SEPARATE OPINION OF JUDGE DONOGHUE

1. Certain circumstances giving rise to the present case are not in dispute. During the pendency of State-to-State arbitration, one State seized documents and data from the office of counsel to the opposing State (for convenience, I refer to all seized documents, data and material as "the Material"). The Court has only limited information about the content of the Material, which Timor-Leste describes as addressing not only a legal dispute that is currently the subject of arbitration (the Timor Sea Treaty Arbitration) — including communications between itself and its counsel — but also Timor-Leste's negotiating position and strategy with regard to questions of maritime delimitation between the two States.

2. This sequence of events surely should give pause to anyone concerned with the integrity of international dispute settlement. The question whether the seizure of the Material is lawful, however, is a matter for the merits and is not addressed today by the Court or by this separate opinion. I write this opinion to set out my reasons for voting with the majority of my colleagues in respect of one provisional measure, while parting company with them as to the other two provisional measures.

3. Article 41 of the Statute of the Court provides that the Court may indicate provisional measures "if it considers that circumstances so require". In recent years, the Court has followed the approach to provisional measures that it took in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40; p. 151, paras. 56-57; pp. 152-153, para. 62). As today's Order indicates, the Court considers whether there appears, prima facie, to be jurisdiction, whether the rights asserted by the requesting party are at least plausible, whether there is a link between the rights that form the subject-matter of the proceedings and the provisional measures being sought and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court renders its final judgment in the case.

4. There is much common ground between my own views and those expressed in the Order. I agree with my colleagues that there is prima facie jurisdiction in this case, that at least some of the rights asserted by Timor-Leste are plausible and that there is a link between the measures sought and the rights asserted by Timor-Leste in its Application.

5. This brings me to the assessment of the risk of irreparable prejudice to the plausible rights asserted by Timor-Leste in this case. My approach to this question differs from the approach that the Court has taken. Recalling the standard established in Article 41, I consider that a risk of irreparable prejudice in the circumstances of this case "requires" the imposition of the third provisional measure, but not the first or the second. I have voted against the first two provisional measures because I conclude that the 21 January 2014 undertaking made by Australia's Attorney-General to the Court (the "Undertaking"), addresses the risk of irreparable prejudice that is the focus of those two measures. I have voted in favour of the third provisional measure because Australia has not taken comparable steps to address prospective acts of interference with communications between Timor-Leste and its legal advisers with regard to the pending arbitration, future proceedings relating to maritime delimitation, or other related procedures, including the present case.

A. The First and Second Provisional Measures Indicated by the Court

6. As noted above, the Court has stated that it will exercise the power to indicate provisional measures only if there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court gives its final judgment (see, e.g., *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 21-22, para. 63). As I see it, a determination of whether there is a real and imminent risk of irreparable prejudice calls, first, for an assessment of whether any prejudice would be irreparable, and, secondly, for an evaluation of the probability that such irreparable prejudice will occur before the Court's final judgment, in the absence of provisional measures. (The urgency of the requested measures also must be taken into account, but, for present purposes, I do not focus on this additional requirement.)

7. The Court has not always been clear about whether the requesting party must address not only whether the prejudice to its asserted rights would be irreparable, but also the probability that such irreparable prejudice will occur. This case illustrates the importance of considering both aspects of the risk of irreparable prejudice. The Court has decided that if the Material is divulged to "any person or persons involved or likely to be involved" in the pending arbitration between Timor-Leste and Australia or in "future maritime negotiations" between the Parties, certain rights asserted by Timor-Leste could be irreparably prejudiced (Order, para. 42). I agree with this conclusion. I differ with the Court's decision to indicate the first and second provisional measures, however, because I believe that the Undertaking addresses the risk that such irreparable prejudice will

occur. By contrast, the Court apparently considers that, despite the Undertaking, the possibility of the information being divulged is serious enough to justify the measures indicated (Order, para. 46).

8. To explain my reasoning, it is necessary to look closely at the key elements of the Undertaking. At the outset, I recall that Australia told the Court that the Attorney-General has the authority to bind Australia as a matter of international law. I summarize below four key provisions of the Undertaking that relate to the Material (*ibid.*, para. 38).

9. First, the Attorney-General states that he has directed the Australian Security Intelligence Organisation (ASIO) not to communicate the Material or information derived from it "to any person for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions) until final judgment in this proceeding or until further or earlier order from the Court".

10. Secondly, the Undertaking states that the Attorney-General will not make himself aware of the content of the Material or information derived therefrom. It further states that should he become aware of any circumstances that "would make it necessary" for him to become informed about the Material, he "will first bring that fact to the attention of the Court, at which time further undertakings will be offered".

11. Thirdly, the Undertaking states that the Material "will not be used by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions)".

12. Fourthly, the Undertaking states that,

> "[w]ithout limiting the above, the Material, or any information derived from the Material, will not be made available to any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or relating to the conduct of: *(a)* these proceedings; and *(b)* the proceedings in the Arbitral Tribunal referred to [above]".

(For ease of reference, I refer to this part of the Undertaking as the "Fourth Commitment".) In response to a question posed by a Member of the Court during the hearing, Australia clarified that the phrase "without limiting the above" means that "matters concerning the Timor Sea and related negotiations, as well as the conduct of these proceedings and of the Tribunal, fall outside the 'national security' purpose" referred to in the Undertaking. This makes clear that even a national security purpose would not justify dissemination of the Material or information derived

from it to any individual for the purposes described by the Fourth Commitment.

