

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2012

Public sitting

held on Friday, 30 November 2012, at 9.30 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE “ARA LIBERTAD” CASE

(Argentina v. Ghana)

Verbatim Record

<i>Present:</i>	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Helmut Tuerk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Judge <i>ad hoc</i>	Thomas A. Mensah
	Registrar	Philippe Gautier

Argentina is represented by:

Mrs Susana Ruiz Cerutti, Legal Adviser, Ministry of Foreign Affairs and Worship,

as Agent;

Mr Horacio Adolfo Basabe, Head, Direction of International Legal Assistance, Ministry of Foreign Affairs and Worship,

as Co-Agent;

and

Mr Marcelo Kohén, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland,

Mr Gerhard Hafner, Professor of International Law,

Mr Holger F. Martinsen, Deputy Legal Adviser, Ministry of Foreign Affairs and Worship,

as Counsel and Advocates;

Mr Mamadou Hebié, appointed lecturer, LLM in International Dispute Settlement (MIDS), Geneva, Switzerland,

Mr Gregor Novak, Mag. Iur., University of Vienna, Austria,

Mr Manuel Fernandez Salorio, Consul General of the Argentine Republic, Hamburg, Germany,

Ms Erica Lucero, Third Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs and Worship,

as Advisers.

Ghana is represented by:

Mrs Amma Gaisie, Solicitor-General, Attorney-General's Department, Headquarters,

Mr Ebenezer Appreku, Director/Legal and Consular Bureau, Legal Adviser, Ministry of Foreign Affairs,

as Co-Agents and Counsel;

and

Mr Raymond Atuguba, Senior Lecturer in Law, Faculty of Law, University of Ghana, Legon,

as Counsel;

Mr Philippe Sands QC, Member of the Bar of England and Wales, Professor of International Law, University College of London, London, United Kingdom,

Ms Anjolie Singh, Member of the Indian Bar, Matrix Chambers, London, United Kingdom,

Ms Michelle Butler, Member of the Bar of England and Wales, Matrix Chambers, London, United Kingdom,

as Counsel and Advocates;

Mr Remi Reichhold, Research Assistant, Matrix Chambers, London, United Kingdom,

as Adviser;

Mr Paul Aryene, Ambassador of the Republic of Ghana to Germany, Embassy of Ghana, Berlin, Germany,

Mr Peter Owusu Manu, Minister Counsellor, Embassy of Ghana, Berlin, Germany.

1 **THE PRESIDENT** (*Interpretation from French*): Ladies and gentlemen, good
2 morning. Today we shall hear the presentations by the Parties in a second round of
3 pleadings in the *ARA Libertad* case between Argentina and Ghana. Argentina will
4 first of all put forward its arguments and Ghana will speak at 12 noon.

5
6 I would now like to call on Mr Hafner to take the floor.
7

8 **MR HAFNER:** Mr President, Mr Vice-President, distinguished Members of the
9 Tribunal, the Co-Agent and Counsel of Ghana yesterday presented this
10 distinguished Tribunal with a number of arguments that cast serious doubts as to
11 their relevance to the present case. I shall first address these points and then turn to
12 the causes of action of Argentina under the Convention.
13

14 Let me first very briefly address the point raised by the Co-Agent of Ghana
15 concerning the very sensitive issue of the rule of law. I had the opportunity to
16 participate in some of the discussions on this matter within the United Nations. There,
17 I gathered the impression that the relation between the rule of law principle and
18 international law is undoubtedly of great theoretical interest; and my learned
19 colleague Professor Sands quite rightly stressed the difference between the national
20 and international dimensions of this rule of law principle in his intervention. In this
21 context, the Co-Agent referred to the Resolution of the General Assembly 66/102
22 entitled "The rule of law at the national and international levels". This resolution
23 contains a passage that is of particular relevance in this case, namely its
24 paragraph 2. It "reaffirms further that States shall abide by all their obligations under
25 international law [...]". This is precisely what we are discussing here. It is only in this
26 respect that the principle of the rule of law is of relevance in this case.
27

28 Mr President, Mr Vice-President, distinguished Members of the Tribunal, permit me to
29 turn to the issue presented by Counsel Singh. Yesterday, she at length elaborated on
30 the context of the cases brought by NML against Argentina before the courts of
31 various States, in particular of the United States and the United Kingdom. However,
32 this lengthy and detailed elaboration produced merely a lot of smoke that was only
33 used as an attempt to hide the real issue at stake before this Tribunal. What is at
34 stake? Only the fact that the Argentine frigate *ARA Libertad* is illegally detained in the
35 Port of Tema and thereby denied a number of Argentina's rights under the
36 Convention. What Counsel Singh explained did not relate, in any way, to this issue.
37

38 Nevertheless, permit me to say a few words on the content of this presentation as it
39 calls for certain corrections. Counsel Singh presented in particular the UK Supreme
40 Court's decision in *NML v. Argentina* as if it related to the warship *ARA Libertad*. This
41 is clearly not the case. The judgment concerned only the State immunity of
42 Argentina. It evidently did not relate to the immunity of the warship *ARA Libertad*. I
43 have shown yesterday that the denial of the immunity to a warship requires a special
44 waiver relating to enforcement measures and, moreover, a specified waiver indicating
45 the particular warship subject to the waiver. The English High Court rendered a
46 decision that is in stark contrast to the interpretation of the above judgment offered by
47 Ghana's Counsel. In *A Company v. Republic of X*, the Court decided, with regard to
48 diplomatic assets that enjoy a similar status to that of military property, that a general
49 waiver of immunity did not amount to a waiver of diplomatic immunity but only of
50 State immunity. In that case, the High Court found that an agreement, which

1 provided, *inter alia*, that the defence of sovereign immunity was waived, was
2 ineffective as a matter of law to confer jurisdiction on the Court in respect of property
3 protected by diplomatic immunities.

4
5 I have tried to make it crystal clear yesterday that doctrine and practice
6 overwhelmingly accept that military property is to be equated with diplomatic property
7 when it comes to the requirement of a special and specified waiver of immunity.

8
9 This is not only confirmed in the ILC's Commentary I referred to yesterday and the
10 Convention on the Jurisdictional Immunities of States and their Property. It is also
11 visible in the jurisprudence of various States, such as the United States, the United
12 Kingdom as just shown, Switzerland, Germany, France; this jurisprudence clearly
13 rejects such an interpretation. As to the cases in the United States, it is quite
14 remarkable that the very same judge who determined that the waiver had legal effect
15 declined any enforcement measure against property used for public purposes. Today
16 I will refrain from repeating the abundant case law supporting this conclusion.

17
18 This conclusion is also confirmed by the legislative acts of various States, among
19 them the United States and the United Kingdom.

