

WRITTEN STATEMENT OF GHANA

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The “ARA Libertad” Case
(Argentina v. Ghana)

**REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES
UNDER ARTICLE 290, PARAGRAPH 5, OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA**

WRITTEN STATEMENT OF THE REPUBLIC OF GHANA

28 NOVEMBER 2012

I. INTRODUCTION AND SUMMARY OF THE FACTUAL BACKGROUND

1. On 29 October 2012 Argentina instituted proceedings against Ghana before an UNCLOS Annex VII arbitral tribunal, pursuant to Part XV of the United Nations Convention on the Law of the Sea (“the Convention”, or “UNCLOS”). On 14 November 2012 Argentina filed a Request for Provisional Measures to the International Tribunal for the Law of the Sea (“ITLOS”). Ghana is not required to submit any written response of the hearing that has been set to commence on 29 November 2012, but in order to assist ITLOS and as a courtesy to Argentina it submits this Written Statement setting out concisely the principal arguments that will be elaborated by Ghana at the oral hearings.
2. In summary, Ghana submits that Argentina’s request for provisional measures should be rejected because:
 - (a) the Annex VII arbitral tribunal which is to be constituted will not have jurisdiction over the dispute submitted to it by Argentina; and/or
 - (b) the provisional measures requested by Argentina are not necessary or appropriate to preserve the rights of the parties to the dispute; and/or
 - (c) there is no urgency such as to justify the imposition of the measures requested, in the period pending the constitution of the Annex VII arbitral tribunal.

II. FACTUAL BACKGROUND

3. This unfortunate case arises from a series of cases brought by NML (reported to be a company incorporated under the laws of the Cayman Islands and a subsidiary of a US company which is engaged in the management of investments) in the courts of the United States and United Kingdom against Argentina. These cases relate to sums said to be due to NML under two series of bonds issued by Argentina pursuant to a Fiscal Agency Agreement (“FAA”) dated 19 October 1994. On 11 May 2006 the US District Court for the Southern District of New York (“the District Court”) granted NML’s motion for summary judgment in respect of sums due to it under the bonds.¹ On 18 December 2006 the District Court entered a judgment in favour of NML in the amount of US \$284,184,632.20 (“the New York Judgment”).² NML subsequently sought to have the New York Judgment enforced in the UK. On appeal, the United Kingdom Supreme Court acceded to NML’s request and agreed with the findings of the District Court that Argentina was not entitled to

¹ *NML Capital Ltd. v. The Republic of Argentina*, United States District Court for the Southern District of New York, 03 Civ. 8845, 16 May 2006, Annex 3.

² *NML Capital Ltd. v. The Republic of Argentina*, Judgment #06,2728, 18 December 2006: see the extract from the Civil Docket for case #: 1:03-cv-08845-TPG (*NML Capital Ltd. v. The Republic of Argentina*), Annex 4.

claim state immunity by reason of a wide-ranging waiver contained in the Bond Agreements.³

4. On 1 October 2012, whilst in the course of an official visit, the *ARA Libertad*, an Argentina military vessel, docked at the Port of Tema in Ghana. On 2 October 2012 NML filed a Statement of Claim before the High Court of the Republic of Ghana sitting in Accra seeking to obtain satisfaction of the New York Judgment debt from Argentina. NML noted in its Statement of Claim that the *ARA Libertad*, an asset belonging to Argentina, was at that time berthed at the Port of Tema and available to be the subject of enforcement proceedings. The Ghanaian High Court accepted jurisdiction over the proceedings in respect of the claim and subsequently made an Order for Interlocutory Injunction and Interim Preservation (“the Injunction”) detaining the *ARA Libertad*.⁴ Argentina has unsuccessfully sought to have the Order set aside.⁵
5. On 15 October 2012 the Ghana Ports and Harbours Authority (“the Ports Authority”) sought a variation of the Injunction to relocate the *ARA Libertad* from berth 11 to berth 6 at the Port of Tema in order to mitigate economic losses resulting from the presence of the *ARA Libertad* in berth 11. The affidavit of the General Manager of the Ports Authority explained that berth 11 is ordinarily one of the busiest at the Port and the ongoing docking of the *ARA Libertad* at that berth was financially detrimental to the Ports Authority and had created “a very serious and alarming state of congestion and traffic at the Port.”⁶ The Ports Authority has also stated that moving the vessel to berth 6 would be beneficial to Argentina because the relocation would ensure the vessel could be protected from possible clinker and cement contamination at berth 11, and such a move would not pose any risk to the ship.⁷
6. Although the High Court granted the motion to move the vessel to berth 6, the crew of the *ARA Libertad* have resisted the Ports Authority’s attempts to allow it to be moved, in compliance with the Court’s ruling.⁸ The Injunction has been appealed by Argentina to the Court of Appeal and the ruling of the High Court on the moving of the vessel is the subject of a motion by Argentina for a stay which is pending before the High Court. Both proceedings will be heard shortly and should be completed by the end of January 2013, with the real prospect of an expedited hearing of the appeal.
7. This is the general factual background against which Argentina has made a request for provisional measures to this Tribunal.