13. The Undertaking remains in effect until final judgment in this case, a point that Australia affirmed during the oral proceedings.

14. Thus, an official with the authority to bind Australia under international law has told the Court that the Material and information derived from it will not be made available for the purposes described by the Fourth Commitment until the Court has rendered its final judgment. As the Court has stated, Australia's good faith in complying with its commitments set forth in the Undertaking is to be presumed (Order, para. 44). The scope of the Fourth Commitment encompasses all forms of dispute resolution referred to by Timor-Leste (that is, the pending arbitration, the case before this Court and potential future maritime delimitation negotiations between Timor-Leste and Australia) and thus protects rights asserted by Timor-Leste that are plausible and that, according to Timor-Leste, could be irreparably prejudiced by Australia's access to the Material. There is nothing in the record that suggests that Australia lacks capacity to give effect to the Undertaking. Under these circumstances, I consider that there is at most a remote possibility that the Material will be divulged to anyone involved in the pending arbitration, in these proceedings or in future bilateral negotiations relating to the Timor Sea.

15. In contrast to my assessment of whether the risk of irreparable prejudice merits interim protection, the Court places emphasis on the fact that Australia has stated that ASIO will keep the Material under seal only until the Court has reached its decision on the request for provisional measures (see Order, paras. 39 and 46). This observation does not change the fact that commitments made in the Undertaking, including the Fourth Commitment, will remain in effect until the Court's final judgment. It is this Fourth Commitment — not the separate, earlier decision by Australia to keep the Material under seal while the Court considers the request for provisional measures — that guards against the irreparable prejudice to the rights asserted by Timor-Leste that would result if the Material fell into the wrong hands.

16. In view of the above considerations, I conclude that the first and second provisional measures are not required to protect the plausible rights that Timor-Leste has asserted in this case and thus do not meet the applicable standard for the imposition of provisional measures. In particular, the second provisional measure requires Australia to keep the Material under seal until further decision of the Court. This means that Australia must refrain from any use of the Material, thus foreclosing possible uses of the Material that might have no implications for the rights that Timor-Leste has asserted.

17. In this regard, the second provisional measure is difficult to reconcile with the Court's statement in the Order that the imposition of provi-

sional measures has as its object "the preservation of the respective rights claimed by the parties" and that "the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party" (Order, para. 22).

18. The Order finds certain rights asserted by Timor-Leste to be plausible, placing emphasis on Timor-Leste's asserted right to communicate freely with its counsel regarding arbitration and other matters relating to international negotiations — a right which, as the Court states, "might be derived from the principle of sovereign equality of States" enshrined in the United Nations Charter (*ibid.*, para. 27). The principle of sovereign equality is unassailable, but the precise rights and obligations that flow from it in the particular circumstances of this case remain to be addressed at the merits phase.

19. The Court does not take into account the fact that Australia responded to Timor-Leste's arguments by asserting its own "sovereign rights to protect its national security and enforce its criminal jurisdiction in its own territory", which, according to Australia, will suffer prejudice if the requested provisional measures are indicated. Thus, Australia, like Timor-Leste, has invoked a well-established principle — that a State may exercise enforcement jurisdiction within its territory. The principles on which the Parties rely do not always easily co-exist, as can be seen in the Court's Judgment in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*I.C.J. Reports 2012 (I)*, pp. 123-124, para. 57). The interplay of the two principles and the resulting rights and obligations that apply in this case are among the matters to be considered at the merits phase.

20. The régime established by the Undertaking would address the risk of irreparable prejudice to the rights asserted by Timor-Leste that the Court considers plausible. It would do so, however, without precluding Australia from using the Material in connection with efforts to enforce its criminal laws within its territory, so long as such use is consistent with the Undertaking. It thus offers a means to address the risk of irreparable prejudice to Timor-Leste with which the Court is concerned, without infringing upon rights that Australia has asserted and that may later be found to appertain to it. In contrast, the second provisional measure bars Australia from using the Material in connection with law enforcement activity, even when such activity would not prejudice plausible rights asserted by Timor-Leste.

21. It is understandable that the Court wishes to be vigilant in crafting interim relief that targets harm that is truly irreparable, such as the prejudice that Timor-Leste could face here. Given that the likelihood of such prejudice is remote, however, it is especially unfortunate that the Court

has imposed a provisional measure that appears to restrict possible uses of the Material that would not cause any irreparable prejudice to Timor-Leste.

B. The Third Provisional Measure Indicated by the Court

22. I reach a different conclusion about the probability of irreparable prejudice to the rights asserted by Timor-Leste when I consider the third provisional measure indicated by the Court, which I support. That measure states that Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending arbitration, the proceedings before this Court or future negotiations concerning maritime delimitation.

23. Australia's arguments opposing Timor-Leste's request for provisional measures suggest that Australia sees no legal impediment to interfering with communications between Timor-Leste and its counsel in the future, so long as such actions comply with Australian law. Australia chose not to provide assurances concerning this matter in the Undertaking or elsewhere. As a result, absent the imposition of the third provisional measure, there is no safeguard against another incident of the type that forms the core of Timor-Leste's case. Under these circumstances and in light of the plausibility of certain rights that Timor-Leste has asserted, I find the third provisional measure appropriate.

(Signed) Joan E. Donoghue.