# Minutes of Public Sittings – Procès-verbal des audiences publiques

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
# TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

## MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 29 AND 30 NOVEMBER AND ON 15 DECEMBER 2012

*The "ARA Libertad" Case*
*(Argentina* v. *Ghana),*
*Provisional Measures*

## PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES LES 29 ET 30 NOVEMBRE ET LE 15 DÉCEMBRE 2012

*Affaire de l'« ARA Libertad »*
*(Argentine c. Ghana),*
*mesures conservatoires*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

---

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

---

Note by the Registry: The corrected verbatim records are available on the Tribunal's website at www.itlos.org.
Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : www.tidm.org.

# Minutes of the Public Sittings held on 29 and 30 November and on 15 December 2012

# Procès-verbal des audiences publiques tenues les 29 et 30 novembre et le 15 décembre 2012

**PUBLIC SITTING HELD ON 29 NOVEMBER 2012, 9.30 A.M.**

**Tribunal**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* 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 Kohen,
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.

29 novembre 2012, matin

**AUDIENCE PUBLIQUE TENUE LE 29 NOVEMBRE 2012, 9 H 30**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD, KULYK, *juges* ; M. MENSAH, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**L'Argentine est représentée par :**

Mme Susana Ruiz Cerutti,
conseillère juridique du Ministère des affaires étrangères et du culte,

*comme agent ;*

M. Horacio Adolfo Basabe,
chef de la Direction de l'aide juridique internationale, Ministère des affaires étrangères et du culte,

*comme co-agent ;*

*et*

M. Marcelo G. Kohen,
professeur de droit international, Institut de hautes études internationales et du développement, Genève, Suisse,

M. Gerhard Hafner,
professeur de droit international,

M. Holger F. Martinsen,
conseiller juridique adjoint du Ministère des affaires étrangères et du culte,

*comme conseils et avocats ;*

M. Mamadou Hebié,
maître de conférences, master en règlement des différends internationaux, Genève, Suisse,

M. Gregor Novak,
master en droit, Université de Vienne, Autriche,

M. Manuel Fernandez Salorio,
consul général de la République argentine à Hambourg, Allemagne,

Mme Erica Lucero,

troisième secrétaire, membre du Bureau du conseiller juridique, Ministère des affaires étrangères et du culte,

*comme conseillers.*

**Le Ghana est représenté par :**

M. Anthony Gyambiby, Vice-Ministre de la justice et Procureur général adjoint,

*comme agent ;*

Mme Amma Gaisie,
Solicitor-General, bureau principal du Service du Procureur général,

M. Ebenezer Appreku,
directeur du Bureau des affaires juridiques et consulaires, conseiller juridique au Ministère des affaires étrangères,

*comme co-agent et conseil ;*

*et*

M. Raymond Atuguba,
maître de conférences, faculté de droit, Université du Ghana, Legon,

*comme conseil ;*

M. Philippe Sands, QC,
membre du barreau d'Angleterre et du pays de Galles, professeur de droit international, University College de Londres, Royaume-Uni,

Mme Anjolie Singh,
membre du barreau de l'Inde, Matrix Chambers, Londres, Royaume-Uni,

Mme Michelle Butler,
membre du barreau d'Angleterre et du pays de Galles, Matrix Chambers, Londres, Royaume-Uni,

*comme conseils et avocats ;*

M. Remi Reichhold,
assistant de recherche, Matrix Chambers, Londres, Royaume-Uni,

*comme conseiller ;*

M. Paul Aryene,
ambassadeur de la République du Ghana en Allemagne, ambassade du Ghana, Berlin, Allemagne,

29 novembre 2012, matin

M. Peter Owusu Manu,
ministre conseiller, ambassade du Ghana, Berlin, Allemagne.

"ARA LIBERTAD"

**Opening of the Oral Proceedings**
[ITLOS/PV.12/C20/1/Rev.1, p. 1–3; TIDM/PV.12/A20/1/Rev.1, p. 1–3]

*The President:*
The Tribunal meets today pursuant to article 26 of its Statute to hear the Parties' arguments in the *"ARA Libertad"* case between the Argentine Republic and the Republic of Ghana.

At the outset, I would like to note that Judge Marotta Rangel and Judge Nelson are prevented by illness from sitting on the bench.

On 14 November 2012 Argentina submitted to the Tribunal a Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with Ghana concerning the detention of the frigate *ARA Libertad*. The Request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named *The "ARA Libertad" Case* and entered in the List of Cases as case number 20.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

*Le Greffier :*
Merci, Monsieur le Président.

Le 14 novembre 2012, copie de la demande en prescription de mesures conservatoires a été transmise au Gouvernement du Ghana. Par ordonnance du 20 novembre 2012, le Président du Tribunal a fixé au 29 novembre 2012 la date de l'ouverture de l'audience. Le même jour, le Président a envoyé une lettre à chacune des parties pour les inviter à s'abstenir de prendre des mesures qui pourraient entraver les effets de toute ordonnance que pourrait adopter le Tribunal. Le 28 novembre 2012, le Ghana a soumis son exposé en réponse à la demande de l'Argentine.

Je vais à présent donner lecture des conclusions des parties.

The Applicant requests that the Tribunal prescribes the following provisional measure:

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

The Respondent requests:

> (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.

*The President:*
Thank you, Mr Registrar.

At today's hearing both Parties will present the first round of their respective oral arguments. Argentina will make its arguments this morning until approximately 1 p.m., with a break of 30 minutes at around 11.00 a.m. Ghana will speak this afternoon from 3 p.m. until approximately 6.30 p.m., with a break of 30 minutes at around 4.30 p.m.

Tomorrow will be the second round of oral arguments, with Argentina speaking from 9.30 to 11.00 a.m. and Ghana speaking from 12 noon to 1.30 p.m.

I note the presence at the hearing of Agent, Co-Agents, counsel and advocates of the Parties.

I now call on the Agent of Argentina, Ms Susana Ruiz Cerutti, to introduce the delegation of Argentina.

*Mme Ruiz Cerutti :*
Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, c'est un véritable honneur pour moi de m'adresser une nouvelle fois à ce Tribunal pour représenter la République argentine.

Permettez-moi, Monsieur le Président, de vous présenter la délégation de la République argentine : Monsieur l'ambassadeur Horacio Basabé, directeur du service juridique international du Ministère des affaires étrangères et du culte de l'Argentine, comme co-agent.

Monsieur Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement, à Genève, membre associé de l'Institut de droit international, Monsieur Gerhard Hafner, professeur de droit international, membre de l'Institut de droit international, et Monsieur Holger F. Martinsen, conseiller juridique adjoint au Ministère des affaires étrangères et du culte, comme conseils et avocats.

Monsieur Mamadou Hebié, maître de conférences, programme de master en règlement des différends internationaux, Monsieur Gregor Novak, *Magister iuris* à l'Université de Vienne, Monsieur Manuel Fernandez Salorio, consul général de la République argentine à Hambourg, et Madame Erica Lucero, secrétaire d'ambassade, membre du Bureau du conseiller juridique du Ministère des affaires étrangères et du culte, en tant que conseils.

Merci beaucoup, Monsieur le Président.

*The President:*
We have been informed by the Co-Agent of Ghana, Mr Ebenezer Appreku, that the Agent of Ghana, Mr Anthony Gyambiby, will not be present at the hearing. I therefore call on the Co-Agent, Mr Appreku, to introduce the delegation of Ghana.

*Mr Appreku:*
Good morning. Honourable President, honourable Members of the Tribunal, it is my singular privilege to introduce the delegation of Ghana. The honourable Anthony Gyambiby, Agent, has indicated he is unable to join us for unavoidable reasons. We have Mrs Amma Gaisie as Co-Agent and Counsel, Solicitor-General of the Republic of Ghana, Attorney-General's Department. We have Dr Raymond Atuguba, Senior Lecturer in Law, Faculty of Law, University of Ghana, Legon, as Counsel. We also have Professor Martin Tsamenyi, Professor of Law, University of Wollongong, Australia, who is unable to join us for unavoidable reasons. We have his Excellency Mr Paul Aryene, Ambassador of the Republic of Ghana to Germany and to ITLOS, Mr Peter Owusu Manu, Minister Counsellor of the Embassy of Ghana in Berlin, and we have Professor Philippe Sands, QC, of Matrix Chambers, London, who is also a Professor at the University of London; Ms Anjolie Singh, a member of the Indian Bar and also of Matrix Chambers, London; Ms Michelle Butler, a member of the English Bar and also of Matrix Chambers; Mr Remi Reichhold, Research Assistant, is a member of the delegation as well.

*The President:*
Thank you, Mr Appreku.

I now request the Agent of Argentina, Ms Ruiz Cerutti, to begin her statement.

« ARA LIBERTAD »

**Plaidoirie de l'Argentine**

EXPOSÉ DE MME RUIZ CERUTTI
AGENT DE L'ARGENTINE
[TIDM/PV.12/A20/1/Rev.1, p. 3–9]

*Mme Ruiz Cerutti :*
Merci, Monsieur le Président.

Monsieur le Président, Monsieur le Vice-Président, Madame et Monsieur les Membres du Tribunal,

Je vous ai déjà dit tout l'honneur qui est le mien de m'adresser à nouveau ce Tribunal au nom de mon pays, quoique ce soit malheureusement cette fois dans le cadre d'un procès, en raison des mesures adoptées par un pays ami, le Ghana, à l'encontre du navire de guerre de l'Argentine qui a la plus haute valeur symbolique pour tous les argentins : la frégate *ARA Libertad.* En outre, je dois le faire en cette année particulièrement symbolique pour tous ceux qui ont été impliqués dans les négociations de la troisième Conférence des Nations Unies sur le droit de la mer.

La Convention fête, dans quelques jours, son trentième anniversaire, et c'est également un honneur de pouvoir évoquer cet évènement devant le Tribunal de Hambourg, en compagnie des collègues, tant du côté du Tribunal que du côté des plaideurs, avec qui nous avons partagé une partie de ce long et difficile chemin ayant abouti à l'adoption de cet instrument dont l'interprétation et l'application nous réunissent aujourd'hui.

Monsieur le Président, il n'est pas nécessaire de rappeler la grande importance que revêt ce Tribunal pour l'Argentine. Nous le considérons comme l'un des piliers du droit international contemporain. C'est pourquoi notre pays est l'un des 34 Etats qui ont choisi le Tribunal comme première option pour le règlement des différends dans le système de la Convention. C'est aussi la raison pour laquelle l'avons appuyé dans tous les *fora* internationaux pertinents.

Quand on essayait de deviner quel serait le premier différend qui nous amènerait à comparaître devant ce Tribunal, jamais nous n'aurions imaginé que ce serait une situation semblable à celle qui nous occupe aujourd'hui : défendre les immunités dont jouit un navire de guerre et son droit de naviguer, de surcroît, face à des mesures adoptées par un pays ami, dont l'intérêt réel dans cette affaire nous est toujours inconnu, même après la présentation dans la journée d'hier de l'exposé écrit du Ghana. En effet, jusqu'à hier, le Ghana n'avait pas daigné répondre ne serait-ce qu'à une seule – je dis bien : même pas à une seule – des nombreuses communications que les autorités argentines lui ont adressées depuis le début de cette crise le 2 octobre passé. L'exposé écrit que je viens de vous mentionner ne clarifie pas non plus les droits éventuels que le Ghana prétend protéger dans cette affaire.

Monsieur le Président, je vais expliquer très brièvement la raison de la présence de la frégate *ARA Libertad* dans le port de Tema, port principal du Ghana. Un des piliers de la politique extérieure actuelle de l'Argentine consiste dans l'approfondissement de la coopération Sud-Sud et, parmi les mesures-clés pour atteindre cet objectif, le développement de liens politiques entre l'Argentine et les pays d'Afrique subsaharienne. C'est dans ce cadre que l'Argentine a suivi une politique caractérisée, entre autres mesures, par la promotion de programmes de coopération dans des domaines où l'Argentine peut apporter une contribution au développement d'autres pays. Ainsi, récemment, des diplomates ghanéens ont assisté à la première rencontre entre la République argentine et les pays d'Afrique subsaharienne qui eut lieu à Buenos Aires du 4 au 7 Avril 2011, sous le thème « Innovation et développement de la production alimentaire ».

EXPOSÉ DE MME RUIZ CERUTTI – 29 novembre 2012, matin

Dans le contexte de telles mesures, qui sont loin d'être les seules, il n'est guère surprenant que le port de Tema fut choisi comme une escale de l'itinéraire du 43e voyage d'instruction des cadets de la marine argentine à bord du navire de guerre *ARA Libertad.*

La frégate *ARA Libertad* est connue par tous les Argentins comme notre « ambassadrice » sur les mers du monde. Ce titre, à des effets purement protocolaires, lui a été attribué par un décret présidentiel.

De nombreux pays possèdent un grand voilier comme navire-école emblématique de leur flotte nationale. Tous ces pays savent que le choix d'un pays comme point d'escale pour les voyages d'instruction des jeunes officiers témoigne clairement de l'intention d'exprimer amitié et désir d'une relation plus profonde entre eux.

Au cours de son histoire et depuis 1873, la marine argentine a toujours possédé des navires-écoles qui servent à la formation de ses futurs officiers. Actuellement, c'est la frégate *ARA Libertad*, chef-d'œuvre dessiné et construit par des argentins, qui exerce cette fonction depuis 1963, année où elle commença sa vie comme navire d'instruction.

Considéré comme l'un des plus grands et des plus magnifiques voiliers, l'*ARA Libertad* effectue chaque année une navigation autour du monde pour la formation des élèves de la marine nationale. Parti en juin dernier de Buenos Aires pour un tour devant l'amener dans 13 différents pays, sa navigation prit fin le 2 octobre dernier dans le port de Tema au Ghana de la manière la plus abrupte et la plus inattendue – je pourrais dire la plus brutale.

Monsieur le Président, les navires de guerre sont définis dans la partie II de la Convention du droit de la mer à l'article 29. Cet article reprend presque, mot pour mot, la définition donnée par l'article 8 alinéa 2 de la Convention de 1958 sur la haute mer. Ainsi, on entend par navire de guerre « tout navire qui fait partie des forces armées d'un État et porte les marques extérieures distinctives des navires militaires de sa nationalité, qui est placé sous le commandement d'un officier de marine au service de cet État et inscrit sur la liste des officiers ou un document équivalent, et dont l'équipage est soumis aux règles de la discipline militaire ».

On peut donc retenir de cet extrait qu'un navire de guerre se définit par : des marques extérieures telles que définies par son Etat d'appartenance, un commandement militaire et une discipline militaire. On constate que la définition ne prend pas en compte la présence ou non d'armes de tout genre qu'il est normal de trouver à bord de tout navire de guerre. L'*ARA Libertad* est un navire-école dont l'équipage est en majorité constitué de marins militaires en cours de formation. Les officiers et les autres membres d'équipage sont tous des militaires de la marine argentine soumis à la discipline militaire. Le commandant du navire est un officier de la marine argentine et le navire porte les marques extérieures fixées par l'Argentine pour ses navires de guerre. « ARA » signifie « marine de la République argentine ».

En somme, l'*ARA Libertad* est bien un navire de guerre auquel la Convention accorde des droits et précise les immunités dont il jouit en raison de sa mission de service public et de représentation de la souveraineté d'un Etat.

Le Ghana accepta l'*ARA Libertad* dans le port de Tema en sa qualité de navire de guerre, comme le démontre la correspondance diplomatique échangée par les deux parties préalablement à sa visite. La condition de navire de guerre de l'*ARA Libertad* n'est pas controversée entre les parties, tout comme n'est pas contestée l'existence d'un accord entre les deux parties en vertu duquel la frégate devait arriver au port de Tema le 1er octobre et partir le 4 octobre, quittant les eaux juridictionnelles du Ghana le 5 octobre. Ces trois dates sont bien fixées dans la correspondance diplomatique échangée.

Monsieur le Président, depuis quasiment deux mois, plus précisément depuis le 2 octobre où le juge commercial de première instance du Ghana décida de saisir un de nos navires de guerre, l'Argentine se demande, en vain, de quel droit le Ghana s'engage-t-il dans

une pareille aventure ? Jusqu'au moment où je vous parle, aucune explication plausible ne nous a encore été communiquée sur les motivations qui sous-tendent la conduite du Ghana.

En raison de la qualité des relations bilatérales entre l'Argentine et le Ghana, et des conditions dans lesquelles fut convenue la visite de la *ARA Libertad* au port de Tema, les raisons du silence et de l'inaction des autorités de ce pays, face à toutes nos notes et démarches depuis le début de cette crise, demeurent aussi un mystère. Une seule fois, une autorité du Ghana a exprimé une certaine préoccupation pour le respect du droit international. Ce fut par le biais de mon collègue ici présent, le Conseiller juridique du Ministère des Relations extérieures et de l'Intégration régionale du Ghana, M. Ebenezer Appraku qui, à juste titre, soutint devant ce juge de première instance de son pays que celui-ci manquait complètement de compétence, tant à l'égard de l'Argentine comme Etat, qu'à l'égard de l'*ARA Libertad* à cause de son immunité comme navire de guerre.

Permettez-moi Monsieur le Président de citer textuellement ce que M. Appraku a dit devant le juge ghanéen pour conclure son intervention à ce moment-là : « *It became the Court's duty in conformity to established principles to release the vessel and to proceed no further in the course* ».

Après avoir entendu ce que le conseiller juridique a exprimé au nom de son gouvernement sur la saisie illégale de notre frégate, ce que nous peinons à comprendre, c'est pourquoi le Ghana, un pays ami de l'Argentine, ne parvient pas, en 60 jours, malgré les énormes et intenses efforts politiques et diplomatiques déployés par l'Argentine, à remédier à une violation aussi manifeste de ses obligations internationales ? Et les neuf pages que le Ghana nous a fait parvenir seulement hier se sont avérées insuffisantes pour jeter la lumière sur ses intérêts et ses motivations dans cette crise.

Monsieur le Président, les faits qui ont poussé l'Argentine à demander une mesure conservatoire devant ce Tribunal sont décrits aux paragraphes 3 à 18 de la demande en prescription de mesures conservatoires argentine. Il est affligeant juridiquement de se demander quel est ce comportement qui consiste, après avoir convenu et autorisé une visite officielle d'un navire de guerre de l'Argentine – visite entourée par toutes les solennités protocolaires de coutume dans ce genre d'occasion, notamment une réception officielle à laquelle assistèrent les autorités civiles et militaires du pays et les membres du corps diplomatique –, qu'un juge de première instance qui, du reste, ne fait pas l'effort de citer et d'interpréter correctement les textes sur lesquels il fonde sa décision, soumette ce navire dès le lendemain de son arrivée à un embargo en violation de toutes ses immunités.

Malheureusement, nul pays n'est totalement exempt du risque d'une décision similaire de la part d'un membre isolé de son pouvoir judiciaire. En revanche, ce qui est grave, c'est que deux mois après le début de cette crise, le gouvernement du Ghana n'a pas encore su retourner sur les chemins de la légalité internationale et du respect de ses pairs, ni n'a adopté des mesures pour éviter l'aggravation de ce différend. L'article 300 de la Convention réglemente des situations de ce genre. Il nous rappelle les obligations qui incombent aux parties en vertu du droit international, et non pas seulement du droit de la mer, quand il dispose, sous le titre « Bonne foi et abus de droit », que « Les États parties doivent remplir de bonne foi les obligations qu'ils ont assumées aux termes de la Convention et exercer les droits, les compétences et les libertés reconnus dans la Convention d'une manière qui ne constitue pas un abus de droit ».

Le Ghana est tenu de se doter de tous les moyens et mécanismes internes nécessaires pour remédier aux effets d'une décision judiciaire qui viole le droit international applicable et qui, de surcroît, génère une situation de crise. Ainsi l'exige le droit international général, comme cela ressort de la Convention des Nations Unies sur l'immunité juridictionnelle des Etats et leurs biens de 2004. Le fait que le Ghana prétende que c'est le fond vautour qui a

choisi la frégate comme « *available to be the subject of enforcement proceedings* » ne diminue ni n'efface sa responsabilité internationale dans cette affaire.

Monsieur le Président, le Tribunal pourrait se demander pourquoi j'ai qualifié à plusieurs reprises dans mon exposé la situation engendrée par cet embargo comme étant « une crise ». La raison est très simple : depuis le premier jour jusqu'à aujourd'hui, mon gouvernement a été contraint de prendre des mesures de gestion de crise à l'égard de l'*ARA Libertad*. En effet, la succession d'événements auxquels nous avons dû faire face ne peut être décrite en d'autres mots :

- nous avons dû évacuer 281 personnes, c'est-à-dire la plus grande partie de l'équipage, tant des cadets argentins comme ceux d'Etats tiers qui avaient été invités à ce voyage d'instruction, à cause des risques pour leur sécurité et du manque de moyens nécessaires pour vivre dignement à bord de l'*ARA Libertad* à cause de l'embargo et des autres mesures prises par les autorités portuaires ghanéennes ;
- nous avons dû reprogrammer l'instruction de nos cadets de la marine argentine ;
- nous avons dû essayer de minimiser les conséquences négatives que l'interruption du 43e voyage d'instruction de l'*ARA Libertad* a causées pour les cadets étrangers qui participaient à ce voyage ;
- nous avons dû résister à toutes les tentatives imaginables décidées par un juge du Ghana de séquestrer les documents du navire et son armoire à pavillons, en raison de l'humiliation qu'une telle action causerait au navire et à l'Argentine ;
- l'équipage du bateau a dû supporter la précarité générée par les autorités portuaires locales lorsqu'elles interrompirent pendant de longues périodes l'approvisionnement en eau et en énergie du navire, plaçant l'équipage dans une situation extrême ;
- nous avons dû maîtriser les tentatives d'aborder par la force notre navire de guerre résultant d'une aventure irresponsable menée par les autorités portuaires. Tout juste hier dans son exposé écrit, le Ghana a reconnu avoir utilisé la force contre un navire de guerre, même s'il tenta de minimiser ce fait avec l'expression « avoiding the use of excessive force » ;
- nous dûmes soutenir quotidiennement l'équipage restant dans l'*ARA Libertad,* composé de 45 personnes assujetties journalièrement à un traitement abusif au cours des soixante derniers jours. Cette situation s'aggrava particulièrement depuis la tentative d'abordage et de déplacement forcé du navire. Depuis ce moment, l'équipage réduit du navire vit pratiquement en état d'arrestation, sous la menace permanente d'une nouvelle tentative d'abordage ;
- une des dernières expressions de ce harcèlement intolérable à l'égard d'un navire de guerre jouissant d'immunités souveraines fut la procédure pour « outrage à magistrat » qui vient d'être entamée contre son commandant devant les tribunaux du Ghana, question sur laquelle nous avons fourni une documentation mise à jour au Tribunal il y a deux jours. Nous n'avons reçu aucune information que pareille action insensée a été rejetée *in limine litis* par les juges du Ghana ni par les autorités du gouvernement de ce pays. Comme vous pouvez le constater, cette accusation d'outrage à magistrat est une nouvelle menace d'une aggravation de la violation des immunités du navire de guerre, lesquelles couvrent évidemment et nécessairement son commandant et son équipage.

En somme, Monsieur le Président et Madame et Messieurs les Membres du Tribunal, il s'agit là seulement de quelques faits qui nous poussent à qualifier la situation engendrée par la conduite du Ghana comme une « crise grave » qui a déjà duré près de 60 jours.

Dans ce contexte, Monsieur le Président, le gouvernement argentin mesure à toute sa valeur votre décision invitant les deux parties, conformément aux termes de l'article 90

paragraphe 4 du Règlement du Tribunal, à se comporter de manière à ne pas aggraver le différend afin que la mesure conservatoire que le Tribunal pourrait adopter puisse produire pleinement ses effets.

Monsieur le Président, l'Argentine a fait tout ce qui était en son pouvoir pour essayer de résoudre pacifiquement ce différend avant de le porter devant cette instance internationale. Une mission de haut niveau de fonctionnaires argentins rencontra durant de nombreux jours diverses autorités ghanéennes. Nous avons fait tout ce qui était possible pour résoudre pacifiquement cette grave situation, y compris à travers de nombreuses requêtes adressées au juge concerné, tout en lui déniant à chaque fois sa compétence à l'égard de l'Argentine et de son navire de guerre. Nous avons informé ce juge de la gravité de la situation qu'il engendrait par cet embargo absurde contre l'*ARA Libertad*. Nous avons fait toutes ces démarches, alors même que l'Argentine n'avait pas et n'a aucune obligation de comparaître devant les tribunaux locaux, et encore moins d'épuiser les voies de recours internes.

Pour conclure, Monsieur le Président, j'aimerais m'arrêter un instant pour examiner la nature et la fonction des immunités des Etats et de leurs biens en droit international. Il est évident que plus une activité est intimement liée à une fonction inhérente à l'Etat, plus grand est le degré de protection spécifique que le droit international confère aux biens affectés à son exercice. Il est difficilement concevable qu'un Etat soit privé de toute capacité d'entrer en relation avec d'autres Etats ou qu'il soit privé de la possibilité de se défendre. De ce préalable, il découle que les biens dédiés à l'action diplomatique et ceux affectés à l'activité militaire possèdent une protection rigoureuse et spécifique qui a été reconnue et réitérée par divers tribunaux à travers le monde entier. L'Argentine espère voir cette protection stricte et spécifique pleinement respectée à l'égard de son navire de guerre.

Ce qui nous occupe surtout aujourd'hui, ce sont les immunités des navires de guerre prévues par la Convention et nous souhaitons voir appliquer l'esprit qui, il y a déjà trente ans, animait le premier paragraphe du préambule de la Convention quand celui-ci affirmait – je cite : « Animés du désir de régler, dans un esprit de compréhension et de coopération mutuelles, tous les problèmes concernant le droit de la mer et conscients de la portée historique de la Convention qui constitue une contribution importante au maintien de la paix, à la justice et au progrès pour tous les peuples du monde ».

Je vous remercie, Madame et Messieurs les Membres du Tribunal, de votre attention et vous prie, Monsieur le Président, de bien vouloir donner la parole au Professeur Gerhard Hafner.

Merci beaucoup.

*The President:*

Merci, Madame Ruiz Cerutti, pour votre exposé.

I now give the floor to Mr Gerhard Hafner.

STATEMENT OF MR HAFNER
COUNSEL OF ARGENTINA
[ITLOS/PV.12/C20/1/Rev.1, p. 8–20]

*Mr Hafner:*
Mr President, Mr Vice-President, Members of the Tribunal, it is a great pleasure and privilege for me to appear – for the first time – before this distinguished Tribunal. I have been entrusted with that part of Argentina's case dealing with the rights Argentina requests this Tribunal to protect through the prescription of a provisional measure. In the following, I shall refer to the United Nations Convention on the Law of the Sea as "the Convention".

Allow me to note, before outlining the structure of my submission, that this is the first case in which a State, Argentina, is seeking from this Tribunal to prescribe a provisional measure to protect the rights enjoyed by Argentina under the Convention relating to the freedom of navigation, innocent passage in the territorial sea and immunity in respect of a vessel of its armed forces, the *ARA Libertad*. This is necessary as a consequence of the threats to the rights enjoyed by Argentina.

I will show that Argentina has been precluded from exercising its rights under the Convention. With regard to the frigate *ARA Libertad*, Argentina enjoys the right of innocent passage according to articles 17 and 18, freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in articles 56, paragraph 2, and 58 and related provisions of the Convention and freedom of navigation on the high seas according to article 87 and 90 of the Convention as well as immunity as recognized by article 32 of the Convention. As I will explain, Argentina enjoys, with respect to its warships, complete and autonomous immunity, both under the Convention and general international law. A further point I will make is that the waiver referred to by Ghana has no legal effect with regard to the frigate *ARA Libertad* so that Argentina by no means waived this immunity with regard to this vessel and is enjoying complete immunity concerning this vessel even in the ports of Ghana, as confirmed by the international law of the sea.

*The President:*
Mr Hafner, I am sorry to interrupt you, but could you please slow down for the sake of the interpretation?

*Mr Hafner:*
I apologize. Mr President, Mr Vice-President, Members of the Tribunal, the legal position I will present here has, by necessity, been elaborated rapidly and does not aim at preparing a decision on the merits of the case. As is appropriate in these proceedings, my explanations should illustrate that the law as applied to the facts of this case unequivocally supports our submissions and request; they further prove that our *prima facie* rights under the Convention, which have been impaired and need protection by provisional measures, have the nature of *fumus boni iuri*.

Permit me, first, to explain which rights, enjoyed by Argentina both under the Convention as well as under general international law, need the protection by this Tribunal. Argentina, as well as Ghana, are parties to the Convention so that it has been applicable to them in their mutual relations since 31 December 1995. The frigate *ARA Libertad* was anchored at Tema, a port near Accra, Ghana, on the basis of consent by Ghana. Accordingly, the frigate was lawfully in the Tema port. It was fully entitled to leave the port, as agreed, on 4 October 2012 and to make use of the right of innocent passage as guaranteed by article 17 of the Convention. There is absolutely no indication that it was engaged in any activity that would render its passage non-innocent. It hardly needs mentioning that the ships of all States,

whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. This right is defined in article 18, paragraph 1(b), of the Convention and includes the "passage through the territorial sea for the purpose of proceeding to or from internal waters or a call at such roadstead or port facility."

Contrary to the Written Statement of the Respondent, the definition of innocent passage includes not only the right to proceed to the internal waters, but also the right to proceed from the internal waters; and it is particularly this latter right that has been denied to Argentina with respect to the frigate *ARA Libertad* so that Argentina seeks its protection through this Tribunal.

All foreign vessels, including foreign warships, enjoy such a right of innocent passage. It allows them to proceed from ports in order to exercise also other rights under the Convention whose enjoyment directly depends on this right. As the International Court of Justice declared in the case concerning *Military and Paramilitary Activities in and against Nicaragua*

> ... in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; article 18, paragraph 1(b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation.

Argentina does not merely seek protection of the right to innocent passage it is entitled to under the Convention. Moreover, Ghana has also explicitly consented to the entrance, presence and timely departure of the frigate *ARA Libertad* in the waters under the jurisdiction of Ghana by letter dated 4 June 2012 (received 5 June 2012).

Preventing the frigate from leaving the port of Tema makes the exercise of the right of innocent passage impossible. The conditions that Ghana can impose on the course of the frigate relate exclusively to maritime safety such as the observance of maritime traffic, separation schemes or sea-lanes, certain national regulations as enumerated in article 21 of the Convention relating to protection of fishing stocks, the environment, the maritime safety or research. No such "laws and regulations" of Ghana are alleged to have been breached by the frigate. Even if a violation of such "laws and regulations" had occurred (*qua non*), Ghana's rights under the Convention are strictly limited to requiring the warship to leave the port. Any more far-reaching measure by Ghana would be impermissible.

Preventing the frigate from leaving the port of Tema makes the exercise of the right of innocent passage impossible. The conditions that Ghana can impose on the course of the frigate relate exclusively to maritime safety such as the observance of maritime traffic, separation schemes or sea-lanes, certain national regulations as enumerated in article 21 of the Convention relating to protection of fishing stocks, the environment, the maritime safety or research. No such "laws and regulations" of Ghana are alleged to have been breached by the Frigate. Even if a violation of such "laws and regulations" had occurred (*qua non*), Ghana's rights under the Convention are strictly limited to requiring the warship to leave the port. Any more far-reaching measure by Ghana would be impermissible.

We are informed by Ghana that it took forcible measures against the frigate *ARA Libertad*. But, as already mentioned, article 30 of the Convention clearly states that in the case of non-compliance by a foreign warship with the laws and regulations of the coastal State concerning passage through the territorial sea, the coastal State may ultimately require

this ship to leave the waters immediately. This situation is also applicable to ports as can be derived from the immunity enjoyed by warships even in foreign ports. For instance, according to article 236 the measures a port State can take against any foreign ship for breach of regulations regarding the protection of the marine environment are not applicable to warships.

