DECLARATION OF JUDGE PAIK

1. I concur with both the conclusions and most of the reasoning of the Tribunal in the Judgment. However, I wish to add my observations on a few issues which I think are likely to recur in one form or another in proceedings before the Tribunal.

Nationality of the "Gemini III"

2. It is undisputed that the "Gemini III" was not flying the flag of Saint Vincent and the Grenadines at the time of its detention. However, Saint Vincent and the Grenadines claims that it was a "tender" of the M/V "Louisa" and was not required to have its own flag. In so doing, Saint Vincent and the Grenadines implies that the Gemini III, as such, possesses Vincentian nationality and should be considered one of "its vessels" under the declaration it made under article 287 of the United Nations Convention on the Law of the Sea (the "Convention").

3. The Convention leaves the matter of a ship's nationality to determination by the domestic law of States. The relevant provision of the Convention is Article 91, which reads as follows:

> *Article 91*
> *Nationality of ships*
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

4. As the Tribunal noted in the *M/V "SAIGA" (No. 2) Case*, "the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties" (*M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*,

p. 10, at p. 37, para. 66). In case of dispute about the nationality of a ship, the initial burden of proof lies with the State claiming that a vessel possesses its nationality (*"Grand Prince"* (*Belize* v. *France*), *Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at p. 38, para. 67). Therefore, it is Saint Vincent and the Grenadines that must first establish that the "Gemini III" was granted Vincentian nationality in accordance with its domestic law.

5. Saint Vincent and the Grenadines has completely failed in this regard. Despite the question directly posed by the Tribunal, namely, "[w]hat is the legal justification for Saint Vincent and the Grenadines to request the release of the vessel *Gemini III* not flying its flag?", Saint Vincent and the Grenadines was unable to provide any evidence in its relevant domestic law or practice to support its claim other than repeating that the "Gemini III" served as a tender for the M/V "Louisa". The only documents submitted by Saint Vincent and the Grenadines in this regard were the invoice for the purchase of the "Gemini III" issued on 17 February 2005 and the Small Commercial Vessel Certificate issued on 21 December 1999 (see Applicant Annex III to the Memorial of Saint Vincent and the Grenadines of 10 June 2011). These documents gave little hint about the nationality of the "Gemini III".

6. Registration is the most widely used modality to grant nationality in the shipping legislation of many States. However, registration might not be required for small vessels not intended for international navigation. In any case, if the domestic shipping law or practice of Saint Vincent and the Grenadines allows "a tender" to possess the nationality of the "mother ship" without registration, Saint Vincent and the Grenadines should have adduced evidence to that effect as substantiation of the Vincentian nationality of the "Gemini III".

7. In addition, even if such law or practice were to exist in Saint Vincent and the Grenadines, the Tribunal would find it difficult to accept the claim that the "Gemini III" possesses Vincentian nationality as a tender of the M/V "Louisa", because the "Gemini III" operated independently of the M/V "Louisa" during most of the material times, as indicated in paragraph 87 of the Judgment.

8. Given the lack of evidence, both in law and in fact, to support the claim of Vincentian nationality of the "Gemini III", the Tribunal could not but conclude that the "Gemini III" is not covered by the declaration of Saint Vincent and the Grenadines and that it, therefore, has no jurisdiction to entertain the disputes concerning the arrest or detention of that vessel.

Approach for the determination of the existence of a dispute

9. A State, by becoming a party to the Convention, accepts the compulsory procedures under Part XV, section 2, of the Convention with respect to "any dispute concerning the interpretation or application of the Convention" which is submitted in accordance with this Part. In the present case, the Parties accepted the jurisdiction of the Tribunal, as they both chose the Tribunal as a means of settlement of their disputes by the declarations made under article 287 of the Convention. However, they disagree as to whether the dispute between them concerns the interpretation or application of the Convention. Thus the first question Tribunal should address is whether the dispute before it is such a dispute and the Tribunal has jurisdiction *ratione materiae* to entertain it.

10. In order to answer this question, it is not enough to note that one party maintains that such a dispute exists and the other denies it (*Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), *Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 810, para. 16). The usual approach in determining the existence of a dispute concerning the interpretation or application of a treaty is to examine whether there is a link or connection between the facts of the claim of a party and the provisions of the treaty invoked by it. To put it differently, international courts or tribunals should examine whether the claims of a party "fall under" or "fall within" particular provisions of the treaty the party relies on, or whether the provisions invoked by a party "cover" the facts alleged and the claims made by it.