20
21 Thus, the British State Immunity Act explicitly excludes from it "anything done by or
22 in relation to the armed forces of a State while present in the United Kingdom [...]".
23 Similar provisions can be found in the United States Foreign Sovereign Immunities
24 Act, which also excludes the possibility of a waiver in respect of any such property.
25 Another explicit rule to the same effect is included in the Australian Foreign States
26 Immunities Act, whose definition of "military property" includes "ships of war". Its
27 section 31(4) reads as follows: "A waiver does not apply in relation to property that is
28 diplomatic property or military property unless a provision in the agreement
29 expressly designates the property as property to which the waiver applies."

30
31 Can anyone earnestly deny that the wealth of jurisprudence and other State practice
32 illustrates the existence of a relevant norm? If Ghana's Counsel has attempted to
33 cast doubt on the existence of this norm, she has failed even at the outset. For, as I
34 have shown, the United Kingdom's Supreme Court judgment that was conspicuously
35 presented by Ghana in both its written submission and oral statements, with all due
36 respect, is entirely immaterial to the present issue.

37
38 Taking the interpretation of the judgment offered by Ghana's Counsel seriously
39 would, by implication, mean that the diplomatic buildings of any State could
40 immediately be attached. Such a solution is fundamentally in contradiction to basic
41 principles of international law and would never be accepted by the community of
42 States.

43
44 Mr President, Mr Vice-President, distinguished Members of the Tribunal. Let me now
45 turn to the very heart of the present case, namely the causes of action of Argentina
46 under the Convention that are undeniably present.

47
48 Yesterday, my learned colleague Professor Sands expressed the view that "the
49 Convention has no rule on the question of the immunity of a 'warship' in internal

1 waters, or on waiver of immunity". In his view, article 32 of the Convention does not
2 refer to any such immunity in internal waters.

3
4 Let me first go back to the text of article 32 of the Convention, if you permit. It reads
5 as follows:

6
7 *Article 32: Immunities of warships and other government ships*
8 *operated for non-commercial purposes*
9

10 With such exceptions as are contained in subsection A and in articles 30
11 and 31, nothing in this Convention affects the immunities of warships and
12 other government ships operated for non-commercial purposes.
13

14 The reference in article 32 to "the Convention", instead of "the Part" was deliberately
15 chosen by the drafters in order to extend the scope of this article beyond the
16 territorial sea, so as to cover the entire geographical scope of the Convention, as also
17 shown by Bernhard Oxman in his article on the regime of warships under the
18 UNCLOS. This author is most certainly the leading authority regarding the
19 interpretation of the Convention, as a number of the persons present here can surely
20 attest.
21

22 The Convention itself also relates to internal waters, which include ports. This is
23 clear not only from the provisions that I quoted yesterday, such as article 25,
24 paragraph 2, of the Convention or more generally Part XII of the Convention that
25 relates to the protection and preservation of the marine environment. It derives
26 already from article 2, paragraph 1, of the Convention, which reads: "The
27 sovereignty of a coastal State extends, beyond its land territory and internal waters
28 and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt
29 of sea, described as the territorial sea."
30

31 This provision obviously recognizes the existence of the sovereignty of a coastal
32 State also over internal waters since without such sovereignty any sovereignty could
33 not be "extended". This provision has to be interpreted in accordance with article 32
34 of the Convention, according to which such sovereignty must not affect the immunity
35 of warships.
36

37 My learned colleague Professor Sands, when stating that the Convention does not
38 accord immunity to warships in internal waters, entirely leaves out one provision that I
39 had discussed yesterday, namely article 236 of the Convention. It reads, in its
40 relevant part:

41
42 *Article 236: Sovereign immunity*
43

44 The provisions of this Convention regarding the protection and preservation
45 of the marine environment do not apply to any warship, naval auxiliary,
46 other vessels or aircraft owned or operated by a State and used, for the
47 time being, only on government non-commercial service.
48

49 It has to be taken into account that the provisions of the Convention regarding the
50 protection and preservation of the marine environment undoubtedly also apply to the
51 ports of States, such as article 211, paragraph 3, of the Convention concerning the

1 entry of foreign vessels into ports or internal waters or article 218 of the Convention
2 concerning the enforcement by port States. Accordingly, article 236 clearly applies to
3 the legal regime of ports.

4
5 Another article of the Convention relating to internal waters is article 8, which is even
6 entitled "Internal Waters". It is manifestly indefensible to argue that the Convention
7 provides no guidance concerning warship immunity in internal waters.

8
9 The quotation presented by my learned colleague Professor Sands from the well-
10 known textbook of Professors Lowe and Churchill, obviously misreads the relevant
11 passage. Professor Sands reads into the authors' analysis that there is a difference
12 between the immunity warships enjoy in internal waters and those they enjoy in the
13 territorial sea, but this certainly cannot be read into the cited text.

14
15 In contrast, the only relevant passage in Professor Churchill and Professor Lowe's
16 work that is pertinent in the present case is the following, I cite from page 99: "[...] warships [...]
17 are not subject to the enforcement jurisdiction of the coastal State, because of the immunity that they enjoy under customary international law (TSC, art. 22(2); LOSC, art. 32)."

18
19
20
21 Professors Churchill and Lowe clearly construe article 32 as determining the
22 immunity with respect to the entire geographical scope of the Convention. This
23 understanding of article 32 is clearly established in all relevant works that have
24 appropriately synthesized the law of the sea, such as, only to mention the most
25 recent example, that by Tanaka.

26
27 Moreover, I have already referred yesterday to an extensive number of authorities
28 contending that the immunity accorded to warships is identical in internal waters as it
29 is in the territorial sea.

30
31 Moreover, article 32 explicitly refers to such immunity so that warship immunity is
32 incorporated into the Convention. I could add that in quite a number of its provisions,
33 the Convention refers to legal expressions that are undefined in the Convention and
34 require a definition from outside the Convention. So, for instance, if the Convention
35 refers to responsibility even though this legal expression has to be interpreted in the
36 sense of the Articles on the Responsibility of States taken note of by the General
37 Assembly.

38
39 My learned colleague Professor Sands made great efforts to demonstrate that neither
40 article 18, paragraph 1(b), nor articles 87, paragraph 1(a), and 90 of the Convention
41 contain any rule of immunity. This may be true as a matter of word count. Indeed,
42 "immunity" is, I readily admit, not mentioned in any of these provisions. However,
43 article 32 is comparable to a horizontal provision that produces effects for the entire
44 Convention, as I have already explained. Thus, any relevant article of the Convention
45 cannot but be read in connection with article 32. This is required in particular by the
46 necessity of a contextual interpretation of a treaty according to the well-established
47 rule of interpretation as codified in article 31 of the Vienna Convention on the Law of
48 Treaties of 1969. It is impossible to state that an article of the Convention that does
49 not mention immunity entitles a State to disrespect immunity. Article 32 together with

1 article 95 of the Convention puts it beyond any doubt that according to the
2 Convention the immunity of warships is to be respected in all maritime areas.