Mr President, Mr Vice-President, distinguished Members of the Tribunal. The second right in relation to which Argentina seeks protection is the freedom of the high seas regarding navigation and other internationally lawful uses of the sea as guaranteed by article 87 of the Convention. The attachment of the frigate *ARA Libertad* by Ghana prevents it from exercising also this fundamental freedom, so that it is immediately affected by this measure. There is no doubt that the frigate *ARA Libertad* is fully entitled under the Convention to make use of this freedom and corresponding rights. In paragraph 14 of its Written Statement, the Respondent clearly misinterprets this freedom.

As I have explained, Ghana is denying a number of rights under the Convention to Argentina. These are denied by reference to a waiver of immunity. Since the immunity of warships is incorporated in the Convention and the alleged waiver is the only justification proffered by Ghana, I will now turn to the question of immunity.

Thus I shall now explain that under customary international law, as it is recognized and enshrined in the Convention, the immunity of warships is a special and autonomous type of immunity which provides for the complete immunity of these ships. The frigate *ARA Libertad* enjoys this immunity as a warship under a foreign flag. The acts denying this immunity prevent the frigate from making use of the rights that it enjoys under the Convention, including innocent passage and freedom of navigation. Both States, Argentina and Ghana, are in agreement that the frigate *ARA Libertad* is a warship in the sense of article 29 of the Convention. It is one of the oldest rules under international law that warships, or in the former terminology men-of-war, enjoy full immunity in maritime areas under coastal State jurisdiction. This rule has already been reflected in the well-known US Supreme Court case *The Schooner Exchange v. McFaddon* of 1812. It is reproduced in the Request of Argentina so that there is no need to reiterate it here.

Throughout the subsequent periods until now, this rule has been maintained and scrupulously respected by all States. *Oppenheim's International Law*, in its fifth edition, makes it very clear that "[…] [n]o legal proceedings can be taken against [a man-of-war] either for recovery of possession or for damages for collision, or for a salvage reward, or for any other cause."

The immunity enjoyed by warships applies also in the port of foreign States as confirmed by the Institut de Droit International. Article 26 of its Resolution adopted in 1928 unequivocally states that military vessels may neither be subject to any measures of attachment nor any legal procedure *in rem*. The resolution further states in article 16 that in foreign ports the local authorities are neither entitled to perform acts of authority on board that ship nor to exercise jurisdiction with regard of the persons on board nor visit the ship. One current scholar, who, I submit, has appropriately analyzed the issue in terms of customary international law, leaves no doubt regarding the existence of this rule and states that: "Warships as defined in UNCLOS and military aircraft have complete immunity in the territorial sea, in internal waters and in ports, which are usually located in internal waters."

Jurisprudence confirms this rule. Thus, for example, in the case *Allianz Via Insurance v. USA* the court of Appeal of Aix-en-Provence stated as follows:

> Assigned to the public service of national defence, a warship is the very expression of the sovereignty of the State whose flag it flies, on the high seas or in foreign territorial waters, and whatever the mission assigned to it, whether an

> act of war or, as in this case, a simple stopover or courtesy visit in the port of a friendly country.
>
> In the event that the performance of this public service mission may give rise to the exercise of a judicial proceeding of any kind whatsoever, the State whose flag the foreign warship is flying should be recognized as enjoying absolute sovereign immunity before the courts of another State.

Article 32 of the Convention leaves no doubt on the existence of this immunity as its states:

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

This formulation reiterates article 22, paragraph 2, of the Convention on the Territorial Sea and the Contiguous Zone of 1958. According to the Virginia Commentary, this article emphasizes that warships and other government ships operated for non-commercial purposes have immunity, except as provided in articles 17 to 26, 30 and 31. These exceptions relate for instance to maritime security provisions such as sea lanes and traffic separation schemes or charges levied upon foreign ships.

The interpretation offered by the Virginia Commentary clearly indicates that it is article 32 which confirms the existence of immunity enjoyed by warships with effect and for the purposes of the Convention as a whole. The provision uses the formulation "nothing in this convention" instead of "nothing in this part". This clearly proves that its application extends beyond the part regarding the territorial sea, with the only exception being the rules concerning the High Seas and the Exclusive Economic Zone where a special provision, article 95, applies. The Convention also relates to ports, such as in article 25, paragraph 2, or, more generally, in part XII on the protection and preservation of the marine environment. The contention of the Respondent in paragraph 11 of its Written Statement that the immunity provisions of the Convention do not relate to internal waters, or in paragraph 13 that internal waters are not the subject of detailed regulation of the Convention, can by no means be sustained.

The immunity to which article 32 refers is a necessary element of this provision since otherwise it would neither make any sense nor would its scope be ascertainable. According to the legal principle of effectiveness or *ut res magis valeat quam pereat*, any provision must be interpreted that it makes sense, a principle that not only the International Court of Justice in various judgments such as *Fisheries Jurisdiction* (Spain *v.* Canada) case, but also arbitral tribunals like the one in the case regarding the *Iron Rhine* considered as being of particular importance.

The immunity of warships relates to the whole maritime area. This is confirmed by article 236 of the Convention, entitled "Sovereign Immunity". It not only extends this immunity of warships and other government ships used for non-commercial purpose to the entire maritime area, including ports, but even establishes immunity from international rules and, as a consequence, from the rules enacted by States in conformity with the Convention.

There is no need to delve further into the question of the existence of such a rule since both Parties to this dispute, Argentina and Ghana, are in agreement that warships enjoy immunity under international law. This rule applies to the frigate *ARA Libertad* in the ports

of Ghana. In his statement in the Superior Court of Judicature, Legal Adviser Mr Appreku stated that this warship enjoys immunity and that the courts must accept such a declaration by the Foreign Ministry as "a conclusive determination by the political arm of the government that the continued retention of the vessels interferes with the proper conduct of our foreign relations."

Mr President, Mr Vice-President, Members of the Tribunal, Argentina seeks protection of the right of innocent passage, freedom of navigation and the immunity of its warships, all rights embodied in the Convention. The denial of immunity is not only a denial of this right under the Convention but also of the other mentioned rights. For this reason is it important to shed light on the substance and character of the immunity of warships.

The immunity of warships is not only related to the general jurisdictional immunity that States enjoy under international law, but has also been established as a separate legal institute under customary international law, which does not share the development of the general State immunity. As such it is reflected in the Convention. The leading authorities on international law and the law of the sea treat the immunity of warships separate from State immunity. An unequivocal distinction between general State immunity and the immunity of warships is also emphasized in all newer works by scholars, such as for instance Pingel or Yang, who are quoted in Argentina's Request and have, I submit, appropriately analyzed the issue in terms of customary international law.

In particular, treaties confirm the autonomous nature of this legal institute and the particular status of warships under international law, to a large extent even disconnected from the immunity of other government ships: article 3 of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships singles out warships as a separate category in addition to other ships owned or operated by a State. Other conventions on maritime law, which ensure the immunity of warships, include treaties such as the International Convention on Salvage of 1989, the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1967, the International Convention on Maritime Liens and Mortgages 1993, the London Convention on Prevention of Martine Pollution by Dumping of Wastes of 1972, the 1973 MARPOL Convention, or the 2001 UNESCO Convention on the Protection of Underwater Cultural heritage.

An excellent example of the particular nature of this status of warships under international law is offered by the Geneva Convention on the High Seas and the Geneva Convention on the Territorial Sea and the Contiguous Zone. The latter clearly distinguishes between rules applicable to all ships, rules applicable to merchant ships, rules applicable to government ships other than warships and rules applicable to warships, thus distinguishing between the latter and other government ships. The rules applicable to warships clearly demonstrate that the coastal State has no right to interfere with the activities of such a ship. The only measure that a coastal State may take against a foreign warship that does not abide by certain rules of the coastal State consists, as already mentioned, in a request to leave the territorial waters of this State.

The distinction between warships and other government ships is maintained in the Convention. The fact that article 32 of the Convention addresses both categories of ships, warships as well as government ships operated for non-commercial purposes, does not militate against this conclusion. As the Virginia Commentary explains, the various texts used for the Third UN Conference on the Law of the Sea still distinguished between these two categories and treated them as separate. They were later placed under the same heading merely for practical purposes.

At other places, the Convention explicitly upholds the differentiation between the different kinds of immunity enjoyed by these two categories of ships. Article 95 relates only

to the immunity of warships whereas article 96 addresses the second category, namely ships used only on government non-commercial service.

This different status of the immunity of warships compared to other governmental ships found its expression also in court judgments. On the one hand, according to the District Court of Amsterdam in the case *Wijsmuller Salvage BV v. ADM Naval Services*, a warship albeit not being on duty did not lose its immunity. In contrast, the Dutch Supreme Court held in 1993 that the exercise of jurisdiction such as by provisional seizure against a vessel belonging to the State and intended for commercial shipping was not contrary to international law.

The literature shares this view; Vitzthum, for instance, derives from the present law of the sea that warships enjoy a preferential treatment that is based on the sovereignty and the equality of States.

The reasons for this special treatment of warships are to be found in the different function of warships compared to other governmental ships. The commentary of the ILC explicitly connects the policing function of warships at sea with their immunity. Only warships are entitled to take such action. The ILC emphasized their particular status as follows: "Hence it is important that the right to take action should be confined to warships, since the use of other government ships does not provide the same safeguards against abuse."

These explanations by the International Law Commission are also to be applied to the corresponding articles of the Convention, namely article 107 regarding "Ships and aircraft which are entitled to seize on account of piracy", according to which only warships and similar ships are entitled to seize vessels under a foreign flag. It is precisely for this reason that they enjoy complete immunity as established already by article 8 of the High Seas Convention and article 95 of the Convention.

A number of different authorities might be quoted in support of the autonomous character of warship immunity such as Colombos, O'Connell, Tanaka, Pingel, Espaliú Berdud, Zou Keyuan, Ivanashchenko, and very recently Yang, to name only few of them. For all these reasons, it must be acknowledged that the complete and autonomous immunity of warships is firmly rooted in present international law and recognized by the Convention.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, that there exist different kinds of immunity in international law is confirmed in the 2008 memorandum of the Secretariat of the United Nations, stating that there are various kinds of immunities that arise under international law covering a range of aspects.

Several courts, such as the German Constitutional Court in 1997 and 2003, as well as other courts in the United Kingdom, in Austria, in the Netherlands, in the United States, in Italy and in Switzerland, have already delivered decisions according to which, for instance, diplomatic immunities were separate from State immunities.

Similarly, Head of State immunity is also a separate immunity category. This conclusion is reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property as its article 3, paragraph 2, explicitly refers to Head of State immunity as a separate kind of immunity. The ICJ in the recent *Jurisdictional Immunities* case, as well as several national courts in the United States, Belgium or France, confirmed the existence of a rule of customary international law concerning the separate nature of such immunity.

These examples convincingly prove that international law distinguishes among different kinds of immunity. In this respect, the autonomous regime of the immunity of warships is comparable to the immunities enjoyed by diplomatic missions, including bank accounts, as well as Head of State immunity. That diplomatic immunity is comparable to the immunity of warships is confirmed also by the French author Pingel according to whom: "Comme les biens des banques centrales ou les locaux diplomatiques, les navires de guerre

sont présentés comme l'un des attributs caractéristiques de l'Etat souverain, devant bénéficier à ce titre de l'exemption de la juridiction des tribunaux étrangers."

Permit me now to turn to the effect of a general waiver on the immunity of warships. Some authorities of Ghana base their forcible measures against the Frigate *ARA Libertad* on a general waiver included in the Fiscal Agency Agreement dated 19 October 1994 and concluded between Argentina and a Fiscal Agent. The full text of this waiver is reproduced in the attachment to Argentina's Request.

In contrast to the view of the Respondent, it is necessary to discuss here the non-existence of a waiver regarding this vessel since Ghana invokes an alleged waiver of Argentina in order to justify its denial of Argentina's rights under the Convention. It already follows from the autonomous nature of the immunity of warships that a general waiver relating to immunity from jurisdiction and immunity from enforcement is never able to remove the warship's immunity. It has already been demonstrated in the Request of Argentina that cases and doctrine convincingly establish that warships are under a special protection against the loss of their immunity. This conclusion can be corroborated by reference to several international conventions that explicitly exclude the exercise of jurisdiction against warships, such as the above-mentioned International Convention on Maritime Liens and Mortgages of 1989. Its article 13(2) stipulates that "(n)othing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned or operated by a State and used only on Government non-commercial service."

This particular quality of the immunity enjoyed by warships signals, as Simonnet puts it:

> Le navire de guerre représente l'État, sa souveraineté, sa puissance. Prétendre exercer une autorité sur un navire aussi intimement liée à l'État serait pour un État étranger prétendre exercer une autorité sur l'État lui-même et comme empiéter sur sa souveraineté.

Similarly, Momtaz maintains that "L'immunité des navires de guerre ne souffre aucune limitation."

It is for this reason already from the outset obvious that a general waiver does not apply to warships. This finding is confirmed in general terms by Lord Atkins in the Privy Council in the case *Chung Chi Cheung v. The King* where he stated: "The sovereign himself, his envoy and his property, including his public armed ships, are not to be subjected to legal process."

Even if the immunity of warships is considered as being possibly subject to a waiver, the autonomous nature of the immunity of warships requires a special and specified waiver. This requirement is generally recognized. In its decision of 2006, the German Constitutional Court acknowledged that the ILC confirmed the tendency of practice according to which a general waiver would not suffice to set aside the diplomatic immunity of property, which is particularly protected by international law. The German Constitutional Court held that such property comprises, beside premises and property used for diplomatic purposes, also governmental ships and vessels or materials of military forces.

National courts and tribunals in Germany as well as in other States followed this practice of the particular protection of such property, so, for instance, the English High Court in the case *A Company v. Republic of X*, or the decision of the Swedish Supreme Court in the case *Tekno-Pharma AB v. The State of Iran* or in the decision of the French Cour d'Appel in the *NOGA* case. In the latter case, as well as in the case before the English High Court, it was even held that a general waiver not only did not imply a waiver with respect to enforcement, but also with effect on adjudicatory jurisdiction so that the special status of the immunity of

diplomatic assets protects such property against both kinds of jurisdiction, irrespective of the existence of a general waiver. For this reason, the Respondent wrongly quotes the judgment of the UK Supreme Court because this case in no way related to an immunity of special property.

This conclusion applies also to warships, which enjoy a similar status as diplomatic assets regarding immunity. The general waiver referred to above cannot have any effect on warships; only a special and specified waiver would release Ghana from its obligation to accord immunity to Argentina in respect of the warship *ARA Libertad.*

However, in the present case such a waiver does not exist.

The waiver referred to by Ghana is said to affect adjudicatory as well as enforcement jurisdiction.

It is generally acknowledged that measures of enforcement need a separate waiver only for this purpose. Article 20 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 unequivocally reflects this rule. The exercise of enforcement jurisdiction is of particular relevance as the measures resulting therefrom have an immediate impact on the property of foreign States and, consequently, on States themselves. The ILC called the immunity against measures of enforcement "the last fortress, the last bastion of State immunity". That the exercise of enforcement jurisdiction is of particular sensitivity to States even of the same political setting is reflected in the European Convention on State Immunity, which does not address the issue of measures of constraint. Accordingly, this jurisdiction as applied to foreign States must be acceded with the greatest care.

Cases and doctrine convincingly establish that warships are under a special protection against the loss of their immunity from enforcement jurisdiction, as was already demonstrated in Argentina's Request. It was particularly emphasized in the above-mentioned decision of the German Constitutional Court in 2006.

The ILC did not leave any doubt regarding the conclusion that in relation to certain properties, including those of a military nature, a special and specified waiver is required:

> A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any specific categories, would not be sufficient to allow measures of constraint against property listed in paragraph 1.

Paragraph 1 of the draft article 19 regarding State immunity, which became article 21 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004, includes among such property also "property of a military character or used or intended for use for military purposes".

This conclusion is also corroborated by the International Law Association, according to which a specified waiver is necessary for property that "is of a military character or is intended for use for military purposes".

Already in the case *Chung Chi Cheung v. The King* the Judicial Committee of the Privy Council quoted the *Schooner Exchange* case and confirmed that, in the area of immunity:

> ... in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign... The implied license therefore under which such vessel enters a friendly port may reasonably be construed and it seems to the court ought to be construed as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality.

In other words, international law does not extend the territoriality principle to permit the exercise of enforcement jurisdiction over warships and government ships operated for non-commercial purposes. As Commander John Astley III and Lieutenant Colonel Michel summarize the consensus on this issue:

> Regardless of the legal regime in which it is operating, a warship or military aircraft may not, absent its consent, be arrested (seized), searched, inspected, or boarded by officials of another State. Instead, if the vessel or aircraft entered internal waters pursuant to host-nation consent, the host may simply withdraw that consent, thereby requiring the aircraft or vessel to depart. If the aircraft/vessel subsequently refuses to leave, minimal force may be used to compel it to do so.

The immunity of warships referred to in the Convention must be interpreted in this sense.

This is precisely one of the reasons why courts in various States felt obliged to abstain from taking measures, for instance, against Russian Government ships. In the *Sedov* case, the Brest County Court had to decide whether the world's tallest sailing ship, the *Sedov*, that was anchored at the Port of Brest and was deemed to belong to the Russian State, could be seized for the satisfaction of debts incurred by the Russian State. The Court concluded that the question has to be answered in the basis of international public maritime law, and more particularly in the Montego Bay Convention.

> The Montego Bay Convention establishes the distinction between government vessels used for non-commercial activities (which correspond to functions of sovereignty) and those which are used for commercial activities.
>
> The contracting States have undertaken not to exercise acts of sovereignty of the government vessels of the other powers used for non-commercial activities when they are authorized to be in their territorial waters (Article 32)...

Within a few weeks after this denial of measures of enforcement against the vessel *Sedov*, similar decisions by the Dutch Regional Court of Haarlem, the German Regional Court Oldenburg and the Hanseatic Higher Regional Court Tribunal Bremen relating to the vessel *Sedov* as well as Russian warship *Krusenstern* followed.

The ILC's Special Rapporteur, Sompong Sucharitkul, offered a compelling reason for the requirement of special waiver: in his view States are "often pressured into concluding agreements containing a clause waiving sovereign immunity not only from jurisdiction, but also from attachment and execution".

However, in particular developing States must be protected, as they

> might otherwise be lured into including in an agreement an expression of consent affecting certain types of property which should under no circumstances be seized or detained, owing to the vital nature of their predominantly public use (such as warships), or to their inviolability (such as diplomatic premises), or to their vulnerability (such as the funds of central banks).

These cases provide sufficient evidence that States recognize that under the Convention and the law of the sea warships of foreign States and ships used for non-commercial purposes enjoy immunity irrespective of any general waiver contained in a contract, even if this waiver relates to enforcement jurisdiction. The practice of national courts quoted above gives sufficient evidence that properties intended for a military purpose

are not subject to such a general waiver, but that any exercise of jurisdiction, in particular measures of constraint against a foreign warship, require an explicit waiver by the flag State specifying this warship. As a rule of general customary international law that is reflected in the Convention, it is binding also on Ghana.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, in addition to the absence of the required special and specified waiver, Ghana has acknowledged the immunity of the warship by agreement. On the one side, this agreement is constituted by the Notes of the Embassy of the Argentine Republic in Nigeria, of 21 May 2012, of 24 May 2012, of 19 June 2012, of 21 June 2012, of 28 June 2012, of 18 August 2012 and of 25 September 2012. These Notes were sent to the High Commission of Ghana in Abuja. The other side of the agreement has been established by a Note of the Ghana High Commission of 4 June 2012.

In the above-mentioned Note of 24 May 2012 Argentina made a request in relation to the frigate *ARA Libertad* for "the Permit from the appropriate authorities" of Ghana "to enter the jurisdictional waters of Ghana and stop over at the Tema Port". This request was positively answered by Ghana, stating that the High Commission of the Republic of Ghana, "with reference to the latter's Note Verbale No. EE/206/12 dated 21 May 2012, requesting for its naval ship to dock at Tema Harbour from 1 to 4 October 2012, has the honour to inform that the Ghanaian Authorities have granted the request".

These instruments constitute a concordance of will, a mutual engagement and, consequently, an agreement of both sides, Ghana and Argentina. Accordingly, Argentina requested Ghana's consent and Ghana gave its permission to Argentina regarding the entry, presence and timely departure of the warship *ARA Libertad* into the jurisdictional waters of Ghana. As a further consequence, both sides are bound by this agreement according to the rule *pacta sunt servanda*.

By the Note of 4 June, Ghana is bound to accept the warship *ARA Libertad* of the Argentine Navy within the waters under its jurisdiction. It was informed and accepted that this vessel has been a warship of a foreign State since the Note explicitly referred to the "naval ship". This qualification automatically involves the granting of immunities in its ports and territorial sea in accordance with, and as recognized by, the Convention and other rules of the International Law of the Sea, otherwise the explicit consent would not have been needed. Accordingly, on the one hand, Ghana cannot deny the knowledge of this fact and of the legal obligations resulting therefrom and incumbent upon it, whereas Argentina could and can rely on this legal consequence. If such a reliance on the words of another State were not possible, the friendly relations among States would be heavily affected. The disregard of such commitments resulting from an international agreement would not only run counter to the basic principle of international law reflected in the principle *pacta sunt servanda*, but would also shake the bottom of international relations.

That the consent to the presence of a warship automatically entails the limitation of the jurisdiction is confirmed by the Supreme Court of New South Wales in *Wright v. Cantrell*, in which the Court held:

> A State which admits to its territory an armed force of a friendly foreign power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its Sovereign.

Moreover, according to the Australian High Court's decision in *Chow Hung Ching and Si Pao Kung v. The King*, public international law recognizes that consent by a receiving

State to the entry of forces of another State implies a waiver of the receiving State's normal supervisory jurisdiction over those forces.

Even if these instruments of Argentina and Ghana could not qualify as an agreement, the Note of Ghana of 4 June is a unilateral commitment on the side of Ghana to which it is bound.

This declaration was subsequently followed by supporting conduct of the Ghanaian authorities before the case was brought before Ghana's courts so that the conduct of Ghana gave sufficient evidence of its consent to grant the warship *ARA Libertad* the immunity of warships in foreign waters as prescribed by the Convention. The statement of the Legal Adviser of Ghana, Mr Appreku, in the Superior Court of Judicature, according to which the frigate *ARA Libertad* enjoys immunity from any measures of enforcement jurisdiction, removes any doubt from this conclusion.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, let me summarize the most important points of my statement: Contrary to the submissions of Ghana, the causes of action of Argentina are based entirely on the Convention. Specifically, Argentina seeks a protection of its right to innocent passage, the freedom of navigation and other lawful uses of the sea as well as the immunity of its warship. These rights are denied on the basis of an alleged waiver that, as doctrine and practice prove, cannot have any legal effect with respect to the frigate *ARA Libertad.* These rights belong to the fundamental rules of the law of the sea and serve as means to foster the friendly relations among States.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, I thank you for the attention you paid to my statement and ask you, Mr President, to give now the floor to Professor Kohen.

*The President:*

Thank you very much, Mr Hafner.

We have reached about eleven o'clock. At this stage the Tribunal will withdraw for a break of thirty minutes. We will continue the hearing at 11.30.

*(Short adjournment)*

*The President:*

We will now continue the hearing. Monsieur Marcelo Kohen peut présenter son exposé.

Monsieur Kohen, vous avez la parole.

« ARA LIBERTAD »

EXPOSÉ DE M. KOHEN
CONSEIL DE L'ARGENTINE
[TIDM/PV.12/A20/1/Rev.1, p. 23–37]

*M. Kohen :*
Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, c'est un honneur de comparaître pour la première fois devant votre Haute juridiction et de le faire pour défendre les droits de mon pays ainsi que l'un des symboles les plus chers à l'ensemble du peuple argentin : la frégate *ARA Libertad*. J'ai aussi une pensée particulière pour mes quarante-cinq compatriotes qui s'y trouvent à bord dans des conditions extrêmement difficiles.

Je ne crains pas l'exagération, Monsieur le Président, si je commence par affirmer que, dans cette affaire, vous êtes placés devant le cas le plus évident et le plus urgent qui soit, depuis l'existence de votre Tribunal, pour prescrire des mesures conservatoires. Mon collègue, Gerhard Hafner, vient de vous montrer que les droits objet du différend qu'il s'agit de préserver tombent sous le coup de la Convention des Nations Unies sur le droit de la mer et sont bien plus que plausibles. Ma tâche consistera à exposer *primo*, que les autres conditions requises pour prescrire la mesure conservatoire demandée sont remplies, *secundo*, que c'est seulement cette mesure qui peut préserver les droits en cause et, *tertio*, que rien n'empêche votre Tribunal de l'adopter.

Monsieur le Président, les conditions à réunir pour que des mesures conservatoires soient prescrites par votre Tribunal, telles qu'elles résultent de l'article 290 de la Convention et de votre jurisprudence, sont les suivantes :

a) que *prima facie* le tribunal arbitral prévu à l'annexe VII soit compétent ;
b) que les mesures conservatoires demandées visent à protéger les droits respectifs des parties ; et
c) qu'il y ait urgence.

Comme vous le savez Monsieur le Président, nous avons appris la position du Ghana relativement à ces trois conditions il y a quelques heures seulement. Je vais examiner les points qui divisent les parties, sans entrer dans d'autres considérations que le Ghana ne conteste pas et que par conséquent nous considérons acquises. Commençons donc par l'examen de la prétendue absence *prima facie* de compétence du Tribunal de l'annexe VII.

Dans son exposé écrit, le Ghana nie l'existence de la compétence *ratione materiae* du Tribunal de l'Annexe VII. Son raisonnement se résume ainsi : *primo*, l'immunité des navires de guerre reconnue par la Convention de 1982 ainsi que leur droit de passage inoffensif s'arrête à la mer territoriale et comme l'*ARA Libertad* se trouve dans ses eaux intérieures – je cite – *(poursuit en anglais)* « La Convention ne prévoit aucune règle ou autre indication relative aux immunités d'un navire de guerre qui se trouve dans les eaux intérieures. » Par ailleurs, la liberté de la haute mer et le droit de navigation de l'*ARA Libertad* ne seraient pas concernés selon la partie défenderesse parce que les mesures de contrainte contre le navire de guerre ont été prises au port de Tema. *Secundo*, selon le Ghana, la question centrale serait l'interprétation et l'application de la renonciation que l'on trouve dans les obligations, question qui n'est pas régulée par la Convention de 1982 ou, pour le dire avec les mots du Ghana – je cite – (*poursuit en anglais)* : « En l'absence de toutes dispositions pertinentes de la Convention, le Ghana fait valoir que le Tribunal Annexe VII n'a pas compétence à l'égard de la question du renoncement à l'immunité. »

Madame et Messieurs du Tribunal, l'Argentine a exactement la position opposée à toute et chacune de ces prétentions et mon collègue Gerhard Hafner vient de vous montrer

leur caractère tout à fait infondé. Au point de vue de la compétence *prima facie* du tribunal arbitral, il suffirait de rappeler que l'Argentine considère que la détention de l'*ARA Libertad* par le Ghana porte atteinte aux droits reconnus par la Convention aux articles 18, paragraphe 1, 32, 87, paragraphe 1, et 90, et que le Ghana le conteste. Si l'on applique votre analyse dans les affaires du *Thon à nageoire bleue*, qui est aussi celle que la Cour de La Haye applique systématiquement, on constate aisément un différend relatif à l'interprétation et à l'application de la Convention.

La deuxième branche de l'argumentation ghanéenne n'est pas moins surprenante que la première. L'Argentine revendique que l'immunité des navires de guerre est reconnue à l'article 32 pour l'ensemble de la Convention de 1982. Le Ghana soutient qu'il faudrait savoir si l'Argentine a renoncé à cette immunité et prétend que la Convention ne fournit pas de règles pertinentes pour répondre à cette question.

Monsieur le Président, si l'on suit le raisonnement du Ghana, vous seriez dans l'impossibilité de régler pratiquement toutes les affaires qui sont portées devant vous. De la même manière que vous pouvez utiliser les règles du droit international général de l'environnement pertinentes lorsque la Convention renvoie, par exemple, à la protection du milieu marin, vous pouvez appliquer les règles de droit international général en matière d'immunité lorsque la Convention se réfère à cette dernière. On ne trouve pas non plus dans la Convention de règles relatives à l'interprétation des traités ou des dispositions portant sur le contenu et les formes de la responsabilité ce qui bien entendu n'empêche pas votre Tribunal ou un tribunal de l'Annexe VII de les trouver ailleurs et de les appliquer au différend *sub judice*. Votre jurisprudence n'offre pas de doute à cet égard. Je cite l'*Affaire du navire « SAIGA » (No. 2)* :

> De l'avis du Tribunal, rien ne l'empêche d'examiner la question de savoir si, en appliquant ses lois au *Saiga* en l'espèce, la Guinée a agi en conformité avec les obligations que la Convention et le droit international général lui imposent envers Saint-Vincent-et-les-Grenadines.

Et ensuite :

> Si la Convention ne contient aucune disposition spécifique se rapportant à l'usage de la force lors de l'arraisonnement de navires, le droit international, qui est applicable en vertu de l'article 293 de la Convention, prescrit que l'usage de la force doit être évité autant que possible et que, lorsque le recours à la force s'avère inévitable, cela ne doit pas dépasser ce qui est raisonnablement requis en la circonstance.

De même, l'avis consultatif de votre Chambre pour le règlement des différends relatifs aux fonds marins fait appel à l'approche de précaution comme règle de droit international général, qui ne figure dans aucune clause de la Convention de 1982. Pour ce faire, la Chambre invoque l'article 31, paragraphe 3, lettre c), de la Convention de Vienne, aux termes duquel l'interprétation d'un traité doit prendre en compte non seulement le contexte, mais aussi – je cite – « toute règle pertinente de droit international applicable dans les relations entre les parties ».

Madame et Messieurs les Membres du Tribunal, si l'on suit le raisonnement du Ghana, chaque fois qu'un Etat revendique devant vous qu'un droit de la Convention a été violé, il suffirait à l'autre partie d'affirmer que l'Etat a renoncé à ces droits et que, comme la question de la renonciation aux droits ne relève pas de la Convention, le tribunal n'est pas compétent. Je pense, Madame et Messieurs du Tribunal, qu'il s'agit d'un argument d'une faiblesse extrême pour essayer d'échapper à la juridiction internationale.

Madame et Messieurs de la Cour, le Ghana ne conteste pas que les autres exigences relatives à la compétence du Tribunal que nous avons mentionnées dans notre demande de mesures conservatoires sont remplies. La première condition exigée par l'article 290, paragraphe 5, de la Convention est donc clairement remplie en l'espèce.

Je passe maintenant à l'examen des conditions substantielles pour la prescription de mesures conservatoires, lesquelles sont aussi amplement satisfaites dans la présente affaire.

Monsieur le Président, je vais examiner la situation qui motive la nécessité de prescrire des mesures conservatoires pour « la préservation des droits respectifs des parties en litige », comme le requiert l'article 290, paragraphe premier, de la Convention.

L'immobilisation forcée dont souffre actuellement l'*ARA Libertad*, empêche l'Argentine d'exercer à travers son navire de guerre son droit de quitter le port de Tema et les eaux juridictionnelles du Ghana, conformément à son droit de passage inoffensif tel que reconnu par l'article 18, paragraphe premier, lettre b), de la Convention et en conformité aussi avec l'échange de notes entre les deux parties à ce sujet. Accord sur lequel, je me permets de le dire en passant Monsieur le Président, le Ghana est resté absolument silencieux dans son exposé écrit présenté hier à votre Juridiction.