11. The Tribunal adopts this approach in the Judgment. It states in paragraph 99 that:

> To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines.

12. However, this approach gives rise to yet another question: that is, how much link or connection must be shown to establish the existence of a dispute concerning the interpretation or application of the Convention? Must such a link be manifest? Or would a reasonable or even plausible link be sufficient? What should be the standard of appreciation in this regard?

13. The Tribunal has little jurisprudence on this matter. Although the Tribunal has been faced in provisional measures proceedings with the question of the existence of a dispute concerning the interpretation or application of the Convention, the present case is the first in which it has had to deal with this question on a definitive basis. On the other hand, the International Court of Justice ("ICJ") has jurisprudence on it, but this jurisprudence is not entirely consistent. (For an analysis of ICJ jurisprudence, see *Separate Opinion of Judge Higgins*, ibid., pp. 847-861.) It appears that the inconsistency of the jurisprudence has to do with the differing circumstances of the cases addressed by the ICJ.

14. Partly for this reason and also partly because the Tribunal's finding on the existence of a dispute in the present Judgment differs from its finding on the same question in the Order of 23 December 2010 on the request for the prescription of provisional measures, it would seem pertinent to examine briefly the question of the requisite degree of connection between the facts of claims and the provisions invoked.

15. In the earlier provisional measures stage, despite the disagreement between the Parties about the existence of a dispute concerning the interpretation or application of the Convention, the Tribunal did not devote much attention to this question and concluded without elaborating any reason that "it appears *prima facie* that a dispute as to the interpretation and application of the provisions of the Convention existed between the parties on the date on which the Application was filed" (*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 67, para. 56).

16. In my Separate Opinion appended to the above Order, I made the following observations on this question:

> 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 allegations 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. (*Separate Opinion of Judge Paik*, ibid., pp. 73-74)

17. In the present Judgment, while the Tribunal has not specifically spelled out the standard for assessing the link, it has proceeded to examine the applicability of each provision invoked by Saint Vincent and the Grenadines to the facts and the claims it made. In so doing, the Tribunal has assured itself that there is no reasonable, let alone sufficient, link between them and that the provisions invoked do not provide substantive grounds for the existence under the Convention of a dispute between the Parties.

18. I believe that the Tribunal's approach is correct. The methodology and the standard of appreciation to be applied for a definitive finding of jurisdiction cannot be identical with those for a *prima facie* finding. While "plausible connection" may be enough for *prima facie* jurisdiction, it falls far short for the present case, in which a definitive finding on the Tribunal's jurisdiction must be made. It should surprise no one that different standards for a jurisdictional link can lead to different conclusions. This is indeed what has happened in the incidental and main proceedings before the Tribunal in this case.

19. In determining the existence of a dispute concerning the interpretation or application of the Convention, the Tribunal needs to make sure as much as it can, but certainly without intruding upon the merits of the case, that there is a sufficient link between the provisions invoked and the claims made. The matter of jurisdiction should always be considered with great care, as it hinges on the consent of States. This is all the more so with respect to jurisdiction claimed under Part XV, section 2, of the Convention, because, unlike many multilateral treaties that have compromissory clauses providing for compulsory procedures and that allow reservations to the clause or make the compulsory procedures optional, the Convention provides its States Parties with neither possibility. It does not necessarily follow that Part XV of the Convention should therefore be interpreted and applied restrictively. However, it certainly follows that the determination of the existence of jurisdiction under the compulsory procedures of the Convention requires particular discretion and judicial scrutiny.

Applicability of article 87 of the Convention

20. I agree with the findings of the Tribunal on the applicability or otherwise of those provisions of the Convention invoked by Saint Vincent and the Grenadines. However, in light of what I stated in my Separate Opinion quoted above (para. 16), I find it appropriate to offer comments, in particular on the applicability of article 87 of the Convention. In this regard, I point out that what the Tribunal does at this stage is not to determine whether or not Spain violated the provisions invoked by Saint Vincent and the Grenadines, which is essentially a question of the merits, but to determine whether those provisions can cover the claims made by Saint Vincent and the Grenadines and thus be applicable.

