SEPARATE OPINION OF JUDGE PAIK

1. While I voted for the operative part of the Order of the Tribunal, I would like to explain my reasoning with respect to the questions of *prima facie* jurisdiction and provisional measures.

2. The existence of *prima facie* jurisdiction is a prerequisite for the Tribunal to prescribe provisional measures. As the Tribunal recalls in paragraph 69 of the Order in this case,

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded (*M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, para. 29).

3. In this case, the Applicant contends that the Tribunal has jurisdiction to hear its request for provisional measures under articles 287 and 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). Article 287 provides for the choice of procedure for "the settlement of disputes concerning the interpretation or application of this Convention"; in this case, both parities chose the Tribunal. Article 288, paragraph 1, provides that a court or tribunal referred to in article 287 shall have jurisdiction over "any dispute concerning the interpretation or application of this Convention". Thus, the first task of the Tribunal is to determine whether *prima facie* a dispute exists between the two parties and whether that dispute concerns the interpretation or application of the Convention.

4. In its Request for the prescription of provisional measures and in the public hearing, the Applicant claims that the M/V "Louisa" conducted an oil and gas survey in the waters of the Bay of Cadiz pursuant to the permits issued by the relevant Spanish authorities (Request, paragraph 58). The Applicant denies that the vessel was engaged in the criminal activity alleged by the Respondent. In its Application instituting proceedings before the Tribunal, the Applicant contends that the Respondent seized the M/V "Louisa" based on "erroneous information regarding the violations of Spain's historic patrimony".

In this regard, the Applicant contends that the Respondent violated articles 73 (enforcement of laws and regulations of the coastal State), 87 (freedom of the high seas), 226 (investigation of foreign vessels), 245 (marine scientific research in the territorial sea) and 303 (archaeological and historical objects found at sea) of the Convention.

5. On the other hand, the Respondent claimed in its oral statement that the M/V "Louisa" was not carrying out scientific research activities to identify the presence of gas or methane, but was instead engaged in the looting of underwater cultural heritage in the Spanish territorial sea or the contiguous zone. Thus, the ship is alleged to have been detained because it constituted clear evidence of a crime, a "piece of conviction (*pieza de convicción penal*)" in criminal proceedings before a Spanish court. The Respondent also rejects the relevance or applicability to the present case of those articles of the Convention invoked by the Applicant.

6. There appears to be disagreement between the parties over the critical facts related to the activities of the M/V "Louisa". Thus, a dispute may exist between the two parties in the sense of, as the Permanent Court of International Justice (PCIJ) put it, a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2*, p. 11). The question, then, is whether the dispute in the present case is concerned with the interpretation or application of the Convention. I have doubts about the applicability or relevance of the provisions invoked by the Applicant, and thus about the existence of jurisdiction of the Tribunal in a case on the merits based on those grounds.

7. These doubts notwithstanding, I was in favour of the Tribunal's decision concerning the existence of *prima facie* jurisdiction for the following reason: while the provisions invoked by the Applicant as the legal basis of its claims do not appear to be manifestly related to the facts of the case, the Tribunal does not need to ascertain, at this stage, whether the allegation made by the Applicant are "sufficiently" arguable or plausible. The threshold of *prima facie* jurisdiction is rather low in the sense that all that is needed, at this stage, is to establish that the Tribunal "might" have jurisdiction over the merits. As long as the Tribunal finds that the Applicant has made an arguable or plausible case for jurisdiction on the merits, the requirement of *prima facie* jurisdiction should be considered to have been met. On the face of it, at

least one provision invoked by the Applicant in its request, Article 87 of the Convention, may provide a basis for an arguable case on the merits, in light of the Respondent's unreasonably long period of detention of the vessel without rendering an indictment or taking any of the necessary judicial procedures. Thus, it appears *prima facie* that "a dispute concerning the interpretation or application of the Convention" existed between the parties on the date the Application was filed.

8. Another procedural condition that the Tribunal must examine in order to determine its *prima facie* jurisdiction is whether the Applicant's claim is admissible. The Respondent contends that the Applicant failed to satisfy at least two conditions in this regard: the obligation to exchange views under article 283 of the Convention and the exhaustion of local remedies under article 295 of that instrument. As I concur with the Tribunal's reasoning regarding the question of admissibility, I have little to add on this point.