L'immobilisation forcée de la frégate empêche l'Argentine d'exercer à travers son navire emblématique son droit de navigation garanti par la Convention dans les différents espaces maritimes. Elle empêche l'*ARA Libertad* d'accomplir son programme de navigation établi en accord avec des Etats tiers, de réaliser son programme régulier de maintenance, d'être employé comme navire école, bref, d'être utilisé tout court. Cette immobilisation porte aussi une atteinte immédiate au droit de l'Argentine de jouir de l'immunité que son navire de guerre possède, comme mon collègue Gerhard Hafner vous l'a amplement démontré. En fait, c'est un affront quotidien que l'Argentine est en train de subir et qu'elle continuera à subir si la mesure conservatoire demandée n'est pas prescrite.

Dans la présente espèce, si la mesure conservatoire n'est pas indiquée, l'Argentine se verrait privée de l'exercice, pour une durée indéterminée, de ses droits. La question à se poser en vue de déterminer si une mesure conservatoire est nécessaire dans la présente espèce est la suivante : que resterait-il donc de l'immunité, de son droit de quitter le port de Tema et les eaux juridictionnelles du Ghana, de sa liberté de navigation, si la frégate *ARA Libertad* devrait rester immobilisée jusqu'à la fin de la procédure arbitrale ?

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs du Tribunal, l'impossibilité pour un Etat de faire valoir son immunité constitue sans aucun doute l'un des cas les plus évidents rendant impérieuse la prescription de mesures conservatoires. En effet, les immunités touchent à l'essence même de la souveraineté des Etats, aux relations respectueuses qui doivent exister entre eux et au principe fondamental de leur égalité souveraine. Son dysfonctionnement, notamment dans des cas aussi flagrants que celui-ci, où même le gouvernement du Ghana l'a reconnu devant le Juge commercial de son pays, risque de dénaturer l'existence même du droit. Par définition, l'immunité implique d'être à l'abri de la juridiction des tribunaux étrangers et de l'adoption de mesures de contrainte. Cela est d'autant plus vrai pour l'immunité d'un navire de guerre puisque le mépris de cette immunité équivaut à rendre impossible la fonction essentielle à laquelle un navire est destiné : naviguer.

Toute proportion gardée, il convient d'évoquer ici l'ordonnance de la Cour internationale de Justice indiquant des mesures conservatoires dans l'affaire du *Personnel diplomatique et consulaire des États-Unis à Téhéran*. Paraphrasant la Cour de La Haye dans notre contexte, on pourrait soutenir que, dans la conduite des relations pacifiques entre Etats relatives à la présence de navires de guerre étrangers dans des espaces maritimes relevant de leur juridiction, il n'y a pas d'exigence plus fondamentale que celle du respect de leur immunité et que, tout au long de l'histoire, des Etats de toutes régions ont observé des

obligations réciproques à cet effet, et que les obligations ainsi assumées ne comportent aucune restriction et sont inhérentes à leurs caractère et fonction.

Au-delà de l'impossibilité d'exercer ces droits pour une durée indéterminée, mais certainement longue, ainsi que du sort de l'équipage durant cette période, point sur lequel je reviendrai dans quelques instants, on peut se demander quelle serait la situation de l'*ARA Libertad* à la fin de la procédure sur le fond si la mesure conservatoire n'est pas ordonnée. Dans le meilleur des cas, il faudrait une opération de rétablissement des conditions de navigation de la frégate dont le résultat est même incertain. Dans le pire des cas, ce navire de guerre serait irrémédiablement perdu : soit matériellement car les conditions de permanence forcée à Tema comportent un risque sérieux à sa sécurité et à sa préservation, soit juridiquement, à cause de l'effort téméraire d'un juge commercial ghanéen, lequel, faisant flèche de tout bois, s'arroge une compétence qui manifestement lui fait défaut et, méprisant ouvertement le droit international, n'hésite pas à se considérer investi du pouvoir d'ordonner l'exécution du navire.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs du Tribunal, si les conditions actuelles d'immobilisation de la frégate et de sa soumission en toute illicéité à la juridiction ghanéenne persistaient, un arrêt ou une sentence arbitrale sur le fond ne produirait qu'un effet partiel et limité – voire carrément nul – pour la sauvegarde de l'exercice des droits argentins.

Monsieur le Président, la condition exigée par l'article 290, paragraphe premier, de la Convention est l'existence d'une circonstance qui requiert la préservation des droits des parties en litige. Les éléments que je viens d'évoquer prouvent, amplement me semble-t-il, l'existence de cette circonstance. La prescription d'une mesure conservatoire devient encore plus indispensable lorsqu'il existe un risque de dommage ou préjudice irréparable. Bien évidemment, le risque de préjudice ou de dommage irréparable ne signifie pas qu'aucune modalité de réparation ne pourra être ultérieurement décidée lors de l'arrêt ou de la sentence arbitrale sur le fond. Autrement, ce serait tout simplement impossible de remplir cette condition et par conséquent d'ordonner des mesures conservatoires.

La Cour permanente de justice internationale, dans sa première ordonnance indiquant des mesures conservatoires, s'est référée à ce qui est désormais considéré comme la définition classique de la notion de préjudice irréparable. Le préjudice irréparable serait constitué lorsque la violation éventuelle des droits en cause – je cite – « ne saurait être réparée moyennant le versement d'une simple indemnité ou par une autre prestation matérielle ».

On peut certainement envisager une réparation pécuniaire pour les préjudices économiques subis du fait de la détention de l'*ARA Libertad.* On peut également penser à plusieurs formes de satisfaction, comme l'Argentine le demande du reste au fond. Mais rien – absolument rien, Madame et Messieurs du Tribunal – ne saurait réparer le fait que la frégate est restée immobilisée de force pour une durée indéterminée, que son immunité et sa dignité furent méconnues, qu'elle fut menacée d'exécution et empêchée d'être utilisée pour ses fonctions primaires : c'est-à-dire naviguer, servir de cadre pour la formation des cadets de la marine, représenter l'Argentine dans les mers et les ports du monde entier. Le préjudice à ces droits, Madame et Messieurs du Tribunal, est irréparable. Peut-on sérieusement demander à l'Argentine d'être « patiente » et d'attendre une décision sur le fond pour voir enfin reconnue son immunité et pour pouvoir disposer du fleuron de sa Marine ? Non, Monsieur le Président, un tel scénario viderait ces droits de toute leur substance.

Monsieur le Président, dans son exposé écrit d'hier, le Ghana prétend que l'Argentine ne subit pas de préjudice irréparable du fait de la détention de l'*ARA Libertad* à Tema. Pour ce faire, le défendeur utilise un double argument : premièrement, il trace un tableau idyllique de la situation sur place qui malheureusement est loin d'être la réalité et, deuxièmement, il

prétend qu'il suffit que l'Argentine paie une caution de 20 millions de dollars des Etats-Unis pour obtenir la libération de son navire de guerre. Je vais aborder l'un et l'autre de ces arguments sans fondement.

Monsieur le Président, je ne peux m'empêcher de trouver choquant que l'exposé écrit du Ghana affirme que « *while it remains in Port Tema the port authority has been very careful to ensure that the ship and its remaining crew have been and will continue to be provided with all requirements to ensure their full liberty, safety and security.* ». Pour sa part, le paragraphe suivant se passe de tout commentaire : « *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* ».

Monsieur le Président, malgré tout l'euphémisme dont fait preuve l'exposé écrit ghanéen, faudrait-il rappeler que dans le contexte de relations pacifiques, comme c'est le cas ici, aucun usage de la force contre un navire de guerre ne peut être considéré comme « raisonnable », ou non hostile comme le prétend l'exposé écrit ghanéen. Tout recours à la force contre un navire de guerre dans ces conditions est intolérable.

Disons-le une fois pour toutes, Monsieur le Président : il ne faut pas se méprendre sur la gravité de la situation, comme semblent le faire les autorités portuaires ghanéennes qui qualifient les mesures prises à l'encontre du navire de guerre de mesures usuelles ou non extraordinaires. Bernard Oxman, qui participa avec certains d'entre vous à la Conférence et qui est un collègue bien connu de votre Tribunal, a écrit à cet égard : « *An attempt to exercise law enforcement jurisdiction against a foreign warship is in fact an attempt to threaten or use force against a sovereign instrumentality of a foreign State.* »

Monsieur le Président, Madame et Messieurs du Tribunal, nous parlons des faits qui se sont produits même après l'introduction de l'instance arbitrale par l'Argentine le 30 octobre passé. Comme on le sait, le 5 novembre 2012, le Juge Frimpong a autorisé l'autorité portuaire du Ghana à déplacer le navire. Le 7 novembre, même si la décision du Juge en question n'était pas définitive, en raison de l'appel suspensif interjeté immédiatement par l'Argentine, l'autorité portuaire a essayé sans succès de déplacer le navire de guerre, puis a coupé le courant électrique et l'eau approvisionnant l'*ARA Libertad*. L'exposé écrit du Ghana reconnaît par ailleurs tous ces faits.

Une décision judiciaire sur l'appel relatif au déplacement forcé devrait intervenir dans les jours qui viennent. En outre, les organes judiciaires ghanéens ont affiché leur volonté de trancher sur le fond et, en dépit des immunités dont jouit l'*ARA Libertad*, sur la demande d'exécution du navire formulée par le fonds vautour NML. En d'autres termes, non seulement les risques de cette politique de méconnaissance de l'immunité du navire sont bien réels et graves, mais ils sont en outre renforcés par la prétention bien concrète de priver l'Argentine de la propriété et de la disposition de son navire de guerre.

Madame et Messieurs du Tribunal, il y a un autre élément fondamental qui commande ici la prescription de la mesure conservatoire demandée. Certainement, il s'agit de préserver les droits appartenant directement à l'Argentine en tant qu'Etat, droits qui, faut-il le rappeler, sont différents de ceux que l'Argentine ferait valoir en la personne de ses ressortissants. Dans pareille situation, l'épuisement des voies de recours internes n'est pas exigé, comme votre Tribunal l'a indiqué dans l'*Affaire du navire « SAIGA » (No. 2)*. Il n'en demeure pas moins, comme l'a dit la Cour internationale de Justice dans sa décision ordonnant des mesures conservatoires dans l'affaire *Cameroun c. Nigéria*, que – je cite – « ces droits concernent aussi des personnes ». En effet, derrière ces droits de l'Argentine, il y a des individus qui subissent en leur personne les conséquences des préjudices portés aux droits de leur Etat. Dans les circonstances actuelles, comme le Capitaine Salonio le décrit dans son témoigne que vous trouvez dans l'Annexe I de notre demande, l'équipage de l'*ARA Libertad*, ou plutôt ce

qui reste, est soumis à des conditions de vie, tant matérielles que psychologiques, d'une extrême tension.

Le Ghana prétend que l'équipage du bateau aurait eu accès à toutes les facilités du port et à l'usage d'un générateur pour l'alimentation en électricité du navire. Ces affirmations sont trompeuses. Comme le reconnaît d'ailleurs le Ghana, l'approvisionnement en eau et en électricité du navire fut interrompu après le refus du Commandant de permettre la prise de contrôle du navire par l'Autorité portuaire. Il n'en conteste que les raisons. Le générateur dont il est question fut loué aux frais de l'Argentine et non mis à la disposition du navire par les autorités portuaires. Du reste, celui-ci fut aussi débranché par la suite après l'échec de la tentative de déplacer le navire sans l'autorisation du commandant. S'il est aujourd'hui rétabli, les faits montrent que sa présence est tributaire du bon vouloir de l'Autorité portuaire. Contrairement à ce que prétend le Ghana dans son exposé écrit, l'Ambassadeur d'Argentine a été privé d'avoir accès au navire, d'abord, et soumis à des conditions pour pouvoir le faire, ensuite. Les personnes délivrant la nourriture sont soumises à des commentaires et actions vexatoires, rendant leur tâche de plus en plus difficile. Cette situation se poursuit.

Cette situation pénible vaut pour l'équipage une situation d'arrestation. En effet, depuis les incidents du 7 novembre passé, marqués par les tentatives de prise d'assaut du navire et de son déplacement forcé par les autorités ghanéennes, l'équipage ne peut plus se rendre à terre. Pire encore, le capitaine Salonio fait actuellement l'objet d'une procédure pour « outrage au tribunal de commerce », ce qui constitue à la fois une méconnaissance flagrante de l'immunité du capitaine de l'*ARA Libertad* et une nouvelle cause d'aggravation du différend.

Monsieur le Président, permettre la continuation de cette situation équivaut à accepter le risque d'une atteinte à la sécurité, à la dignité et à la vie des personnes.

Je viens maintenant, Monsieur le Président, à la prétention du Ghana du paiement d'une caution de 20 millions de dollars des Etat-Unis pour que l'Argentine puisse obtenir la libération de la frégate *Libertad*, ce qui, selon lui, montrerait qu'il n'y a pas nécessité de prescrire une mesure conservatoire. En d'autres termes, ce que le Ghana prétend, c'est anéantir l'immunité dont les navires de guerre jouissent pour être précisément exemptés de ces types de mesure de contrainte, comme mon collègue Gerhard Hafner vous l'a déjà expliqué. Que prétend donc le Ghana ? Que l'Argentine paye une caution pour pouvoir exercer son droit de passage inoffensif et quitte le port et les eaux juridictionnelles ghanéennes, droit qui lui est librement garanti par la Convention et à propos de l'exercice duquel l'Argentine et le Ghana s'étaient entendus jusque dans les moindres détails ? Depuis quand faudrait-il payer pour pouvoir exercer ces droits ?

En réalité, Monsieur le Président, cette exigence est une preuve supplémentaire de la nécessité d'accorder la mesure conservatoire demandée par l'Argentine car il témoigne de l'impossibilité pour mon pays d'exercer ses droits sans aucune condition qui soit exigée par les règles pertinentes de la Convention et du droit international général.

Je viens maintenant à la troisième condition. L'article 290, paragraphe 5, de la Convention prévoit que, dans l'attente de la constitution d'un tribunal arbitral, votre Tribunal peut prescrire des mesures conservatoires s'il estime que l'urgence de la situation l'exige. Dans la présente affaire, la procédure de constitution du tribunal arbitral se trouve à ses tout débuts. Le Ghana n'a pas encore répondu à la proposition faite par l'Argentine d'initier des contacts en vue de procéder à la nomination des trois arbitres. Jusqu'à présent, tout ce que le Ghana a fait, c'est d'annoncer, il y a quelques heures, qu'il estime que ce tribunal arbitral n'est pas compétent.

Le Ghana se trompe à double titre, Monsieur le Président, quand il prétend qu'il n'y a pas urgence avant la date de constitution du Tribunal. D'abord, parce que l'urgence existe aujourd'hui même, comme je vais l'expliquer dans un instant. Ensuite car, comme vous

l'avez affirmé dans l'affaire de la *Poldérisation*, – je cite : « l'urgence de la situation doit être appréciée compte tenu de la période pendant laquelle le tribunal arbitral prévu à l'annexe VII n'est pas encore à même de 'modifier, rapporter ou confirmer ces mesures conservatoires ».

Compte tenu de ce qui précède, il est difficile de déterminer quand le Tribunal arbitral sera en mesure de se prononcer sur une demande de mesures conservatoires. Non seulement la nomination des arbitres risque de prendre un temps considérable, mais encore faut-il que le Ghana, changeant radicalement son attitude adoptée jusqu'à présent, réponde aux notes argentines et accepte de participer de bonne foi à la constitution du tribunal pour que celui-ci puisse effectivement commencer son activité dans les plus brefs délais. Ce qui est certain, en revanche, c'est qu'un long laps de temps s'écoulera avant que le tribunal arbitral ne se prononce sur le fond, compte tenu du fait que le Ghana a déjà annoncé qu'il contestera sa juridiction.

Monsieur le Président, plusieurs raisons indiquent qu'il existe, sans l'ombre d'un doute, urgence pour prescrire la mesure conservatoire demandée. La condition de l'urgence a été considérée comme satisfaite par votre Tribunal et par votre institution sœur, la Cour de La Haye, lorsqu'« il est probable qu'une action préjudicielle aux droits de l'une ou de l'autre Partie sera commise avant » que la décision finale soit rendue, ou lorsqu'il existerait un risque « réel » ou « imminent » qu'un préjudice irréparable à ces droits se produise.

Madame et Messieurs les Membres du Tribunal, dans la présente affaire, il n'est point nécessaire de spéculer sur la probabilité, l'imminence ou la réalité d'un *risque* de préjudice ou de dommage irréparable à ces droits. Ces préjudices ou dommages irréparables ne sont pas hypothétiques : ils sont en train de se produire chaque jour qui passe. À vrai dire, le seul risque qui demeure actuellement, c'est de voir ces dommages irréparables se perpétuer dans le temps et s'aggraver au point d'anéantir tous les droits que l'Argentine possède à l'égard de son navire-école, en attendant la constitution et l'éventuelle sentence du Tribunal arbitral.

Je dois aussi signaler que, compte tenu du comportement du défendeur, la probabilité de l'aggravation de ces préjudices durant le temps de constitution du Tribunal arbitral et ultérieurement est bien réelle. Les événements du 7 novembre 2012 sont là pour le démontrer. Monsieur le Président, quelle garantie peut avoir l'Argentine par rapport au comportement de l'autre partie si le gouvernement ghanéen n'a pas formulé la moindre remarque, même par rapport au fait que l'Autorité portuaire a agi utilisant la force contre l'*ARA Libertad* alors que la décision judiciaire sur laquelle cet usage prétendument se fondait n'était même pas définitive ? L'Argentine, que peut-elle attendre d'un Etat qui n'a pas même pas répondu à aucune de ses notes et a procédé de cette façon violente même après le début de la procédure arbitrale ?

Le Ghana prétend aussi qu'il n'y a pas d'urgence car son Autorité portuaire serait toujours prête, entre autres, à répondre avec considération à tout besoin de ravitaillement du combustible de l'*ARA Libertad*. Monsieur le Président, cela ne peut pas être vrai car la mesure de contrainte ordonnée par le Juge Frimpong le 2 octobre interdit explicitement au point 2 la possibilité de mazouter le navire, et c'est l'autorité portuaire qui applique cet ordre.

Un autre argument du Ghana pour contester l'urgence est la prétendue fin de la procédure interne vers la fin du mois de janvier 2013. Monsieur le Président, toute considération sur ce que cela signifierait pour les droits de l'Argentine mise à part, rien ne permet d'affirmer une telle prétendue rapidité des procédures ghanéennes. Compte tenu de la situation procédurale actuelle, on peut affirmer carrément plutôt le contraire.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, dans le contexte des voies de fait déjà essayées, reconnues par le Ghana dans son exposé écrit, et des menaces toujours pendantes, les risques d'une confrontation sont aussi réels et très sérieux, surtout si les autorités ghanéennes (judiciaires, portuaires ou autres) décident, comme elles l'ont déjà fait et envisagent de le faire encore,

d'exercer leur pouvoir à l'encontre de l'*ARA Libertad*. Dans quelques jours, le Juge ghanéen doit se prononcer sur l'appel à la décision d'autoriser le transfert du navire par l'Autorité portuaire. Le capitaine Salonio ne tolérera pas, comme il est de son droit et de son devoir, que la violence soit employée à l'encontre de son navire de guerre et de son personnel.

Monsieur le Président, c'est la première fois que votre Tribunal se trouve confronté à une situation dans laquelle la vie, la sécurité et l'intégrité des personnes, ainsi qu'un bien aussi particulier comme le navire de guerre d'un Etat, subissent un préjudice irréparable. La Cour de La Haye, dans des circonstances semblables où des risques similaires existaient, n'a pas hésité à ordonner des mesures conservatoires. C'était le cas dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* et *Nicaragua*. C'était aussi le cas dans les différends frontaliers *Burkina Faso/Mali* et *Cameroun c. Nigéria*, dans l'affaire *Bosnie-Herzégovine c. Yougoslavie*, dans les affaires *Breard*, *LaGrand* et *Avena*, et, enfin, dans les affaires *République démocratique du Congo c. Ouganda*, *Géorgie c. Russie* et, plus récemment, en les affaires de *Certaines activités du Nicaragua dans la région frontalière* et de la *Demande d'interprétation de l'arrêt dans l'affaire du* Temple de Préah Vihéar.

En résumé, Monsieur le Président – et ceci clôt la première partie de mon exposé – il existe une nécessité impérieuse de préserver les droits argentins. Si ces mesures doivent être prescrites lorsqu'il existe un *risque* de préjudice et même pas un préjudice actuel, à plus forte raison s'imposent-elles lorsque le préjudice est déjà concret, actuel et continu, qu'il s'est aggravé depuis le début de la procédure arbitrale, et que tout indique que sa persistance ne peut que l'aggraver davantage. Il y va non seulement de l'exercice de ces droits, mais de leur intégrité et leur existence même.

Je viens maintenant à la demande de prescription de la mesure conservatoire qui se lit comme suit dans la traduction du Greffe – je cite : « Que le Ghana autorise sans condition la frégate *ARA Libertad*, navire de guerre argentin, à quitter le port de Tema et les eaux relevant de la juridiction du Ghana et à se ravitailler à cette fin ».

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs du Tribunal, en vue de préserver les droits de l'Argentine qui sont en cause dans la procédure arbitrale entamée le 30 octobre passé, la libération inconditionnelle du navire de guerre immobilisé à Tema, ainsi que la possibilité pour celui-ci de se ravitailler afin de pouvoir quitter le port et les eaux juridictionnelles du Ghana, constituent la seule mesure conservatoire envisageable. Toute autre mesure, notamment celle impliquant que l'*ARA Libertad* reste au port de Tema ou qu'il soit mouillé dans les eaux juridictionnelles du Ghana – comme l'Autorité portuaire ghanéenne l'avait à l'origine demandé au Juge Frimpong – est incapable de préserver les droits de l'Argentine. En effet, même au cas où les procédures judiciaires internes ghanéennes seraient suspendues en attendant une décision sur le fond, l'Argentine serait privée de l'exercice de ses droits pendant une durée indéterminée ; les conditions de vie de l'équipage continueraient d'être précaires et anormales. Dans le meilleur des cas – si jamais la situation actuelle venait à s'améliorer et la tension à diminuer – l'état de la frégate ne pourrait que se dégrader car sa maintenance ne peut pas être normalement assurée dans le port de Tema. Par ailleurs, les risques d'une confrontation que j'ai évoqués ne disparaîtraient pas pour autant. Bien au contraire, leur probabilité ne ferait que s'agrandir avec le temps. En somme, ce serait prolonger une situation de toute évidence insupportable, insoutenable.

Monsieur le Président, Madame et Messieurs les Membres du Tribunal, on aurait du mal à imaginer quelle autre mesure que la libération immédiate des otages et des locaux diplomatiques et consulaires la Cour de La Haye aurait pu prendre dans l'affaire du *Personnel diplomatique et consulaire des États-Unis à Téhéran*. Il en va de même ici : toute mesure différente de la libération inconditionnelle de l'*ARA Libertad* équivaudrait à

pérenniser la méconnaissance de l'immunité du navire de guerre et à rendre aléatoires et conditionnels les droits de passage et de libre navigation dont le navire jouit.

Dans le même sens, toute mesure qui impliquerait la soumission de la libération de l'*ARA Libertad* à une condition quelconque, fût-elle de nature pécuniaire ou autre, signifierait en même temps la négation de l'immunité dont les navires de guerre jouissent en vertu de la Convention et du droit international. Pareille exigence serait aussi une grosse confusion entre la situation des navires de guerre et celle des navires privés ou s'adonnant à une activité commerciale.

Monsieur le Président, permettez-moi de faire une comparaison entre la situation de l'*ARA Libertad* et celle, hypothétique, d'un navire commercial qui aurait été arraisonné par le Ghana et immobilisé au port de Tema pour avoir été pris en violation *in flagranti* des lois et réglementation de pêche du Ghana. Le Ghana aurait-il pu garder ce navire le laps du temps nécessaire à ce que jugement soit rendu à propos de l'infraction du navire ? La réponse est négative. La Convention de 1982 a prévu une procédure bien connue par vous, Madame et Messieurs du Tribunal, à cet effet : c'est la prompte mainlevée de l'article 292 de la Convention de Montego Bay. En d'autres termes, cette Convention, que privilégie-t-elle ? La liberté de navigation. Certes, me dira-t-on, contre le paiement d'une caution.

Mais comparons maintenant la situation de l'*ARA Libertad* avec ce navire commercial s'adonnant à la pêche illégale. L'*ARA Libertad* a-t-il commis un quelconque acte illicite dans les eaux juridictionnelles du Ghana ou ailleurs ? Réponse : non. Bien au contraire, l'*ARA Libertad* a exercé le droit de passage inoffensif pour se rendre au port de Tema, comme convenu dans l'échange de notes entre l'Argentine et le Ghana, dans le cadre d'une visite officielle !

Monsieur le Président, nous ne sommes pas dans une situation semblable à celle d'un navire commercial sur lequel pèserait une accusation d'infraction aux règlements de pêche, environnementaux ou autres, et pour lequel le mécanisme de prompte mainlevée envisage la possibilité de payer, en contrepartie de la liberté du navire, une caution. Personne ne soutient que l'*ARA Libertad* a commis une infraction quelconque et, même si cela avait été le cas, et la responsabilité de l'Etat du pavillon serait engagée, tout ce que la Convention prévoit à l'encontre des navires de guerre, c'est la possibilité de lui demander de quitter la mer territoriale de l'Etat côtier. Le parallèle avec tout ce que l'Etat accréditant peut faire à l'encontre des diplomates est saisissant. Même la possibilité de ne plus reconnaître la qualité de diplomate à la personne déclarée *non grata* si l'Etat accréditant refuse d'exécuter ou n'exécute pas dans un délai raisonnable n'existe pas par rapport à un navire de guerre. En d'autres termes, Madame et Messieurs du Tribunal, l'immunité des navires de guerre n'est soumise à aucune condition. L'immunité de l'*ARA Libertad* et son droit de passage inoffensif ne sont pas subordonnés au paiement d'une somme d'argent. L'immunité de l'*ARA Libertad* et son droit de quitter le Ghana ne sont pas subordonnés à la décision d'un juge commercial. La Convention de 1982 est dépourvue d'ambiguïté à cet égard. Le navire de guerre est dans ce sens « intouchable », même s'il arrivait qu'il commette des infractions. Il en va de même pour le droit de passage inoffensif dans la mer territoriale du Ghana dont l'*ARA Libertad* est privé de l'accomplir.

*The President:*
Monsieur Kohen, excusez-moi de vous interrompre, pouvez-vous parler plus lentement pour que nos interprètes puissent vous suivre ? Merci.

*M. Kohen :*
Merci, Monsieur le Président, je le ferai.

EXPOSÉ DE M. KOHEN – 29 novembre 2012, matin

Permettez-moi, Monsieur le Président, de rappeler que l'Argentine a notifié au Ghana les dates, heures et coordonnées de ce passage tant pour arriver que pour quitter le port de Tema et les eaux juridictionnelles du Ghana – comme vous le voyez à l'écran – et le Ghana les a acceptées. Faudrait-il payer une caution ou quoi que ce soit maintenant pour exercer un droit de passage, quitter le port comme convenu et poursuivre la libre navigation au-delà de la mer territoriale du Ghana ?

Madame et Messieurs du Tribunal, la logique de la Convention de Montego Bay est de rendre sans délai les navires et leur équipage à la mer. En d'autres termes, faire en sorte qu'il n'existe pas d'entraves pour que les navires puissent toujours remplir la fonction pour laquelle ils ont été conçus : naviguer. Et j'ajoute : pour garantir la liberté première des mers, la liberté de navigation. La seule mesure qui s'impose dans le cas d'espèce, c'est donc de permettre inconditionnellement à l'*ARA Libertad* de quitter le port de Tema et les eaux sous la juridiction du Ghana et qu'il puisse être ravitaillé à cette fin.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, toute ordonnance prescrivant des mesures conservatoires vise à protéger les droits éventuels des parties. Encore faut-il que ces droits soient plausibles. Ceux de l'Argentine le sont, comme il a été démontré. Cela ne souffre d'ailleurs pas de contestations entre les parties. Le Gouvernement ghanéen l'a lui-même reconnu devant le Juge commercial de première instance qui a imposé la mesure de contrainte contre la frégate, comme vous le voyez à l'écran, même s'il est vrai qu'il n'a pas tiré toutes les conséquences qui découlaient de cette constatation.

La mesure conservatoire demandée aujourd'hui par l'Argentine à votre Haute juridiction vise à préserver ses droits qui font l'objet du différend soumis au Tribunal arbitral. Si vous faites droit à la demande argentine, ce ne sera pas la première fois que votre Tribunal ordonnera une mesure conservatoire des droits d'une seule des parties à l'instance. Vous l'avez déjà fait dans votre ordonnance du 11 mars 1998 en l'*Affaire du navire « SAIGA » (No. 2)* à l'égard des droits de Saint-Vincent-et-les Grenadines. Pour cette raison, votre Haute juridiction a prescrit, à l'unanimité, que « la Guinée doit s'abstenir de prendre ou d'exécuter toute mesure judiciaire ou administrative à l'encontre du *Saiga*, de son capitaine et des autres membres de l'équipage, etc. ». Cela dit, la situation de l'*ARA Libertad* est différente de l'affaire *Navire « SAIGA » (No. 2)*. Dans cette dernière, l'indication d'une mesure conservatoire demandant la libération était sans objet puisque le navire et l'équipage avaient été libérés par la Guinée.

La CIJ l'a également souligné dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* – je cite :

> Il n'est pas rare qu'en indiquant des mesures conservatoires elle se soit adressée aux deux parties ; et que cela ne signifie pas et ne saurait signifier que la Cour ne puisse connaître d'une demande émanant d'une seule partie pour la simple raison que les mesures sollicitées seraient unilatérales.

On pourrait se demander si, en prescrivant la libération inconditionnelle de l'*ARA Libertad*, d'éventuels droits du Ghana seraient affectés ou mis en cause. Aucun droit établi ou déclaré par la Convention ou même par d'autres règles de droit international n'est en cause en ce qui concerne le Ghana. La réalité, Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, c'est qu'il n'y a aucun droit du Ghana à préserver en la présente instance.

Il ne peut pas s'agir du droit d'exercer sa juridiction et d'appliquer des mesures de contrainte à l'encontre d'un navire de guerre étranger comme l'*ARA Libertad*. Le

gouvernement ghanéen le sait, et il l'a déjà reconnu explicitement dans son exposé écrit. Certes, dans une petite note de bas de page, la note 16, dont je cite la première partie :

> 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.

Monsieur le Président, il est bien connu et depuis longtemps que, comme l'a affirmé la Cour permanente de Justice internationale, « un Etat ne saurait invoquer vis-à-vis d'un autre Etat sa propre constitution pour se soustraire aux obligations que lui imposent le droit international ou les traités en vigueur ».

Madame et Messieurs du Tribunal, il ne s'agit pas d'examiner ici des questions qui relèvent du fond de l'affaire, à savoir l'attribution des comportements illicites à l'Etat ghanéen. Il suffit d'affirmer ici que ce que le gouvernement ghanéen ne peut prétendument faire en raison de ses dispositions internes, votre Tribunal a toute l'autorité pour le prescrire.

Je profite de cette dernière remarque pour examiner maintenant la question d'un prétendu pré-jugement sur le fond si l'on adopte la mesure conservatoire demandée. Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, votre jurisprudence est constante pour indiquer que vos ordonnances ne préjugent en rien de la compétence de votre Tribunal ou celle d'un tribunal arbitral ou du fond de l'affaire. Vous avez également indiqué que le fait d'agir ou s'abstenir d'agir pour une partie dans le cadre des mesures conservatoires – je cite – « ne saurait nullement être interprété comme une renonciation à l'une quelconque de ses prétentions ou une reconnaissance des prétentions de la partie adverse ».

