Note No. 10/2020

The Permanent Mission of Australia to the United Nations presents its compliments to the Office of Legal Affairs of the United Nations and has the honour to refer to the request for information on State practice relating to general principles of law in Chapter III, paragraph 30 of the Report of the International Law Commission on the work of its seventy-first session (A/74/10).

The Permanent Mission has the further honour to submit the attached information in response to the request, for transmission to the International Law Commission.

The Permanent Mission of Australia to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs of the United Nations the assurances of its highest consideration.

AUSTRALIAN MISSION TO THE UNITED NATIONS
NEW YORK

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19 February 2020

In accordance with Chapter III, paragraph 30 of the Report of the International Law Commission on the work of its seventy-first session (A/74/10), Australia provides the following information on its practice relating to general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statue of the International Court of Justice.

Counter-Memorial of Australia in Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)[1]

Paragraph 1.17: Summary

'1.17. Chapter 4 [of the *Counter-Memorial of Australia in Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* [2]] demonstrates that there is no unqualified right of confidentiality of, or non-interference in, communications between a State and its legal advisers, and no basis for asserting that legal professional privilege is a general principle of law. Even if such rights exist and apply to this dispute, their scope must necessarily be limited; they should not be so broad as to enable a foreign State (Timor-Leste) to prevent the proper exercise of territorial sovereignty by a forum State (Australia) in the forum State's territory and over its nationals to protect the safety of its citizens (and possibly others) and its national security'.

Paragraph 3.47: Onus of proof

'Para 3.57. … Timor-Leste bears the onus of proving its factual claims. The rule that the party seeking to rely on a fact has the burden to prove it has long been applied by international courts and tribunals[3] and has even been said to be a general principle of law.[4]'

Paragraphs 4.19 – 4.23: General principles of law derived from principles of municipal jurisprudence

'4.19 Timor-Leste asserts that legal professional privilege is a general principle of law within the meaning of Article 38(1)(c) of the [ICJ] Statute. But there is no good evidence of this, and certainly no evidence that any such privilege has the absolute character that Timor-Leste attributes to it.'

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[1] Volume 1, 28 July 2014, (*Timor-Leste v. Australia*).
[2] Ibid.
[3] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application*, 26 November 1984, I.C.J. Reports 1984, 392 at [101]; Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, I.C.J. Reports 2010, 14 at [162].
[4] J L Simpson and H Fox, *International Arbitration* (Stevens and Sons Ltd, 1959), 194. See also: S Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume III: Procedure* (4th ed., Brill Nijhoff, 2006), 1040; M Kazazi, *Burden of proof and related issues: a study on evidence before international tribunals* (Kluwer Law International, 1996), 369.

'4.20. General principles of law within the meaning of Article 38(1)(c) of the Statute are generally derived from general principles of municipal jurisprudence, appropriately adapted to the international law sphere to avoid 'distortion'.[5]'

'4.21. Timor-Leste relies heavily on third party reviews of domestic legislation in its attempt to demonstrate that legal professional privilege is a general principle of law. But the mere fact that a form of legal professional privilege exists in many domestic legal systems is not sufficient to generate a new general principle of international law, particularly one which would apply to relations between a State and an individual legal adviser who is a national of, resident in, and subject to the laws of, another State.'

'4.22. In addition, Timor-Leste makes no effort in its Memorial to explain how the domestic law principles should be appropriately adapted to the international law sphere without distortion, or how the specific and often complex procedures in domestic legal systems for the claiming and testing of privilege should be replicated under international law and before this Court. These are fundamental points for consideration by the Court when deciding whether to recognise a new 'general principle of law', which by its very nature would apply to all States and not simply the Parties to these proceedings.'

'4.23. Legal professional privilege has never been described or accepted by this Court as a general principle of law. Further, none of the judicial decisions cited by Timor-Leste specifically recognise legal professional privilege as a general principle of law within the meaning of Article 38(1)(c) of the Statute…'

Paragraph 6.6: General principles of law should be qualified

'6.6. In Australia's submission, there is no unqualified right of confidentiality or legal professional privilege such as that proposed by Timor-Leste, and no basis for asserting that either right is a general principle of law. But even if such an unprovenanced right did exist, its scope must necessarily be limited to appropriately recognise Australia's territorial jurisdiction, in particular, in a way which would prevent it being used for an improper purpose. Moreover, even if the scope of such a right was so broad as to protect the actions of Mr Collaery from the exercise of Australia's jurisdiction in this case, the measures put in place by Australia are clearly sufficient to prevent any harm to Timor-Leste in the Arbitration. Further, and in any case, Timor-Leste has waived any right of confidentiality over certain Materials by its public disclosures (through Mr Collaery) of confidential national security information.'