9. At this stage, I would simply like to point out that, with respect to the exhaustion of local remedies, the Applicant apparently claims that the breach of obligations by the Respondent under the relevant provisions of the Convention resulted in damage to what the Applicant perceives to be its own rights. It should be reminded that the Tribunal stated in the *M/V "SAIGA" (No. 2) Case* that the claims in respect of such damage are not subject to the rule that local remedies must be exhausted (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, para. 98).

10. I concur with the Tribunal that the circumstances of this case are not such as to require the prescription of provisional measures. Under article 290 of the Convention, such measures may be prescribed in order to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. It is clear that in the circumstances of this case, there is no real and imminent risk that irreparable prejudice may be caused to the rights of the parties so as to warrant the prescription of the provisional measures requested by the Applicant.

11. On the other hand, my view that, under the circumstances, it is neither necessary nor appropriate to prescribe provisional measures in order to prevent serious harm to the marine environment, as requested by the Applicant, may require some explanation.

12. Provisional measures aimed at preventing serious harm to the marine environment are a new and positive addition, introduced by the Convention, to the institution of provisional relief. This addition reflects the importance that the Convention attaches to protection and preservation of the marine environment under its Part XII. On the basis of this provision, in order to protect the marine environment in the interests of the international community, the Tribunal can prescribe measures that may go beyond the rights or interests of any of the parties to the dispute. Given the importance of this provision, where a request for provisional measures is made on these grounds, the Tribunal should take it rather seriously.

13. That said, however, the prescription of provisional measures on these grounds is also subject to the conditions that are set out explicitly or implicitly in article 298, paragraph 1. Before prescribing such measures, the Tribunal should be satisfied, *inter alia*, that the evidence produced by the Applicant shows a credible risk of serious harm to the marine environment and that, under the circumstances, it is appropriate to take measures to prevent such harm.

14. The Applicant contends that "there is a definite threat to the environment by leaving the M/V "Louisa" docked in El Puerto de Santa Maria for any significant additional time". In support of this claim, it submitted the opinion of an expert based in Hamburg. On the other hand, the Respondent denies any possibility of serious harm to the marine environment as a result of the M/V "Louisa" remaining docked at the port and points out that the vessel is subject to continuous monitoring by the Spanish port authorities.

15. While the alarm raised by the Applicant is of a serious nature, the evidence that it has produced is hardly convincing. The expert's opinion submitted by the Applicant as proof of a high risk of harm to the marine environment was apparently drawn up in haste, without the expert having visited the port where the M/V "Louisa" is docked. Moreover, that opinion is more concerned with "flooding of an idle vessel" than with potential harm to the marine environment. Nowhere in the opinion is there any clear and specific indication of the possibility that such harm would result from the continued detention. The quantity of lubricating oil and diesel fuel on board the vessel, which has been indicated as a potential source of pollution, is relatively modest. Simply to allege that "without Tribunal intervention, the Louisa would simply sink at its dock, release massive amounts of hydrocarbons, endanger shipping in the port area and wreak havoc on its owner and flag country" (Request, para. 63) is not sufficient for the Tribunal to prescribe provisional measures.

16. In addition, the M/V "Louisa" is docked at a Spanish port and the Respondent assures the Tribunal that "[t]he *Capitanía Marítima* of Cadiz has an updated protocol for reacting against threats of any kind of environmental accidents within the port of El Puerto de Santa Maria and the Bay of Cadiz". Considering that, if and when pollution occurs, it is the Respondent that will suffer the most, there is no reason to believe that Spain is not as vigilant to the possibility of serious harm to the marine environment as it should be. While the Parties should always act with prudence and caution with respect to the marine environment, neither is there any reason to doubt that the Respondent will do so under these circumstances. The fact that the vessel has been detained as evidence of a crime that allegedly took place in the territorial or internal waters of the Respondent makes the appropriateness of prescribing provisional measures all the more doubtful.

17. While the requirement of urgency is not explicitly set out in article 290, paragraph 1, there is no doubt that the very nature of provisional measures as an exceptional form of relief presupposes an element of urgency. However, I do not find that the circumstances of this case are such as to make the prescription of provisional measures necessary or appropriate as a matter of urgency.

18. Thus, while I fully endorse the importance of protection of the marine environment, the circumstances of the case fall far short of the basic requirements for the prescription of provisional measures, another equally important concern of which the Tribunal, as a judicial institution with gravitas, should be aware.

19. For the foregoing reasons, I voted in favour of the operative part of the Order.

(signed) J.-H. Paik