Monsieur le Président, nous ne demandons pas au Tribunal de préjuger sur le fond du différend. Il n'est pas question d'établir en cette phase de la procédure l'existence d'un ou plusieurs faits internationalement illicites commis par le Ghana, et nous ne le cherchons pas. La mesure demandée ne préjuge en rien de l'existence ou non d'un fait internationalement illicite ou de son attribution au Ghana. Elle ne préjuge en rien du reste des demandes argentines formulées lors de l'introduction de l'instance arbitrale. En la présente procédure incidente, nous ne vous demandons nullement de vous prononcer sur la nature au regard du droit international des procédures judiciaires en cours au Ghana ni sur la même nature des actes accomplis par les autorités portuaires du Ghana. La libération de l'*ARA Libertad* est sans incidence sur ces questions qui sont du ressort du fond du différend.

Un parallèle avec l'indication des mesures conservatoires par la Cour de La Haye s'impose ici. Lorsque la CIJ a ordonné dans ses mesures conservatoires l'arrêt du minage des ports nicaraguayens par les Etats-Unis, ou la libération du personnel et des locaux diplomatiques et consulaires des Etats-Unis à Téhéran, par exemple, elle n'a pas préjugé sur le fond des différends, même si elle a dû faire une évaluation succincte des droits en litige et de la manière de les préserver pendant la décision sur le fond. Permettez-moi Monsieur le Président de citer *in extenso* le paragraphe 28 de l'ordonnance de la Cour indiquant des mesures conservatoires dans l'affaire des otages, car il est de toute pertinence ici – je cite :

> Considérant qu[e l'Iran] soutient en premier lieu que la demande en indication de mesures conservatoires, telle qu'elle a été formulée par les États-Unis, implique en fait que la Cour ait jugé de la substance même de l'affaire qui lui est soumise ; considérant que dans l'affaire de l'Usine de Chorzów la Cour permanente de Justice internationale s'est certes abstenue d'indiquer des mesures conservatoires,

> motif pris de ce qu'en l'espèce la demande tendait à 'obtenir un jugement provisionnel adjugeant une partie des conclusions' (ordonnance du 21 novembre 1927, CPJI série A n° 12, p. 10) ; considérant cependant que dans ladite affaire les circonstances étaient totalement différentes de celles de la présente espèce et qu'il s'agissait alors d'obtenir de la Cour une décision définitive sur une partie de la demande de dédommagement monétaire ; considérant en outre qu'une demande en indication de mesures conservatoires a nécessairement, par sa nature même, un lien avec la substance de l'affaire puisque, comme l'article 41 l'indique expressément, son objet est de protéger le droit de chacun ; et qu'en la présente espèce le but de la demande des États-Unis ne paraît pas être d'obtenir un jugement, provisionnel ou définitif, sur le fond des réclamations mais de protéger pendente lite la substance des droits invoqués.

Ici non plus, Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, la prescription de la mesure conservatoire demandée n'impliquera pas un jugement provisionnel sur le fond. De surcroît, la libération inconditionnelle de la frégate ne causerait non plus aucun préjudice au Ghana.

Qui plus est, Monsieur le Président, prescrire la libération inconditionnelle de la frégate n'implique nullement porter atteinte à un droit du Ghana puisque le Ghana lui-même s'est mis d'accord avec l'Argentine pour que la frégate quitte le port de Tema le 4 octobre 2012. Il y a un accord spécial relatif à l'entrée et à la sortie de l'*ARA Libertad* des eaux territoriales du Ghana liant les parties. On peut ici comparer cette situation avec votre ordonnance indiquant des mesures conservatoires dans l'affaire du *Thon à nageoire bleue*. Dans cette affaire, vous avez prescrit comme mesure conservatoire l'application de l'accord spécial liant les parties relatif aux quotas nationaux annuels pour les captures permissibles, sans préjudice de toute décision que pourrait rendre le Tribunal arbitral. Ici également, il s'agit de prescrire aussi l'application de l'accord spécial entre l'Argentine et le Ghana concernant la visite de l'*ARA Libertad* au Ghana et de laisser ce navire de guerre quitter le port et les eaux juridictionnelles du Ghana comme convenu par les deux parties.

J'en arrive, Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, à mes conclusions. Nous croyons avoir démontré que les droits de l'Argentine tels que reconnus par la Convention, explicitement accordés et reconnus par le Ghana, méritent une protection urgente par la prescription de la seule mesure conservatoire qui s'impose : la libération de la *Libertad*. Rien n'empêche le Tribunal de procéder de la sorte, ni des raisons juridictionnelles ni des raisons de fond. Au contraire, votre décision concernant la prescription d'une mesure conservatoire dans cette affaire clarifiera de manière plus générale le traitement dû aux navires de guerre. L'« ordre public des océans » exige que les trois droits fondamentaux des Etats dans le domaine du droit de la mer qui sont en cause dans cette affaire, à savoir l'immunité des navires de guerre, le droit de passage inoffensif qui inclut le droit de quitter un port – d'autant plus si l'on y est en visite officielle – et la liberté de navigation dans les différents espaces maritimes concernés, soient préservés.

La libération de la frégate *ARA Libertad* signifiera non seulement la préservation des droits de l'Argentine dans cette malheureuse affaire propulsée par des intérêts financiers spéculatifs, mais aussi une réaffirmation et une garantie des droits bien enracinées dans la conscience juridique de tous les Etats, nécessaires pour pérenniser « un ordre juridique pour les mers et les océans qui facilite les communications internationales », comme le déclare si bien le préambule de la Convention des Nations Unies sur le droit de la mer.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, je vous remercie de l'attention que vous avez bien voulu nous porter. Ainsi s'achève le premier tour des plaidoiries de la République argentine.

« ARA LIBERTAD »

*The President:*
Monsieur Kohen, merci pour votre exposé.

The first round of pleadings by Argentina is concluded. We shall continue this afternoon at 3 p.m. with the first round of pleadings by Ghana.

*(The sitting closes at 12.35 p.m.)*

29 November 2012, p.m.

**PUBLIC SITTING HELD ON 29 NOVEMBER 2012, 3 P.M.**

**Tribunal**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* GAUTIER.

**For Argentina:** [See sitting of 29 November 2012, 9.30 a.m.]

**For Ghana:** [See sitting of 29 November 2012, 9.30 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 29 NOVEMBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD, KULYK, *juges* ; M. MENSAH, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Argentine :** [Voir l'audience du 29 novembre 2012, 9 h 30]

**Pour le Ghana :** [Voir l'audience du 29 novembre 2012, 9 h 30]

*The President:*
The Tribunal will now continue the hearing in the *"ARA Libertad" Case*. This afternoon we will hear the first round of oral arguments presented by Ghana. I give the floor to the Co-Agent of Ghana, Mr Ebenezer Appreku, to begin his statement.

You have the floor, sir.

"ARA LIBERTAD"

**Argument of Ghana**

STATEMENT OF MR APPREKU
CO-AGENT OF GHANA
[ITLOS/PV.12/C20/2/Rev.1, p. 1–5]

*Mr Appreku:*
Respectfully, Mr President, honourable Members of the Tribunal, it is my privilege to appear before you today as Co-Agent for the Government of the Republic of Ghana. I would like to begin by expressing the gratitude of my Government to the Tribunal for kindly providing the much-needed facilities for the Ghanaian legal team this week, and I would also like to commend the Registrar and his able staff for their efficiency.

The presentation of Ghana's submissions this afternoon will be as follows: I will deliver some introductory remarks and describe the difficult situation with which my Government is presently faced. I will also set out, from the point of view of the Ghanaian Government, how and why this matter has found its way to this Tribunal. Ms Anjolie Singh will then set out the factual background underlying Argentina's request for provisional measures and establish the facts which have led to the filing of the request for those provisional measures by Argentina.

Ms Singh will also update the Tribunal on the current situation pertaining to the Argentine *ARA Libertad* and the measures which have been taken to ensure that the vessel and its crew are not exposed to any harm or damage. Ms Michelle Butler will then follow and will set out the law applicable to provisional measures and in particular the requirements of article 290, paragraph 5, of the United Nations Convention on the Law of the Sea as they have been applied by this Tribunal. Professor Philippe Sands QC will conclude this afternoon's presentation by addressing the jurisdictional hurdles faced by the Tribunal, the propriety of the application and the requirement for urgency. Mr Sands will explain why Argentina's request does not meet the requirements of article 290, paragraph 5.

Mr President, the purpose of my introductory remarks is to put this matter into context and shed light on the path that led to Ghana's appearance before the Tribunal today. My Government received, with much regret, a submission to arbitration from Argentina on 30 October 2012, submitting a dispute to an Annex VII arbitral tribunal relating to the detention of and court measures adopted against the *ARA Libertad*. The submission to arbitration was shortly followed, on 14 November 2012, by a request for the prescription of provisional measures under article 290 of the 1982 United Nations Convention on the Law of the Sea. It is for this reason that we find ourselves in Hamburg before this distinguished Tribunal.

When Argentina's request for provisional measures was received at the Ministry of Foreign Affairs and Regional Integration in Accra it was immediately given the respect it was due. We have consulted, at length, the applicable rules and principles of public international law, the provisions of the 1982 United Nations Convention on the Law of the Sea and the relevant case law and in particular the relevant case law of this pre-eminent Tribunal. We have proceeded very carefully with the utmost regard to our domestic and international obligations and in full recognition of the rights of the Argentine Republic.

Ghana and Argentina share close ties and cooperate on a wide range of trade and other matters, including on matters relating to the law of the sea. Earlier this year, I myself along with members of my Government's Boundary Commission working on Ghana's submission to the Commission on the Limits of the Continental Shelf participated in a seminar on the Continental Shelf organized by the Argentine Foreign Ministry in Buenos Aires. Ghana's strong and positive relationship with Argentina is underscored by the fact that

this most unfortunate situation has arisen in the context of a goodwill visit by the *ARA Libertad* to Ghana. This Tribunal is an august forum for the peaceful settlement of disputes. It is therefore the sincere hope of my Government that these proceedings will not in any way dampen our ties with Argentina, which we cherish enormously.

Mr President, this is a unique case, not just before this Tribunal, but before any standing international Tribunal resolving disputes between States. The Government of Ghana does not consider itself to be a State in dispute with the Argentine Republic. We have a longstanding friendship with Argentina and we hope to continue that friendship in the future. Ghana is not a party to the dispute between NML and Argentina. NML, a private company incorporated under the laws of the Cayman Islands, has issued proceedings against Argentina in the United States, the United Kingdom and in France. It is this dispute which forms the subject matter of Argentina's Statement of Claim and Request for the prescription of provisional measures.

When this matter came before the High Court sitting in Accra, the executive arm of government, represented by both the Attorney General's department and the Ministry of Foreign Affairs, took a position in the capacity as *amicus curiae* which, to a large extent, was supportive of Argentina. In Ghana's view, the heart of this issue is essentially a matter of contract law in two senses, the first relating to the law governing a bond issued by Argentina which includes a clause waiving immunity, which clause has to be interpreted and applied in accordance with the applicable law. In the second sense, under Ghanaian law, a foreign judgment for the recovery of debt, such as the one at issue here, may be enforced as a contract between the creditor and the debtor. This matter is not governed by the 1982 Convention, which is silent on matters of the immunity of a foreign warship in internal waters and on the circumstances in which a waiver of immunity may or may not be given. At the same time, however, Ghana recognizes that it has a duty to make submissions before this Tribunal that are consistent with the Convention and this Tribunal's jurisprudence. With this duty in mind, it is respectfully submitted that Argentina's request for provisional measures before ITLOS does not meet the requirements set out in article 290, paragraph 5. A little bit later this afternoon Ms. Butler and Mr Sands will address the legal requirements of provisional measures and will explain in detail why we say that this case does not meet the requirements of article 290, paragraph 5.

Mr President, it is clear that the High Court in Accra was faced with a dilemma. The Court made an independent determination and interpreted a waiver of state immunity contained in a commercial contract. This has placed Ghana in a difficult and delicate position because we have been unwittingly drawn into a private dispute between a foreign corporation and a sovereign State with which we enjoy close and cordial relations.

However, by reason of my Government's strong and unwavering commitment to the rule of law and the separation of powers – encompassing a completely independent judiciary – the situation is not one which can be resolved instantaneously by an act of the executive branch of the Ghanaian Republic. In Ghana the independence of the Ghanaian Judiciary is fully respected. These principles are enshrined in our constitution.

Article 125 states that the Judiciary is independent and subject only to the constitution and that "neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power".

Furthermore, article 127 provides that "in the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, [...] shall not be subject to the control or direction of any person or authority."

The executive arm of government is therefore unable to interfere with the work of the Ghanaian courts; it is not within the powers of the Government to compel the Ghanaian courts to do anything. It is not for the executive branch to meddle with the judicial function of the

Ghanaian High Court, just as no political body and no organ of the United Nations can in any way interfere with the judicial functions of this illustrious Tribunal.

However, Mr President, Ghana is equally mindful of its obligations under international law. Ghana is respectful of its international obligations and is committed to upholding its constitution within the framework of international law. Just as is the case in our constitution, international law also recognizes the principle of judicial independence. The 1985 Basic Principles on the Independence of the Judiciary, which are endorsed in two UN General Assembly resolutions, provides an international framework for judicial independence. You will see these on the screen. The first two of these basic principles provide, *inter alia,* that UN Member States are to guarantee judicial independence and to allow the judiciary to decide matters before them impartially "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

The Principle further provides that "[t]here shall not be any inappropriate or unwarranted interference."

Mr President, at the high level meeting of the 67th Session of the UN General Assembly held on 24 September 2012, just a few months ago, Member States of the General Assembly adopted a declaration on the Rule of Law at the national and international Levels. Ghana's President made a statement at the meeting stating that: "At the national level, Ghana reaffirmed its commitment to govern itself based on the rule of law when it adopted the 1992 Constitution and has since worked very hard to strengthen and build upon its record in this area."

The Declaration adopted at that meeting, attended by Argentina as well as Ghana, underscores that "the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice".

Ghana fully aligns itself with these pronouncements. The principle of judicial independence, which can only be guaranteed by the rule of law and the separation of powers, is of fundamental importance to the Ghanaian Government. This applies not only in Ghana but also in Argentina. The Argentine Constitution also upholds the rule of law, the separation of powers and the independence of the judiciary. If Ghana were simply to accede to the Argentine request to the executive arm of government to have the *ARA Libertad* released and thus dispense with the rule of law in this instance, Ghana would not only be acting in violation of its constitution, but also in breach of its international obligation to respect judicial independence. We are pleased that, in keeping with its belief in the rule of law, Argentina chose to file an appeal in Ghana instead of resorting to the use of force and it is respectfully submitted, Mr President, that it is the Court of Appeal sitting in Accra, Ghana, that must determine whether or not to set aside the order of the High Court.

Mr President, distinguished Members of the Tribunal, you will have seen from our written statement, which we submitted yesterday morning in accordance the Registry's note, that the dispute between NML and Argentina is still a live issue before the Ghanaian courts. The order of interlocutory injunction and interim preservation has been appealed by Argentina to the Court of Appeal. Argentina has also sought to set aside the motion to vary that order before the High Court. I have sought further clarifications from my government on the status of these appeals. I understand that steps may be taken to expedite an appeal, subject of course to the co-operation of Parties, if indeed that is what Argentina wishes. The government is continuing to consider further domestic measures that might be available to it, within the constraints of national and international law, to contribute to a very early end to this unhappy situation.

STATEMENT OF MR APPREKU – 29 November 2012, p.m.

Before concluding my presentation, Mr President, there is one more additional point that I would like to address. Argentina has argued that it has suffered losses resulting from the order of injunction. However, it is not alone. Far from benefiting in any way from the judicial measures imposed against the *ARA Libertad*, Ghana is also exposed to significant and ongoing losses. Not only is our important relationship with Argentina under strain, but the docking of *ARA Libertad* at berth 11, the most lucrative berth at Ghana's main port, since 1 October this year is resulting in significant losses to the Ports Authority. The Ghanaian Government had agreed with Argentina that the vessel would remain in Port Tema until 3 October. However, 57 days have now elapsed since the scheduled departure. In that time, as a result of the judicial measures, our most profitable berth has been in constant use by the Argentine vessel. To put this into perspective, last year 1,667 vessels docked at Port Tema. It is estimated that for every day the *ARA Libertad* remains at berth 11, the Ports Authority is incurring a potential loss of US $160,000 per day. On that account, a loss of more than US $9 million has potentially been incurred. Mr President, the Ghanaian Government does not stand to gain anything at all from the continued application of the injunctive order. However, as I have already explained, without pronouncing on the merits of that High Court decision, the Government of Ghana (that is to say the executive arm of government) cannot set aside the rule of law in order to avoid these losses simply for the sake of releasing the *ARA Libertad*. We must abide by the independent judgment of our High Court until and unless the Court of Appeal has been allowed to determine the appeal filed by Argentina.

In conclusion, Mr President, I would like to underscore once again the *sui generis* nature of the matter presently before this august Tribunal. The Ghanaian Government is not in dispute with Argentina. Argentina is in dispute, and has been in dispute for many years in domestic courts around the world, with a private company – NML. Ghana is not a party to that dispute and does not seek to become a party to that dispute. The government stands to gain nothing from interfering in that dispute. However, as Ms Butler and Mr Sands will explain in due course, this dispute between Argentina and NML cannot be decided by this Tribunal under the provisions of the 1982 Convention. There is no dispute, if I may underscore the point, between Ghana and Argentina on the application or interpretation of that Convention; and, incidentally, the requirements for the indication of provisional measures contained in article 290, paragraph 5, of that Convention have not been met.

I thank you, Mr President, honourable Members of the Tribunal, for your kind and esteemed attention, and may I now invite you to call Ms Anjolie Singh to the bar, who will address you on the factual background?

*The President:*

Thank you, Mr Appreku.

I now give the floor to Ms Anjolie Singh to make her statement.

STATEMENT OF MS SINGH
COUNSEL OF GHANA
[ITLOS/PV.12/C20/2/Rev.1, p. 5–10]

*Ms Singh:*
Mr President, Mr Vice-President, distinguished Members of the Tribunal, it is a great honour to appear before you here at ITLOS, and to do so on behalf of Ghana.

As set out by Ghana's Co-Agent, my task is to outline the facts that have caused us all to be here today. Some of these facts are set out in our written statement, and I will now provide a little more detail. I propose to draw your attention to those aspects of the facts that are directly relevant to the submissions that will be made by Ms Butler and Mr Sands, and in doing so I will also comment on some of the facts and allegations made by Argentina.

Before turning to the factual circumstances, I would like to make two preliminary observations that explain why Ghana is drawing your attention to certain matters. First, this is not an inter-state dispute in the traditional sense. Ghana finds itself caught up in a contractual dispute between Argentina and a private company, NML Capital ("NML") that is incorporated under the laws of the Cayman Islands and engaged in the business of the management of investments. Second, the matter before you is not in reality a dispute "concerning the interpretation or application" of the Law of the Sea Convention 1982 but rather one that concerns the construction of a contractual waiver of immunity contained in an Argentine government bond. This bond is held by NML and is the subject of legal proceedings brought by NML against Argentina in the New York courts. NML has also sought to have these decisions enforced in various courts around the world, including in London. The proceeding brought in Ghana as a result of which we are here today is a continuation of these legal matters, in which Ghana has had, until only recently, no involvement.

Mr President, against this background, I will first turn briefly to the dispute between NML and Argentina in the United States and the United Kingdom. These proceedings have eventually led to the judgment of the single judge of the Commercial Division of the High Court of Justice in Accra. After that, I will touch upon the events that occurred in Ghana after the arrival of the *Libertad.*

In 1994 the Republic of Argentina issued a series of sovereign bonds that were subject to New York law. The bonds contained a clause dealing with jurisdiction and immunity in relation to claims on the bonds. Between 2001 and 2003, NML bought a number of those bonds. Argentina defaulted on the bonds and then sought to restructure its debt in relation to those bonds. NML refused to take part in the restructuring but instead brought a claim in New York seeking payment of the principal amount of the bonds, as well as interest. It appears that under the terms of the bonds, Argentina submitted to the jurisdiction of the New York courts in respect of any proceedings relating to the bonds. In 2006, the District Court for the Southern District of New York entered judgment against Argentina in favour of NML for an amount of about US $284 million. The US courts considered Argentina's arguments on state immunity, but ruled that Argentina had waived its immunity as a result of a broad waiver set out in the bonds issued under a Fiscal Agency Agreement. You can see the terms of the waiver on your screens. 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) ....

NML subsequently initiated enforcement proceedings in various courts, including in France, Belgium and the United Kingdom. In May 2008, NML instituted an action against Argentina before the High Court of England and Wales. The English High Court granted NML leave to serve the proceedings on Argentina out of jurisdiction. Argentina then applied to set aside the order on the ground that it enjoyed state immunity and that the English courts did not have jurisdiction in the proceedings. These issues regarding state immunity and the jurisdiction of the English Courts were heard by the High Court, then by the Court of Appeal and finally by the United Kingdom Supreme Court, the highest court in the United Kingdom.

The Supreme Court ruled that Argentina did not enjoy state immunity and that the English courts had jurisdiction. It agreed with the findings of the court in the United States, that Argentina was not entitled to claim state immunity [from enforcement of the United States judgment] as a result of the wide-ranging waiver contained in the bond agreements.

Mr President, I would like to take you to that judgment of the United Kingdom's Supreme Court. The President of the Court, Lord Phillips, addressed the consequences of the waiver in relation to enforcement. You can see it on your screens. He said:

> State immunity cannot be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognized in this jurisdiction, the state against whom the judgment was given was not entitled to immunity in respect of the claim.
> (para 49)

He continued:

> If a state waives immunity it does no more than place itself on the same footing as any other person. ... If, ..., state immunity is the only bar to jurisdiction, an agreement to waive immunity is tantamount to a submission to the jurisdiction. In this case Argentina agreed that the New York judgment could be enforced by a suit upon the judgment in any court to the jurisdiction of which, absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction. England is such a country ...
> (para 59)

On the issue of jurisdiction, Lord Phillips held:

> The reality is that *Argentina agreed that the bonds should bear words that provided for the widest possible submission to jurisdiction for the purpose of enforcement*, short of conferring jurisdiction on any country whose domestic laws would not, absent any question of immunity, permit an action to enforce a New York judgment.
> (para 62).

Members of the Tribunal, we do not draw your attention to these conclusions in order to express any view on the merits of the conclusion, but simply to put this case in its context. The facts, such as they are, that were before the Ghanaian court cannot be said to be insignificant. The UK Supreme Court decision was relied upon in the enforcement proceedings that followed in Ghana, a matter to which I now turn.

"ARA LIBERTAD"

Mr President, Members of the Tribunal, as you are aware, the *ARA Libertad*, arrived at the port of Tema on 1 October 2012 for an official visit. The very next day, on 2 October, NML filed a Statement of Claim before the High Court in Accra. Through this action, NML sought to enforce the judgments rendered against Argentina by the courts in New York. Including interest. The claim against Argentina now exceeds US $375 million.

NML informed the High Court that the *Libertad*, an Argentine vessel, was berthed at the port of Tema and was an asset available to be the subject of enforcement proceedings. A single judge of the Ghanaian High Court accepted jurisdiction with respect to the claim and subsequently made an order detaining the *Libertad*. The order prevented the captain and crew of the *Libertad* from leaving the port of Tema or bunkering, without a further order of the court, unless Argentina posted sufficient security. He set the amount at US $20 million.

On 4 October 2012, Argentina sought to have the Order for Injunction set aside. The primary basis for its application was that the vessel had complete immunity from restraint, and that there had been no waiver of that immunity. The High Court promptly considered Argentina's application and heard the arguments of counsel for both Argentina and NML. As the Co-Agent of Ghana stated, the Government of Ghana adopted a position that was to some extent supportive of Argentina before the High Court.

On 11 October 2012, the High Court denied Argentina's request to set aside the injunction. The single Judge rejected Argentina's claim regarding immunity, and found that the waiver contained in Argentina's bond documents, which are at the heart of the dispute with NML, operated to lift the vessel's immunity from execution. His decision was based on an interpretation of Argentina's waiver that relied upon his understanding of the judgments of courts in the United States and the United Kingdom. I have already referred to these judgments. In reaching that conclusion the Judge did not accept the view put to the High Court by the executive branch of Ghana's Government.

Argentina has appealed the High Court's decision within Ghana's court system and this appeal is currently pending. Argentina could have posted the security required to secure the release of the *Libertad*, and obtained its immediate release. It has declined to do so.

These developments have had direct and adverse consequences for Ghana. In the days that followed, the *Libertad*'s presence in the Tema port caused significant practical difficulties and serious financial losses for the Ghana Ports and Harbours Authority. In these circumstances, the Port Authority applied to the High Court to vary the Order of Injunction, and to allow the vessel to be moved from berth 11 to berth 6. The reason for this is that berth 11 is one of the busiest and most commercially utilized berths at the port, and is of great importance for Ghana's cement and steel supplies. The Order of Injunction does not allow for the Port Authority to be compensated for the berthing of the *Libertad*. In seeking to move the vessel, the Port Authority sought to mitigate the significant economic losses it has faced as a result of the vessel's location, as well as the "serious and alarming state of congestion and traffic at the port" that has been caused by the presence of the vessel. The authority is also of the view that moving the vessel to berth 6, a more sheltered anchorage, would protect the vessel from possible clinker and cement contamination.

Regrettably, Argentina opposed the application of the Port Authority. After considering the submissions of the Parties, the High Court issued an Order providing for the relocation of the vessel. In making his order, the Judge expressly kept in mind the safety of the vessel and its crew. Argentina has appealed against this Order, and this appeal is also currently pending. In the meantime, the *Libertad* remains in berth 11, as the vessel's crew has resisted the Port Authority's attempt to allow the vessel to be moved in compliance with the Court's ruling. The Port Authority continues to accrue significant losses.

Argentina claims that on 7 November 2012, officers of the Port Authority sought to implement the Court's Order by the use of threats and intimidation. It alleges that the

Argentine Ambassador was treated with a lack of respect. We have looked into this allegation, as it is one that Ghana takes very seriously, not least coming from a State with which Ghana has such excellent relations. The Acting Director of the Port Authority has denied this allegation on oath, and stated that the Ambassador was neither denied access nor unduly delayed at the port gate. He has provided his explanation: he states that he received a call from port security personnel that a lady claiming to be the Ambassador of Argentina had arrived at the port and was seeking permission to enter and visit the *Libertad*. The security officer informed the lady that she would require clearance from his superiors before being granted access. This is the normal procedure at the port. As soon as the Director learnt that the lady in question was the Ambassador, she was given access. This took no more than a few minutes. Ironically, when the Ambassador arrived at berth 11, the crew of the *Libertad* removed the gangway, and it took a little time before they lowered it again so as to enable her to board the vessel.

The Director of the Port Authority states that the Argentine Ambassador arrived at the port in a private vehicle with ordinary registration that did not display CD number plates. It was this that resulted in the delay. He also states that on earlier occasions the authorities had received prior notice of the arrival of the Ambassador and security personnel had been instructed to grant her entry, as well as provide her security detail to the berth.

Argentina also makes a number of other allegations. It alleges that there is a serious risk to the safety of the vessel and its crew; that the *Libertad*'s fuel supply will be depleted by mid-December 2012; that the number of crew remaining on the vessel are insufficient to respond adequately to a fire on board. It has even likened this situation to the *Hostages* case before the International Court. We see no reason to respond to this unfortunate allegation.

Ghana was pleased to receive the question from the Tribunal yesterday, as it provided a further opportunity to address this matter. Whilst we say that the Annex VII Tribunal has no jurisdiction over the case brought by Argentina, we fully understand and appreciate the humanitarian considerations that underpin the question.

Ghana can provide the fullest assurance that there is no "serious risk" (or indeed any risk) to the *Libertad* or its crew from the continued docking of the vessel in Port Tema. In fact, while it remains in the port, the Port Authority continues to ensure that the ship and its remaining crew are provided with all the requirements to ensure their full liberty, safety and security. A report on actions taken by the Port Authority has been submitted to the Tribunal and Argentina, together with Ghana's written submissions. The report states that the Authority has sought to protect the vessel from all possible risks, including risks to navigational safety and risks of clinker and cement contamination; that moving the vessel over a short distance would pose no risk to the ship; and that the crew enjoys a high level of liberty. In fact, the port authorities state that the crew have access to all amenities inside the port and even have access to a generator on the quay.

Yesterday, the Port Authority provided further comments and clarifications with respect to the status of the vessel and the condition of the crew. Members of the Tribunal, this is in Tab 1 in your Judge's Folders. The information makes clear that the vessel continues to have access to water and electricity. These utilities were provided every day from the day the *Libertad* berthed to 6 November. On that day the water was disconnected to facilitate the movement of the vessel to berth 6 pursuant to the High Court's order. The Harbour Master notified the crew of the *Libertad* that the water supply had been disconnected to facilitate movement and that arrangements had been put in place to provide water in berth 6. The Port Authority also moved the shore power generator set to berth 6. As a result of the armed resistance of the Argentine crew, attempts to move the vessel were abandoned. The generator was reconnected that very day and the water supply was reconnected shortly thereafter.

The new report further states that the crew of the *Libertad* have not been subjected to any harassment or psychological harm, they have not been prevented from leaving the vessel, and they may go in and out of the port without any restrictions. Indeed, some do. Further, given Argentina's concern as regards the possibility of a fire on board and the sufficiency of the crew that remains on the *Libertad* to deal with such an eventuality, the authority states that its fire service is on standby 24 hours a day.

Following the unsuccessful attempt to move the ship from berth 11 to berth 6, the vessel has remained at the same location inside the harbour and continues to receive services from her agents. The costs incurred by the Port Authority continue to mount.

Since the inception of the litigation in Ghana, Argentina has had the possibility of obtaining the release of the *Libertad* by simply posting security, as set out in the High Court's order. It continues to have that possibility and, if the security had been posted, we would not be here today. In the meantime, Mr President and members of the Tribunal, the Port is losing approximately US $640,000 for a four-day stay, which is the amount of the revenue that accrues to the port from the best possible use of berth 11 by a commercial vessel. (Documents to this effect are set out in Tab 2 of your Judge's Folders.)

Mr President, members of the Tribunal, you will appreciate that the facts of this matter are a little more complex than you may have been led to believe. They make clear that Ghana is caught up in a dispute that is not its own, and yet it suffers financial harm of its own. It no more wishes to be in the present situation than does Argentina but, like Argentina, it has to deal with this matter in the context of the rule of law, both domestic and international. It is to these rules that we now turn, and I would ask that you invite Ms Butler to the podium.

Thank you.

*The President:*

Thank you, Ms Singh.

I now give the floor to Ms Michelle Butler to make her statement.

STATEMENT OF MS BUTLER
COUNSEL OF GHANA
[ITLOS/PV.12/C20/2/Rev.1, p. 11–16]

*Ms Butler:*
Mr President, Mr Vice President, Members of this distinguished Tribunal, it is a great honour to appear before this esteemed Tribunal today on behalf of Ghana.

As Ghana's Co-Agent, Mr Appreku, has said during his presentation, as soon as Ghana received Argentina's application for provisional measures, its legal team took great care to examine the relevant inter-State case law on provisional measures. Ghana has considered in detail the jurisprudence of this Tribunal under article 290, paragraph 5, of UNCLOS governing the limited circumstances in which provisional measures may be ordered. Ghana undertook this exercise with diligence, because it wanted to be sure that its approach was fully informed by and reflected the approach that this Tribunal has developed over the past fifteen years. In this process Ghana has also had the opportunity to look at the writings of commentators, which I am happy to say are both numerous and helpful.