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[5] R Jennings and A Watts (eds.), *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 37. This interpretation of general principles of law is cited with approval in J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 34-35; see also M N Shaw, *International Law* (6th ed., Cambridge University Press, 2008), 98-100.

Counter-Memorial of Australia in Certain Phosphate Lands in Nauru (Nauru v. Australia)[6]

Paragraphs 292–294: The difficulty with domestic law analogies in considering general principles of law

'292. … Australia rejects the attempt by Nauru to import into these treaty provisions the whole set of legal rights and duties connected with the notion of a "trust" in domestic law, particularly the common law. To do that is to mistake completely the fundamental elements of the United Nations Trusteeship System. Domestic law analogies have limited value in this area. The Court recognised the difficulty in equating domestic systems with the international mandate and trusteeship system in the *Status of South West Africa (Advisory Opinion) (ICJ Reports 1950.* p.132)…'

'293. Judge McNair in his separate opinion in that case pointed to the inappropriateness of seeking to apply private law institutions directly to an international institution. He said:…

> "To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(1)(c) of the Statute of the Court bars witness that this process is still active, and it will be noted that this article authorises the Court to 'apply ... (c) the general principles of law recognised by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'. In my opinion. the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rule and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions" (p.148).'

'294. It is important to note the use to which Judge McNair would put private law analogies: it was only as "an indication of policy and principles". It was not to import the private law rules and institutions…'

Paragraph 301: Fiduciary Duties as a general principle of law

'301. In the context of United Nations trusteeship, one can conclude that the basic notion of a "sacred trust" may well involve certain fiduciary duties on an Administering Authority. And it is this general principle, rather than any specific rule applicable to a trustee as such, that might be imported into international law. The content and nature of such a fiduciary duty can vary considerably. Its content can only be determined by a consideration of the actual circumstances governing the relationship….'

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[6] 23 March 1993.

Paragraph 518: Doctrine of clean hands and good faith as a general principle of law

'518. … The doctrine of clean hands requires that a claimant's own conduct be consistent with its claim. This is a specific principle forming part of the more general principle of good faith which is applicable in international as in other legal systems…'

Memorial of Australia in Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)[7]

Paragraph 4.57–4.59, 4.61 and 5.124 : Good faith concepts (*ex re sed non ex nomine*) as general principles of law

'4.57. Finally, Article 31(1) of the *Vienna Convention* specifically requires interpretation in good faith. The interpretation of a treaty provision, and its application in the given circumstances, is integral to the performance of the treaty.

'4.58. The good faith obligation in Article 26 of the *Vienna Convention* (closely related to Article 31(1)) is that: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The obligation reflects the customary international law principle of *pacta sunt servanda* and is recognised in Article 2 of the *Charter of the United Nations*.'

'4.59. The obligation of good faith applies to the performance of treaty obligations as well as the exercise of rights. At its heart, it requires "every right to be exercised honestly and loyally."[8] It requires parties to observe treaty stipulations "in their spirit as well as according to their letter."[9] It extends to precluding use of the "form of the law" to cover the commission of what would otherwise be an unlawful act. This reflects the maxim *ex re sed non ex nomine* ("according to the form, not the name").[10]'

'4.61. Good faith also invokes notions of reasonableness: "[a] reasonable and bona fide exercise of a right…is one which is appropriate and necessary for the purpose of the right (ie in furtherance of the interests which the right is intended to protect)."[11] This recourse to reasonableness is also supported in international jurisprudence.[12]

'5.124…The principle *ex re sed non ex nomine* requires the Court to look to the real state of affairs, without attaching decisive importance to the legal denominations upon which Japan relies.[13]'

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[7] Volume I, 9 May 2011.
[8] B Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (Grotius Publications Limited, 1987), ("*Cheng, General Principles of International Law*") 123.
[9] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), 367.
[10] *Cheng, General Principles of International Law,* 122.
[11] *Cheng, General Principles of International Law*, 125.
[12] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (1999) 38 ILM 119, para. 158.
[13] *Cheng, General Principles of International Law*, 122.

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)

Public sitting held on Wednesday, 18 August 1999, at 3.00 p.m.[14]

'Mr Burmester: … Before turning to a consideration of the particular requirements, I draw the Tribunal's attention to the widespread jurisprudence on the award of provisional measures. This is, of course, familiar to the Tribunal, in part having been considered in the first provisional measures case heard by this Tribunal, the Saiga case. I can therefore be brief.

The position is well summarized by Lawrence Collins in his Hague lectures in 1992. He concluded:

> There can be no doubt that the procedural power to grant provisional or protective measures reflects a general principle of law and that principle nowadays is based on the need to prevent the judgement of the court from being prejudiced or frustrated by the actions of the parties.'

[14] ITLOS/PV.99/21/Rev.2, 18 August 1999.