³ *NML Capital Limited v. Republic of Argentina*, [2001] UKSC 31, 6 July 2011.

⁴ Order for Interlocutory Injunction and Interim Preservation of the “*ARA Libertad*”, High Court of Justice (Commercial Division), Accra, 2 October 2012. This Order is in Annex A of Argentina’s Request for Provisional Measures, 14 November 2012.

⁵ *NML Capital Limited v. Republic of Argentina*, Suit No. RPC/343/12, Ruling of 11 October 2012. See Argentina’s Request for Provisional Measures, 14 November 2012, Annex A.

⁶ See Argentina’s Request for Provisional Measures, 14 November 2012, Annex E.

⁷ Report on Actions Taken by Ghana Ports and Harbour Authority Together with Explanatory Information and Items of Evidence, 23 November 2012, p. 4, Annex 1.

⁸ See Argentina’s Request for Provisional Measures, 14 November 2012, para. 17 and Annex E.

III. LAW ON PROVISIONAL MEASURES

8. The substantive law regarding the “exceptional and discretionary” imposition of provisional measures is set out in Article 290 of the Convention.⁹ Pursuant to Article 290(1), ITLOS has the power to prescribe provisional measures where such measures are appropriate under the circumstances to prevent irreparable prejudice to the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision”.¹⁰ In order to grant a party provisional measures pending the constitution of an Annex VII arbitral tribunal under Article 290(5) of the Convention, ITLOS must be satisfied, first, that the arbitral tribunal to be constituted will have *prima facie* jurisdiction over the dispute, and second, that the urgency of the situation justifies the prescription of provisional measures at that stage.¹¹
9. Accordingly, for Argentina to be granted provisional measures in the present proceedings (where there is no risk of harm to the marine environment), it has the burden of satisfying ITLOS that:
 - (a) the Annex VII arbitral tribunal which is to be constituted will have jurisdiction over the dispute;
 - (b) the provisional measures sought are necessary and appropriate to preserve the rights of the parties to the dispute;
 - (c) urgency justifies the imposition of the measures.

Ghana respectfully submits that Argentina has failed to meet any or all of these requirements. Accordingly, the Republic of Ghana invites the Tribunal to reject the prescription of provisional measures requested by Argentina on the basis that the requirements of Article 290 of UNCLOS are not met. In making these submissions Ghana wishes to make clear that it fully understands the reasons that Argentina has acted to bring these proceedings and in no way minimises the importance of the interests that it seeks to protect. Ghana considers, however, that the resolution of this unfortunate dispute must comply with the relevant rules of international law, which are not to be found as such in the Convention. Accordingly, as matters currently stand ITLOS does not have jurisdiction to order the provisional measures requested by Argentina.

A. *Prima Facie Jurisdiction*

10. Article 288(1) of UNCLOS stipulates that a Tribunal “shall have jurisdiction over any dispute concerning the interpretation or application of this

⁹ *MOX Plant Case*, Separate Opinion of Judge Mensah, 3 December 2001.

¹⁰ UNCLOS, Article 290(1); ITLOS Statute, Article 25(1); ITLOS Rules, Article 89(1).

¹¹ UNCLOS, Article 290(5); ITLOS Rules, Article 89(4).