Your orders, and these writings, confirm that the law on this matter is clear. They also make it clear, as Mr Sands will elaborate, that the case before you is plainly not one in which it would be possible, or appropriate, for the Tribunal to prescribe the provisional measures sought by Argentina, or indeed any provisional measures at all. We say that it is perfectly clear that when one faithfully applies the now well-established test for provisional measures at ITLOS under article 290, paragraph 5, its conditions are simply not met in this case.

Quite naturally, Ghana would prefer not to adopt a position in these proceedings which opposes that of Argentina but unfortunately, faithful application of the legal test to the facts puts Ghana in an invidious position. It is a position in which we have no option but to oppose Argentina's request. That is why we regret that this application was ever made. In our view, to accede to Argentina's provisional measures application would be to depart from all of your carefully considered case law.

With that in mind, I now turn to the jurisprudential basis which forms the foundation for the Ghanaian Government's conclusions on the facts of this case.

Mr President, provisional measures are a common feature in national and international judicial proceedings. Their *raison d'etre* can be viewed from two perspectives. When considering the matter from a litigant's perspective, a party to a dispute before a court or tribunal is entitled to a reasonable assurance that the subject matter of the dispute will not be so altered as to make it impossible for it to enjoy the right or interest it is claiming in the event that its claim is upheld. When provisional measures are approached from the Tribunal's point of view, the parties to a dispute should be prevented from taking actions in relation to the subject matter of the dispute that could have the effect of rendering otiose the final decision by the Tribunal. This theme was explored by the Permanent Court of Arbitration in the *Case concerning the denunciation of the treaty between China and Belgium* and in the Separate Opinion of Judge Weeramantry in the *Genocide Convention (No. 2)* case before the International Court of Justice.

Here at ITLOS, the matter is governed by article 290 of the Convention. Article 290, paragraph 1, gives the court or tribunal seized of the matter the power to prescribe provisional measures where, pending the final decision, 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. Article 290, paragraph 5, provides ITLOS with a separate jurisdictional basis for provisional measures in very limited circumstances. This Tribunal is now tasked with interpreting that provision in the present case. It can only prescribe provisional measures pending the constitution of the Annex VII

Arbitral Tribunal if certain conditions are met: first, that the Arbitral Tribunal to be constituted will have *prima facie* jurisdiction and second, that the situation is urgent.

The law governing the prescription of provisional measures by ITLOS is further elaborated by the Statute and Rules of the Tribunal. In particular, ITLOS' power to prescribe provisional measures in accordance with article 290 of the Convention is enshrined in article 25 of the Statute of the Tribunal. Likewise, articles 89 to 95 of the Rules of the Tribunal contain provisions setting out the procedural requirements governing the form, content and timing of provisional measures applications as well as the procedural safeguards to be applied during and following their determination.

Mr President, Members of the Tribunal, when one distils all of these provisions, the matter is straightforward – the procedural and substantive conditions which have to be established before this Tribunal can even consider the granting of provisional measures are threefold. First, the Annex VII arbitral tribunal, which is yet to be constituted, must have *prima facie* jurisdiction over the dispute; second, the provisional measures sought are necessary and appropriate to preserve the rights of the parties to the dispute - that is, there is a risk of irreparable prejudice to the rights of the parties; and, third, urgency justifies the imposition of the measures.

The second and third requirements – that is, irreparable harm and urgency are sometimes conflated in the jurisprudence of this and other courts and tribunals, as well as in academic writings. Although I will today deal with all three of these requirements in turn, as we have done in our written submissions, it is important to note that there is a symbiotic relationship between the concepts of "irreparable prejudice" and "urgency" in the law of provisional measures. This inter-relationship can perhaps best be demonstrated by the International Court of Justice in the *Great Belt* case where it stated:

> Whereas provisional measures under article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given.

This quote makes clear that there is a temporal limitation to irreparable prejudice. In the case of article 290, paragraph 5, that temporal limitation is even more pressing.

I turn now to the requirement to show *prima facie* jurisdiction. It must be borne in mind that when ITLOS is asked under article 290, paragraph 5, to prescribe provisional measures, it is not the tribunal that will be seized of the merits of the case; likewise it is not the tribunal that possesses ultimate competence with respect to provisional measures. That tribunal is, of course, the Annex VII tribunal. ITLOS is not required to make a finding that is conclusive as to whether the Annex VII tribunal will have jurisdiction on the merits. It must, however, be able to identify some basis in the Convention for believing that the facts of the present dispute give rise to legal claims under the Convention; and both legal claims must of course form the jurisdiction of an Annex VII tribunal.

Mr President, the reason for this caution is both necessary and logical. Since provisional measures are intended to regulate matters pending a decision on the merits of the dispute itself, ITLOS should not impose restraints on the parties unless there is some plausible likelihood that the Annex VII tribunal will be in a position to deal with the merits of the dispute. The law relating to this requirement of establishing *prima facie* jurisdiction was set out clearly by this Tribunal in the *M/V "SAIGA" (No. 2) Case*. It has also been addressed by other international courts, including by the International Court of Justice in recent decisions such as in *Georgia v. Russia* and *Belgium v. Senegal*.

STATEMENT OF MS BUTLER – 29 November 2012, p.m.

Whether or not there is *prima facie* jurisdiction for an Annex VII tribunal in the present case is determined by article 288, paragraph 1, of the Convention. That provision states that: "A court or tribunal referred to in article 287" [which, in the current proceedings is an Annex VII tribunal] "...shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

In effect, because the Annex VII tribunal's jurisdiction is restricted to matters regarding the interpretation or application of UNCLOS, ITLOS must be satisfied that Argentina is relying upon provisions of the Convention that give rise to a plausible dispute arising under UNCLOS. It is plainly insufficient for Argentina to merely cite provisions from UNCLOS in support of its claim. In order to establish *prima facie* jurisdiction, Argentina must persuade you, at this stage, that the facts alleged give rise to a dispute that *prima facie* requires the interpretation or the application of one or more provisions of UNCLOS.

The issue as to whether there was *prima facie* jurisdiction with respect to a provisional measures case was dealt with comprehensively by this Tribunal in the *M/V "SAIGA" (No. 2) Case* (relating to an article 290, paragraph 1, request) and in the *Southern Bluefin Tuna* and *Mox Plant* cases. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal mirrored the approach of Judge Hersch Lauterpacht in the *Interhandel* case before the ICJ. In that decision, Judge Lauterpacht asked not whether there is conclusive proof of jurisdiction, but rather whether, on the evidence available, jurisdiction is not so "obviously excluded" as to make it extremely unlikely that the merits of the dispute would actually be considered by the tribunal to which it had been submitted. In reflection of this guidance, ITLOS concluded in the *M/V "SAIGA" (No. 2) Case* that:

> Before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.

Mr Sands will in due course apply this standard to the facts. As will be shown, it is our case to the Tribunal that Argentina falls well short of the standard that this Tribunal has previously applied.

I turn now to the second issue, that of irreparable prejudice. Provisional measures are intended to preserve the rights of the Parties and to prevent irreparable harm. The harm must be probable rather than hypothetical, and it should also be imminent. That indicates the close link between the element of irreparable harm and urgency, to which I will return in a moment.

Preserving the rights of the Parties requires consideration of the rights in issue under the Convention as well as the nature of any measures that might be ordered and the effect of their application on the Parties. Care has to be taken by a tribunal to ensure that, in seeking to preserve the rights of one Party to the dispute that serious and avoidable prejudice is not done to the rights of the other Party to that dispute. This approach has been applied by the International Court of Justice in the *Arrest Warrant* case and by this Tribunal in the *Land Reclamation* case.

In the recent ITLOS case relating to the *Louisa*, this Tribunal made clear that a Party seeking provisional measures must demonstrate "a real and imminent risk that irreparable prejudice may be caused". In those proceedings, the Tribunal took into account assurances given by Spain. Those assurances related to its ongoing careful monitoring of the situation in the port, and it was its monitoring of the *Louisa* which was aimed at preventing an imminent threat of harm to the marine environment. After considering these assurances, ITLOS

declined to prescribe any provisional measures. The assurances given in that case by Spain were summarized by the Tribunal as follows:

> 74. Considering that Spain, in its Response, stated that "there is no imminent threat or harm to the marine environment due to the presence of the Louisa in the commercial dock of El Puerto de Santa Maria" and that "the Port authorities are continuously monitoring the situation, paying special attention to the fuel still loaded in the vessel and the oil spread in the different conducts and pipes on board".
>
> 75. Considering that Spain, during the hearing, further stated that "t]he Capitana Maritima of Cadiz had an updated protocol for reacting against threats of any kind of environmental accident within the port of El Puerto de Santa Maria and the Bay of Cadiz".

Mr President, in Ghana's respectful submission, the approach of the Tribunal in the *"Louisa"* case to those assurances given by Spain and their impact on the question of irreparable harm, is instructive. We say that that approach is of direct applicability to the assurances that are given by Ghana in these proceedings. We say also that they are of direct relevance to the impact that those assurances have on the irreparable harm that is alleged by Argentina in this proceeding.

I turn now to the requirement of urgency under article 290, paragraph 5, of UNCLOS. In order to satisfy this requirement the Party applying for provisional measures must demonstrate that there is a real risk of significant prejudice to the rights of a Party that occurs in the limited time before the Annex VII tribunal is itself able to consider a provisional measures request. In other words, ITLOS can only order provisional measures if it concludes that there is a reasonable risk that the rights of Argentina are in danger of serious and irreversible prejudice in the few weeks before the arbitral tribunal is constituted.

Mr President, Members of the Tribunal, in accordance with your case law, it is not sufficient for Argentina simply to show that there will be some prejudice to their rights caused before a final decision on the merits of the case itself: Argentina is obliged to persuade you that the irreparable prejudice might occur before the constitution of the Annex VII tribunal. It is clear that provisional measures that may be "appropriate" pending a final decision on the dispute – which may take two or three years – will not necessarily be appropriate in the few weeks before an Annex VII tribunal is constituted.

Mr President, I would now like to address you and the other members of the Tribunal briefly on the "exceptional" and "discretionary" nature of provisional relief. As you will be well aware, the Tribunal's power to impose provisional measures is not an open-ended or a broad one; it cannot be fashioned at will to assist a Party pursuing a claim which may be lacking in legal substance. It is not sufficient for an applicant merely to feel that it is suffering some significant injury for them to be granted. To the contrary, the grant of provisional measures is a matter that is narrowly circumscribed and it is defined by settled law as being both "exceptional and discretionary".

But what does this mean in practice? What it means is that even if each of those three procedural and substantive requirements that I have just outlined (that is, *prima facie* jurisdiction, irreparable prejudice and urgency) are present – even if all those are met, the Tribunal is not compelled to order provisional measures; rather, it has a mere discretion to do so. It is for the Tribunal to determine whether, on the facts of the case, the measures requested are needed to achieve results that cannot otherwise be achieved. Indeed, it is instructive that the discretionary nature of the grant of provisional measures appears in

express terms in article 290, paragraph 5, of UNCLOS where the word "may" rather than "shall" is used in reference to ITLOS' power to prescribe provisional measures.

In addition to being discretionary, the prescription of provisional measures is regarded as an exceptional remedy. This is because the impact of provisional measures is to restrain a State from acting in a particular way prior to a full hearing and a decision being made on the merits. Accordingly, the grant of provisional measures constitutes an exception to the normal rules regarding the burden of proof. For that reason the International Court of Justice cautioned in the *Great Belt* case, that the power should only be exercised in circumstances in which there are exceptional and compelling reasons to do so. It should only be exercised where there is a basic evidential and legal foundation to support the exercise of that power. Indeed, the requirement for a satisfactory evidential basis being put forward by an applicant for provisional measures has been noted by this Tribunal in its Order in the *Southern Bluefin Tuna Cases*.

Mr President, my final submission before you this afternoon relates to the content of provisional measures orders which may be prescribed by the Tribunal. It is, of course, trite law to say that even if all of the procedural and substantive requirements which I have just described are met, the Tribunal is in no way *required* to order the exact provisional measures which have been requested by a party. You will be well aware that in every case before this Tribunal where provisional measures have been prescribed to date, the Tribunal has seen fit to order alternative relief to those requested by the party. As such, we simply note that if, despite all of our submissions today, you are still minded to prescribe provisional measures in this case, that you should not feel limited to prescribing the exact measures that have been sought by Argentina.

Mr President, Members of the Tribunal, I will conclude by expressing my hope that these submissions have assisted in setting out the framework for Ghana's views on the substantive and procedural legal requirements necessary for the Tribunal to utilize its narrow, exceptional, discretionary and temporally limited power under article 290, paragraph 5, of the Convention.

I will now invite Mr Sands to come to the bar in order to apply these legal principles to the facts of the present case. Thank you very much for your kind attention. Subject to the needs of a break I will now invite Mr Sands to come to the podium.

*The President:*
Thank you, Ms Butler.
Professor Sands?

*Mr Sands:*
This might be a good point to have a break.

*The President:*
The Tribunal will withdraw and continue the hearing at a quarter to five.

*(Adjourned for a short time)*

*The President:*
We will continue the hearing. I now give the floor to Mr Philippe Sands.

"ARA LIBERTAD"

STATEMENT OF MR SANDS
COUNSEL OF GHANA
[ITLOS/PV.12/C20/2/Rev.1, p. 16–28]

*Mr Sands:*
Mr President, Members of the Tribunal, it is a privilege to appear before you in this case and to do so on behalf of Ghana. I must confess to a certain sense of *déjà vu* in relation to the subject matter. It may not quite be the film *Groundhog Day*, but I had the privilege to appear for the first time before this Tribunal in an offshoot of your very first case nearly 15 years ago, which concerned a request for provisional measures to enforce a prompt release judgment that you handed down on 4 December 1997. That, of course, was the famous *Saiga* saga.

The present case is not a prompt release case, although one might be forgiven for thinking that it could have been a prompt release case until, of course, one looks carefully at the terms of article 292 of the Convention and the related provisions, when it becomes readily apparent that Argentina could not bring this matter before this Tribunal under that provision. It has therefore tried to find another way to open the door to this Tribunal.

Ghana understands and fully recognizes the difficulty in which Argentina finds itself, and Ghana also readily appreciates why Argentina would seek to wish to find a way to obtain early relief in this matter. This morning we listened to speeches delivered with customary Argentine eloquence and a great deal of passion. We were perhaps surprised at those matters that they chose to address, and even more surprised at those matters that they chose not to address. Ghana's distinguished Agent has spoken very eloquently also of the empathy that his country has for Argentina, a country with which it has a long, close and very friendly relationship, and we are sorry to find ourselves here today, having to opposing Argentina's application. There was of course a very simple way of avoiding this hearing altogether: Argentina could simply have paid the $20 million dollar bond by way of a security, which would probably have been cheaper than this hearing, as required under the Ghanaian judgment, and the vessel would have been released immediately. It still has that option, which so far it has chosen not to pursue; and that is pertinent to this case.

We are therefore here today in proceedings that obviously place Ghana in something of a dilemma. Of course, Ghana would love to be able to assist Argentina, and indeed it has done so in the domestic proceedings in Ghana, and it will continue to do so. However, Ghana is also a country strongly committed to the rule of law, which has to mean respecting the independence of its own courts and judges, even if sometimes they hand down judgments that might not be entirely to the liking of the executive branch of government. If the separation of powers means anything, it is surely in relation to the independence of the judiciary. We were therefore very surprised when Professor Kohen somehow suggested that Ghana had acted inappropriately by not taking other steps to release the vessel.

The rule of law also means something else. The rule of law means respecting international conventions, including the 1982 Convention on the Law of the Sea. That is why, faced with a request by Argentina for provisional measures under article 290, paragraph 5, Ghana has had to pay the most careful attention to that Convention and to the various judgments of this Tribunal that have been given on the interpretation and application of the Convention; and Ms Butler went through that exercise with you. In our submission, having looked at the Convention and at your jurisprudence, it is absolutely clear that this Tribunal cannot accede to Argentina's request for provisional measures under the Convention, and Ghana had no plausible alternative to opposing the application and to rejecting the request for three reasons: first, the Annex VII arbitral tribunal, which will shortly be constituted, will not have jurisdiction over the dispute submitted to it by Argentina; second, the provisional

measures requested by Argentina are not necessary or appropriate to preserve the rights of the parties to the dispute in the short period that remains before the constitution of the tribunal; and, third, there is no urgency such as to justify the imposition of the measures requested in that period.

We have set out our arguments for each of these three points in our Written Statement, and we are very sorry that we were not able to submit it earlier; we had a little less time than our colleagues on the other side and we did the best that we could. I will deal with each in turn, but before doing so it is important to put this case in its more general context, which Ms Singh set out.

In a certain way, this case reflects the modern world in all its financial and sovereign glory. A private actor, NML, obtains a judgment against Argentina from a New York court, which interprets a bond governed by New York law that is offered by Argentina. Ms Singh took you to that text. Argentina would prefer that you did not look at it. The private actor then goes to the English courts – not just any court but the Supreme Court – and obtains a further judgment that interprets that bond, and in particular a clause providing for waiver of immunity on the part of Argentina. The judgment of the Supreme Court records that in the view of one of the justices, Lord Collins, "this was the clearest possible waiver of immunity…". Lord Collins is not just anybody; he is Lawrence Collins, who some of you will know. He knows something about public international law and he also knows a little something about private international law.

Armed with that judgment, NML then goes to the Ghanaian courts and obtains a further judgment to enforce a claim against an Argentine military training vessel. It relies on a waiver of immunity that provides, on its face, not only for immunity against pursuit but also against enforcement without apparent limitation. The Government of Ghana has no role in any of this, although it does make its view known to the Ghanaian court. The Ghanaian court rejected the executive's view and did so in reliance on the earlier New York and London Supreme Court judgments, so the matter is now subject to appeal in the Ghanaian courts, and in the meantime Argentina initiates Annex VII arbitration proceedings under the 1982 Convention and comes to this Tribunal to invite you to order the release of the vessel pending the constitution of that arbitration tribunal.

Mr President, you can see the difficulty immediately. We have all been placed in a situation of difficulty. The matter is obviously delicate for Argentina but it is equally delicate for Ghana, and it will be delicate for this Tribunal. Why? Because this Tribunal has, in effect, been asked to decide that the Annex VII tribunal has jurisdiction under some rule or rules of the Convention to interpret and apply a waiver of immunity in an Argentine bond that is governed by New York law and to order the release of the vessel, for that is what the Annex VII tribunal will have to do. That is the heart of this case, and it allows me to turn to the first reason we say you cannot order the provisional measures requested.

Ms Butler has taken you through the case law on article 290, paragraph 5, which requires this Tribunal to determine "that *prima facie* the tribunal which is to be constituted would have jurisdiction".

In accordance with that provision, Argentina has to persuade a majority of you that the Annex VII arbitral tribunal, once constituted, would have jurisdiction over the dispute submitted to it by Argentina. You have seen article 288, paragraph 1, of the Convention, which provides that the Annex VII tribunal will have jurisdiction only over "any dispute concerning the interpretation or application of this Convention". We say that it is self-evident that the yet-to-be constituted Annex VII tribunal has not been seized in relation to a dispute that concerns the "interpretation or application" of the Convention, because Argentina has to find two rules in UNCLOS to succeed in any case before the arbitral tribunal. First, it has to find a rule that provides for the absolute immunity of a military vessel that is berthed in a

Ghanaian port, in internal waters; and, second, it has to find a rule of the Convention that provides that Argentina cannot waive that immunity, assuming it to have been granted, so that the decision of the Ghanaian court determining that the waiver of immunity under the bond encompassed enforcement measures against the *Libertad* can then be said to be wrong as a matter of UNCLOS law. Those are the two rules that an Annex VII tribunal will have to apply.

Where are those two rules in the Convention? The single, most striking thing about this morning's presentation was how little Argentina had to say about the Convention. It was as though you are just a court of general jurisdiction, free to resolve disputes under international law irrespective of what the Convention does and does not say. Where are the UNCLOS rules? They are not to be found in Argentina's application, and we say that they are not to be found anywhere in the Convention; those two rules are just not there.

Argentina invokes four provisions of the Convention. To say that they have done so tentatively would, I think, overstate the point. This is the very first time I have appeared in a case before this Tribunal in which a party relying on a provision under the Convention in relation to a dispute does not take you to that provision. You will recall that in *Bangladesh v. Myanmar* instruments and provisions were put on the screen and both sides descended into a great deal of detail. Argentina did not do that. They never even quoted the provisions; they made passing reference to them. That says a lot about Argentina's case and its connection – we say complete disconnection – with the Convention. You need only cast an eye over those provisions to recognize with burning and crystal clarity that none of them comes close to being either of the rules on which Argentina would have to found a dispute to be able to persuade you that the Annex VII tribunal will have jurisdiction. Quite simply, there is no rule of UNCLOS to be interpreted or applied in this case.

Let us start with article 32 of the Convention – one of the four provisions. It is true, and we are bound to accept, that article 32 uses the words "immunities of warships", but they do so only in relation to the territorial sea. Article 32 has nothing to say about immunity in internal waters. Let us look at it. You can see it on your screens. It reads:

> 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*"

It is crystal clear from this text that the Convention has no rule on the question of the immunity of a "warship" in internal waters, or on waiver of immunity, and that it is plain that such immunities as might exist arise outside of the Convention. It is clear from their text, on a plain reading, that the exceptions in articles 30 and 31 are of no relevance to this case. By contrast, article 95 of the Convention stipulates in clear terms that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State".

Now going back to article 32, it becomes crystal clear that the immunity of a warship in internal waters is not governed by any rule in the Convention, and that is confirmed by all the leading commentators, on which you have heard nothing. Let us take one example. Robin Churchill and Vaughan Lowe, who know a thing or two about the law of the sea and internal waters, recognize that the legal status of a foreign warship in internal waters is governed by ordinary immunity rules that arise in general international law outside of the Convention. As they put it, when warships enter internal waters and a foreign port they "put themselves within the territorial jurisdiction of the coastal State", and "that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities". The point is that the purported rule on which Argentina seeks to

rely obviously arises outside of the Convention. To the extent that there is a legal dispute between Argentina and Ghana, it cannot concern the interpretation or application of any rule in the Convention, as article 288 requires. Consequently, article 32 cannot be a legal basis for Argentina's claim, nor therefore, we say, can the Annex VII tribunal or this Tribunal establish jurisdiction on the basis of that provision.

Mr President, in its Statement of Claim, paragraph 6, Argentina also invoked the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State Owned Vessels. Neither Argentina nor Ghana are parties to that Convention. Even if they were, an Annex VII tribunal plainly could not resolve a dispute concerning the interpretation or application of that Convention, and accordingly this Tribunal cannot order provisional measures under article 290, paragraph 5, in relation to any alleged violation of that Convention.

We listened with great attention and great respect this morning to Professor Hafner's eloquent discourse on the subject of immunity but I am sure, like us, you will have noted that he had almost nothing to say about the Convention. Article 288, paragraph 1, of UNCLOS provides that an Annex VII tribunal will have jurisdiction over "any dispute concerning the interpretation or application of the Convention", not the interpretation or application of general international law. Where the drafters of the Convention wanted to incorporate general international law into the Convention so that it became part of the Convention, they did so. I can give you one example: article 2, paragraph 3, of the Convention, which I would remind you – although some of you sitting today will need no reminder - provides that the "The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*." There is no equivalent provision in relation to internal waters, and there is no dispute that the *Libertad* is located in a port, in internal waters, not in the territorial sea. You simply cannot apply a rule that arises outside of the Convention in the sense of founding a cause of action on such rule. To accede to Argentina's request, and that means to grant any provisional measures, you are going to have to rewrite the Convention and to extend it into areas that the drafters chose not to go.

Argentina has invoked other provisions of the Convention, but none provide any assistance. Article 32, frankly, is its best shot. It invokes article 18, paragraph (1)(b). All this does is define the meaning of the word "passage" under Part II of the Convention, namely in relation to navigation through the territorial sea when "proceeding to or from internal waters or a call at such roadstead or port facility". It is totally plain, not just *prima facie*, from its text that this article has nothing to say about innocent passage *in* the internal waters of a coastal State. In those waters the coastal State enjoys full, total, complete territorial sovereignty, and all foreign vessels – including warships – are subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State.

There is no dispute that the *ARA Libertad* is in internal waters. Relatedly, it is clear from article 18, paragraph 2, that "innocent passage" cannot be invoked when the vessel has stopped, unless stopping or anchoring is "incidental to ordinary navigation" or "rendered necessary by *force majeure* or distress" and so on. None of the exceptions have any relevance to this case. So article 18 provides no assistance to Argentina. They simply cannot rely upon it. It includes no rule on immunity and certainly no rule on the subject of waiver of immunity.

Argentina also invokes articles 87, paragraph 1(a), and 90 of the Convention. These relate respectively to freedom of the high seas, and right of navigation on the high seas. Like article 18, paragraph 1(b), they are simply irrelevant to this case. Those provisions cannot in any way constrain the rights of a coastal State in its internal waters, or be seen to impose any obligation in internal waters. They contain no rule on immunity and they contain no rule against waiver of immunity.

Let us look at article 87, paragraph 1(a), which says that:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States ... (a) freedom of navigation.

What does this provision have to say about internal waters? Nothing, not does it say anything about immunity, nor does it say anything about waiver of immunity. It quite simply cannot provide any cause of action in relation to this case. If it does, then it is going to provide a lot of causes of action for a lot of cases in the future.

What about article 90 of the Convention? "Every State, whether coastal or land-locked, has the right to sail ships flying its own flag on the high seas."

What does that have to say about immunity? Where is the rule on waiver of immunity? It is just a re-statement of general international law, to the effect that all States are entitled to use the high seas. There is nothing in that provision that implies any obligation for Ghana – or its courts – in relation to the regulation of a foreign vessel that is berthed in one of its ports. If there is such an obligation, the floodgates will open.

The central issue in this matter is the question of the immunity attaching to an Argentine warship that is located in the internal waters of Ghana, and whether that immunity has been waived by Argentina in the bond that it issued. Neither matter is governed by the Convention, nor is it affected by the Convention, nor is it touched by the Convention. As Ms Singh explained, in its ruling on the question of immunity and the extent of the waiver, the decision of the Commercial Division of the High Court of Ghana was based on an interpretation of Argentina's waiver that referred to judgments of courts in the United States and the United Kingdom. Whatever the merits or demerits of Justice Frimpong's judgment or approach, it cannot be said that the judgment should have applied or taken account of a rule set forth in the Convention.

If I were to turn up next month in the Court of Appeal in Accra, waving the 1982 Convention in support of an application for the discharge of the injunction, and the Justices asked me, "Which provisions of the Convention, Mr Sands, are you relying upon?" I could not give them an answer. I could not stand before the English Supreme Court and point to a provision of the Convention which requires a particular rule of immunity or waiver of immunity to be identified. It is as simple as that, but you are being asked to do that. It is the same thing. That is, if I may take my favourite Australian expression, a hopeless argument. It is hopeless because the Convention cannot be invoked in circumstances where it has no rule on immunity or on waiver of immunity and is entirely unregulated by the Convention.

In the absence of any provision in the Convention, Ghana submits that you have no option but to decide that the Annex VII tribunal has no *prima facie* jurisdiction in relation to this dispute in respect of issues of immunity or waiver of immunity, as they arise in relation to the facts of this case. It is not that the case is plausible, which is the standard that Argentina has identified as being applicable – and we say it does not even get close to the standard of plausible – it is, to be very frank, not even arguable. It is not even an arguable case.

Mr President, this is a court of law, not a court of emotion, and certainly not a court of passion. As this Tribunal made clear in the *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*, it cannot prescribe provisional measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded. The words "*prima facie*" speak for themselves.

In these circumstances, we find it difficult to see how ITLOS could, at this limited jurisdictional phase under article 290, paragraph 5, express a view on the merits of a

Ghanaian High Court judgment on the interpretation and application of a waiver of immunity in a bond the contract for which is governed by the law of New York but that is what our good friends from Argentina are inviting you to do. It is readily apparent that UNCLOS has nothing to say about this matter. To the extent that this is largely a question governed by *private* international law relating to the identification of rules applicable to the interpretation of the bond, UNCLOS is simply irrelevant. Moreover, ITLOS cannot, as Argentina suggests, as a last resort, address the matter by reference to some sort of principle of "court comity". You cannot do that, any more than Ghana can send in the troops tomorrow at the instance of the executive to disobey the order of the Ghanaian court.

Mr President, in short, this is not a matter on which this Tribunal has been empowered to intervene at this stage of the proceedings, whether in the terms that Argentina has sought, or at all. There is no dispute under the Convention, there is no *prima facie* dispute under the Convention, and there is no provision of the Convention to be interpreted or applied which can possibly resolve this matter.

Ghana fully understands the deep concerns felt by Argentina, and its great unhappiness with the present situation, and these are sentiments and feelings from which Ghana does not dissociate itself but this is simply the wrong forum for the matter to have been raised, and that is why my distinguished Agent expressed the deepest regret that the matter has migrated from New York to London, on to Accra, and now here to Hamburg.

Let me move on to the other requirements of which the Tribunal must be satisfied before it can prescribe provisional measures under article 290, paragraph 5. Even if you were to find, rather astonishingly, that there was *prima facie* jurisdiction to prescribe the relief sought by Argentina, none of the other conditions are satisfied either. The provisional measures sought by Argentina are not necessary or appropriate, and they are not needed for reason of urgency.

Let us begin with necessity and appropriateness. In Ghana's view, Argentina has not established that the measures it seeks are necessary or appropriate. 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.

Our arguments on this issue are twofold. First, Argentina has not suffered irreparable harm up to now as a consequence of the temporary holding of the *Libertad* at the Tema port, pursuant to a Ghanaian High Court order. Second, Argentina will not suffer irreparable harm in the very short period between now and the establishment of the Annex VII tribunal. Ghana entirely understands the legitimate desire of Argentina to protect what it says are its rights with respect to that most distinguished and attractive vessel. Nevertheless, the claim for relief before you does not come close to meeting this key prerequisite for the grant of provisional measures under article 290, paragraph 5.

In its Request for provisional measures Argentina set out several bases on which it suggests that irreparable harm both has already occurred, and will continue to occur, as a result of the detention of the *Libertad* in Port Tema. Argentina makes four claims about the docking of the ship:

(i) that it hinders the Argentine Navy from using the ARA Libertad for the training of cadets;
(ii) that it poses a serious risk to the safety of the warship and its crew;
(iii) that it causes a serious risk to the very existence of Argentina's rights;
(iv) that it injures the feelings of the Argentine people.

Contrary to these claims, there is no real or imminent risk of irreparable prejudice to Argentina's rights caused by the ongoing docking of the vessel.

Mr President, Members of the Tribunal, you have seen two documents originating from the Ghanaian Government. One is a report on the actions that have been taken by the Ports Authority, and the other is a letter from the Ports Authority to the Minister for Foreign Affairs, and these were attached as Annexes 1 and 2 to our written submissions, filed yesterday morning. We invite you to read these two documents very carefully, as I am sure you will, because they set out in great detail the significant care and attention which the Ghanaian Port Authority has exercised in ensuring that the needs of the ship itself and its remaining crew are met during their continuing stay in Port Tema. We have provided further information this morning, which was received yesterday from the Port Authority, which is a complete response to the Tribunal's question regarding the status of utilities with respect to the ship, and it is also in part a response to additional questions put by the Ghanaian legal team, myself included, to the authorities some days ago. We invite you simply to read those documents very carefully. They are contained in Tabs 1–4 of your Judge's Folders.

