

East Timor Takes Australia to ICJ over Documents Seized by Australian Intelligence

Matthew Happold – *EJIL:Talk! Blog of the European Journal of International Law* –
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<https://www.ejiltalk.org/east-timor-takes-australia-to-icj-over-documents-seized-by-australian-intelligence/>

By an application deposited with the International Court of Justice on 17 December 2013 (not yet on the Court's website), East Timor has instituted proceedings against Australia over the seizure and detention by 'agents of Australia of documents, data and other property' belonging to East Timor or which it 'has the right to protect under international law'. Simultaneously, East Timor also requested the Court to indicate provisional measures in the case.

The case concerns a search of the Canberra law offices of Mr Bernard Collaery on 5 December by agents of the ASIO (Australian Security Intelligence Organisation) and the removal by them of various documents and electronic devices. It [also appears](#) that at the same time a retired ASIS (Australian Secret Intelligence Agency) officer was also arrested, had his passport confiscated and his premises searched, with documents there also being seized. [It was later confirmed](#) by the Australian Attorney General George Brandis that he had approved the warrants under which the searches had been conducted, and that the raids had been carried out 'to protect national security'.

East Timor and Australia are currently parties to an arbitration administered by the Permanent Court of Arbitration. On 23 April 2013 [East Timor initiated arbitration proceedings](#) under the 2002 Timor Sea Treaty in respect of a dispute related to the [2006 Treaty on Certain Maritime Arrangements in the Timor Sea \(CMATS\)](#). The dispute concerns the validity of the CMATS Treaty, with [East Timor alleging](#) that 'Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.' [Few details of the arbitration have been made public (there is no specific mention of it on the [PCA's website](#)) but [Mr Collaery is one of East Timor's lawyers](#) and the [retired ASIS officer one of East Timor's witnesses in the arbitration](#). It appears that he was to speak of the bugging of the East Timorese cabinet office during the CMATS Treaty negotiations (see [here](#)).

The claim before the ICJ concerns only the search of Mr Collaery's office. According to the [Court's press release](#), East Timor alleges that during the search 'documents and data containing correspondence between the Government of Timor-Leste and its legal advisers, notably documents relating to a pending arbitration under the 2002 Timor Sea Treaty between Timor-Leste and Australia' were seized, in breach of East Timor's sovereignty and its property and other rights under international law. It claims the return of the documents and destruction of any copies made of them, as well as just satisfaction in the form of an apology from Australia and the payment of East Timor's legal costs.

The basis on which East Timor claims the Court has jurisdiction is both States' declarations under [Article 36\(2\) of the ICJ Statute](#) accepting the Court's compulsory jurisdiction. East Timor was unable to rely on these declarations as a basis for jurisdiction in the underlying dispute as in 2002 [Australia modified its declaration](#) to exclude disputes 'concerning or relating

to the delimitation of maritime zones'. However, at first glance both declarations do seem apt to cover the instant dispute.

East Timor has also requested the Court to indicate provisional measures under Article 41 of its Statute. In particular, it asks the ICJ to order that all documents and data seized be given up to the custody of the Court pending disposal of the case; to order Australia to provide both it and the Court with lists of all copies of documents and data seized, and to destroy all such copies; and to order Australia give assurances that 'it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers'. Pending the decision of the ICJ on its request, East Timor asks the President of the Court to exercise his powers under [Article 74\(4\) of the Rules of Court](#), which provides that: 'Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.' The President is asked to order Australia to provide it and the Court with a list of all the documents and electronic data files seized; to seal such documents and data (and any copies thereof); immediately to deliver the sealed documents and data to the Court (or return them to Mr Collaery); and not to 'intercept or cause or request the interception of communications between Timor-Leste ... and its legal advisers' in relation to the case.

It may confidently be predicted that such an order will not be made. Other than that, a lack of details at present makes it difficult to predict the course of events. East Timor has, however, managed to pull Australia into a public forum, which it may find less congenial than the private arbitration also taking place. And with the recent revelations concerning various States' electronic espionage activities, the issues could hardly be more current. Watch this space.