Convention". For a number of reasons, however, the dispute presented by Argentina does not fall within the provisions of UNCLOS.¹²

11. First, whereas Article 32 of UNCLOS refers to the immunity of warships in the territorial sea, it does not refer to any such immunity when in internal waters. Article 32 provides that "with such exceptions as are contained in subsection A and in articles 30 and 31 (which are not at issue in the present case), *nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes*". In other words, the Convention does not provide any rule or other guidance on the immunities of a "warship" which is present in internal waters. Unlike Article 95 of the Convention which stipulates in express terms that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State", Article 32 does not establish any rule with regard to the grant of immunity (or any rule on the waiver of immunity).
12. The interpretation and application of the rules concerning the immunity of a "warship" in internal waters does not involve the interpretation and application of the UNCLOS. To the extent that such a rule might exist it could only be found outside the Convention, whether under other rules of customary or conventional international law. Consequently, Article 32 cannot be a legal basis for Argentina's claim, and therefore neither the Annex VII Tribunal nor ITLOS can establish jurisdiction on the basis of that provision.
13. Argentina has also invoked Articles 18(1)(b), 87(1)(a) and 90 of UNCLOS as a basis for its claim. However, none of these provisions are applicable to the facts of this case. Article 18(1) defines "passage" as navigation through the territorial sea without entering the internal waters of the coastal State or for the purpose of entering or leaving the internal waters. It clarifies the meaning of passage for the purpose of "innocent passage" in the territorial sea,¹³ without extending that right to the internal waters of a coastal state. Internal waters are an integral part of a coastal state and are therefore not the subject of detailed regulation by the Convention. The coastal state enjoys full territorial sovereignty over internal waters, and any foreign vessel that is located in internal waters is subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State. As set out by Argentina, the *ARA Libertad* is detained by the authorities of Ghana at the Port of Tema and is thus within the internal waters of Ghana. It is not in Ghana's territorial sea: Article 18(1)(b) is therefore not applicable or in dispute and cannot provide a basis for asserting the jurisdiction of the Annex VII Tribunal.
14. Likewise, Articles 87 and 90 relate to the freedom of the High Seas and the Right to Navigation and are not directly relevant to this matter: enforcement measures with respect to the *ARA Libertad* were not carried out on the high seas but instead occurred exclusively within the Port of Tema. As such, Argentina's purported rights of innocent passage and freedom of navigation are not engaged in the present proceedings. These provisions do not cover access to ports, as by

¹² This is even though Ghana has accepted that the *ARA Libertad* is a warship for the purposes of Article 29 of UNCLOS.

¹³ UNCLOS, Article 19: Meaning of Innocent Passage.

virtue of its sovereignty, a coastal state can regulate the access of ships to its ports.¹⁴ It follows that Articles 87 and 90 are not applicable or in dispute and cannot provide a basis for asserting the jurisdiction of the Annex VII Tribunal.

15. Secondly, the central issue in relation to this matter concerns the interpretation and application of a waiver of immunity that is found in the bonds. In its ruling on the question of immunity and the extent of the waiver, the decision of the High Court (Commercial Division) of Ghana was based on an interpretation of Argentina’s waiver that was based on judgments of courts in the United States and the United Kingdom.¹⁵ Ghana notes that the Convention contains no rule or provision on the issue of waiver of immunity, and that the matter is entirely unregulated by the Convention. In its decision the Ghanaian Court did not base its conclusion on waiver of immunity on any provision of the Convention (and was plainly exercising a judicial function, independently and completely separately from other branches of the Ghanaian government). In the absence of any relevant provision of UNCLOS, Ghana submits that the Annex VII Tribunal has no jurisdiction over the issue of waiver of immunity in this matter. Relatedly, Ghana can see no basis on which ITLOS could - at this limited jurisdictional phase under Article 290(5) – express any view on the merits of a Ghanaian High Court judgment on the interpretation and application of a waiver of immunity that is unrelated to any provision of the Convention.¹⁶

¹⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, paras. 212-213.

¹⁵ The US District Court sets out the waiver in relevant part. It states:

“...To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled ... to any immunity from suit, ... from attachment prior to judgment, ... from execution of a judgment or from any other legal or judicial process or remedy, ... the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) ...”

¹⁶ The executive branch of the Government of Ghana has indicated its position with regard to the immunity of warships before the Ghanaian Court. However the executive is unable to intervene directly to effect the release of the vessel in the way that Argentina has demanded. The Constitution of Ghana provides for a clear separation of powers between the three branches of the government and establishes an independent judiciary. Some of the relevant international and constitutional provisions which impose restraints on Ghana include:

- Key international obligations which require that Ghana respects the rule of law and the independence of the judiciary;
- Key provisions of chapter 11 of the 1992 Constitution of the Republic of Ghana establishes an independent judiciary;
 - Article 125(1) which states that justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution;
 - Article 125(3) fleshes this out further when it states that “[t]he judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power;”