Mr President, Members of the Tribunal, you will be aware that 281 of the original crew have already been repatriated to their countries of origin. Those countries include Brazil, Paraguay, Peru, South Africa, Suriname, Venezuela, Uruguay and Chile, and of course Argentina itself. I must confess, when one of my juniors first showed me that list, I was a bit confused as to why a warship would have individuals from so many different nationalities on board. I find it very difficult to imagine a British warship with a crew composed of Germans, French, Russians and Ukrainians, Maltese and other Europeans. It is obviously a training vessel but it is a special type of training vessel.

The *ARA Libertad* nevertheless remains in port, diligently occupied by its captain and the remaining 44 crew members, who are rightly taking all steps they need to take to protect their vessel. While these individuals and the ship remain in Port Tema the Port Authority will continue to ensure that both the ship and these remaining individuals will be provided with all necessary requirements to ensure their full liberty, safety and security. The letter from the Ghanaian Ports and Harbour Authority (Annex 2 to our written submissions) confirms that "[s]ince her berth inside the harbour 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."

The more recent information which came in yesterday, and which is in Tab 1 of your Judge's Folders, confirms that neither the crew, nor anyone delivering supplies to or from the vessel (including those delivering food and collecting rubbish) have been harassed and that the crew have complete liberty to enter and to leave the port (and to use the port facilities for exercise) as they wish. Apart from a brief interlude on 6 November 2012, when water and power facilities were cut off from the ship, as was explained simply to facilitate its move from berth 11 to berth 6, the ship has also been fully supplied with water and electricity. The ship's generator was reconnected the same day and its water supply was reconnected two days later. It is true that the order of Judge Frimpong (which is currently under appeal) appears to specify that the ship is prevented from refuelling, but the Port Authorities are willing to do all that they can to support any Argentine application for variance of Judge Frimpong's order so as to allow the ship to refuel or at least to clarify if there is some degree of misunderstanding as to whether or not it can be refuelled - and we are told that it can already be refuelled. Moreover, throughout this unfortunate and difficult situation, the crew of the *ARA Libertad* have been free to come and go. That is important. We really did not think it was too helpful to draw the analogy between this matter and the Iran hostage case. It is a point in fact that only serves to underscore the absence of irreparable harm and the total difference in the situation. We are not aware, for example, that the Iranian authorities, back in 1979, invoked a judgment of the Southern District of New York or a judgment of the English House of Lords, as it then was, to justify their actions; nor are we aware that the Iranian

authorities offered the United States an opportunity to post a bond to obtain the early release of its hostages. To the contrary, despite considerable inconvenience and substantial monetary loss (in the amount of US$160,000 per day [Tab 2 Judge's Folders] being caused to the Port Authority, the port authorities are still doing everything they possibly can whilst complying with their obligations under Ghanaian law to enforce the High Court order – to accord the fullest possible respect to the *ARA Libertad* and its crew consistent with its original visit to Ghana on a goodwill mission. As you know, we heard from the other side that they moved the vessel from berth 11 to berth 6, and this was simply done to minimize the economic loss which Ghana is suffering as a result of the extended stay of the vessel. It is also an action that would have the added benefit of protecting the historical and cultural value of the *ARA Libertad* by removing it from possible risk of clinker and cement contamination. There is a plan of Port Tema at Tab 4 of your Judge's folders that shows not only that berth 6 is very close to berth 11 but also that it provides better shelter for the *Libertad.* In his ruling on the application, and after hearing from both Parties on the issue, Judge Frimpong specifically found that there were no risks to the boat or to the crew associated with such a move. Indeed, the Port Authority in its latest information [Tab 1, Judge's folders] have provided additional evidence that it is already experienced in facilitating such a move, and had already moved the *Libertad* previously by one bollard on 3 October 2012; and in their view the move could be carried out without any risk.

Mr President, Ghana is taking all the steps it can to respect and protect the vessel and crew, and no provisional measure that you could possibly think of would enhance that situation in the future.

Argentina further claims that it is suffering irreparable harm as it is unable to maintain its training activities. Ghana obviously respects the desire to continue with that training activity, but we would respectfully point out that in recent years Argentina has not had the benefit of the *ARA Libertad* to carry out such activities including for extended periods: from 2004 to 2007 the vessel was not available at all whilst it was undergoing major refurbishment (see Annex B of Argentina's own provisional measures application, page 1). This fact makes it rather clear – and we say that with the greatest respect – that a detention for a few weeks cannot easily be said to give rise to a harm that is irreparable. Ghana is bound to assume that naval training in Argentina did not stop altogether between 2004 and 2007, and that alternative arrangements were put in place. To the extent that there is any harm, it is reparable by alternative arrangements. Indeed, in Annex B to Argentina's provisional measures application at page 3, this point appears to be conceded. Even if further costs were incurred as a result of such an alternative course of action, that would not constitute irreparable harm, as it could in due course be compensated by a money damages award. Again, this claim cannot provide a valid reason for a basis for grant of provisional measures in the present situation.

The provisional measures sought by Argentina are not necessary for another reason, having regard to the express terms of the order by the Ghanaian High Court. Argentina's distinguished Agent told you this morning that it has done everything it can to resolve the situation. With great respect, that is not entirely true. The Ghanaian court order specifically allows the Argentine Government to obtain the immediate release of the vessel at any time upon payment of a security in the amount of US$20 million. Obviously, that may not be a very attractive thing to do, but the option is there and the boat could be released tomorrow. Argentina could then pursue its action for recovery of the bond rather than the release of the vessel, including a return of the security offered and, if necessary, compensation and declaratory measures. If the Tribunal were to accede to Argentina's request here, it would in effect be creating a "Prompt Release Plus" mechanism; but of course no application has been made under article 292, and because Ghana has made, through its courts, that option available, such an application would be bound to fail. Accordingly for this Tribunal to grant

the provisional measures sought is not necessary or appropriate as Argentina already has in its own power the ability to ensure the immediate release of the vessel through the mechanism established by the terms of the domestic court order. In the absence of payment of this security, the High Court has ordered the ship to remain until the dispute is resolved (or until it adopts a further order). Accordingly, while the matter remains pending before the Ghanaian courts, there is simply no need for any additional remedy by this Tribunal to prevent any prejudice being caused to the rights of Argentina under UNCLOS, even assuming it to be relevant – and we say it is not. No rights exist under the Convention that are pertinent.

I turn now to my final submission relating to the lack of urgency in this case. It is Ghana's respectful submission that there is simply no urgency such as to require the prescription of provisional measures in the very short period that remains pending the constitution of the Annex VII tribunal. Ms Butler has just addressed you on the conditions. With the greatest respect, Argentina has not adduced any evidence – no evidence – to demonstrate that there is a real risk of the occurrence in that short period of some sort of critical event that could cause irreparable prejudice to the rights that Argentina claims under UNCLOS. None of the very limited material that has been adduced comes close to demonstrating any such risk.

Argentina has made much of the events of 7 November 2012, when officers of the Ghanaian Port Authority did try to move the ship from one berth to another – not very far, but in compliance with the order of the Ghanaian High Court. This, it is said, indicates that more breaches of Argentina's rights are likely to take place in the very near future. It also suggests that based on current estimates – it is Argentina's view - that the *Libertad*'s fuel supply will be depleted by mid-December 2012; and that the number of crew present on the vessel are somehow insufficient to respond adequately to fire emergencies or to carry out the scheduled maintenance of the ship necessary to implement the Argentine Navy's 2013 training plans. You have no evidence in relation to any of those matters. Finally, Argentina also submits that the emotional toll of the recent events is causing an untenable safety risk for the crew of the *Libertad* and that if the ship is not freed by 8 December the Argentine Navy's training schedule for 2013 will be adversely effected. I have already dealt with that point, but let me recall publicly our sincere regret about the unfortunate events of 7 November 2012, when the port authorities sought to enforce the High Court order in compliance with their domestic law obligation to do so. It does seem that the real cause of the difficulty was linguistic, and that this caused confusion about certain acts and their intentions. Of course, Ghana regrets that this did lead to a minor delay in the ability of the Argentine Ambassador to board the *Libertad*, a delay, as you have already heard, was occasioned by security checks as she had entered the harbour in a civilian vehicle not a diplomatic vehicle. The delay was not due to anything other than good faith error and it was then compounded by a further error by the crew in failing to promptly lower the gangplank for her so that she could access the ship (see Tabs 1 and 3 of Judge's Folders). Similarly, the need to stop utility supplies for a very short period in order to carry out the planned movement of the ship from berth 11 to berth 6 also regrettably seems to have been misconstrued as an indication of negative intentions on behalf of the port authorities. It was not a negative intention. Like the Government of Ghana, the Ghanaian Port Authorities are fully committed to doing all in their power to provide all possible assistance and support to the vessel until this matter is resolved. Ghana confirms that it will take all steps to address any issues which the crew of the *ARA Libertad* may have resulting from the need to respond adequately to any unlikely emergencies that might arise: the Port Authority will take any and all steps which have to be taken in the unfortunate event that there was such an emergency. The Ports Authority has made its port fire service available on standby 24 hours a day at further cost to the Ghanaian authorities. As such, realistically,

the events of 7 November 2012 could not be said to demonstrate that there is a risk of irreparable prejudice to Argentina's rights prior to the imminent formation of the Annex VII tribunal.

Mr President, Members of the Tribunal, this brings to an end the first round of oral arguments for Ghana.

We invite the Tribunal to reject *in toto* the Request made to it, for the reasons I have explained, and to do so firmly.

In closing, we would wish to leave you with a sense that an order by this Tribunal in the terms that we see would not bring Ghana any particular satisfaction; it would not. Ghana fully understands Argentina's strong sense of grievance and is fully committed to working closely with Argentina to resolve this matter as soon as possible, but such a solution cannot be achieved at any price; it has to respect the rule of law, and that means the domestic and international rule of law.

Listening to my good friend Professor Kohen this morning, it was almost as though he was suggesting that Ghana should violate the orders of its own court and somehow take steps to release the vessel. That was not a happy suggestion.

It reminded me of another case that came up during the first year in which I ever appeared before this Tribunal, which was also notorious and very difficult for all countries concerned. It too concerned the question of immunity. Many of you know it well. It was, of course, the case of Senator Pinochet and the consequences when the English House of Lords ruled that Senator Pinochet was not entitled to immunity in relation to alleged crimes against humanity committed many years earlier. That judgment caused obvious hurt in Chile. It also caused tremendous difficulties for the Government of the United Kingdom. The Government of the United Kingdom was stuck with a judgment of its courts. It simply was not an option to decide to use manpower to release Senator Pinochet and somehow send him back; that is the nature of a constitutional legal order that all your countries respect. Chile was understandably deeply aggrieved by what had happened.

Chile had options. It did not go to an international court to seek to order the prompt release of Senator Pinochet, because it knew that in circumstances in which the laws governing the immunity of a former head of state were changing or were subject to particular legal considerations, such an application would be bound to fail, just as this application is bound to fail in circumstances in which the Ghanaian court has adopted a judgment with which the Ghanaian executive may not agree, which has interpreted, applied and taken forward judgments of the courts of the Southern District of New York and of the English Supreme Court. It is therefore plain that there is something there for the judge to rely on, however much the Government of Ghana may disagree.

In those circumstances, we say that Argentina's Application to you is also bound to fail, and we invite you to so rule.

Mr President, Members of the Tribunal, that concludes Ghana's first round of submissions. Thank you for your attention. Unless we can assist further, that concludes our presentation.

*The President:*

Thank you, Mr Sands.

The first round of oral arguments presented by both Parties is now concluded. The hearing will continue tomorrow with the second round of arguments. We will hear the argument of Argentina from 9.30 until 11 a.m. and the argument of Ghana from 12 noon until 1.30 p.m.

I wish you a good evening. The sitting is now closed.

"ARA LIBERTAD"

(*The sitting closes at 5.45 p.m.*)

30 novembre 2012, matin

**PUBLIC SITTING HELD ON 30 NOVEMBER 2012, 9.30 A.M.**

**Tribunal**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* GAUTIER.

**For Argentina:** [See sitting of 29 November 2012, 9.30 a.m.]

**For Ghana:** [See sitting of 29 November 2012, 9.30 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 30 NOVEMBRE 2012, 9 H 30**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD, KULYK, *juges* ; M. MENSAH, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Argentine :** [Voir l'audience du 29 novembre 2012, 9 h 30]

**Pour le Ghana :** [Voir l'audience du 29 novembre 2012, 9 h 30]

*Le Président :*
Mesdames et Messieurs, bonjour. Nous entendrons aujourd'hui les exposés des parties au cours du deuxième tour de plaidoiries dans l'affaire de l'*ARA Libertad* entre l'Argentine et le Ghana. L'Argentine présentera tout d'abord ses arguments. Le Ghana interviendra à midi.

J'invite maintenant M. Hafner à prendre la parole.

**Reply of Argentina**

STATEMENT OF MR HAFNER
COUNSEL OF ARGENTINA
[ITLOS/PV.12/C20/3/Rev.1, p. 1–6]

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

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

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

Nevertheless, permit me to say a few words on the content of this presentation as it calls for certain corrections. Counsel Singh presented in particular the UK Supreme Court's decision in *NML v. Argentina* as if it related to the warship *ARA Libertad*. This is clearly not the case. The judgment concerned only the State immunity of Argentina. It evidently did not relate to the immunity of the warship *ARA Libertad*. I have shown yesterday that the denial of the immunity to a warship requires a special waiver relating to enforcement measures and, moreover, a specified waiver indicating the particular warship subject to the waiver. The English High Court rendered a decision that is in stark contrast to the interpretation of the above judgment offered by Ghana's Counsel. In *A Company v. Republic of X*, the Court decided, with regard to diplomatic assets that enjoy a similar status to that of military property, that a general waiver of immunity did not amount to a waiver of diplomatic immunity but only of State immunity. In that case, the High Court found that an agreement, which provided, *inter alia*, that the defence of sovereign immunity was waived, was ineffective as a matter of law to confer jurisdiction on the Court in respect of property protected by diplomatic immunities.

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

STATEMENT OF MR HAFNER – 30 November 2012, a.m.

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

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

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

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

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

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

Yesterday, my learned colleague Professor Sands expressed the view that "the Convention has no rule on the question of the immunity of a 'warship' in internal waters, or on waiver of immunity". In his view, article 32 of the Convention does not refer to any such immunity in internal waters.

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

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

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

The reference in article 32 to "the Convention", instead of "the Part" was deliberately chosen by the drafters in order to extend the scope of this article beyond the territorial sea, so as to cover the entire geographical scope of the Convention, as also shown by Bernhard Oxman in his article on the regime of warships under the UNCLOS. This author is most

certainly the leading authority regarding the interpretation of the Convention, as a number of the persons present here can surely attest.

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

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

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

*Article 236: Sovereign immunity*

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

It has to be taken into account that the provisions of the Convention regarding the protection and preservation of the marine environment undoubtedly also apply to the ports of States, such as article 211, paragraph 3, of the Convention concerning the entry of foreign vessels into ports or internal waters or article 218 of the Convention concerning the enforcement by port States. Accordingly, article 236 clearly applies to the legal regime of ports.

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

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

In contrast, the only relevant passage in Professor Churchill and Professor Lowe's work that is pertinent in the present case is the following, I cite from page 99: "[...] warships [...] 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)."

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

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

Moreover, article 32 explicitly refers to such immunity so that warship immunity is incorporated into the Convention. I could add that in quite a number of its provisions, the

Convention refers to legal expressions that are undefined in the Convention and require a definition from outside the Convention. So, for instance, if the Convention refers to responsibility even though this legal expression has to be interpreted in the sense of the Articles on the Responsibility of States taken note of by the General Assembly.

My learned colleague Professor Sands made great efforts to demonstrate that neither article 18, paragraph 1(b), nor articles 87, paragraph 1(a), and 90 of the Convention contain any rule of immunity. This may be true as a matter of word count. Indeed, "immunity" is, I readily admit, not mentioned in any of these provisions. However, article 32 is comparable to a horizontal provision that produces effects for the entire Convention, as I have already explained. Thus, any relevant article of the Convention cannot but be read in connection with article 32. This is required in particular by the necessity of a contextual interpretation of a treaty according to the well-established rule of interpretation as codified in article 31 of the Vienna Convention on the Law of Treaties of 1969. It is impossible to state that an article of the Convention that does not mention immunity entitles a State to disrespect immunity. Article 32 together with article 95 of the Convention puts it beyond any doubt that according to the Convention the immunity of warships is to be respected in all maritime areas.

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

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

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

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

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

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

Mr President, Mr Vice-President, distinguished Members of the Tribunal. Let me answer one question that was raised by my learned colleague Professor Sands yesterday, who

asked that Argentina should "find two rules in UNCLOS" that establish *prima facie* jurisdiction.

The rules that Argentina is allegedly unable to find plainly exist and Argentina has found not only one, or two, rules in the Convention applicable to its case, but several, as already mentioned. The rules that provide for the absolute immunity of warships are particularly based on article 32 of the Convention, as already explained by reference to numerous authoritative sources. For this reason it is hardly understandable that my learned colleague could come to the conclusion that the "coastal State enjoys full territorial sovereignty, and all foreign vessels – including a warship – are subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State."

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

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

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

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

*The President:*
Thank you, Mr Hafner.

La parole est à M. Kohen.

EXPOSÉ DE M. KOHEN
CONSEIL DE L'ARGENTINE
[TIDM/PV.12/A20/3/Rev.1, p. 7–14]

*M. Kohen :*

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, ma tâche ce matin consiste essentiellement à répondre aux argumentations de la partie adverse au sujet des conditions à remplir pour que le Tribunal prescrive la mesure conservatoire sollicitée par l'Argentine. Je vais aborder à tour de rôle les trois conditions pour montrer que ces argumentations n'ont en rien entamé la conclusion à laquelle nous sommes parvenus hier matin, à savoir que ces conditions sont bien réunies en l'espèce. Permettez-moi tout d'abord deux considérations générales sur la présentation du Ghana d'hier après-midi.

Ma première remarque est celle de perplexité. Je suis surpris de la facilité avec laquelle les conseils du Ghana ont traité le fait qu'un navire de guerre puisse être contraint de rester au port d'un Etat étranger et que même l'usage de la force, fut-il « modéré » ou « non excessif », puisse être exercé à son encontre. Il n'est pas moins surprenant l'effort de justification juridique de ce prétendu comportement. Nous avons entendu des arguments sur la prescription de mesures conservatoires, l'interprétation de la Convention de 1982, le droit des immunités et la relation droit international-droit interne, lesquels, s'ils étaient corrects, non seulement rendraient complexe – pour dire le moins – la présence des navires de guerre étrangers dans les ports des Etats, mais encore constituent-ils de véritables défis aux interprétations bien établies des règles fondamentales du droit international.

Ma deuxième remarque générale concerne une grande nouveauté entendue hier après-midi dans la bouche de Mme Butler. Elle vous a avertis, Madame et Messieurs les Membres du Tribunal, que même si vous trouvez que les trois conditions pour prescrire la mesure conservatoire sont réunies, vous auriez la discrétion de ne pas l'ordonner. La Conseil du Ghana semble appliquer ici l'interprétation que l'on fait de l'article 65 du Statut de la Cour et de l'article 138 du Statut de votre Tribunal pour l'exercice discrétionnaire de la compétence consultative. Elle a toutefois renversé le rôle de ce que l'on appelle les « raisons décisives » *(compelling reasons)* : dans la jurisprudence de la Cour ces « raisons décisives » peuvent jouer pour que la Cour s'abstienne d'exercer sa compétence consultative, tandis que, pour Mme Butler, il faudrait qu'il y ait des « raisons décisives » pour prescrire des mesures conservatoires. Je ne pense pas qu'il faille aller plus loin. Je me contenterai de dire que ni votre Tribunal ni la Cour de La Haye n'ont jamais invoqué – sans doute pourrais-je aussi dire « même pas imaginé » – ce pouvoir discrétionnaire en matière de mesures conservatoires.

Je passe maintenant à l'examen des arguments avancés par le défendeur pour contester l'existence *prima facie* de compétence du tribunal arbitral.

Monsieur le Président, la partie défenderesse prétend l'absence de compétence du Tribunal sur la base de deux arguments principaux : que les articles de la Convention invoqués par l'Argentine ne sont pas pertinents et que la question de fond relèverait plutôt du « droit de New York et peut-être aussi du droit du Ghana ».

Mon collègue Philippe Sands s'est adonné à des interprétations très originales de certaines des règles de la Convention citées par l'Argentine. C'était bien entendu son droit le plus absolu, sauf qu'il est allé un peu vite en besogne. Il est entré au vif sur le fond du différend que le Tribunal arbitral devrait trancher pour savoir si le Ghana a violé ou non ses obligations internationales découlant de ces articles. Une chose est sûre, ce faisant, il a apporté la meilleure preuve qui soit pour démontrer ce qu'il voulait éviter, à savoir qu'il existe un différend sur l'interprétation et application des règles de la Convention et que, par conséquent, le Tribunal est compétent. En sus de votre jurisprudence citée hier, j'ajouterai ce que la Cour de La Haye a établi dans l'affaire relative à la *Convention sur le génocide* en

Bosnie-Herzégovine. La Cour a trouvé que les parties « sont en désaccord quant au sens et à la portée juridique de plusieurs de ces dispositions ... ». Pour la Cour, il ne saurait en conséquence faire de doute qu'il existe entre elles un différend relatif à « l'interprétation, l'application ou l'exécution de la (...) convention ». Nous sommes exactement dans la même situation ici par rapport aux règles de la Convention de 1982, et Gerhard Hafner vous a d'ailleurs montré notre *fumus boni iuris*.

Je pourrais dire la même chose au sujet de tous les exposés de la partie ghanéenne lorsque chacun et chacune de nos contradicteurs se sont adonnés avec un zèle remarquable à l'examen de la prétendue renonciation argentine aux immunités, même si personne – je dis bien personne – n'a encore expliqué comment cette renonciation serait applicable à l'*ARA Libertad*. Zèle remarquable mais néanmoins infructueux, comme Gerhard Hafner vient de vous le montrer.

J'ai l'impression, Monsieur le Président, que les conseils du Ghana ont un problème avec le lien de causalité ou, pour le dire plus prosaïquement, qu'ils mettent la charrue avant les bœufs. Ils veulent cacher le différend concernant le manquement du Ghana à ses obligations internationales découlant de la Convention avec le différend que le fonds vautour NML a avec l'Argentine. Selon le Ghana, le droit véritablement applicable serait donc celui de New York ou du Ghana.

Madame et Messieurs du Tribunal, j'attire votre attention sur un défaut majeur de l'argumentation ghanéenne : la question de savoir si le navire de guerre *ARA Libertad* bénéficie d'immunité n'est régie ni par le droit de New York ni par le droit du Ghana : comme toute question relative aux immunités, elle est essentiellement régie par le droit international et les juges nationaux, qu'il existe en leurs Etats des lois relatives aux immunités ou non, sont tenus de respecter et d'appliquer le droit international lorsqu'ils doivent faire face à une action contre un Etat étranger.

En réalité, Monsieur le Président, toute la thèse du défendeur repose sur une méprise grave non seulement de l'interprétation de la portée des renonciations à l'immunité, mais aussi du fonctionnement de l'institution des immunités elle-même. Si l'on suit la thèse ghanéenne, le droit international n'a aucun rôle à jouer en matière d'immunités. Sans doute les tribunaux internationaux non plus. Ce serait une question régie par les droits internes et du ressort des tribunaux internes. Le Ghana finalement nous dit à peu près ceci : « Il ne fallait pas venir à Hambourg, il faut aller à Accra devant la Cour d'appel de Ghana pour régler la question, laquelle appliquera le droit de New York et peut-être le droit du Ghana ». Ensuite, nos contradicteurs ont fait grand cas du besoin de respecter l'état du droit (*the rule of law*), ce qui implique le respect de la division des pouvoirs et l'indépendance du pouvoir judiciaire.

Le vrai problème, Monsieur le Président, que le Ghana semble ignorer, même si c'est une évidence, c'est que les différends concernant les immunités juridictionnelles et d'exécution émergent précisément par l'action des organes judiciaires de l'Etat. A-t-on besoin de rappeler le tout récent arrêt de la Cour de La Haye sur les *Immunités juridictionnelles de l'Etat* entre l'Allemagne et l'Italie ? Si un Etat pouvait invoquer l'indépendance de ces organes judiciaires pour ne plus être responsable de leurs violations des immunités des biens et des personnes protégées, ou imposer à l'Etat étranger de poursuivre les voies de recours internes pour voir reconnues ces immunités, l'institution s'éteindrait. La thèse ghanéenne est ainsi la démolition la plus parfaite qui soit du fondement même de l'immunité : *par in parem non habet imperium*.

Mon collègue Philippe Sands a cherché la complication en choisissant l'exemple du général Pinochet. Plutôt que s'aventurer à spéculer sur les raisons du Chili pour ne pas agir devant une instance internationale lors de son arrestation à Londres, il aurait pu puiser son exemple dans la jurisprudence de La Haye. Il aurait pu trouver, par exemple, que, dans l'affaire *Yerodia*, la Cour engagea la responsabilité de la Belgique pour les actes de ses

organes judiciaires qui avaient émis un mandat d'arrêt, violant ainsi les immunités d'un ministre des affaires étrangères. Si M. Yerodia avait été arrêté en vertu de ce mandat d'arrêt, la République démocratique du Congo aurait eu les mains liées sur le plan international, car il aurait fallu laisser la question aux juges internes, si l'on suit la thèse Sands.

Je n'insisterai pas davantage sur la question. L'article 4 des articles sur la responsabilité des Etats et l'article 6 de la Convention des Nations Unies sur les immunités de l'Etat et leurs biens sont d'une clarté absolue à cet égard.

En marge de la question élémentaire selon laquelle l'Etat est responsable des actes de tous ces organes, j'avoue mon étonnement de l'insistance du défendeur de s'abriter derrière l'état du droit (*the rule of law*) pour justifier ces actions. Nos contradicteurs ont même reconnu que l'état du droit inclut également le respect du droit international. D'une part, il y a un mépris flagrant des droits argentins issus directement du droit international, d'autre part, il y a aussi dans les événements du 7 novembre un mépris flagrant de l'ordre juridique interne ghanéen sans qu'aucune conséquence n'en découle. En d'autres termes, selon le gouvernement ghanéen, il ne peut libérer l'*ARA Libertad* parce que cela serait contraire à une décision exécutoire d'un juge ghanéen. Par contre, son autorité portuaire peut procéder au transfert de force l'*ARA Libertad*, même si une décision n'est pas encore exécutoire et malgré l'avertissement d'une note argentine du 31 octobre exhortant le Ghana à ne pas agir de la sorte. C'est un état de droit à géométrie variable, me semble-t-il.

En outre, je remarque le silence significatif face à une question essentielle, comme celle de l'accord intervenu entre les deux Etats pour que le navire de guerre arrive à Tema le 1er octobre et quitte ce port le 4, et puis les eaux juridictionnelles du Ghana le 5 octobre. Il semble impossible de nier que cet arrangement concerne des questions du droit de la mer. Et l'évidence montre que l'*ARA Libertad* n'a pas pu quitter Tema le 4 octobre, comme il était convenu entre les parties, et qu'il ne le peut toujours pas. Monsieur le Président, je ne pense pas que la question de l'état du droit (*the rule of law*) ait une incidence quelconque sur la question qui fait l'objet de notre présence ici, même si d'une façon générale l'état de droit implique le respect du droit international, il convient de rappeler peut-être la règle la plus élémentaire qui soit : *pacta sunt servanda*.

Je passe maintenant à la nécessité de prescrire la mesure conservatoire qui est bien réelle.

Les efforts du défendeur pour minimiser la gravité de la question qui motive cette demande d'une mesure conservatoire n'ont pas échappé à l'attention du Tribunal. Les arguments du Ghana pour prétendre qu'il n'est pas nécessaire d'ordonner la mesure conservatoire peuvent se résumer à ceci : *primo* tout se passe très bien actuellement à Tema et il n'y a aucun problème pour le navire de guerre ou pour son équipage. *Secundo*, comme le navire-école a été refait entre 2004 et 2007, s'il n'est pas utilisé maintenant il n'y a pas de préjudice irréparable. *Tertio*, l'Argentine peut à tout moment payer la caution de 20 millions de dollars US et l'*ARA Libertad* partir immédiatement. Ce sont les trois arguments principaux du Ghana.

L'effort du Ghana pour montrer que la situation sur le terrain se serait quelque peu améliorée ne change pour autant rien quant à la nécessité de prescrire une mesure conservatoire pour préserver les droits de l'Argentine qui sont en cause dans la présente espèce. Car le droit de l'Argentine en cause n'est pas celui de garder la frégate au port de Tema dans des conditions plus ou moins satisfaisantes (et de toute façon, elles ne le sont pas du tout actuellement). C'est essentiellement celui de pouvoir quitter Tema et que l'*ARA Libertad* reprenne son activité normale.

Le Ghana est conscient de la fragilité de son argumentation pour justifier les actes indéfendables de son Autorité portuaire le 7 novembre 2012. Pour se rattraper, le défendeur a déployé de gros efforts sous forme de témoignages pour montrer que la présence forcée de

l'*ARA Libertad* et de son équipage à Tema serait une sorte de séjour de vacances. Je m'abstiendrai aussi de commentaires à propos des prétendus soucis de l'Autorité portuaire du Ghana pour protéger la frégate des prétendus risques de contamination par le ciment, ce qui pousserait cette Autorité à la faire changer de place. Peu importe si c'est par la force puisqu'à ce stade, il semblerait que pour le Ghana c'est le directeur de l'Autorité portuaire de Tema qui donne désormais des ordres au Capitaine Salonio.

Monsieur le Président, je voudrais aussi attirer votre attention sur le fait que l'annexe de l'exposé écrit du Ghana mentionne une quantité de témoignages sur serment, photographies et vidéos que l'Argentine n'a pas reçus.

Madame et Messieurs les Membres du Tribunal, vous trouverez dans vos dossiers les témoignages sur serment que nous avons reçus il y a quelques heures du capitaine Salonio de l'*ARA Libertad* et de l'ambassadeur concurrent de l'Argentine au Ghana, Susana Pataro. Ces témoignages démentent les récits présentés par le Ghana en annexe de son exposé écrit et dans son dossier des juges soumis hier. Nous vous prions de les prendre en considération afin d'évaluer la situation actuelle de l'*ARA Libertad* et les affirmations de l'autre partie. Le témoignage du Capitaine Salonio montre l'état de précarité et de tension qui existe toujours, tout comme son impossibilité de se rendre à terre. J'attire votre attention, Monsieur le Président, sur le caractère trompeur de la question 5 posée à l'autorité portuaire par le conseil du Ghana. Le capitaine Salonio est bel et bien soumis à une procédure pour « outrage au tribunal », comme notre document soumis à votre Tribunal le 27 novembre 2012 le prouve. Peu importe que l'autorité portuaire soit ou non à l'origine d'une telle démarche. Le témoigne de l'ambassadeur Pataro, pour sa part, met au clair ce qui s'est vraiment passé le 7 novembre avec elle. Le traitement qui lui a été infligé avait par ailleurs motivé une note de protestation de l'Argentine au Ghana, qui est restée comme toutes les autres sans réponse.

Monsieur le Président, hier matin, j'avais soutenu qu'en prescrivant la libération de l'*ARA Libertad* le Ghana ne subirait aucun dommage. L'après-midi, les collègues de l'autre côté de la barre vous ont confirmé mon affirmation. En effet les conseils du Ghana vous ont expliqué les prétendus problèmes que pose la présence de l'*ARA Libertad* au port de Tema, et le manque à gagner que cela signifie pour le port. Madame Butler a rappelé qu'il faut tenir compte des droits des deux parties lorsqu'on prescrit des mesures conservatoires, mais elle n'en a invoqué aucun. Apparemment, le seul droit que M. Sands a pu suggérer qui serait en cause pour le Ghana, c'est le respect de l'état du droit, point sur lequel je me suis déjà référé. Quoi qu'il en soit, Monsieur le Président, votre Tribunal s'adresse aux Etats qui constituent un et un seul sujet de droit sur la scène internationale. La prescription de la mesure conservatoire devra être appliquée par le Ghana et, si tant est que le Ghana est soucieux du droit international, il ne faut pas abriter des doutes que *the rule of law* lui imposera de s'en tenir à votre décision.