3
4 Let me make it entirely clear again what Argentina's causes of action under the
5 Convention are in this case. This is necessary because my learned colleague
6 Professor Sands in his remarks to the Tribunal yesterday has either ignored or
7 misinterpreted Argentina's arguments with respect to the causes of action under the
8 Convention that it is bringing before this Tribunal.

9
10 What is at issue in this case is the denial to Argentina of its rights under the
11 Convention, which include, but are not limited to, immunity. The denial of immunity
12 has the direct and foreseeable effect of denying other rights under the Convention,
13 such as the ones invoked yesterday.

14
15 One of the rights under the Convention, and denied by Ghana, is the right of innocent
16 passage. It was agreed, by an exchange of notes between Argentina and Ghana,
17 that the frigate *ARA Libertad* was scheduled to leave the port of Tema on 4 October
18 2012. This meant that it was agreed between the two States that this vessel, by
19 leaving the port, would enjoy the right of innocent passage, as defined in article 18,
20 paragraph 1(b), of the Convention. However, the vessel was precluded from
21 exercising this right. The attachment had a direct and foreseeable bearing on the
22 exercise of this right that includes proceeding from the port.

23
24 Moreover, according to article 18, paragraph 1(b), of the Convention, innocent
25 passage "means navigation through the territorial sea for the purpose of proceeding
26 to or from internal waters or a call at such roadstead or port facility."

27
28 This article can only be interpreted to mean that the denying a vessel from "leaving" a
29 port immediately amounts to a direct denial of the right of innocent passage.

30
31 According to the working schedule of the *ARA Libertad*, it was known and agreed by
32 both States that after leaving the port of Tema, the frigate would make for the high
33 seas in order to reach the next destination, Luanda in Angola. It was agreed that the
34 frigate would leave the territorial sea of Ghana on 5 October 2012 at 1500 GMT at
35 latitude 00°24' 80 (N) and longitude 000°00' 90 (W). So the relevant authorities of
36 Ghana were aware that the *ARA Libertad* envisaged to proceed to the high seas.
37 Even if the navigational route of the *ARA Libertad* would have led through only the
38 Exclusive Economic Zone of Ghana and the neighbouring States it nevertheless
39 would have enjoyed the freedom of navigation on the high seas according to
40 article 58 of the Convention. Accordingly, the attachment of the frigate *ARA Libertad*
41 in the port of Tema was the immediate cause that precluded this ship from enjoying
42 this freedom.

43
44 Mr President, Mr Vice-President, distinguished Members of the Tribunal. Let me
45 answer one question that was raised by my learned colleague Professor Sands
46 yesterday, who asked that Argentina should "find two rules in UNCLOS" that
47 establish *prima facie* jurisdiction.

48
49 The rules that Argentina is allegedly unable to find plainly exist and Argentina has
50 found not only one, or two, rules in the Convention applicable to its case, but

1 several, as already mentioned. The rules that provide for the absolute immunity of
2 warships are particularly based on article 32 of the Convention, as already explained
3 by reference to numerous authoritative sources. For this reason it is hardly
4 understandable that my learned colleague could come to the conclusion that the
5 “coastal State enjoys full territorial sovereignty, and all foreign vessels – including a
6 warship – are subject to the legislative, administrative, judicial and jurisdictional
7 powers of the coastal State.”

8
9 This is certainly not true; of course, the International Court of Justice has already
10 decided that immunity can only be applied if jurisdiction exists: jurisdiction must be
11 given before immunity is to be granted. But international law obliges States to respect
12 the immunity of warships that is enshrined in the Convention, if they are within the
13 jurisdiction of a State. Even the scholarly authority Professor Sands quotes reaches
14 this conclusion, just as any work on point, as I already had the opportunity to explain.

15
16 There are also other rules of the Convention that are pertinent but which have been
17 glossed over in Ghana’s submission. They relate to the maritime navigational rights
18 that I have already elaborated on in detail. As to the second rule my learned
19 colleague Professor Sands is looking for, there is no need to look any further since it
20 is already encompassed by the first one, on the absolute immunity of warships.

21
22 Mr President, Mr Vice-President, distinguished Members of the Tribunal, let me now
23 summarize the gist of my argument and Argentina’s case as it relates to the causes
24 of action under the Convention which require protection by this Tribunal: I have set
25 out by observing that the “rule of law” that we are discussing here can only mean that
26 States are to abide by their obligations under international law. I then found myself
27 compelled to point out the error constituted by the reliance of Ghana’s Counsel on
28 jurisprudence of the United Kingdom Supreme Court that is entirely immaterial to the
29 present case. After discussing these points I was able to turn to the real heart of the
30 dispute. Contrary to the contentions of Ghana, the causes of action under the
31 Convention, which require protection by this Tribunal, are based entirely on the
32 Convention. Specifically, Argentina seeks the Tribunal to protect the immunity of its
33 warship, the *ARA Libertad*, and its right to innocent passage and freedom of
34 navigation on the high seas. As I have shown, the only arguable interpretation of the
35 pertinent provisions places all of these rights squarely within the Convention.

36
37 Mr President, Mr Vice-President, distinguished Members of the Tribunal. I thank you
38 for the attention you paid to my statement and ask you, Mr President, unless I can be
39 of further assistance, to give now the floor to Professor Kohen.

40
41 **THE PRESIDENT** (*Interpretation from French*): Thank you very much. I now give the
42 floor to Professor Kohen.

43
44 **PROFESSOR KOHEN** (*Interpretation from French*): Mr President, Mr Vice-President,
45 Members of the Tribunal, my task this morning essentially consists in replying to the
46 arguments put forward by the other Party regarding the conditions that must be met
47 for the Tribunal to prescribe the provisional measure sought by Argentina. I shall
48 address the three conditions in turn in order to demonstrate that those arguments
49 have in no way invalidated the conclusion we came to yesterday morning, which was
50 that these conditions are fully satisfied in this case.

1
2 Allow me to begin with two general points on Ghana's submissions yesterday
3 afternoon. My first comment is an expression of puzzlement. I am surprised at the
4 ease with which counsel for Ghana dealt with the fact that a warship can be forced to
5 remain in the port of a foreign State and that even force, albeit "moderate" or "non-
6 excessive", can be used against it. No less surprising is the effort to provide legal
7 justification for this alleged behaviour. We have heard arguments about the ordering
8 of provisional measures, the interpretation of the 1982 Convention, the right of
9 immunity, and the relationship between international and domestic law which, if
10 correct, would not only render the presence of foreign warships in States' ports
11 complex, to say the least, but would also constitute veritable challenges to the settled
12 interpretations of the fundamental rules of international law.