16. This is because the central question in the case – which is plainly a matter for the merits – is whether Argentina has waived immunity. *Prima facie*, that is a question to be resolved by the law applicable to the interpretation and application of the bond, namely New York law, and possibly also the law of Ghana.
17. Irrespective of whether the issue of waiver is a matter that falls to be resolved by general international law, it is apparent that UNCLOS has nothing to say on that matter. To the extent that this is a question governed by *private* international law relating to the identification of rules applicable to the interpretation of the bond, UNCLOS is irrelevant and the matter cannot be resolved by an Annex VII Tribunal established under Part XV. Moreover, ITLOS should not (as a matter of “court comity”) decide the matter at this stage, as Argentina has requested it to do.
18. In this regard, the domestic legal process in Ghana is continuing and Argentina has appealed to the Ghanaian Court of Appeal in respect of the injunction and has applied to the High Court by way of motion for a stay with respect to the High Court’s order to move the vessel from berth 11 to berth 6 in the port. As set out in Argentina’s Request, the executive branch (represented by the legal advisor of the Ghanaian Ministry of Foreign Affairs) took a position at variance with the decision of the High Court¹⁷ and is considering what further steps it might take in the dispute between NML and Argentina in continued support of the views it has previously expressed, as the proceedings develop before the Ghanaian Courts. It is expected that Argentina’s appeal and motion for a stay will be disposed of by the Ghanaian Courts before the end of January 2013, with the real prospect of an expedited hearing of the appeal.

B. Necessity and appropriateness

19. Even if the Annex VII Tribunal had jurisdiction, Argentina has not established that the provisional measures it has requested are necessary or appropriate because it has not demonstrated that it will suffer a real and imminent risk of irreparable prejudice to its rights such as to warrant the imposition of the measures.¹⁸ Ghana does not accept that Argentina has suffered irreparable harm due to the temporary holding of the ARA Libertad at the Tema Port pursuant to an order of the Ghanaian High Court, or that it will suffer irreparable harm in the short period between now and the establishment of the Annex VII Tribunal.
20. Argentina submits that the continuous docking of the ARA *Libertad* in Port Tema:

- Article 127(1) which provides that “in the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.”

¹⁷ Argentina’s Request for Provisional Measures, 14 November 2012, paras. 12-13.

¹⁸ *MOX Plant Case*, Separate Opinion of Judge Mensah, 3 December 2001.

- (a) hinders the Argentine Navy from using the ARA Libertad for training cadets,¹⁹
 - (b) poses a serious risk to the safety of the warship and crew;²⁰
 - (c) causes a serious risk to very existence of Argentina’s rights; and
 - (d) injures the feelings of the Argentine people.²¹
21. Contrary to the Argentina’s submission, there is no real or imminent risk of prejudice to Argentina’s rights caused by the ongoing docking of the ARA Libertad at Port Tema. In fact, while it remains in Port Tema, the Port Authority has been very careful to ensure that the ship and its remaining crew²² have been and will continue to be provided with all requirements to ensure their full liberty, safety and security. Indeed, in exercising their duty to enforce the order of the Ghanaian High Court, the Port Authority has acted reasonably in avoiding the use of excessive force and has taken into account the historical and cultural value of the vessel in trying to protect it from all possible risks – including risks to navigational safety and risks of clinker and cement contamination.²³ According to the Ghana Ports and Harbour Authority:

“5. ... Since her berth inside the harbor basin, the crew have had access to all amenities inside the port including doing physical exercises on the wharf and the use of a generator on the quay apron for the vessel.

[...]

11. She has since [following the unsuccessful attempt on 7 November 2012 to move the ship from berth 6 to berth 11 due to congestion at the port] remained at the same location inside the harbor and [is] receiving services from her agents, MAPPs Shipping.²⁴”

22. As such, the imposition of provisional measures imposing the immediate release of the ARA Libertad cannot be said to be necessary or appropriate in the circumstances to prevent imminent and irreparable harm to the rights of Argentina.
23. In fact, the grant of the provisional measures now sought by Argentina is entirely inappropriate as Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security to the Ghanaian courts. The interlocutory order made in the Ghanaian High Court proceedings enables

¹⁹ Argentina’s Request for Provisional Measures, 14 November 2012, para. 54.

²⁰ *Ibid.*, paras. 54, 60.

²¹ Argentina’s Request for Provisional Measures, 14 November 2012, paras. 56 and 58.

²² A significant number of the crew, including many individuals who do not have Argentine nationality, have left the vessel and Ghana, see: <http://www.businessinsider.com/argentina-evacuating-libertad-ghana-2012-10>.