Monsieur le Président, face à la démonstration du caractère faux des affirmations du Ghana quant à la promptitude de l'Autorité portuaire pour fournir du combustible à l'*ARA Libertad*, le Conseil du Ghana a donné l'explication suivante :

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

Si je laisse de côté la gentille invitation d'aller demander à un juge incompétent qu'il modifie une décision que l'Argentine conteste *in toto*, j'avoue à nouveau ma perplexité face à

l'affirmation sans fondement selon laquelle le navire de guerre peut déjà être réapprovisionné. Non seulement il n'y a rien qui le prouve, mais encore cela serait contraire à l'injonction du Juge Frimpong. À nouveau, c'est semble-t-il ce que l'on appelle « l'état de droit » de l'autre côté de la barre.

Madame et Messieurs les Membres du Tribunal, la demande d'autoriser la frégate *ARA Libertad* à se ravitailler de combustible pour pouvoir quitter Tema et les eaux juridictionnelles du Ghana garde toute sa valeur.

Un mot simplement sur le fait que le navire-école n'a pas été utilisé pendant trois ans. Il a en effet subi des travaux de modernisation substantiels. Utiliser cela comme justification pour garder l'*ARA Libertad* en état de détention n'est pas très sérieux. C'est l'Etat du pavillon du navire de guerre qui doit être en mesure de décider de son emploi et pouvoir disposer pleinement du navire dans les conditions modernes qui sont les siennes actuellement. Priver la Marine argentine de son navire-école porte en effet un préjudice irréparable.

Monsieur Sands a aussi prétendu que nous demandons une sorte de « prompte mainlevée plus ». Je me suis déjà expliqué sur la différence entre la prompte mainlevée et la situation d'un navire de guerre qui n'est accusé par ailleurs d'aucune infraction. Mon contradicteur n'a pas réagi à cette distinction et il n'y a pas lieu d'y insister. Je ferai simplement état de ma curiosité quant à la manière de parvenir aux calculs manifestement exorbitants de notre collègue quand il prétend que les coûts de cette procédure équivaudraient aux 20 millions de dollars que NML a demandés comme caution et que le Juge Frimpong s'est empressé de fixer.

Le défendeur prétend enfin qu'il n'y a pas urgence parce que le tribunal arbitral pourrait agir vite et que le Ghana donne des assurances pour que l'*ARA Libertad* et son équipage soient bien traités en attendant la fin de la procédure devant la justice ghanéenne.

Je ne reviendrai pas sur ce que nous avons dit hier sur la prétendue rapidité avec laquelle le tribunal arbitral pourrait être en mesure de s'occuper d'une mesure conservatoire. J'ajoute seulement un constat, Monsieur le Président. Nous sommes aujourd'hui exactement au trentième jour de la notification argentine instituant la procédure arbitrale. Au moment où je vous parle, nous n'avons pas reçu de nouvelles concernant la désignation d'un arbitre par le Ghana, comme le prescrit l'article 3 de l'Annexe VII.

Je ne reviendrai pas non plus sur toutes les raisons qui témoignent de l'urgence pour la prescription de la mesure conservatoire, tant au point de vue de la sécurité du navire que de l'équipage et des risques de tensions au port. Le fait que les préjudices aux droits de l'Argentine ont un caractère continu justifie amplement cette urgence.

Il y a une autre question essentielle que le Ghana passe sous silence. C'est la possibilité réelle que ses organes judiciaires décident d'exécuter en toute illicéité, bien entendu, l'*ARA Libertad*. En d'autres termes, si l'on croit nos contradicteurs, le fait que la procédure interne s'achèverait selon eux fin janvier 2013 ajoute plutôt un autre élément d'urgence à la prescription de la mesure conservatoire. Rien ne permet de supposer que le Tribunal arbitral sera même en état de fonctionner à ce moment-là. Rien ne permet d'affirmer non plus la date de la fin de la procédure interne.

J'en viens maintenant aux prétendues assurances du Ghana. La jurisprudence de votre Tribunal a considéré l'octroi d'assurances comme un élément à prendre à compte pour décider où non de la nécessité de prescrire des mesures conservatoires dans des contextes bien différents de ceux de l'espèce. Par ailleurs, de quelles assurances s'agit-il ? À nouveau, il s'agit de l'assurance donnée pour que les droits de l'Argentine à l'égard du navire de guerre ne puissent pas être exercés pour un temps indéterminé. Cela ressemble à peu près à cela : « On va garder le Libertad en détention, mais on va le traiter, ainsi que son équipage, correctement pendant cette détention ! » Ce que le Ghana vous demande finalement, Madame et Messieurs du Tribunal, c'est de lui permettre de juger et de décider du sort du navire. C'est

ce qui se cache derrière la demande de non-mesure conservatoire du Ghana. Votre Tribunal, pourrait-il « préserver » ce prétendu droit ghanéen qui n'existe nullement et que le défendeur n'a même pas fait l'effort de démontrer ?

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, le Ghana vous invite à exclure la question de l'immunité du domaine du droit international et à rendre la présence des navires de guerre dans des ports étrangers soumise à l'arbitraire de l'Etat côtier. L'Argentine, par contre, vient ici pour préserver trois droits fondamentaux qui font l'essence de la coexistence des Etats en mer et qui d'ailleurs résultent d'un arrangement bilatéral.

Vous avez remarqué le caractère tout à fait exceptionnel de la situation qui est présente devant vous. Un navire de guerre qui est en visite accordée par les deux Etats concernés et qui est par la suite empêché de quitter le port pour poursuivre sa route et soumis à une mesure de contrainte. La seule manière de préserver les droits de l'Etat du pavillon, sans porter aucun préjudice au Ghana et avec profit pour lui et pour l'ensemble de la communauté internationale, c'est de permettre que l'*ARA Libertad* quitte le port de Tema et les eaux territoriales du Ghana, en permettant son ravitaillement à cette fin.

Je vous remercie de l'attention que vous m'avez portée, Madame et Messieurs les Membres du Tribunal, et vous prie, Monsieur le Président, de bien vouloir donner la parole à l'agente de la République argentine.

*Le Président :*

Je vous remercie, Monsieur Kohen.

J'invite maintenant l'agent de l'Argentine, Mme Ruiz Cerutti, à prendre la parole.

EXPOSÉ DE MME RUIZ CERUTTI
AGENT DE L'ARGENTINE
[TIDM/PV.12/A20/3/Rev.1, p. 14–19]

*Mme Ruiz Cerutti :*
Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Juges, au deuxième jour des plaidoiries, l'Argentine n'est pas encore au bout de ses surprises. L'affirmation de certains des avocats du Ghana selon laquelle les immunités des navires de guerre ne sont pas prévues dans la Convention des Nations Unies sur le droit de la mer est simplement erronée. Quand la Convention déclare que rien n'affecte les immunités des navires de guerre et qu'un Etat – en l'occurrence le Ghana – soutient que la présence dans l'un des espaces maritimes prévus par la Convention suffit à affecter les immunités d'un navire de guerre, ce qui est évidemment en jeu, c'est l'interprétation et l'application de la Convention.

Hier, je me référais au principe de la bonne foi que l'article 300 de la Convention énonce, non seulement comme une technique interprétative, mais aussi comme une norme de fond qui engendre des obligations de comportement. Nous ne croyons pas qu'il soit possible d'interpréter la Convention de bonne foi et de nier en même temps que celle-ci inclut l'immunité des navires de guerre. Seule une interprétation contraire à la bonne foi pourrait permettre à un juge national de décider qu'il a le droit d'exercer sa compétence à l'égard d'un navire de guerre en visite officielle dans le port de son pays avec l'accord de son gouvernement.

Tous les ans, l'Assemblée générale des Nations Unies adopte une résolution sur les océans, dans laquelle elle proclame « l'universalité de la Convention et son caractère unitaire » et réaffirme, dans son préambule :

> qu'elle définit le cadre juridique dans lequel doivent s'inscrire **toutes** les activités intéressant les mers et les océans et revêt une importance stratégique en ce qu'elle sert de base nationale, régionale et mondiale à l'action et la coopération dans le domaine des océans.

Dans la partie dispositive, l'Assemblée générale « *réaffirme également* le caractère unitaire de la Convention et l'importance capitale de la préservation de son intégrité ».

Monsieur le Président, prétendre que la Convention ne régule pas les immunités d'un navire de guerre non seulement ignore le texte de la Convention, mais aussi nie que cet instrument régule toutes les activités dans les océans. Cette lecture rejette aussi le caractère unitaire et l'intégrité de la Convention de 1982. Je me demande s'il y aurait encore une seule visite d'un navire de guerre dans un port étranger si on déclarait que les questions relatives aux immunités des navires de guerre sont exclues du régime général du droit de la mer résultant de la Convention.

Monsieur le Président, hier, nous avons écouté la partie adverse signaler qu'il n'existait pas de différend entre le Ghana et l'Argentine, sinon entre l'Argentine et quelque chose qui s'appelle NML. En réalité, à ce stade du procès, on aura tous remarqué qu'il existe bien une controverse entre le Ghana et l'Argentine, à laquelle se référait extensivement mon collègue Ebenezer Appreku qui, si j'ai bien compris, signala que le Pouvoir exécutif de son pays maintiendra et soutiendra sa position officielle selon laquelle ses juges manquent de compétence sur l'Argentine et plus spécifiquement sur l'*ARA Libertad*. En outre, Monsieur Appreku se référa à la difficile situation dans laquelle se trouve son pays en raison du principe de la séparation des pouvoirs. Après l'avoir écouté, j'ai l'impression que le Gouvernement du Ghana ne s'oppose pas à ce que ce Tribunal prescrive la mesure

conservatoire demandée par l'Argentine. Bien au contraire, cette décision résoudrait la tension entre les pouvoirs exécutifs et judiciaires ghanéens invoquée par M. Appreku. Cette décision serait en même temps conforme au droit international de la mer, aux principes du droit international et à l'Etat de droit. En outre, une réponse du Tribunal du droit de la mer aurait pour utilité de préserver l'immunité de l'*ARA Libertad*.

A l'exception de mon collègue M. Appreku, le reste des interventions de la partie adverse semble se référer à un autre différend, celui engendré par les réclamations d'un fonds vautour contre l'Argentine. Les intérêts d'une entreprise ne sont pas les mêmes que ceux d'un Etat. Comparer une dette avec des accusations de crimes contre l'humanité nous paraît un exercice de rhétorique inadéquat qui introduit la confusion et présente des risques que normalement un Etat ne prendrait pas. Pour une entreprise privée, qu'un navire de guerre employé à des fins militaires puisse avoir à bord des militaires de multiples nationalités autres que celui de l'Etat du pavillon peut sembler incompréhensible. Heureusement, la coopération entre Etats offre des possibilités bien différentes.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres de ce Tribunal, tout au long de la présente procédure, le Ghana a rappelé à plusieurs reprises le fonds vautour NML et les nombreuses poursuites auxquelles celui-ci a essayé de soumettre l'Argentine. Il s'agit là d'une tentative peu habile de détourner l'attention du véritable différend qui oppose aujourd'hui le Ghana à l'Argentine à propos de l'embargo sur la frégate *Libertad* et aussi de fuir sa responsabilité internationale. Cette stratégie de la partie adverse m'oblige à dédier quelques lignes au fonds vautours et à leurs pratiques, même si cela, je dois le souligner expressément, est étranger à la décision que vous aurez à prendre.

Je fais une parenthèse. Il y a 44 mentions du fonds NML dans les interventions que nous avons entendu hier après-midi de la partie adverse.

Monsieur le Président, les tribunaux du Ghana n'ont certainement pas été désignés comme juridiction compétente dans les emprunts obligataires émis par l'Argentine. Pourquoi, donc, un fonds de ceux que l'on dénomme « vautours », ayant son siège dans les îles Caïmans, a-t-il choisi le Ghana comme juridiction et la frégate *ARA Libertad* comme proie ?

Certains fonds d'investisseurs, connus comme des « fonds d'investissement spéculatifs », achètent des dettes de pays au bord du défaut de paiement pour une fraction minime de leur valeur, dans le but de récupérer leur valeur totale à travers des actions judiciaires devant des tribunaux étrangers. Ces stratégies sont fréquemment récompensées par les rançons financières que ces fonds parviennent à extorquer aux finances étatiques, alors que cet argent devrait normalement servir à la lutte contre la pauvreté et l'instabilité.

Si les activités des fonds vautours virent le jour en Amérique du Sud, depuis les années 90, ceux-ci posèrent leurs griffes sur de nombreux pays de l'Afrique subsaharienne, en acquérant leurs dettes à bon marché. Par la suite, ces fonds attendirent les programmes d'aide financière et d'allégement de la dette par la Banque mondiale, le FMI et les pays développés pour lancer leur attaque, à savoir présenter leurs titres devant des tribunaux américains ou européens et y réclamer le paiement de l'intégralité de la dette.

Quand il fut évident qu'une grande partie de l'aide donnée à l'Afrique était en train de tomber dans les griffes des fonds vautours, certaines organisations commencèrent à questionner le système financier international et coordonnèrent leurs efforts pour faire pression sur leurs gouvernements respectifs et sur les institutions financières internationales afin que ceux-ci prennent les mesures nécessaires à cet égard.

Dans ce contexte, c'est une triste ironie que ce soit un juge africain qui se soit emparé de la frégate *ARA Libertad* au port de Tema suite à une requête d'un fonds vautour. Une pièce clé du patrimoine national argentin est ainsi retenue, en claire violation du droit international, dans le but de faire payer une dette spéculative, achetée par des bouts de pain, à cause d'un défaut de paiement survenu il y a près d'une décennie.

EXPOSÉ DE MME RUIZ CERUTTI – 30 novembre 2012, matin

Mon pays est tombé en défaut de paiement en 2001. En plein milieu d'une crise économique inédite en raison de sa gravité dans l'histoire argentine contemporaine. Pour sortir de cette situation, en 2005 et 2010, l'Argentine conçut et exécuta une restructuration complète de sa dette, qui fut acceptée par plus de 92 % de ses créanciers – j'insiste : 92 % de ses créanciers. À partir de ce moment, le message du gouvernement argentin a été clair : l'Argentine se conformera au plan de restructuration de sa dette. Elle paya et paye ainsi une juste compensation à tous les détenteurs de bons qui acceptèrent l'échange de leurs créances, et contribuèrent de cette façon à son rétablissement économique. Il convient aussi de souligner que les intérêts des bons restructurés étaient liés à l'évolution du PIB argentin. Après une croissance annuelle supérieure à 8 % depuis 2003, cela conduisit à un gain significatif pour les détenteurs des bons qui se joignirent à la restructuration.

Monsieur le Président, nous comprenons volontiers pourquoi un fonds vautours comme NML a décidé d'agresser un symbole emblématique de l'Argentine. Ayant l'habitude de spéculer, il s'imagina que l'Argentine serait disposée à payer le prix d'une caution comme celle que prétendait imposer le juge ghanéen pour la libération de l'*ARA Libertad*. Mais il se trompa lourdement : l'Argentine n'a jamais cédé et ne cédera jamais face à des tentatives d'extorsion de ce genre. Elle ne pourrait du reste pas le faire, à cause des obligations auxquelles elle a souscrit en restructurant sa dette.

En revanche, ce que nous peinons à comprendre, c'est : pourquoi le Ghana ? Pourquoi le Ghana, un pays ami de l'Argentine, n'a pas réagi devant l'action du fonds vautour.

Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal, j'ai l'impression que la vision *ius privatista* qui a prévalu hier dans les plaidoiries de la partie adverse veut déformer le contenu de la mesure conservatoire demandée par l'Argentine, lui attribuant un contenu émotionnel au détriment de la rationalité qui est la sienne.

Monsieur le Président, les immunités des navires de guerre ne reposent pas sur du sentimentalisme. La protection de la fonction qui caractérise les immunités diplomatiques, celles relatives aux navires de guerre s'appuient en outre, inexorablement, sur le bon sens. On n'emploie pas la force contre un navire de guerre à moins d'un contexte belliqueux. L'usage de la force contre un navire de guerre en dehors de ce contexte, en plus d'être un fait internationalement illicite, est par-dessus tout un acte insensé.

Exposer cette folie en face d'un tribunal international, Monsieur le Président, est le comportement le plus rationnel que l'Argentine pouvait adopter dans les circonstances actuelles. Je défie quiconque de suggérer un chemin plus rationnel que celui que nous avons choisi et qui nous a menés au Tribunal d'Hambourg.

En parlant de rationalité, Monsieur le Président, Madame et Messieurs les Membres du Tribunal, j'avoue avoir été surprise hier quand mon collègue Appreku affirma : « *we are pleased that, in keeping with its belief in the rule of law, Argentina chose to file an appeal in Ghana instead of resorting to the use of force* ». S'il y a irrationalité dans cette affaire, l'Argentine ne pense pas qu'elle vienne de son côté. Le commentaire de mon collègue me pousse à certaines réflexions :

En premier lieu, si le Ghana est tant convaincu de la nécessité de préserver son état de droit, il devrait éviter une répétition de l'épisode du 7 novembre, où il a lui-même admis avoir utilisé la force contre un navire de guerre argentin.

Un navire de guerre, selon la Convention – je cite : « est placé sous le commandement d'un officier de marine au service de cet Etat », c'est-à-dire qu'il est un navire dans lequel s'appliquent seulement les normes de l'Etat du pavillon par l'intermédiaire du Commandant. Le Ghana, en affirmant qu'un navire de guerre étranger qui se trouve dans ses eaux intérieures est « available for enforcement » prétend que la définition d'un navire de guerre possède un champ d'application limité, alors même que cette restriction n'apparaît pas dans

le texte de la Convention. Sinon, le Ghana ne serait pas en train d'essayer de prendre des mesures coercitives contre l'*ARA Libertad*.

Si les navires de guerre doivent cesser d'être sous l'autorité exclusive de l'Etat du pavillon quand ils se trouvent dans les eaux intérieures d'un Etat tiers, alors la définition de la Convention serait assujettie à une condition qui n'est pas contenue ni expressément ni implicitement dans la norme. Cette conclusion est, par ailleurs, centrale à la compétence du tribunal arbitral qui devra résoudre le fond de la requête que l'Argentine a formulée contre le Ghana.

Pendant que cette controverse demeure irrésolue, la position de l'Argentine est que la définition du navire de guerre s'applique, comme le prévoit la Convention, dans la totalité des espaces maritimes, y inclus les eaux intérieures quand le navire de guerre s'y trouve avec le consentement de l'Etat riverain. Du point de vue de l'Argentine, si le commandant de l'*ARA Libertad* permettait que les autorités du Ghana prennent contrôle du navire, que ce soit pour le déplacer d'un endroit à l'autre ou pour une raison quelconque, notre pays cesserait de qualifier l'*ARA Libertad* comme un navire de guerre, et nous n'avons pas pris de décision dans ce sens.

La véritable urgence, Monsieur Le Président, dérive du fait que l'Argentine ne sait pas quels sont les paramètres que le Ghana utilise pour mesurer la « rationalité » avec laquelle il utilisa la force contre un navire de guerre argentin. Je le répète, je ne sais pas ce que le Ghana considère comme « rationnel » quand le Ghana utilise cet adjectif pour qualifier l'usage de la force contre un navire de guerre. Maintenant, c'est à l'égard du capitaine du bateau que le Ghana est en train de permettre un recours à la force parce que celui-ci se comporte conformément à la Convention, c'est-à-dire en appliquant dans le navire de guerre exclusivement la loi de l'Etat de son pavillon.

Dans un contexte comme celui-ci, l'absence de denrées essentielles, comme le combustible dont l'approvisionnement est interdit par le juge ghanéen qui a dicté l'embargo, est un facteur supplémentaire qui aggrave la pression psychologique à laquelle est assujetti l'équipage du navire. Ces considérations que je viens de formuler, ajoutées à la déclaration sous serment du capitaine de l'*ARA Libertad* que nous avons jointe au dossier des juges ce matin, répondent à la question qui nous a été adressée par le Tribunal au sujet de la situation actuelle de l'*ARA Libertad* et de son équipage.

Monsieur le Président, la présence consentie par l'Etat riverain d'un navire de guerre dans ses eaux territoriales n'altère en aucune façon sa condition de navire de guerre. Aujourd'hui, le Ghana nous a dévoilé une partie du mystère de sa position. Nous savons que cet Etat prétend le contraire, c'est-à-dire qu'un navire de guerre perd cette condition lorsqu'il se retrouve dans les eaux intérieures d'un Etat qui a consenti à sa présence.

Monsieur le Président, s'agissant d'un aspect du fond du différend qui sépare le Ghana et l'Argentine, je ne peux que rejeter la prétention de mon collègue Appreku quand il soutient, et je cite :

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

L'objet du différend entre l'Argentine et le Ghana porte sur le respect de l'immunité du navire de guerre argentin. Le défendeur prétend que l'on peut déroger à l'immunité de ce navire parce qu'il se trouve dans ses eaux intérieures. Il est difficile d'imaginer un différend plus central à la structure de la Convention. La compétence du Tribunal appelé à connaître du fond est quelque chose de plus que *prima facie*.

EXPOSÉ DE MME RUIZ CERUTTI – 30 novembre 2012, matin

Monsieur le Président, l'autre différend auquel se référait mon distingué collègue M. Appreku, je parle des différends que NML s'est dévoué à perdre contre l'Argentine un Tribunal après l'autre, n'a rien à voir avec votre Tribunal ni avec l'objet de la présente controverse qui consiste à déterminer si les immunités des navires de guerre, qui sont inhérentes à la définition établie par la Convention pour ces navires, cessent d'exister tout comme la définition même d'un navire de guerre lorsqu'ils se retrouvent dans les eaux intérieures d'un Etat riverain qui a consenti à leur présence.

Un autre des aspects des propos de mon collègue Appreku que j'aimerais aborder vise la cohérence de son argumentation. Lui, en représentant le pouvoir exécutif ghanéen, a admis que le juge de son pays manquait de compétence tant à l'égard de l'Argentine qu'à l'égard de l'*ARA Libertad*. Après, il est inconcevable qu'il suggère le paiement d'une caution que prétend imposer un juge sans compétence. L'exigence d'une somme d'argent par un juge qui ne possède pas de compétence ne peut s'appeler caution, Monsieur le Président.

Pour conclure, Monsieur le Président, je suis en état de faire une proposition formelle à la partie ghanéenne. L'article 287, paragraphe 5, de la Convention dispose que :

> Si les parties en litige n'ont pas accepté la même procédure pour le règlement du différend, celui-ci ne peut être soumis qu'à la procédure d'arbitrage prévue à l'Annexe VII, à moins que les parties n'en conviennent autrement.

L'Argentine propose au Ghana de soumettre le fond du différend à votre Tribunal, Monsieur le Président, aux lieu et place du Tribunal arbitral dont la constitution est toujours en cours. Cette proposition, tant qu'elle ne sera pas acceptée par le Ghana et mise en oeuvre, n'exempte pas le Ghana de toutes ses obligations découlant de l'Annexe VII de la Convention.

Je ne voudrais pas conclure, Monsieur le Président, mon exposé sans remercier tout le personnel du Greffe pour la précieuse assistance qu'il a accordée aux parties, ainsi qu'aux interprètes qui ont très bien travaillé pour nous traduire.

A présent, je crois que je dois lire les conclusions de la République argentine, si vous le permettez, Monsieur le Président.

*Le Président :*
Merci, Madame Ruiz Cerutti. C'est donc le dernier exposé de l'Argentine.

*Mme Ruiz Cerutti :*
Tout à fait, Monsieur le Président.

*Le Président :*
L'article 75, paragraphe 2, du Règlement du Tribunal prévoit qu'à l'issue du dernier exposé présenté par une Partie au cours de la procédure orale, l'agent donne lecture des conclusions finales de cette Partie sans récapituler l'argumentation. Le texte des conclusions finales, signé par l'agent, est communiqué au Tribunal et une copie est transmise à la partie adverse.

J'invite donc l'agent de l'Argentine, Mme Ruiz Cerutti, à donner lecture des conclusions finales de l'Argentine.

*Mme Ruiz Cerutti :*
Merci beaucoup, Monsieur le Président. Je vais lire en anglais les conclusions.

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

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

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

Thank you very much.

Je vous remercie, Monsieur le Président, Monsieur le Vice-Président, Madame et Messieurs les Membres du Tribunal.

*Le Président :*

Je vous remercie Madame Ruiz Cerutti.

Cela nous amène au terme du deuxième tour des plaidoiries de l'Argentine. Nous reprendrons l'audience à midi avec les plaidoiries du Ghana. La séance est maintenant levée.

*(L'audience est levée à 11 heures 55.)*

30 November 2011, noon

**PUBLIC SITTING HELD ON 30 NOVEMBER 2012, NOON**

**Tribunal**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* GAUTIER.

**For Argentina:** [See sitting of 29 November 2012, 9.30 a.m.]

**For Ghana:** [See sitting of 29 November 2012, 9.30 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 30 NOVEMBRE 2012, 12 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD, KULYK, *juges* ; M. MENSAH, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Argentine :** [Voir l'audience du 29 novembre 2012, 9 h 30]

**Pour le Ghana :** [Voir l'audience du 29 novembre 2012, 9 h 30]

*The President:*
The Tribunal will continue the hearing in the *"ARA Libertad" Case*. We will now hear the second round of oral arguments presented by Ghana.

I give the floor to Mr Sands.

**Reply of Ghana**

STATEMENT OF MR SANDS
COUNSEL OF GHANA
[ITLOS/PV.12/C20/4/Rev.1, p. 1–10]

*Mr Sands:*
Mr President, Members of the Tribunal, we shall be very brief in our second round. We do not want to repeat what is set out in our Written Statement or what we said yesterday. It is very clear to us that the Members of the Tribunal are fully on top of this dossier. Therefore, instead we will limit ourselves to responding to the points raised this morning. That is necessarily meant, and we apologize to the interpreters that we are not in a position to give them a written text in advance, but we thought that it would be more useful to home in on the most important points. I, of course, make the general reservation that we maintain the totality of our arguments and home in on these points because we think that they are usefully addressed at this stage.

I will make six points in relation to what Argentina had to say this morning, and then I will invite you to ask the distinguished Agent of Ghana to come to the bar to conclude Ghana's submissions for this stage of the proceedings.

I should say that we were pretty surprised about what Argentina did not address this morning, and we thought that that was rather telling. It was quite selective in its choice of articles of the Convention, although we appreciate that they have now seen fit to go into some of the detail. They did not, for example, say anything about article 2, paragraph 3, of the Convention, which we had raised yesterday – and I will say more about that in due course; they did not say anything about the bond or its waiver of immunity. They seem to be saying to you that you can ignore that bond completely and can ignore completely the terms of their waiver of immunity, whatever it may mean, including waiver of immunity in relation to enforcement. We say that that is a surprising position to adopt in these proceedings.

Let me deal with the first point, which is very brief, that is on the facts that led up to the arrest and impounding of the vessel. The point that I want to make here is a simple one. We were criticized very gently and generously by Professor Hafner for somehow suggesting that the judgments in the United States and the United Kingdom, to which we took you, were of significance or that they related to the vessel. Of course, we were very careful in what we said. We did not say that those judgments were about the vessel; we said that they were about the bond and the waiver of immunity, including in relation to enforcement, and that is a significant distinction.

However, for the avoidance of doubt, we want to be clear that we took you to those cases because we do not think that you can understand the facts without having the totality of the context, and those cases, unhappy as they may be for Argentina, are a significant part of that context; they are not judgments that are immaterial to these proceedings, as Mr Hafner said this morning. We therefore rely on these cases not to express any view on their substantive content or their merits but simply to explain how the circumstances in which the events that have brought us here for the past couple of days have happened.

In relation to those judgments, if we understood him correctly, Professor Hafner said that the proper place in which to raise those issues is before the courts of Ghana. Of course, we agree with that; that is exactly where those issues ought to be raised, and towards the end of my presentation I will come back to talk about the role of the courts of Ghana and their relationship to these proceedings.

Let me turn to our second point in relation to *prima facie* jurisdiction. We are pleased that Argentina has finally decided to engage with this issue and has seen fit to descend into

the details of the four provisions on which they rely in support of their claim. I have to say that overnight we have had an opportunity to read the transcript of yesterday's proceedings, to look at all the authorities cited and to note what authorities Argentina has and has not referred to. I mentioned yesterday that it was rather striking that Argentina had almost nothing to say about the four provisions of the Convention on which they purport to rely. Re-reading the transcript this morning for a second time, it is equally striking how little they had to say about your jurisprudence on all these matters. It is as though, rather like the waiver of immunity and the bond itself, they would like to wish away this Tribunal's jurisprudence on these matters.

By way of an aside, I should say from experience as sitting as an arbitrator that I find it incredibly helpful when counsel address submissions on the authorities that are most unhelpful, because often judges faced with an authority that is on the point but unhelpful want an explanation of why it is distinguishable or should not be followed on the facts of a particular case. That is not a criticism; it is simply a different style of advocacy. We are in a fortunate position on the side of Ghana that there really are no authorities unhelpful to our case. We are able to rely very fully on the authorities.

There is one recent authority that is very unhelpful to Argentina, and they made no effort to address it yesterday, nor did they mention it today, and we think that that absence is rather revealing. It is, of course, the case of the *Louisa*, which recently came before the Tribunal and with which many of you will be far more familiar than I, between Saint Vincent and the Grenadines and Spain. I re-read it at about 3 o'clock in the morning together with the separate and dissenting opinions, so I am a little more familiar with it than I was yesterday, though I had of course read it before. It is an instructive and rather helpful decision. Reading the separate and dissenting opinions helped me to re-frame the question of *prima facie* jurisdiction, which is addressed quite fully by some of the judges, in a slightly different way.

Argentina has asserted that four provisions of the Convention have been violated because of Ghana's treatment of the *Libertad* in the internal waters of Ghana. Another way of putting the issue, perhaps in the form of a question, is: are any of the four articles of the Convention that have been invoked by Argentina, that is articles 18, 32, 87 and 90, relevant to the exercise by Ghana of its sovereign rights over activities conducted in its internal waters? In a sense, that is the nub of the issue.

We need only raise that question to come immediately to the answer, which is obviously negative. On their face – we need not go any further – none of those provisions is applicable to acts occurring in internal waters. On their face, none has anything to say about any issue of immunity or waiver or immunity in internal waters. Therefore, *prima facie* on the face of these provisions themselves, the Annex VII tribunal does not have jurisdiction and you are not able to prescribe any provisional measures under article 290, paragraph 5. We say that you do not need to go beyond the face of these four provisions to conclude that sovereign acts occurring in internal waters do not engage these provisions.

This morning Professor Hafner put one of those provisions, article 32, up on your screen, but I fear that it did not help his cause. He did not put up articles 18, 87 or 90. It is very clear – I read it on the screen, as you will have read it on your screens this morning – that nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes. The provision does not set forth an obligation establishing a rule of immunity. It is a saver clause. It merely makes clear that the Convention's provisions in the territorial sea will have no impact on immunity rules, but it is only in relation to the territorial sea. Indeed, nothing in the Convention deals with the status of ships in port.

We referred you to the writings of Professors Churchill and Lowe, and this morning counsel for Argentina said absolutely nothing to rebut the review of those two distinguished

authorities, and there is nothing to rebut them, because they are right and because the Convention simply does not regulate these matters.