13
14 My second general comment concerns something wholly new that was said
15 yesterday afternoon by Ms Butler. She warned you, Members of the Tribunal, that
16 even if you were to find the three conditions for prescribing the provisional measure
17 to be satisfied, you would have discretion not to order that measure. Counsel for
18 Ghana seems to be applying here the interpretation given to article 65 of the Statute
19 of the Court and article 138 of your Tribunal's Statute for the discretionary exercise of
20 advisory jurisdiction. However, she reversed the role of what are called "compelling
21 reasons": in the Court's case-law these "compelling reasons" may be invoked as
22 reason for the Court to abstain from exercising its advisory jurisdiction, whereas
23 according to Ms Butler there would need to be "compelling reasons" for the ordering
24 of provisional measures. I do not think I need go any further. I shall confine myself to
25 saying that neither your Tribunal nor the Hague Court have ever invoked – and I
26 could probably say that they never even imagined – this discretionary power in
27 relation to provisional measures.

28
29 I shall now move on to the arguments put forward by the Respondent in order to
30 contest the *prima facie* existence of the arbitral tribunal's jurisdiction. Mr President,
31 the Respondent relies on two principal arguments in arguing that the tribunal lacks
32 jurisdiction: that the Convention articles invoked by Argentina are not relevant, and
33 that the merits of the case are a matter for "New York law, and possibly also the law
34 of Ghana".

35
36 My colleague Philippe Sands engaged in some very original interpretations of some
37 of the Convention rules cited by Argentina. Of course, it was his absolute right to do
38 so, except that he rather got ahead of himself. He went straight to the heart of the
39 dispute which the arbitral tribunal would be asked to decide in order to establish
40 whether or not Ghana has breached its international obligations under these articles.
41 One thing is certain: in doing so, he provided the best possible proof of what he
42 wanted to avoid, i.e. that there is a dispute over the interpretation and application of
43 the rules of the Convention and that the Tribunal consequently has jurisdiction. In
44 addition to your case-law cited yesterday, I would add the finding of The Hague Court
45 in the case relating to the Convention on Genocide in Bosnia-Herzegovina. It found
46 that the parties

47
48 are moreover in disagreement with respect to the meaning and legal scope
49 of several of those provisions. [...] For the Court, there is accordingly no

1 doubt that there exists a dispute between them relating to “the
2 interpretation, application or fulfilment of the Convention”.

3
4 We are in exactly the same situation here with regard to the rules of the 1982
5 Convention, and Gerhard Hafner has shown you our *fumus boni iuris*.

6
7 I could say the same with regard to everything put forward by counsel for Ghana.
8 Each member of the opposing team showed remarkable zeal in examining
9 Argentina’s alleged waiver of immunities, though no-one (I repeat, no-one) has yet
10 explained how this waiver would apply to the *ARA Libertad*. That remarkable zeal
11 was nonetheless fruitless, as Gerhard Hafner has just demonstrated.

12
13 I have the impression, Mr President, that counsel for Ghana have a problem with the
14 causal link or, to put it more prosaically, that they have put the cart before the horse.
15 They seek to hide the dispute regarding Ghana’s failure to meet its international
16 obligations under the Convention behind the dispute between the NML vulture fund
17 and Argentina. According to Ghana, the law that really should apply is that of New
18 York or of Ghana.

19
20 Members of the Tribunal, let me draw your attention to a major defect in Ghana’s line
21 of argument: the question whether the warship *ARA Libertad* enjoys immunity is
22 governed neither by New York law nor by the law of Ghana. Like any question
23 relating to immunity, it is governed essentially by international law, and national
24 courts, whether or not their States have legislation on immunity, are required to
25 observe and apply international law when faced with proceedings against a foreign
26 State.

27
28 In reality, Mr President, the Respondent’s entire line of argument is based on a
29 serious error not only over the interpretation of the scope of waivers of immunity but
30 also over the way in which the actual concept of immunity works. If we follow the
31 Ghanaian argument, international law has no role to play in the whole question of
32 immunity, nor doubtless do the international courts or tribunals. Thus, in their view, it
33 is a matter governed by domestic law and one for the domestic courts. Ultimately,
34 Ghana seems to be saying more or less the following: “You should not have come to
35 Hamburg; you should have gone to Accra, to the Ghanaian Court of Appeal, in order
36 to resolve this matter, and that court would apply New York law and perhaps the law
37 of Ghana”. Opposing counsel then went on to make a great deal of the need to
38 observe the rule of law, which implies respect for the separation of powers and the
39 independence of the judiciary.

40
41 The real problem, Mr President, which Ghana seems to overlook despite its being so
42 obvious, is that disputes concerning immunity from jurisdiction and execution arise
43 precisely from the action of States’ judicial organs. Need we recall the quite recent
44 judgment by the Hague Court on *Jurisdictional Immunities of the State*, in a dispute
45 between Germany and Italy? If a State could rely on the independence of its judiciary
46 in order to avoid responsibility for violating the immunities enjoyed by protected
47 property and persons, or to force a foreign State to pursue domestic remedies in
48 order to get these immunities recognized, there would be nothing left of the
49 institution. The Ghanaian argument is thus the most perfect way to demolish the very
50 basis of immunity: *par in parem non habet imperium*.

1
2 My colleague Philippe Sands complicated his task by choosing the example of
3 General Pinochet. Instead of speculating about Chile's reasons for not instituting
4 proceedings before an international court when he was arrested in London, he could
5 have drawn on the case law of The Hague. He could have found, for instance, that in
6 the *Yerodia* case the Court engaged the responsibility of Belgium for the acts of its
7 judicial bodies, which had issued an arrest warrant, thereby violating the immunity of
8 a Minister of Foreign Affairs. If Mr Yerodia had been arrested pursuant to this arrest
9 warrant, the Democratic Republic of the Congo would have had its hands tied
10 internationally because, if we are to accept Mr Sands' theory, it would have had to
11 leave the matter to the domestic courts.

12
13 I do not intend to dwell further on this matter. Article 4 of the articles on responsibility
14 of States and article 6 of the United Nations Convention on the Jurisdictional
15 Immunities of States and their Property are absolutely clear in this regard.

16
17 Aside from the elementary point that the State is responsible for the acts of all its
18 organs, I confess that I was astonished at the Respondent's insistence on sheltering
19 behind the rule of law to justify its actions. Our adversaries even acknowledged that
20 the rule of law encompasses respect for international law. On the one hand,
21 Argentine rights flowing directly from international law are being flouted; on the other
22 hand, the internal Ghanaian legal order was flouted by the events of 7 November
23 without entailing any consequences. In other words, according to the Ghanaian
24 Government, it cannot release the *ARA Libertad* because that would be contrary to
25 an execution order from a Ghanaian court. By contrast, its Port Authority may forcibly
26 relocate the *ARA Libertad* even though there is as yet no enforceable decision and
27 notwithstanding the warning contained in an Argentine note dated 31 October urging
28 Ghana to refrain from taking such action. It seems to me that the rule of law in
29 question changes with the wind.

