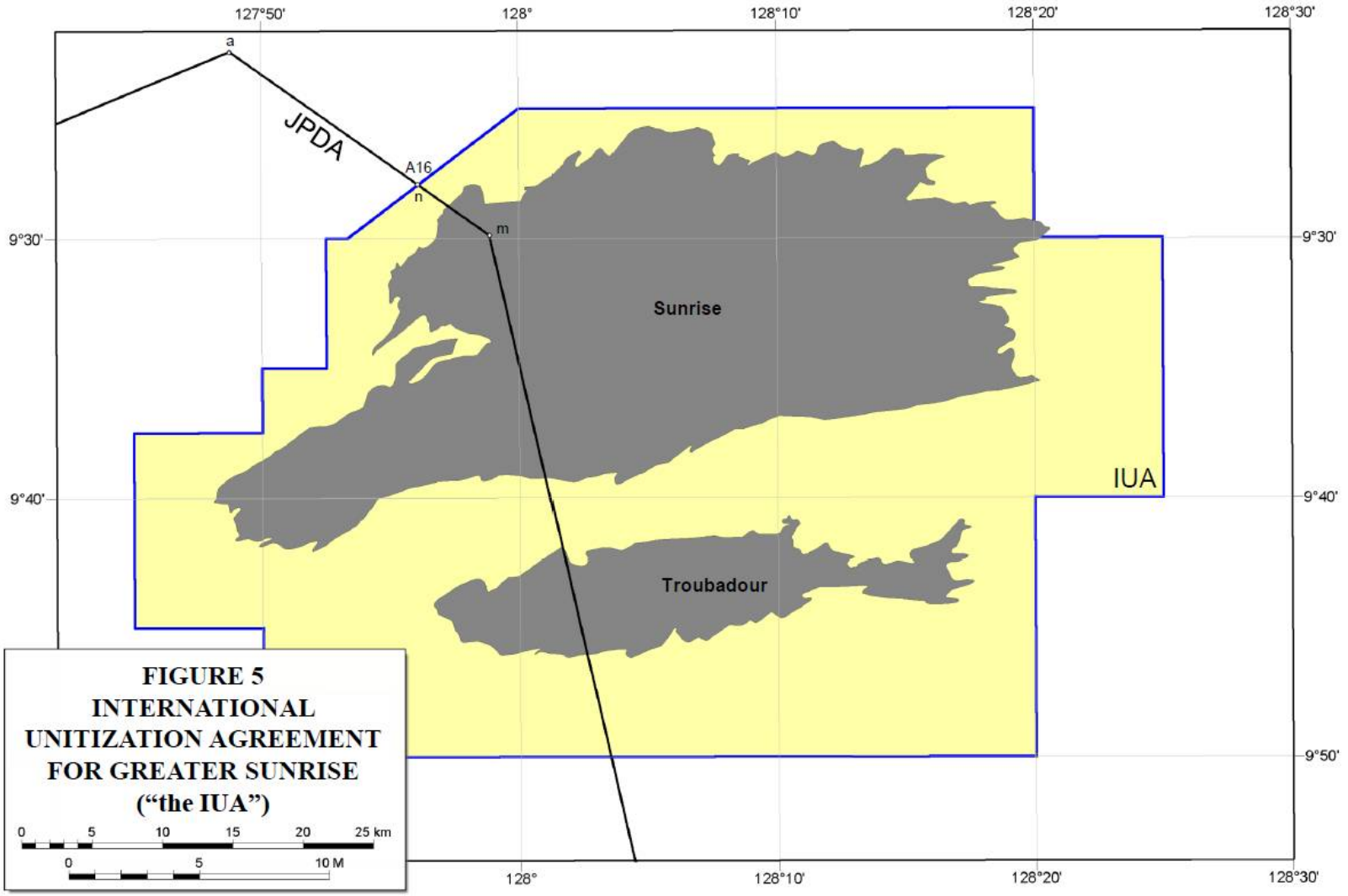


FIGURE 5: INTERNATIONAL UNITIZATION AGREEMENT FOR GREATER SUNRISE ("THE IUA")



LIST OF ANNEXES

Annex No.	Document description	Date
1.	Expert report of Gaffney, Cline & Associates submitted in the TST Arbitration	18 February 2014
2.	Commonwealth of Australia, Parliamentary Debates, The Senate, Petroleum (Timor Sea Treaty) Bill 2003, Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003, Passenger Movement Charge (Timor Sea Treaty) Amendment Bill 2003, Second Reading	6 March 2003
3.	P. Cleary, Shakedown: Australia's Grab for Timor Oil, pp. 84-87	2007
4.	ABC Online, 'Aust on Political Collision Course with East Timor'	19 April 2004
5.	Timor-Leste's Statement of Claim in the TST Arbitration	18 February 2014
6.	Application filed by Australia in the TST Arbitration for an Order to Disallow the Giving of Potential Evidence	31 January 2014
7.	Redacted copy of the Consultancy Agreement between the Government of Timor-Lester and Bernard Collaery & Associates, Trading as Collaery Lawyers	17 September 2012
8.	Letter from B. Collaery to I. Carnell	2 April 2008
9.	Letter from B. Collaery to I. Carnell	1 May 2008
10.	German Introductory Act to the Civil Code, Article 43	Undated
11.	Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2) [2008] WASC 10	1 February 2008
12.	Breen v Williams [1994] 35 NSWLR 522	7 November and 23 December 1994
13.	Chantrey Martin (A Firm) v Martin [1953] 2 QB 286, pp. 292-293	3 July 1953

Annex No.	Document description	Date
14.	Wentworth v De Montfort [1988] 15 NSWLR 348, pp.353, 357-361	17 November and 16 December 1988
15.	Legal Profession (Solicitors) Rules 2007 (ACT), Rule 6	2007
16.	Australian Foreign States Immunities Act 1985	1985
17.	US Foreign Sovereign Immunity Act 1976	1976
18.	Israel Foreign States Immunity Law 5769-2008	January 2009
19.	UK State Immunity Act 1978	1978
20.	Indian Code of Civil Procedure 1908, Section 86	1908
21.	Foreign and Commonwealth Office, Written Statement of D. Lidington	27 November 2013
22.	DLA Piper, Legal Privilege Handbook 2013	2013
23.	Linklaters, Privileged, Privilege review 2009	2009
24.	Norton Rose, Disclosure and Privilege in Asia Pacific	2010