We have not, and do not need to at this limited phase of the proceedings, burdened you with the history of the agreement that the 1982 Convention would not regulate the status of vessels in internal waters, but I will now refer you very briefly to the relevant little story of how that happened.

If you go backwards in time from the 1982 Convention to the Conference on the Law of the Sea, to the 1958 Convention, back through the work of the International Law Commission, then back to the Preparatory Committee for the Hague Conference for the Codification of International Law and trace the work on the territorial waters, you will see that that is the starting point, and in that context the Hague Preparatory Committee asked States whether the subject of jurisdiction over foreign ships in ports should be included as a subject at the conference. The decision taken was not to include any clause on that subject in the proposed convention, and that set the scene for everything that followed.

That work, five or so decades before the 1982 Convention, informed the subsequent work of the International Law Commission, the negotiations that led to the 1958 Territorial Sea Convention and the later negotiations and the text that became the 1982 Convention. At each stage it was understood that the regime of ports and internal waters was excluded from the relevant instrument and from the 1982 Convention, on the basis, as one member of the International Law Commission put it in 1954, that it was "universally agreed" that the regime of ports and internal waters was "different from that of the territorial sea".

The 1982 convention contains no rule on the status of foreign vessels in internal waters and ports, on immunity in internal waters and ports or on the waiver of immunity in internal waters and ports of a kind that can be relied upon in these proceedings by Argentina. It is as simple as that. Argentina has provided you with absolutely nothing that contradicts that position, and they have had quite a few weeks to prepare for this phase of the proceedings, unlike our side.

What they did do is to ignore a provision that we think is rather relevant. They had nothing to say about article 2, paragraph 3. Let us have a look at that in a little more detail. The title is "Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil". Paragraph 1: "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

Then we go to paragraph 3: "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

Argentina wants you to re-write paragraph 3. It wants you to say "the sovereignty over internal waters and the territorial sea is exercised subject to this Convention and to other rules of international law"; but of course it does not say that, and the fact that it does not say that is absolutely dispositive of this case. It is plain the drafters of the Convention did not intend to regulate sovereign acts in internal waters by reference to the Convention or other rules of international law. If they had wanted to, they would have done that. So no reference is made to that, and we think that that is really very telling. Instead we did get references to new provisions that have never before been mentioned in these proceedings, for example reference to article 25. I have to say that we had to watch it as we were being addressed this morning. I put it up on my screen and I saw that article 25 says "rights of protection of the coastal State" and paragraph 1 says that the coastal State may take the necessary steps "in its territorial sea" to prevent passage that is not innocent. "In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State" has certain rights. It is just crystal clear from the text, that it has absolutely nothing to do with the regulation of matters in internal waters.

STATEMENT OF MR SANDS – 30 November 2012, noon

Another provision that was thrown at us today for the first time was article 36. What does that say? It is in Part XII of the Convention. It is limited to the protection and preservation of the marine environment, which is not in issue in this case. It basically says that all the provisions of the Convention regarding the protection and preservation of the marine environment do not apply to warships and certain other ships. There you have a clear rule that extends to certain waters under article 218 that are governed, but it is not a general rule. It is plainly not a general rule and it can provide no assistance in circumstances of a case that has nothing to do with the protection and preservation of the marine environment.

Another provision that was mentioned newly this morning was article 8. What does that say? Well, finally we have a provision that does use the words "internal waters". Again, look at the text of the Convention to see what it says. Paragraph 1 says:

> Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
>
> 2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

It becomes absolutely clear when you read that text that innocent passage is not intended to be available in the internal waters which were previously considered as such; so I think one has to be rigorous in going through these provisions. We simply cannot see why these provisions have been thrown at you as part of a general, almost desperate effort, to find any basis on which to hang an immunity case in relation to matters in internal waters. It is what one might call a "multiple bootstraps" argument to concoct an immunity rule in UNCLOS applicable in internal waters where, plainly, none exists. In regard to those kinds of efforts we commend in particular, but not only, some of the separate and dissenting opinions and the opinion of the majority in the *Louisa* case, for example paragraph 22 of Judge Wolfrum's opinion and the totality of Judge Golitsyn's opinion on how one ought to be addressing these kinds of matters.

I come to my third point. Again, it is a brief one. Argentina is constantly taking you to rules of international law arising outside of the Convention. We were presented with a lengthy and excellent discourse yesterday by Professor Hafner on the law of State immunity and a little bit on waivers of immunity. We listened attentively and with great interest; but you will have seen that virtually the totality of that presentation was to do with rules that arise and exist outside of the Convention. They have done it again today. Today we were presented with an argument, bootstraps of sort, related to innocent passage, but the gist of the argument was that there had been an exchange of letters between Argentina and Ghana and that this somehow implicated a violation of Ghana's obligation to present Argentina with a right of innocent passage: it does absolutely nothing of the sort. Firstly, we do not accept that there is an agreement that has been violated. Even assuming that there had been an agreement in the exchange of letters, if anything has been violated it is the agreement in that exchange of letters, not anything else – not the Convention on the Law of the Sea. You cannot have two States enter into an agreement in that way and then argue, "it is not the agreement that has been violated but some other international agreement that is in some way connected, so we can bootstrap ourselves into a tribunal that doesn't have jurisdiction" in relation to a dispute concerning exchanges of letters.

The fourth point that we make is in relation to the place of the merits on all of these issues: Mr Kohen said this morning, if I understood him correctly, that by addressing the merits of the four provisions on which Argentina rests its case for jurisdiction, we have sort

of stumbled into confirming that there is an arguable or plausible case. It is plain that we have not done that. We read with interest paragraph 12 of Judge Wolfrum's opinion in the *M/V "Louisa" Case* which I think summarizes the position rather clearly in a really, I would have thought, non-contentious sort of way.

> On the basis of the jurisprudence of the ICJ it may be summarized that – for an international court or tribunal to assume *prima facie* jurisdiction – it is not sufficient that an applicant merely invokes provisions which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question. On the contrary, it is necessary for the adjudicative body to take into account the facts…

which we have done

> …which are known to it at the moment of deciding on provisional measures and to consider whether on this basis, together with legal basis invoked by the applicant, *prima facie* jurisdiction on the merits may be established. Such considerations cannot be left to the merits phase.

With great respect to all members of the Bench, we think that that is the right approach. You cannot just keel over the moment a Party invokes certain provisions which, as we have explained to you, on their face have nothing to do with the subject matter that has arisen in these proceedings.

Let me turn to the fifth point, which is more on the factual side, and move on to the question of irreparable harm and urgency. We do not have very much to add to what was said yesterday. The facts on the ground, frankly, are rather clear and there is not much of a difference between the two Parties as to the present situation. There is no denial on the part of Argentina that the crew is anything other than completely free to come and go as they wish, and there really is not any claim that anything untoward has happened except on 7 November. We have explained what happened in those circumstances, and we read with great interest the affidavits that have come in today which are, frankly, completely consistent with the account that we have given.

We read that the gravamen of the distinguished Argentinian Ambassador in Ghana's affidavit is that she was delayed for fifteen minutes from entering the port. That is what this is about: fifteen minutes. She confirmed that she was in a rented vehicle that did not have diplomatic plates. Just pause for a moment and ask yourself the question: comparing the situation that was raised by our distinguished friends in relation to the Iran hostages case - a delay of fifteen minutes to enter a port facility. It was then followed by, apparently, a further delay as it says here of 45 minutes to get on board the boat. We explained yesterday that that was due to the gangway being raised and there was an issue about bringing the gangway down, and that took some time to resolve until apparently the crew realized who the individual was who wanted to get on board.

If at the end of the day this case and the facts on 7 November are about an hour's delay, this really is not something that ought to be detaining the International Tribunal for the Law of the Sea in Hamburg, with great respect to our friends and with even greater respect to this Tribunal.

We heard more about re-fuelling in the presentation this morning. This really is not a significant issue, but since the other Party keeps coming back to it, let us just be clear about what the situation is here. Justice Frimpong's order is silent on the question of re-fuelling. Overnight I asked for an account of what has actually happened in relation to the re-fuelling issue and what we understand to be the case is that at the end of the hearing in which the

order was being determined Judge Frimpong was asked by counsel for Argentina how they were to go about re-fuelling the ship consistent with the terms of the order. Apparently it is not on the transcript because by this point he was walking away from his desk but Justice Frimpong replied by stating that this was such a minor matter that it was not something that he ought to be called upon to consider but rather that the parties themselves ought to discuss and agree upon, and then file a clarification of their agreement with the registry of the court to the extent that this was necessary.

The results of our inquiries overnight have been that counsel for NML and Argentina have apparently not been able to reach an agreement on that matter. That is all there is to it. Ghana is entirely comfortable with whatever agreement the Parties come up with on that issue and has not in any way supported or is associated with a desire to prevent the re-fuelling of the vessel. That is what it is about.

Since we are on the subject of the Ghanaian courts, let me come to my sixth point, the courts of Ghana. It does seem that Argentina has a certain reluctance to engage with the internal judicial processes in Ghana to resolve this matter, and we can understand that there would be a general reluctance. What we find more difficult to understand is that they put great store in seeking a solution from the executive branch, from the Government of Ghana, whilst apparently not appreciating the extent to which that branch is distinct from and constrained by a completely independent judicial branch, but even against this background, having accepted the jurisdiction by participating in the proceedings and having obtained the order, it is very striking as to what they have and have not done. When the order came down, they did not rush to instruct their lawyers to file and appeal against the ruling of the Ghanaian court that was detaining their ship. In fact, they waited a full 12 days before filing an appeal.

I have to tell you, from my own practice as a barrister involved in several cases of this kind, when you are facing a situation of urgency, as we have been told is the case, you file immediately. In fact, you usually have the appeal ready when the order comes down, and it goes in straight away because you want the clock to start running to get the proceedings going forward as quickly as you can. That has certainly happened in the *Pinochet* case in the English courts, a case in which I was involved.

The appeal was filed in the Ghanaian courts and there it has sat, because under the law of Ghana it is in part for the appellant in that case to seek to expedite proceedings and to move things on, and Argentina cannot be said to be apparently seeking a vigorous prosecution or appeal of this matter in the courts of Ghana. The necessary administrative steps that Argentina, as appellant, needs to take in order to have the case heard quickly are all outstanding. For example, it has not yet procured the service on the parties of something I am told is called a Form 6 document, which signals the point from which time begins to run for the appeal and requires the judges to act within limited time frames. When I heard that, I was surprised. We have been hearing about all this urgency but in fact, if you look at the matter, they do not seem to be treating it with any degree of urgency in the Ghanaian court system, in which appeal is available before an independent judiciary.

You heard yesterday from the distinguished Agent of Ghana what the position of Ghana was in relation to the first instance proceedings, and you also heard that position would be maintained in future proceedings, but Ghana is merely *amicus* in the proceedings and, as an *amicus*, the executive branch has no power to move the proceedings along. You heard yesterday and you will hear again shortly that if Argentina wants to expedite the proceedings, Ghana will be completely supportive of that, and that Ghana will maintain the position that it is taking in the domestic proceedings.

Similarly, despite the passage of time since the order having been adopted, Argentina has filed no application to abridge the time for the hearing of the appeal, and it has filed no application, for example, to have judges sit during the impending vacation from the legal

term, which is about to hit us. These are all things that normally one would expect to happen but none of them have been done.

While I am on the subject of proceedings in the Ghana courts, can I just show you the file? This is the court file. *(Indicating)* I must say, I have just seen this since I arrived in Hamburg and I am not going to claim that I have read the whole thing. I have not read the whole thing. I assume our distinguished friends on the Argentine side have access to the file. They are a party to it. So this is not a matter which has been dealt with lightly, it has to be said.

However, I did take some time very late into the morning to have a look at what was in the file. We are perfectly happy to make the entire contents of the file available to this Tribunal. Frankly, we did not do so because we thought a 1,000-page document was not likely to provide great reading material in the days to come but there is quite a lot of interesting stuff in it. For example, at page 751 of the file is a letter from the Secretary of Foreign Affairs in Buenos Aires dated 23 May 2012 which is addressed, I think, as an internal letter to other parts of the Foreign Mission Service in Argentina, including, I suspect, missions abroad. This is 23 May 2012. Let us just read one paragraph, and I quote, and I do so simply on the basis that this is in the court file, so I am not speaking to the veracity, the accuracy of the translation of this document. It is simply one of the documents in the file, apparently not challenged:

> The frigate *Libertad* enjoys the immunities provided for the State's public property. However, bearing in mind the existence of judicial proceedings against the Republic in various foreign jurisdictions, it is not possible to guarantee that its training voyage might not result in potential claims, precautionary measures or enforcement measures during its stay in foreign ports.

We place reliance on this simply for the following point. They knew in May 2012 that there were serious risks involved with this vessel. Ghana did not know about any of this in relation the exchange of letters but still the vessel was allowed to sail, and difficulties did in due course ensue, and people have lost their jobs as a result of those difficulties, people in Argentina.

I make only this point: this was entirely preventable. The costs that Ghana has been put to in participating in these proceedings, in devoting human resources to the management of this issue, in the loss of revenue to its port authority of US $160,000 a day, all could have been prevented if Argentina had acted differently.

I would simply say, in assessing the balance of equities in this matter, and when you hear the critique that Ghana has been put to yesterday and again today, this is not Ghana's dispute, this is not Ghana's case, this is not something of Ghana's making. It was known, it was predictable, it was predicted, it could have been prevented, and nothing was done to stop that. That, I think, is why the history of this case, the bond, the waiver of immunity, the court proceedings in New York and in London, are all highly relevant.

We will make this file available to the Tribunal if that would be helpful.

By contrast, what we do see is that Argentina moved with considerable haste to bring proceedings to an Annex VII tribunal and to this Tribunal. It filed an application to establish an Annex VII tribunal – I am just going to say that I wrote these words last night, before the distinguished Agent's intervention this morning – "but everyone in this room knows that it is most unlikely that an arbitration tribunal will ever hear this matter." We then heard the offer that was made by the distinguished representative of Argentina, and I leave it to you, individual members of the Bench, to work out for yourselves the motivation behind that offer.

Argentina has had its day in court, it has had its international day in court, the media is here, in particular the Argentinean media, the matter has been widely reported in certain parts of the world, and we say that is the end of the matter. It is time for these proceedings to end in the oral phase today and in the order that will follow in due course. We say therefore you really cannot make any sort of an order for provisional measures in such circumstances as we find in this case, where there is plainly no jurisdiction, where Argentina by its own actions has not pursued the matter with urgency in all the fora that are available to it, in which there is no irreparable harm, and in which the Annex VII arbitral tribunal on the present schedule will be constituted very shortly.

That is not to say that your order might not be very useful in certain respects. You have heard from us a great number of assurances that are given fully, openly transparently and in good faith. We have assured Argentina of our total desire to work cooperatively with them in the courts of Ghana. We have provided assurances that, working with them, we will do everything we can to expedite the appeal process, and you have a mechanism that you have used in your previous orders in which you record those assurances, which contribute both to reconciling the parties and bringing them together but also to signalling to other entities – and here I am going to tread very carefully because it would be completely inappropriate for the executive of Ghana, through me or through anyone else, to indicate what the courts of Ghana should or should not do, and that of course is not something I am doing, but a view from this Tribunal indicating that such cooperation as Argentina and Ghana can muster to expedite proceedings to resolve this matter would be a jolly good thing, and that is something you can record in your order, whilst rejecting the Request for provisional measures.

By way of conclusion, it is not just that Argentina's problems remain after we have heard them this morning; I would say to you that they are compounded, because we really did hear nothing. Argentina still has to persuade you that there are two rules in UNCLOS, one providing for the immunity of a vessel such as this in the internal waters of Ghana and the other providing a clear rule that Argentina is not entitled to waive any such immunity, assuming it to exist. We just do not see how they can possibly succeed in relation to these matters. We do not see that Argentina has put anything before the Tribunal which allows an argument to be made that the Convention precludes it, for example, from waiving immunity by prior written agreement in respect of a vessel that is located in another State's internal waters. That is not a matter for this Tribunal in interpreting a contractual agreement governed by New York law in a bond issued in a faraway place.

Plainly, no such rule is to be found in article 18 or 32 or 87 or 90. It is, we say, as simple as that but we go one step further, just by way of closing. If ITLOS were to accede to this, astonishing as that would be, it would effectively be saying that an international court, at a provisional measures phase, could overturn the express choice-of-law provision by the parties to a contract and say that the immunity has not been waived.

That is a decision which would have very significant and global consequences. It would create huge uncertainty in the commercial marketplace not just for sovereign bond issues, of which, as you all know, there is a great number, but also for a great number of other commercial transactions in which security is a vitally important matter.

Mr President, Mr Vice-President, Members of the Tribunal, that concludes my part of the presentation this morning. We now invite you to call to the bar the distinguished Agent of Ghana to conclude Ghana's submissions.

*The President:*
Thank you, Mr Sands.

I now give the floor to the Co-Agent of Ghana, Mr Ebenezer Appreku.

STATEMENT OF MR APPREKU
CO-AGENT OF GHANA
[ITLOS/PV.12/C20/4/Rev.1, p. 10–14]

*Mr Appreku:*
Mr President, distinguished Members of the Tribunal, it falls to me to conclude Ghana's oral presentation this afternoon.

With the greatest of respect, a signed copy of Ghana's submission will be handed to the Registry shortly.

Mr President, it has been a great honour for me to be a member and Co-Agent of Ghana's representation and first appearance before this Tribunal. Ghana is proud to have been able to contribute over many decades to the development of international law, and not least our contribution to the law of the sea. My country has a strong tradition in this regard: we were active participants in the Law of the Sea Conference, then led by the Attorney General of Ghana; Kofi Annan, the former UN Secretary-General, who showed enormous interest in law of the sea matters, is from Ghana; the General-Secretary of the International Seabed Authority, who has recently been elected for a second term, is also from Ghana; and, even closer to Hamburg, as you know, my country considers it a great honour that the first President of this Tribunal is from Ghana. We were the second African country, only after Mauritius, to make a submission to the UN Commission on the Limits of the Continental Shelf, on 28 April 2009. So, Mr President, you can see that Ghana is mindful of its rights and obligations under the 1982 Convention on the Law of the Sea, especially so since traditionally we have been the Chair of the Programme of Assistance for the Sustained Teaching and Wider Appreciation of International Law under the UN.

Mr President, Ghana has been strongly supportive of the 1982 Convention since its inception, and equally supportive of this Tribunal. That does not mean, however, that Ghana should simply accept jurisdiction in Part XV proceedings without any regard to what the drafters of the 1982 Convention contemplated. That is why we have expressed regret that the Annex VII proceedings were initiated against us in the first place, in circumstances that were not appropriate in our view. For the reasons explained by Professor Sands yesterday afternoon, this Tribunal has not been called upon to adjudge a dispute falling under the 1982 Convention. This is not an "international law of the sea" dispute. It is not an inter-State dispute in the traditional, strict sense. We are not in dispute with Argentina, a friendly country, with regard to any of the provisions of the 1982 Convention. There is no rule or provision of the 1982 Convention to interpret and apply, within the meaning of article 288.

Mr President, the obvious jurisdictional flaw at the heart of Argentina's case cannot be overstated. Professor Sands took the Tribunal to all four provisions of UNCLOS cited in Argentina's Request for provisional measures. None of these four provisions contains any right that Argentina can invoke in this case. We listened attentively to the arguments put to us yesterday morning and today by Argentina. With the greatest respect, nothing that we have heard causes Ghana to change her position.

However, even putting the jurisdictional hurdle to one side and for argument's sake ignoring article 288, paragraph 1, the requirements for provisional measure are plainly not met. Put simply, Mr President, this case also fails on the facts. That is why we have taken the time to take the Members of this distinguished Tribunal through the facts of the case, the various proceedings in national courts, the terms of the waiver of immunity contained in the bond issued by Argentina, the proceedings brought in Ghana, and all the steps taken by the executive branch of my government to ensure the welfare of the *Libertad*'s crew.

Mr President, Members of the Tribunal, for me it was disconcerting and discomforting, because we are dealing in a friendly atmosphere, to hear Argentina's account

of the facts yesterday. In her opening speech, the distinguished Agent for the Argentine Republic went as far as to state that the crew of the *Libertad* "is living practically in a state of arrest". Needless to say, the welfare of the *Libertad*'s crew is taken very seriously by the Ghanaian authorities. Anticipating that the welfare of the crew would also weigh on the Members of this Tribunal, Ghana sought a clarification of the situation from the ports authority; this is to be found at Tab 1 of the Judge's Folder. It is clear from this evidence that the ports authority has taken all possible measures to ensure the welfare of the vessel's crew. The crew members are not under arrest; they are free to leave and return to the vessel as they deem fit. No crew member has been prevented from disembarkation nor has any crew member been detained in any way, shape or form. We invite this honourable Tribunal to assess the real facts with as much care as we know it will when it looks as the law.

There is another point that I feel bound to mention. We have listened most attentively to the presentations made on behalf of Argentina. They are entitled to the fullest respect, and they have our fullest respect. However, I am bound to say that I was surprised that the esteemed Agent of Argentina made as much as she did of the statement that I made to the High Court in Accra, setting forth the views of the Government of Ghana on certain matters before the High Court. It seemed as though the distinguished Agent was portraying my submissions before the High Court as somehow inconsistent with Ghana's submissions before this Tribunal. You will have recognized immediately that there is no inconsistency. In the proceedings between NML and Argentina, the executive arm of the Ghanaian Government, represented by the Attorney General's Department and the Ministry of Foreign Affairs, intervened as a friend of the court – in the capacity of *amicus*. The government adopted a position before the High Court that was supportive of Argentina. We realized that the Argentine Republic had found itself in a difficult position and therefore intervened to assist.

I appeared before the High Court not, I underscore with the greatest respect, in my personal capacity but in my official capacity as a legal adviser to the Ministry of Foreign Affairs, and the views that I expressed reflected what I was authorized to say by the Foreign Minister. In expressing its views, the Government of Ghana acted within the confines of Ghana's domestic laws and in accordance with its Constitution. Despite our best efforts, the High Court's decision did not go Argentina's way, and the views expressed by the executive arm of government of Ghana, which it continues to hold, were not accepted. That case is on appeal, and it is a matter of surprise to us that Argentina has not sought to expedite those proceedings. Given all that you heard yesterday about urgency, one would have thought that Argentina would do all it could to move the appeal along as fast as possible. The Government of Ghana would support such an endeavour, but as it is a mere *amicus* it is not in a position to move matters along at any greater speed than the appellant – Argentina.

Mr President, we hope that Argentina moves those proceedings along with greater speed, and we will do all we can to support them in that endeavour. Indeed, you heard us say yesterday that we are willing to work with Argentina to achieve the earliest possible resolution of this matter. My government does not stand to gain anything from this unhappy state of affairs – in fact, quite the opposite. However, such efforts must be conducted in accordance with our laws and consistent with our strong commitment to the rule of law at both national and international levels.

In coming before this Tribunal, we have had to pay the closest attention to the limits of the Tribunal's jurisdiction. It is plain to us that there is no dispute under the Convention. It is plain to us that the Annex VII tribunal will not have jurisdiction to resolve a dispute in respect of articles 18, 32, 87 and 90 of the Convention, because those provisions are simply not engaged. The fact that Argentina invokes them cannot be sufficient to found jurisdiction. This honourable Tribunal has to take those provisions and the facts and decide whether, *prima facie*, the jurisdiction of the Annex VII tribunal on the merits may be established. We do not

see how this honourable Tribunal could possibly conclude that it may. None of the articles of the Convention invoked by Argentina is relevant to the exercise by Ghana of its sovereign rights over activities conducted in its internal waters.

That does not mean we will not move speedily to constitute the tribunal: in accordance with article 3(c) of Annex VII of the Convention we have appointed an arbitrator, and we are ready to move speedily to the appointment of the three remaining arbitrators. But I must be very clear on our position: we will be bound to oppose the jurisdiction of the Annex VII tribunal; and since that tribunal will have no jurisdiction, it is evident that this Tribunal cannot accede to Argentina's Request for provisional matters to order the provisional measures it has requested – or any provisional measures at all – to cover the short period between now and the constitution of the Annex VII tribunal. This will not be the first case in which the Tribunal has declined to order provisional measures.

That does mean that an order of this Tribunal declining to order provisional measures might not provide some measure of assistance to the parties. It could, for example, record our commitment to the utility of continued cooperation between the parties in achieving a speedy resolution of the matter, and our commitment to be as supportive as we can in expediting the proceedings before the courts of Ghana if that is an approach to which Argentina is attached. Our commitment to work with Argentina is strong and unwavering.

I must say that I was therefore a bit surprised when we heard the proposal that came from the distinguished Agent of Argentina that they do not want to hear anything about the Court of Appeal case, but I want to assure my distinguished counterpart that when the matter comes before the Court of Appeal, if they are minded to activate the process that is available to them, probably I personally will lead the judge to assist, but the ball is in their court.

Mr President, an hour ago we heard the proposal, as I have hinted, by the Argentine Agent, my distinguished counterpart, Ms Susana Ruiz Cerutti, on behalf of her government that Argentina has now decided to withdraw from the Annex VII arbitration and instead to have the matter submitted to a panel before this distinguished Tribunal – provided that Ghana accepts this proposal. We have noted the proposal and it will be considered in due course, after the Tribunal has given its order.

Mr President, by way of conclusion, I would like to take this opportunity to reiterate my sincere gratitude to the Registrar, his staff and also express my thanks to the translators for the exemplary way they have carried out their work. We thank our distinguished colleagues from Argentina for contributing to the positive atmosphere in cooperating with us in these proceedings. We thank you, Mr President and Members of the Tribunal, for according us your attention and your commitment to promoting the rule of law with respect for the 1982 Convention.

Finally, pursuant to article 75 of the Rules of the Tribunal, it remains for me to read out Ghana's submissions.

*The President:*

Thank you, Mr Appreku. I understand that this was the last statement made by Ghana during this hearing. As you said, article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a Party at the hearing its Agent, without recapitulation of the arguments, shall read the Party's final submissions. The written text of these submissions signed by the Agent shall be communicated to the Tribunal and a copy of it shall be transmitted to the other Party.

I now invite the Co-Agent of Ghana, Mr Appreku to take the floor to present the final submissions of the Respondent. You have the floor.

STATEMENT OF MR APPREKU – 30 November 2012, noon

*Mr Appreku:*
Mr President, distinguished Members of the Tribunal, for the reasons set out in our Written Statement and on the basis of the facts and the legal argument put before you today and yesterday afternoon, the Republic of Ghana requests the Tribunal: to reject the request for provisional measures filed by Argentina on 14 November 2012; and to order Argentina to pay all costs incurred by the Republic of Ghana in connection with this request.

Thank you Mr President.

*The President:*
Thank you, Mr Appreku.

**Closure of the Oral Proceedings**
[ITLOS/PV.12/C20/4/Rev.1, p. 14]

*The President:*
This brings us to the end of the hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both the Argentine Republic and the Republic of Ghana. I would also like to take this opportunity to thank both the Agent of Argentina and the Co-Agent of Ghana for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to documentation.

*Le Greffier :*
Monsieur le Président, conformément à l'article 86, paragraphe 4, du Règlement du Tribunal, les parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections concernent la version vérifiée du compte rendu dans la langue officielle utilisée par la partie concernée. Les corrections devront être transmises au Greffe le plus tôt possible et au plus tard le vendredi 7 décembre 2012, à 17 heures, heure de Hambourg.

Merci.

*The President:*
The order in this case is tentatively set to 15 December 2012. The Agents of the Parties will be informed reasonably in advance of any change to this date.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the judgment.

The hearing is now closed.

*(The sitting closes at 1.10 p.m.)*

15 December 2012, p.m.

**PUBLIC SITTING HELD ON 15 DECEMBER 2012, 3 P.M.**

**Tribunal**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* 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 Kohen,
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 Remi Reichhold,
Research Assistant, Matrix Chambers, London, United Kingdom,

*as Adviser;*

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

15 décembre 2012, après-midi

**AUDIENCE PUBLIQUE TENUE LE 15 DÉCEMBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD, KULYK, *juges* ; M. MENSAH, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**L'Argentine est représentée par :**

Mme Susana Ruiz Cerutti,
conseillère juridique du Ministère des affaires étrangères et du culte,

*comme agent ;*

M. Horacio Adolfo Basabe,
chef de la Direction de l'aide juridique internationale, Ministère des affaires étrangères et du culte,

*comme co-agent ;*

*et*

M. Marcelo G. Kohen,
professeur de droit international, Institut de hautes études internationales et du développement, Genève, Suisse,

M. Gerhard Hafner,
professeur de droit international,

M. Holger F. Martinsen,
conseiller juridique adjoint du Ministère des affaires étrangères et du culte,

*comme conseils et avocats ;*

M. Mamadou Hebié,
maître de conférences, master en règlement des différends internationaux, Genève, Suisse,

M. Gregor Novak,
master en droit, Université de Vienne, Autriche,

M. Manuel Fernandez Salorio,
consul général de la République argentine à Hambourg, Allemagne,

Mme Erica Lucero,

troisième secrétaire, membre du Bureau du conseiller juridique, Ministère des affaires étrangères et du culte,

*comme conseillers.*

**Le Ghana est représenté par :**

M. Anthony Gyambiby, Vice-Ministre de la justice et Procureur général adjoint,

*comme agent ;*

Mme Amma Gaisie,
Solicitor-General, bureau principal du Service du Procureur général,

M. Ebenezer Appreku,
directeur du Bureau des affaires juridiques et consulaires, conseiller juridique au Ministère des affaires étrangères,

*comme co-agent et conseil ;*

*et*

M. Remi Reichhold,
assistant de recherche, Matrix Chambers, Londres, Royaume-Uni,

*comme conseiller ;*

M. Peter Owusu Manu,
ministre conseiller, ambassade du Ghana, Berlin, Allemagne.

**Reading of the Order**
[ITLOS/PV.12/C20/5/Rev.1, p. 1]

*Le Greffier :*
Le Tribunal va rendre aujourd'hui son ordonnance dans l'*Affaire de l'« ARA Libertad »*, demande de prompte mainlevée, inscrite au rôle des affaires sous le n° 20, Argentine étant le demandeur et l'Argentine a Fédération de Russie le défendeur.

Le Tribunal a entendu les exposés oraux des parties au cours de 4 audiences publiques qui se sont tenues les 29 et 30 novembre 2012.

Argentina, in its final submissions, requested the prescription by the Tribunal of the following provisional measure pending the constitution of the arbitral tribunal under Annex VII of UNCLOS:

> that Ghana unconditionally enables the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end.
>
> Equally Argentina requests that the Tribunal rejects all the submissions made by Ghana;

Ghana, in its final submissions, requested the Tribunal the following:

> (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;
>
> Mr President.

*The President:*
I now call on the Agent of Argentina, Ms Susana Ruiz Cerutti, to introduce the delegation of Argentina.

*[Ms Ruiz Cerutti notes the representation of Argentina.]*

*The President:*
Thank you, Ms Ruiz Cerutti.

I therefore call on the Co-Agent, Mr Appreku, to introduce the delegation of Ghana.

*[Mr Appreku notes the representation of Ghana.]*

*The President:*
Thank you, Mr Appreku.

I will now read relevant parts from the Order in the *"ARA Libertad" Case. [The President reads the extracts]*

The sitting is now closed.

*(The sitting closes at 3.40 p.m.)*

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The "ARA Libertad" Case (Argentina* v. *Ghana), Provisional Measures.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire de l'« ARA Libertad » (Argentine c. Ghana), mesures conservatoires.*

Le 26 mai 2014
26 May 2014

Le Président
Shunji Yanai
President

Le Greffier
Philippe Gautier
Registrar