INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2012

Public sitting

held on Thursday, 29 November 2012, at 3 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE "ARA LIBERTAD" CASE

(Argentina v. *Ghana)*

Verbatim Record

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

Argentina is represented by:

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

as Agent;

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

as Co-Agent;

and

Mr Marcelo 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.

THE PRESIDENT: Please be seated. 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.

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(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(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.

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.

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.

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.

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*.

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.

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.

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