DECLARATION OF JUDGE PAIK

1. In provisional measures proceedings, a rather low threshold of *prima facie* jurisdiction is balanced by more stringent requirements for the prescription of such measures, such as those of urgency and irreparability. In my view, the Order should be clearer in terms of how Argentina's request meets those requirements. Hence I append this brief observation.

2. In measuring the "urgency of the situation" under article 290, paragraph 5, of the Convention, the Tribunal needs to consider the following factors. First, of particular relevance is the nature of the rights or legal interests in respect of which the request for provisional measures is made. In this case, among the rights at issue is that of Argentina to enjoy the immunity of a warship in the port of a foreign State. This right is clearly established in international law, and, in fact, constitutes one of the most important pillars of the *ordre public* of the oceans. In addition, as the Order of the Tribunal indicates in paragraph 94, a warship, the subject-matter of the right claimed by Argentina, is an expression of the sovereignty of the State and an instrument of war. As such, any dispute involving a warship has the potential to disrupt peace and security and should thus be dealt with with utmost caution. The fact that the frigate *ARA Libertad* is an unarmed training vessel does not mitigate the gravity of the situation. This nature of the right and of its subject-matter suggests an element of urgency in the present case.

3. The second factor to be considered is a temporal element. Under article 290, paragraph 5, of the Convention, the Tribunal may not prescribe provisional measures unless it is satisfied that prejudice to the rights of the parties is likely to occur before an arbitral tribunal has been constituted and become functional. The time frame envisaged under article 290, paragraph 5, is thus much tighter than that under article 290, paragraph 1, which provides for the prescription of provisional measures *pendent lite*. While the requirement of urgency under article 290, paragraph 5, is accordingly more stringent than that under article 290, paragraph 1, whether such a requirement is met depends on the circumstances of the particular case. In the present case, the Tribunal was informed that several legal proceedings related to the frigate *ARA Libertad*, including those on the

application for execution of the judgment against the warship and on the appeal against its forced relocation, are now under way in the domestic courts of Ghana. The information available to the Tribunal also indicates that the plaintiff, which filed a motion for interlocutory injunction and interim preservation of the *ARA Libertad* and thus triggered the events leading to the present proceedings, is apparently a quite active litigant. While the outcome of the litigation and the dates of the decisions are unknown, the fact that they are pending and have the potential further to aggravate the situation cannot be taken lightly.

4. The third factor to be considered is the existence or otherwise of commitments or assurances given by the parties that an action prejudicial to the rights of the parties will not be taken. In determining the urgency of the situation, the Tribunal has attached importance to such commitments or assurances. However, Ghana in this case is unable to give such assurance because it is beyond the competence of the government (executive branch) of Ghana. The measures of constraint against the *ARA Libertad* were ordered by the High Court of Ghana. As the Co-Agent of Ghana acknowledged, the government of Ghana cannot interfere with those judicial acts due to the strict separation of powers and the independence of the judiciary. Although the affidavit submitted by the Ghana Port and Harbour Authority confirms, among other things, that the warship has access to water and electricity and that the crew is not subject to any harassment or psychological aggression, such confirmation by no means assures that the *ARA Libertad* is now safe from further measures of constraint that might be ordered by the courts of Ghana. On the contrary, the warship and its crew remain as vulnerable to them as before, if not more so. The lack of assurance on the part of Ghana thus does not help mitigate the urgency of the situation.

5. The next requirement for the prescription of provisional measures is that such measures should aim to preserve the respective rights of the parties to the dispute. In order to preserve the respective rights of the parties, irreparable prejudice or harm to the rights must be prevented. Thus the test of "irreparable prejudice" has been developed mostly by the International Court of Justice (*Fisheries Jurisdiction* case *(United Kingdom of Great Britain and Northern Ireland* v. *Iceland), Order of 17 August 1972, I.C.J. Reports, 1972*, p. 16, para. 21), though it should be pointed out that its application by the Court has not always been consistent and that such a test is not the only applicable standard to justify provisional measures. Under this test, if prejudice or harm that cannot be repaired simply by "the payment of an indemnity or by compensation or restitution in some other material form" is likely to occur, provisional measures may

be considered (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J. Series A, No. 8,* p. 7). The purpose of provisional measures is thus to prevent a risk of irreparable prejudice or harm from occurring.