30
31 Moreover, I note the significant silence on such a basic issue as the agreement
32 between the two States that the warship would arrive in Tema on 1 October and
33 leave the port on 4 October and Ghanaian jurisdictional waters on 5 October. It
34 seems impossible to deny that this arrangement relates to law of the sea issues. And
35 the evidence shows that the *ARA Libertad* was unable to leave Tema on 4 October
36 as agreed between the parties and that it still unable to do so. Mr. President, I do not
37 think that the question of the rule of law has any bearing whatsoever on the question
38 which has brought us here, although generally speaking the rule of law implies
39 respect for international law. Perhaps it is worth recalling the most elementary of all
40 rules: *pacta sunt servanda*.

41
42 I shall now turn to the pressing need to prescribe the provisional measure.

43
44 The Respondent's efforts to downplay the gravity of the question that motivated this
45 request for a provisional measure has not escaped the Tribunal's attention. Ghana's
46 arguments in support of its claim that it is unnecessary to order the provisional
47 measure may be summarized as follows: *primo*, all is well at the moment in Tema
48 and there is no problem for either the warship or its crew. *Secundo*, as the training
49 vessel was refurbished between 2004 and 2007, if it is not in use now, no irreparable
50 damage will be sustained. *Tertio*, Argentina can at any moment post the

1 US \$20 million bond and the *ARA Libertad* can immediately set sail. Those are
2 Ghana's three main arguments.

3
4 Ghana's efforts to demonstrate that the situation on the ground has improved
5 somewhat has no bearing whatsoever on the need to prescribe a provisional
6 measure to protect Argentina's rights that are at issue in the present case. Because
7 the right at issue for Argentina is not that of ensuring that the frigate is held in the
8 port of Tema under conditions that are more or less satisfactory (and they are not at
9 all satisfactory at the moment). The right consists essentially in being able to leave
10 Tema and in enabling the *ARA Libertad* to resume its normal activity.

11
12 Ghana is aware of the flimsiness of its arguments aimed at justifying the indefensible
13 acts of its Port Authority on 7 November 2012. To compensate for this, the
14 Respondent has gone to great lengths to present affidavits demonstrating that the
15 forced presence of the *ARA Libertad* and its crew in Tema is a sort of holiday. I shall
16 refrain from commenting on the putative concern of the Ghanaian Port Authority to
17 protect the frigate from the alleged risks of contamination from cement, which was
18 what supposedly motivated it to seek its relocation. Whether this would be
19 undertaken by force is of little consequence because it seems at this stage that, as
20 far as Ghana is concerned, it is the director of the Tema Port Authority who now
21 issues orders to Captain Salonio.

22
23 Mr President, I would also like to draw your attention to the fact that the annex to
24 Ghana's written pleading mentions a number of affidavits, photographs and videos,
25 which Argentina has not received.

26
27 Members of the Tribunal, you will find in your folders the affidavits that we received a
28 few hours ago from Captain Salonio of the *ARA Libertad* and the Argentine
29 Ambassador accredited to Ghana, Susana Pataro. These affidavits refute the
30 accounts presented by Ghana in the annex to its written pleading and in the judges'
31 file submitted yesterday. We request you to take them into account in assessing the
32 current situation of the *ARA Libertad* and the assertions of the opposing party. The
33 affidavit of Captain Salonio illustrates the insecurity and tension of the situation that
34 still prevails as well as his inability to go ashore. I would like to draw your attention,
35 Mr. President, to the misleading nature of question 5 posed to the Port Authority by
36 counsel for Ghana. Captain Salonio really is being subjected to proceedings for
37 "contempt of court", as demonstrated by our document filed with your Tribunal on
38 27 November 2012. It is of no consequence whether or not the proceedings were
39 instituted by the Port Authority. The affidavit of Ambassador Pataro sets out clearly
40 what occurred on 7 November. Moreover, the treatment to which he was subjected
41 triggered a protest note from Argentina to Ghana, which, like all the other notes, has
42 remained unanswered.

43
44 Mr President, I argued yesterday morning that Ghana would suffer no damage if it
45 were to order the release of the *ARA Libertad*. Yesterday afternoon our colleagues
46 on the opposing side confirmed what I had stated. Counsel for Ghana presented you
47 with an account of the problems that the presence of the *ARA Libertad* is allegedly
48 creating in the port of Tema, and the losses thus incurred. Ms Butler pointed out that
49 account must be taken of the rights of both Parties when prescribing provisional
50 measures, but she failed to invoke any right. Apparently the only right that Mr Sands

1 could suggest as being perhaps at issue for Ghana is respect for the rule of law, a
2 point that I have already addressed. In any event, Mr President, your Tribunal deals
3 with States, which constitute a single subject of law at the international level. The
4 prescription of the provisional measure must be applied by Ghana, and if Ghana is
5 so concerned about international law, it should not harbour any doubts about the fact
6 that the rule of law will require it to abide by your decision.
7

8 Mr President, faced with the demonstrated falsity of Ghana's claims regarding the
9 promptness with which the Port Authority acted in supplying fuel to the *ARA Libertad*,
10 Counsel for Ghana has provided the following explanation: (*continued in English*)
11

12 It is true that the order of Judge Frimpong (which is currently under appeal)
13 appears to specify that the ship is prevented from refuelling, but the Port
14 Authorities are willing to do all that they can to support any Argentinian
15 application for variance of Judge Frimpong's order so as to allow the ship to
16 refuel or at least to clarify if there is some degree of misunderstanding as to
17 whether or not it can be refuelled – and we are told that it can already be
18 refuelled.
19

20 (*Interpretation from French*) Leaving aside the kind invitation to apply to a court
21 having no jurisdiction to alter a decision which is contested by Argentina *in toto*, I
22 must once again confess I am perplexed by a statement, which is unfounded, that
23 the warship could already have been resupplied. Not only is there nothing to bear out
24 this assertion but it would also be contrary to Judge Frimpong's order. Again, this
25 seems to be what is called the rule of law by the opposing side.
26

27 Members of the Tribunal, the application to authorize the *ARA Libertad* to refuel in
28 order to leave Tema and Ghana's territorial seas remains entirely valid.
29

30 Just a word on the point that the training vessel has not been used for three years. It
31 did indeed undergo substantial modernization, but that cannot be taken seriously as
32 a reason for keeping the *ARA Libertad* in detention. Surely it is for the warship's flag
33 State to decide how the vessel is to be employed and to make use of the vessel in its
34 present modernized condition. Depriving the Argentine navy of its training ship
35 causes irreparable harm.
36

37 Mr Sands has also claimed that we are demanding some "super kind of prompt
38 release". I have already commented on the difference between prompt release and
39 the situation of a warship that has not been accused of committing any offence. The
40 opposing Party has not reacted to this distinction. There is no need to dwell on it
41 here. I shall simply mention my curiosity as to how my colleague arrived at his
42 manifestly exorbitant calculations in claiming that the cost of these proceedings
43 equates to the \$20 million that NML sought as a bond, and which Judge Frimpong
44 was in such a hurry to set.
45

46 Lastly, the Respondent claims that there is no urgency because the arbitral tribunal
47 could act quickly and Ghana is giving every assurance that the *ARA Libertad* and its
48 crew are being well treated pending the conclusion of the proceedings in the
49 Ghanaian courts.
50

1 I shall not go back over our comments yesterday regarding the alleged speed with
2 which the arbitral tribunal could be in a position to address the request for provisional
3 measures. I would simply add one observation. It has now been 30 days since
4 Argentina gave notice that it was instituting arbitral proceedings. To date, we have
5 received no news regarding Ghana's designation of an arbitrator as required under
6 article 3 of Annex VII.