²³ Report on Actions Taken by Ghana Ports and Harbour Authority Together with Explanatory Information and Items of Evidence, 23 November 2012, p. 4, Annex 1.

²⁴ Letter dated 16 November 2012 from Mr Richard A-Y Anamoo, the Director-General of the Ghana Ports and Harbours Authority to the Hon. Minister of Foreign Affairs, Annex 2.

Argentina to secure the release of the ARA Libertad through payment of a bond in the amount of US\$20 million. In the absence of payment of this security the High Court has ordered the ship to remain in Tema port until the dispute is resolved (or until further order) thus preventing any attempt by Argentina to avoid enforcement of NML's claims by removing its property from the territory of Ghana. Accordingly, while the dispute remains pending before the Ghanaian courts, there is no need for any additional remedy by this Tribunal in order to prevent any prejudice being caused to the rights of Argentina. If Argentina is seriously concerned about irreparable prejudice to its rights it can elect to pay the security to the Ghanaian courts, and this would expeditiously deal with the matter of irreparable harm and allow the claim to be addressed by means of return of the bond or payment of damages.²⁵

C. Urgency

24. Finally, Ghana submits that there is no urgency such as to require the prescription of provisional measures pending the constitution of the Annex VII tribunal. This is because Argentina has not adduced evidence to demonstrate that there is a real risk of the occurrence, prior to the constitution of the Annex VII tribunal of a critical event causing irreparable prejudice to Argentina's rights. Nothing in the materials presented by Argentina comes close to demonstrating any such risk.
25. Argentina claims that the events of 7 November 2012 (when officers of the Ghanaian Port Authority tried to move the ship from one berth to another within the port in compliance with the order of the Ghanaian High Court) indicate that breaches of Argentina's rights are likely to take place in the future.²⁶ It also suggests that based on current estimates, the ARA Libertad's fuel supply will be depleted by mid-December 2012; and that the number of crew present on the ARA Libertad are insufficient in numbers to respond adequately to fire emergencies or to carry out the scheduled maintenance of the ship necessary to implement the Argentinean Navy's 2013 training plans.²⁷
26. Ghana regrets that the events of 7 November 2012 appear to have been exacerbated by language difficulties, which may have caused certain actions taken by the Ports Authority to be mistakenly treated as hostile.²⁸ The events of 7 November 2012 in no way demonstrate that there is a risk of irreparable prejudice to Argentina's rights prior to the imminent formation of the Annex VII Tribunal. Likewise, any issues which the crew of the ARA Libertad may have resulting from the need to refuel or the need to respond adequately to emergencies are being kept under close consideration by the Ports Authority.
27. Argentina has failed to establish any urgency in the present situation, such as to

²⁵ *MOX Plant Case*, Separate Opinion of Judge Mensah, 3 December 2001.

²⁶ Argentina's Request for Provisional Measures, 14 November 2012, paras. 63-64.

²⁷ *Ibid.*, paras. 65-67.

²⁸ Report on Actions Taken by Ghana Ports and Harbour Authority Together with Explanatory Information and Items of Evidence, 23 November 2012, pp. 4-5, Annex 1.

require the prescription of the provision measures requested by Argentina in the short period before the Constitution of the Annex VII arbitral tribunal.

IV. CONCLUSION

28. Accordingly, and for the abovementioned reasons, the Republic of Ghana requests the Tribunal:
- (1) to reject the request for provisional measures filed by Argentina on 14 November 2012; and
 - (2) to order Argentina to pay all costs incurred by the Republic of Ghana in connection with this request.

Respectfully submitted,



Mr. Ebenezer Appreku
Co-Agent for the Republic of Ghana

LIST OF ANNEXES

- Annex 1 Report on Actions Taken by Ghana Ports and Harbour Authority Together with Explanatory Information and Items of Evidence, 23 November 2012.
- Annex 2 Letter dated 16 November 2012 from Mr Richard A-Y Anamoo, the Director-General of the Ghana Ports and Harbours Authority to the Hon. Minister of Foreign Affairs.
- Annex 3 *NML Capital Ltd. v. The Republic of Argentina*, United States District Court for the Southern District of New York, 03 Civ. 8845, 16 May 2006
- Annex 4 Extract from the Civil Docket for case #: 1:03-cv-08845-TPG (*NML Capital Ltd. v. The Republic of Argentina*)
- Annex 5 *NML Capital Limited v. Republic of Argentina*, [2001] UKSC 31, 6 July 2011