6. In the present case, the alleged violation of Argentina's rights has already occurred and the state of infraction continues. Moreover, further violations are likely to occur, not least depending on the progress and outcome of the litigation pending in the Ghanaian courts. Moreover, the rights allegedly violated are of such nature that compensation or any material reparation may fall short of repairing harm caused to them. According to Argentina, prejudice or harm to its rights includes not only a serious risk to the very existence of its rights but consequential damages such as the prevention of the warship from fulfilling its missions and duties, a serious risk to the safety of the warship and its crew and injuries to the dignity of the State and the feelings of its people. What is important in this case is that the continuation of situation is likely to increase a serious risk of irreparable prejudice or harm to those rights.

7. Considering the nature of the right at issue and its subject-matter, pending litigation in the courts of Ghana with its potential to aggravate the situation, the lack of assurance on the part of Ghana, and the nature and gravity of harm that has occurred and is likely to occur, I believe that the requirements for the prescription of provisional measures, in particular those of urgency and irreparability, have been met in this case.

8. Now that the need for provisional measures is established, the question is what should be the content of such measures. As provisional measures are prescribed without there being any need to prove the conclusive existence of jurisdiction or the validity of claims, a request for measures that would result in virtually resolving the dispute should not be accepted. The Permanent Court of International Justice emphasized this point when it stated that any request "designed to obtain an interim judgment in favour of a part of the claim formulated in the Application" should be dismissed (*Case concerning the Factory at Chorzów (Indemnities), Order of 21 November 1927, P.C.I.J. Series A, No. 12*, p. 10). However, this does not necessarily mean that a party cannot seek relief through a request for provisional measures which is in substance identical with the principal relief sought on the merits of the claim. Much depends on the circumstances of the particular case. In the present case, the relief sought by Argentina

in the request, which is the unconditional release of the warship *ARA Libertad*, comes close, in substance, to the principal relief sought in the claims submitted in its Application. However, this fact alone should not preclude the Tribunal from considering the measures sought by Argentina. In addition, the various forms of relief sought by Argentina in its Application instituting the Annex VII arbitration are obviously broader than those sought in the request for provisional measures.

9. In prescribing provisional measures, what the Tribunal should consider is the preservation of the "respective" rights of the parties to the dispute. In other words, the Tribunal should have due regard for and do justice to the respective rights of both parties. Provisional measures that preserve the rights of one party but prejudice those of the other party cannot be considered appropriate. In the present case, while Argentina clearly demonstrates its rights to be preserved, Ghana fails to do so as regards its own rights. Furthermore, Ghana did not differ from Argentina on the point that the *ARA Libertad*, as a warship, is entitled to immunity under general international law and thus must be released. The Co-Agent of Ghana stated before the High Court of Justice in Accra: "[I]t became the court's duty in conformity to established principles to release the vessel and to proceed no further in the course". (Proceedings in the Superior Court of Judicature in the Commercial Division of the High Court of Justice Accra held on Tuesday, 9 October 2012 before his Lordship Justice Richard Adjei-Frimpong. Statement by Mr. Ebenezer Appreku, Director of the Legal and Consular Bureau of the Ministry of Foreign Affairs and Regional Integration of Ghana). He stated further in the public hearing before the Tribunal that

> [I] appeared before the High Court not, I underscore with the greatest respect, in my personal capacity but in my official capacity as a legal adviser to the Ministry of Foreign Affairs, and the views that I expressed reflected what I was authorized to say by the Foreign Minister. . . . Despite our best efforts, the High Court's decision did not go Argentina's way, and the views expressed by the executive arm of government of Ghana, which it continues to hold, were not accepted (ITLOS/PV.12/C20/4, p. 12, lines 8-15).

In my view, this understanding between the parties on the need for the release of the ARA Libertad is of particular relevance to the Tribunal in granting the relief sought by Argentina. The unconditional release of the *ARA Libertad* preserves the rights of Argentina while it does not affect or prejudice those of Ghana.

10. There is clearly an important role to be played by the discretion and appreciation of the Tribunal when it considers and prescribes provisional measures under article 290 of the Convention. However, the application of this provision to the facts should not vary with the length of the "Chancellor's foot". A little more clarity in the reasoning of the Tribunal could be helpful in this regard.

(signed) J.-H. Paik