7
8 Nor shall I go back over all the reasons that demonstrate the urgency of the need for
9 the prescription of provisional measures, both from the point of view of the security of
10 the vessel and crew and the risk of tensions in the port. The fact that the harm to
11 Argentina's rights is ongoing amply justifies this urgency.

12
13 There is another essential question on which Ghana has remained silent. That is the
14 very real possibility that the country's judicial bodies will decide to execute the
15 order – entirely unlawfully, of course – against the *ARA Libertad*. In other words, if
16 we were to believe the opposing side, the fact that the proceedings in the domestic
17 courts would, in their view, be completed by the end of January 2013 is surely an
18 added element of urgency for the prescription of provisional measures. There is no
19 basis for supposing that the arbitral tribunal would even be in a position to be
20 operational by then. Nor is there any basis for forecasting when the proceedings in
21 the domestic courts might end.

22
23 That brings me to the alleged assurances from Ghana. The case law of your Tribunal
24 has considered the granting of assurances, as an element to be taken into account
25 for determining whether or not provisional measures need to be prescribed, in
26 circumstances which are quite different from those of this case. Moreover, what are
27 these assurances? The assurance that the rights of Argentina with regard to the
28 warship cannot be exercised for an indeterminate period. That seems more like
29 saying, "We will keep the *Libertad* in detention, but it and its crew will be properly
30 treated whilst they are being kept there". What Ghana is basically asking for is to
31 allow it to judge and decide on the fate of the vessel. That is what lies hidden behind
32 Ghana's request that no provisional measures be prescribed. Could your Tribunal
33 truly "safeguard" this alleged right of Ghana's, which does not exist and which the
34 Respondent has not even made an effort to show exists?

35
36 Mr President, Mr Vice-President, Members of the Tribunal, Ghana invites you to
37 disregard the question of immunity in the area of international law and to make the
38 presence of foreign warships in foreign ports subject to the ruling of a coastal State.
39 But Argentina has come here to preserve three fundamental rights which are the
40 essence of the co-existence of States at sea and which, moreover, are the result of a
41 bilateral arrangement.

42
43 You will have noticed the quite exceptional nature of the situation that you are faced
44 with. A warship visiting by agreement between the two States concerned is then
45 prevented from leaving port to continue on its way and is subject to a measure of
46 constraint. The only way to protect the rights of the flag State without causing harm
47 to Ghana – which would in fact be to its benefit and that of the entire international
48 community – would be to permit the *ARA Libertad* to leave the Port of Tema and the
49 territorial waters of Ghana and permit it to be resupplied to that end.

1 I thank the Members of the Tribunal for your attention. Mr President, I request you to
2 give the floor to the Agent of the Argentine Republic.

3
4 **THE PRESIDENT** (*Interpretation from French*): Thank you, Mr Kohen. The Agent for
5 Argentina, Ms Ruiz Cerruti, is now given the floor.

6
7 **MS RUIZ CERRUTI** (*Interpretation from French*): Mr President, Mr Vice-President,
8 Members of the Tribunal, on this second day of pleading, Argentina finds that there
9 are still some surprises left. The assertion by Counsel for Ghana whereby the
10 immunity of warships is not covered in the United Nations Convention on the Law of
11 the Sea is simply wrong. When the Convention states that nothing shall affect the
12 immunities of warships and when a State – Ghana in this case – maintains that
13 presence in one of the maritime areas covered by the Convention is sufficient to
14 affect the immunities of a warship, what is clearly at stake is the interpretation and
15 application of the Convention.

16
17 Yesterday I referred to the principle of good faith, which article 300 of the Convention
18 sets out, not just as a principle of interpretation but also as a basic norm that creates
19 obligations as to conduct. We do not think it is possible to interpret the Convention in
20 good faith and at the same time deny that the Convention includes the immunity of
21 warships. Only an interpretation contrary to good faith could enable a national court
22 to decide that it has the right to exercise jurisdiction over a warship making an official
23 visit to a port in its country with the agreement of its government.

24
25 Every year the General Assembly of the United Nations adopts a resolution on the
26 oceans in which it proclaims “the universal and unified character of the Convention”.
27 In the preamble of the resolution, the Assembly reaffirms

28
29 that the Convention sets out the legal framework within which all activities
30 in the oceans and seas must be carried out and is of strategic importance
31 as the basis for national, regional and global action and cooperation in the
32 marine sector.

33
34 In the operative part of the resolution, the General Assembly also “reaffirms equally
35 the unified character of the Convention and the vital importance of preserving its
36 integrity”.

37
38 Mr President, to claim that the Convention does not regulate the immunities of a
39 warship is not just to ignore the text of the Convention but also to deny that that
40 instrument regulates all activities in the oceans and seas. Such a reading also
41 denies the unified character and the integrity of the 1982 Convention. I wonder
42 whether any warship would ever call at a foreign port if one were to declare that
43 matters relating to the immunities of warships are excluded from the general regime
44 of the law of the sea arising from that Convention.