21. Saint Vincent and the Grenadines did not contest the fact that the M/V "Louisa" was arrested in a port of Spain for acts committed in the territorial sea and the internal waters of Spain. However, Saint Vincent and the Grenadines maintains that its vessels have been denied "access" to the high seas by "wrongful detention" effected by Spain (*Memorial of Saint Vincent and the Grenadines of 10 June 2011*, paras. 72-73). It further contends that "this freedom [freedom of the high seas] means very little if a port State is permitted to detain a foreign vessel under a thinly alleged violation of the port State's law involving the vessel" (*Reply of Saint Vincent and Grenadines of 10 February 2012*, p. 26). Thus Saint Vincent and the Grenadines appears to claim that its exercise of the freedom of the high seas, in particular freedom of navigation, was impeded by the continued detention of its vessel by Spain.

22. It should be noted in this regard that in the *"ARA Libertad"* case, Argentina made a similar argument with respect to the detention of the frigate "ARA Libertad". Argentina claimed that Ghana's detention of the vessel prevented Argentina from exercising the freedom of the high seas regarding navigation as guaranteed by article 87 of the Convention (*The "ARA Libertad"* (*Argentina* v. *Ghana*), *Provisional Measures, Order of 15 December 2012*, para. 43).

23. Article 87 of the Convention, which provides for the freedom of the high seas, imposes upon States an obligation not to impede that freedom. The question is then whether the freedom of the high seas, in particular freedom of navigation, provided for in this provision includes the right of a State to have access to the high seas to enjoy that freedom, or whether such freedom can be extended to include the right of the flag State to ensure that a vessel of its nationality can leave a port of the coastal State without undue interference from it.

24. The Permanent Court of International Justice and the ICJ have had a few opportunities to address the notion of freedom of navigation, though neither directly nor in the context of article 87 of the Convention. In the *Oscar Chinn* case, for example, the Permanent Court, in referring to measures taken by the Belgian government to enjoin a reduction of tariffs for fluvial navigation in Belgian Congo, interpreted the freedom of navigation as follows: "According to the conception universally accepted, the freedom of navigation referred to by the Convention [Convention of Saint-Germain-en-Laye of 1919] comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers" (*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at p. 83). Similarly, in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ found that "the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty [Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua]", which provides that "[b]etween the territories of the two Parties there shall be freedom of commerce and navigation" (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 14, at paras. 278-279). In both cases, the notion of the freedom of navigation was interpreted broadly.

25. However, I must underline that the freedom of navigation in question in the above cases was such freedom in the context of the particular treaties concluded between the parties to the dispute. Typically, freedom of navigation under treaties of friendship, commerce and navigation includes the right of vessels of either party to have access to ports and waters of the other party open to foreign commerce and navigation. Therefore, the pronouncements in the above judgments should be understood in that particular context. On the other hand, the freedom of navigation invoked by Saint Vincent and the Grenadines is one under article 87 of the Convention on the freedom of the high seas. That article 87 of the Convention applies only to the high seas, and partly to the exclusive economic zone through article 58, paragraph 1, of the Convention, is clear from article 86 of the Convention, which provides that "the provisions of this part [high seas] apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic water of an archipelagic State. . . ."

26. Article 125 of the Convention provides for the right of access to and from the sea and freedom of transit for land-locked States. In particular, paragraph 1 of this article states:

> Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to *the freedom of the high seas* and the common heritage of mankind. (*Italics added*)

Similarly, article 3, paragraph 1, of the Convention on the High Seas of 1958 provides that "[i]n order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea". However, the right of access or free access to and from the sea is confined to land-locked States only. Needless to say, the freedom of the high seas does not entail the general right of access for all States.

27. It should be recalled that one of the most important characteristics of the Convention is that it divides the ocean spaces into various maritime zones and provides for specific rights (and/or jurisdictions) and obligations of States Parties in those zones. The scope, extent and nature of the rights and obligations of States Parties vary in the different zones. Indeed, this spatial division constitutes a basis for the international legal order for the seas and oceans under the Convention, which is largely structured in accordance. Therefore, it is essential, in interpreting the Convention, to refer clearly to the maritime zones and the context in which specific rights or obligations are provided for.

28. Freedom of the high seas is one of the oldest principles of international law. It is well known that the Convention on the High Seas was the only one among the 1958 Geneva Conventions on the law of the sea which claimed to codify established principles of international law. While the content of the freedom of the high seas is subject to change, and indeed has evolved over time, it has been long established that this freedom is one which all States enjoy "in the high seas".

29. To extend the freedom of the high seas to include a right of the State to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter. For these reasons, I have come to the conclusion that article 87 of the Convention cannot afford a basis for the claim of Saint Vincent and the Grenadines.

(*signed*) Jin-Hyun Paik