

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(TIMOR-LESTE *v.* AUSTRALIA)

REQUEST FOR THE MODIFICATION
OF THE ORDER INDICATING PROVISIONAL MEASURES
OF 3 MARCH 2014

ORDER OF 22 APRIL 2015

2015

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

QUESTIONS CONCERNANT LA SAISIE
ET LA DÉTENTION
DE CERTAINS DOCUMENTS ET DONNÉES

(TIMOR-LESTE *c.* AUSTRALIE)

DEMANDE TENDANT À LA MODIFICATION
DE L'ORDONNANCE EN INDICATION DE MESURES CONSERVATOIRES
DU 3 MARS 2014

ORDONNANCE DU 22 APRIL 2015

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OF 3 MARCH 2014

ORDER

Present: President ABRAHAM; Vice-President YUSUF; Judges OWADA, TOMKA, BENNOUNA, CAÑADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; *Judges ad hoc* CALLINAN, COT; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 17 December 2013, the Democratic Republic of Timor-Leste (hereinafter “Timor-Leste”) instituted proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013, and subsequent detention, by

“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”. In its Application, Timor-Leste claims, in particular, that these items were taken from the business premises of a legal adviser to Timor-Leste (Collaery Lawyers) in Narrabundah, in the Australian Capital Territory, allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. It states that the seized material includes, *inter alia*, documents, data and correspondence between Timor-Leste and its legal advisers relating to an *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia.

2. On 17 December 2013, Timor-Leste, referring to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court, also submitted a request for the indication of provisional measures.

3. After hearing the Parties, the Court, by an Order of 3 March 2014, 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;

.....
 (2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;

.....
 (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.” (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 161, para. 55.)

4. By an Order of 28 January 2014, the Court fixed 28 April 2014 and 28 July 2014 as the respective time-limits for the filing in the case of a Memorial by Timor-Leste and a Counter-Memorial by Australia. The Memorial and Counter-Memorial were filed within the time-limits thus fixed.

5. By letters dated 17 June 2014, the Parties were informed that the oral proceedings would open on 17 September 2014.

6. By a joint letter dated 1 September 2014, the Agents of Timor-Leste and Australia requested the Court “to adjourn the hearing set to com-

mence on 17 September 2014, in order to enable the Parties to seek an amicable settlement”. The Agents also raised the possibility that the Parties might jointly seek a variation of the Order indicating provisional measures of 3 March 2014. By letters dated 3 September 2014, the Registrar informed the Parties that the Court had decided, pursuant to Article 54 of the Rules of Court, to grant their joint request to postpone the oral proceedings.

7. By a letter dated 25 March 2015, Australia indicated that it “wished to return the materials removed from the premises of Collaery Lawyers on 3 December 2013, which are the subject of the present proceedings” and are listed in the Schedule to the above letter. Australia accordingly requested modification of the Order of 3 March 2014, pursuant to Article 76 of the Rules of Court. The Registrar communicated a copy of that request forthwith to the Government of Timor-Leste.

8. By letters dated 25 March 2015, the Registrar informed the Parties that the time-limit within which Timor-Leste could submit written observations on Australia’s request had been fixed as 10 April 2015. Timor-Leste filed such observations on 27 March 2015.

* * *

9. The request for modification of the Order of 3 March 2014, presented by Australia, concerns the second provisional measure indicated therein, namely that “Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court”. Australia requests the Court “to exercise its power under Article 76 (1) of the Rules to authorize the removal of the materials from their current location, where they have been kept under seal, and to allow their return still sealed to Collaery Lawyers”.

10. In its written observations, Timor-Leste takes note of Australia’s request and states that it “would have no objection to an appropriate modification of the second provisional measure for this purpose”.

* *

11. Article 76, paragraph 1, of the Rules of Court reads as follows:

“At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.”

12. In order to rule on Australia’s request, the Court must therefore first ascertain whether, in light of the facts now brought before it by that

State, there has been a change in the situation which called for the indication of certain provisional measures in March 2014. If so, it must then consider whether such a change justifies the modification or revocation of the measures previously indicated.

*

13. The Court will begin by determining whether there has been a change in the situation calling for the measures indicated in its Order of 3 March 2014.

14. The Court recalls that the above-mentioned measures were required because of Australia's refusal to return the documents and data seized and detained by its agents. It observes that, in its letter of 25 March 2015, Australia has now notified the Court of its intention to return the documents and data in question. The Court further notes that, in its written observations, Timor-Leste raises no objections to this course of action or to the corresponding provisional measures being modified accordingly. In view of Australia's change in position regarding the return of the documents and data, the Court is of the opinion that there has been a change in the situation that gave rise to the measures indicated in its Order of 3 March 2014.

*

15. The Court must now consider the consequences to be drawn from that change in situation in respect of the measures which were indicated in the Order of 3 March 2014.

16. In that Order, the Court found that

“the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents on 3 December 2013 from the office of a legal adviser to the Government of Timor-Leste”.

In particular, it considered that

“there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration and in future maritime negotiations with Australia should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia”.

The Court took note of the written undertaking by the Attorney-General of Australia dated 21 January 2014, whereby he declared that no part of the Australian Government would have access to the material seized, but the Court also observed that the Australian Government envisaged the

possibility of making use of that material in certain circumstances involving national security. The Court thus concluded that there remained an imminent risk of irreparable harm (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, pp. 157-159, paras. 42-48).

17. The Court notes that the return of the documents and data seized, and any copies thereof, would be in accordance with part of the third submission of Timor-Leste presented in its Application (*ibid.*, p. 148, para. 2) and in its Memorial. However, it observes that such return could only be effected on the basis of a “further decision” (point 2 of the operative part of its Order of 3 March 2014 (see paragraph 3 above)), whereby the Court would authorize the transfer of that material and specify the modalities for that transfer.

18. In view of the foregoing, and in reaching its decision on Australia’s request, the Court takes the view that the change in situation is such as to justify a modification of the Order of 3 March 2014. Taking account of the Parties’ agreement regarding the return of the seized documents and data, which, by necessary implication, includes any copies thereof, the Court considers that it should now authorize such return, while maintaining the obligation for Australia to keep under seal that material until its transfer has been completed under the supervision of a representative appointed for that purpose by Timor-Leste. The Court must be duly informed that the return has been effected and at what date that return took place.

19. The modification resulting from the present Order is without effect on the measures indicated in points 1 and 3 of the operative part of the Order of 3 March 2014 (see paragraph 3 above), which will continue to have effect until the conclusion of the present proceedings, or until further decision of the Court.

* * *

20. The decision rendered in the present proceedings in no way pre-judges any question relating to the merits of the case. It leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

* * *

21. For these reasons,

THE COURT,

(1) Unanimously,

Authorizes the return, still sealed, to Collaery Lawyers of all the documents and data seized on 3 December 2013 by Australia, and any copies thereof, under the supervision of a representative of Timor-Leste appointed for that purpose;

(2) Unanimously,

Requests the Parties to inform it that the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, has been effected and at what date that return took place;

(3) Unanimously,

Decides that, upon the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, the second measure indicated by the Court in its Order of 3 March 2014 shall cease to have effect.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of April, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of Timor-Leste and the Government of Australia, respectively.

(*Signed*) Ronny ABRAHAM,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge *ad hoc* CALLINAN appends a declaration to the Order of the Court.

(*Initialled*) R.A.

(*Initialled*) Ph.C.