45
46 Mr President, yesterday we heard the other party say that there was no dispute
47 between Ghana and Argentina, but rather between Argentina and something called
48 NML. In fact, by this point in the proceedings, everyone will have observed that there
49 is indeed a dispute between Ghana and Argentina, which was referred to extensively
50 by my learned colleague Ebenezer Appreku. If I understood him correctly, he

1 indicated that the executive branch of government in his country maintains its official
2 position to the effect that its judges do not have jurisdiction over Argentina and, more
3 specifically, over the ship *ARA Libertad*. Moreover, Mr Appreku referred to the
4 difficult situation that his country finds itself in because of the principle of the
5 separation of powers.
6

7 Having listened to him, I get the impression that the Government of Ghana is not
8 opposed to this Tribunal prescribing the provisional measure requested by
9 Argentina; on the contrary, that decision would resolve the tension between the
10 executive branch and the judicial authorities mentioned yesterday by Mr Appreku.
11 Such a decision would at the same time be in accordance with the international law
12 of the sea, the principles of international law and the rule of law. Moreover, a
13 response from the Tribunal for the Law of the Sea would have the useful effect of
14 preserving the immunity of the *ARA Libertad*.
15

16 With the exception of my learned colleague Mr Appreku, the rest of the statements
17 by the other party seemed to refer to a different dispute, the one arising from the
18 claims of a vulture fund against Argentina. The interests of a company are not the
19 same as those of a State. Comparing a debt with accusations of crimes against
20 humanity seems to us an inappropriate exercise in rhetoric, which introduces
21 confusion and is fraught with risks that a State would normally not take. It may seem
22 incomprehensible to a private company that a warship used for military purposes
23 may have on board military personnel of various nationalities other than that of the
24 flag State; fortunately, co-operation between States offers quite different possibilities.
25

26 Mr President, Mr Vice-President, Members of the Tribunal, throughout the present
27 proceedings Ghana has referred on numerous occasions to the vulture fund NML
28 and the numerous legal proceedings to which NML has tried to bring against
29 Argentina. This seems to be a rather clumsy attempt to divert attention from the real
30 dispute that sets Ghana against Argentina today concerning the embargo that has
31 been placed on the *ARA Libertad* and also to avoid international responsibility.
32

33 This strategy on the part of the other party compels me to dwell for a little while on
34 vulture funds and their practices, even though, as I must emphasize explicitly, this is
35 outside the scope of the decision that this Tribunal will have to take. By the way,
36 there are 44 references to vulture funds in the statements made by the other party.
37

38 Mr President, the Ghanaian court has certainly not been designated as a competent
39 forum to deal with bonds issued by Argentina. Why, then, did a fund, one of those
40 so-called vulture funds, with headquarters in the Cayman Islands, choose Ghana as
41 a forum and the *ARA Libertad* as its prey?
42

43 Some of these “speculative investment funds”, as they are called, buy up debts from
44 countries that are about to default for a mere fraction of their value with a view to
45 recovering the total value via legal actions before foreign courts. These strategies
46 are frequently successful, obtaining financial ransoms extorted from the public purse,
47 money that should normally be used to combat poverty and instability.
48

49 Although the activities of the vulture funds first emerged in South America, since the
50 1990s they have got their claws, as it were, on a number of countries in sub-Saharan

1 Africa, by acquiring their debts on the cheap. These funds then waited for financial
2 aid and debt relief programmes to be offered by the World Bank, IMF and the
3 developed countries before going on the attack, by presenting their bond certificates
4 to American and European courts and seeking payment of the whole of the debt.
5

6 When it was clear that a large proportion of the aid given to Africa was falling into the
7 clutches of these vulture funds, some organizations began to question the
8 international financial system and they coordinated their efforts to put pressure on
9 governments and the international financial institutions so that the necessary
10 measures could be taken to deal with the situation.
11

12 Within this context, there is a sad irony in the fact that it is an African judge who
13 seized the frigate *Libertad* in the port of Tema, following a request from a vulture
14 fund. A key element of the Argentine national heritage is thus being held in clear
15 violation of international law in order to obtain the payment of a speculative debt
16 bought for a song because of a default in payment that occurred almost a decade
17 ago.
18

19 My country defaulted on its payments in 2001, right in the middle of an economic
20 crisis of unprecedented gravity in recent Argentine history. In order to get out of that
21 situation in 2005, and again in 2010, Argentina devised and carried out a complete
22 restructuring of its debts, which was accepted by more than 92 per cent of its
23 creditors - I emphasize, 92 per cent of its creditors. From that moment on, the
24 message of the Argentine Government was clear: Argentina will abide by the
25 restructuring plan for its debts. It has paid, and is still paying, fair compensation to all
26 bond-holders who agreed to swap their claims, and this has contributed to its
27 economic recovery.
28

29 It must also be emphasized that the interest on the restructuring bonds was pegged
30 to the movement of Argentina's GDP. After annual growth of more than 8 per cent
31 since 2003, this has led to a significant gain for the bond-holders who participated in
32 the restructuring process.
33

34 Mr President, we fully understand why a vulture fund such as NML decided to attack
35 an emblematic symbol of Argentina. Being in the habit of speculating, it imagined
36 that Argentina would be prepared to accept the price of posting a bond such as that
37 which the Ghanaian court maintains it has imposed for the release of the *ARA*
38 *Libertad*. But they made a big mistake: Argentina has never yielded and will never
39 yield to such attempted extortion, nor could it do so because of the obligations it
40 undertook when restructuring its debt. On the other hand, we have difficulty
41 understanding why Ghana, a country that is friendly towards Argentina, has not
42 reacted to the activity of the vulture fund.
43

44 Mr President, Mr Vice-President, honourable Members of the Tribunal, I have the
45 impression that the *ius privatista* view that prevailed yesterday in the pleadings by
46 the other Party is intended to distort the content of the provisional measure
47 requested by Argentina by attributing to it an emotional content which is to the
48 detriment of its due rationality.
49

1 Mr President, the immunity of warships is not based on sentiment. The protection of
2 the function that characterizes diplomatic immunity, and immunity relating to
3 warships, is based inexorably on common sense. You do not employ force against a
4 warship except in a context of war. The use of force against a warship outside of that
5 context, apart from being contrary to international law, is, moreover, an absurd act.
6 To expose that folly before an international tribunal, Mr President, is the most
7 rational conduct that Argentina could adopt in the current circumstances. I defy
8 anyone to suggest a more rational approach than the one which we have chosen
9 and which has led us here to this Tribunal in Hamburg.

10
11 While we are talking about rationality, Mr President, Members of the Tribunal, I must
12 admit that I was surprised yesterday when my learned friend Mr Appreku stated: "We
13 are pleased that, in keeping with its belief in the rule of law, Argentina chose to file
14 an appeal in Ghana instead of resorting to the use of force."

15
16 If there is irrationality in this case, Argentina does not think that it comes from our
17 side. The comment made by my learned friend leads me to a number of
18 observations:

19
20 First, if Ghana is so convinced of the need to preserve its rule of law, it ought to
21 avoid a repetition of the episode that took place on 7 November, where Ghana itself
22 admitted that it used force against an Argentine warship.

23
24 A warship, according to the Convention, is "under the command of an officer duly
25 commissioned by the government of the State"; that is to say, it is a ship in which
26 only the law of the flag State applies through the authority of the commander. By
27 stating that a foreign warship in its internal waters is "available for enforcement",
28 Ghana is claiming that the definition of a warship has a limited scope, when in fact
29 that restriction does not appear in the text of the Convention; otherwise, Ghana
30 would not be trying to take coercive measures against the *ARA Libertad*.

31
32 If warships are to cease to be under the exclusive authority of the flag State when
33 they are in the internal waters of a third country, the definition in the Convention
34 would be subject to a condition which is not contained either expressly or implicitly in
35 the rule. This conclusion is, moreover, fundamental to the jurisdiction of the arbitral
36 tribunal that will be called upon to rule on the merits of the request made by
37 Argentina against Ghana.

38
39 Whilst this dispute remains unresolved, the position of Argentina is that the definition
40 of warship applies, as the Convention states, throughout all maritime areas, including
41 internal waters when the warship is there with the consent of the coastal State. From
42 the point of view of Argentina, if the commander of the *ARA Libertad* were to allow
43 the Ghanaian authorities to take control of the ship, either to move it from one place
44 to another or for any other reason, our country would cease to classify the *ARA*
45 *Libertad* as a warship, and we have not taken any such decision.

46
47 The real urgency in this, Mr President, stems from the fact that Argentina does not
48 know what parameters Ghana is using to measure the "rationality" with which it used
49 force against an Argentine warship. I repeat, I do not know what Ghana considers
50 "rational" when Ghana uses that adjective to describe the use of force against a

1 warship. Now Ghana is allowing the use of force against the captain of the ship
2 because the captain is acting in accordance with the Convention, that is to say, by
3 applying on board the warship exclusively the law of its flag State.
4

5 In such a context, the absence of essential items, such as fuel, the supply of which
6 has been prohibited by the Ghanaian court which imposed the embargo, is an
7 additional aggravating factor, adding to the psychological pressure to which the crew
8 of the vessel is subjected. These observations I have just made, along with the
9 affidavit from the captain of the *Libertad* which we have annexed to the Judge's
10 folders this morning, are in response to the question which was put to us by the
11 Tribunal on the subject of the current situation of the *ARA Libertad* and its crew.
12

13 Mr President, the presence with the consent of the coastal State, of a warship in its
14 territorial waters in no way alters its status as a warship. Today Ghana has revealed
15 some of the mystery that surrounds its position. We now know that this State is
16 claiming the contrary, that is, that a warship loses that status when it is in the internal
17 waters of a State which has consented to its presence.
18

19 Mr President, since it is an aspect of the substance of the dispute between Ghana
20 and Argentina, I can only reject the claim made by my learned friend Mr Appreku
21 when he said:
22

23 *(Continued in English)*
24

25 Ghana is not a party to the dispute between NML and Argentina. NML, a
26 private company incorporated under the laws of the Cayman Islands has
27 issued proceedings against Argentina in the United States, the United
28 Kingdom and in France. It is this dispute which forms the subject matter of
29 Argentina's Statement of Claim and Request for the prescription of
30 provisional measures.
31

32 *(Interpretation from French)*
33

34 The subject-matter of the dispute between Argentina and Ghana relates to the
35 respect for the immunity of the Argentine warship. The Respondent maintains that
36 the immunity of that vessel has been waived because it is in internal waters. It is
37 difficult to imagine a dispute which is more central to the structure of the Convention.
38 The jurisdiction of the tribunal which is called upon to decide on the merits is
39 something more than *prima facie*. Mr President, the other disputes to which my
40 learned friend Mr Appreku referred, and I am talking about the disputes that NML
41 has consistently lost against Argentina in one court after another, have nothing to do
42 with this Tribunal or with the subject of the present matter, in which it must be
43 determined whether the immunities of warships, which are inherent in the definition
44 established by the Convention for those vessels, cease to exist, as does the very
45 definition of a warship, when the warship is in the internal waters of a coastal State
46 which has consented to its presence.
47

48 Another of the aspects of the comments made by Mr Appreku that I want to deal with
49 is the consistency of his argument. He, representing the Ghanaian executive, has
50 admitted that the court in his country lacked jurisdiction, both with regard to
51 Argentina and with regard to the *ARA Libertad*. It is then inconceivable for him to

1 suggest the posting of a bond imposed by a court which has no jurisdiction. A
2 demand for a sum money by a court which does not have jurisdiction cannot be
3 called a bond, Mr President.

4
5 To conclude, Mr President, I am able to make a formal proposal to the Ghanaian
6 side. Article 287, paragraph 5, of the Convention provides that “if the Parties to a
7 dispute have not accepted the same procedure for the settlement of the dispute, it
8 may be submitted only to arbitration in accordance with Annex VII, unless the Parties
9 otherwise agree.”

10
11 Argentina is proposing to Ghana to submit the merits of this dispute to your Tribunal,
12 Mr President, in lieu of the arbitral tribunal which is still being constituted. This
13 proposal, pending its acceptance by Ghana and implementation, does not exempt
14 Ghana from all its obligations under Annex VII of the Convention.

15
16 I cannot conclude, Mr President, without expressing my thanks to all the Registry
17 staff for the very valuable assistance they have given to the parties. I would also like
18 to thank the interpreters, who have done very well to translate what we have been
19 saying.

20
21 I believe I must now read the final submissions of the Argentine Republic, if you will
22 allow me to do that, Mr President.

23
24 **THE PRESIDENT** (*Interpretation from French*): Thank you, Ms Ruiz Cerutti. That is
25 therefore the last statement by Argentina. Article 75, paragraph 2, of the Rules of the
26 Tribunal states that at the conclusion of the last statement made by a party at the
27 hearing, its agent, without recapitulation of the arguments, shall read that party’s final
28 submissions. A copy of the written text of these, signed by the agent, shall be
29 communicated to the Tribunal and transmitted to the other party. I therefore invite the
30 Agent for Argentina, Ms Ruiz Cerutti, to read Argentina’s final submissions.

31
32 **MS RUIZ CERUTTI** (*Interpretation from French*): Thank you very much,
33 Mr President. I will read our final submissions and I shall do this in English.

34
35 (*Continued in English*)

36
37 For the reasons set out above, pending the constitution of the arbitral
38 tribunal under Annex VII of the United Nations Convention on the Law of
39 the Sea, Argentina requests that the Tribunal prescribes the following
40 provisional measure:

41
42 that Ghana unconditionally enables the Argentine warship Frigate ARA
43 Libertad to leave the Tema port and the jurisdictional waters of Ghana and
44 to be resupplied to that end.

45
46 Equally Argentina requests that the Tribunal rejects all the submissions
47 made by Ghana.

48
49 Thank you very much.

50
51 (*Interpretation from French*)

1
2
3
4
5
6
7
8
9

Thank you very much, Mr President, Mr Vice President and Members of the Tribunal.

THE PRESIDENT (*Interpretation from French*): Thank you, Ms Ruiz Cerutti. This brings us to the end of the second round of pleadings for Argentina. The hearing will resume at 12 o'clock when we will hear the pleadings of Ghana. The sitting is now closed.

(The sitting was closed at 11.55 a.m.)