

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2012**

15 December 2012

<u>List of Cases:</u> No. 20

THE “ARA LIBERTAD” CASE

(ARGENTINA *v.* GHANA)

Request for the prescription of provisional measures

ORDER

Present: (...).

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the fact that the Argentine Republic (hereinafter “Argentina”) and the Republic of Ghana (hereinafter “Ghana”) are States Parties to the Convention,

Having regard to the fact that Argentina and Ghana have not accepted the same procedure for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and Statement of Claims dated 29 October 2012 and submitted by Argentina to Ghana on 30 October 2012 instituting arbitral proceedings under Annex VII to the Convention in a dispute concerning the “detention by Ghana [...] of the warship ‘ARA Fragata Libertad’” of Argentina,

Having regard to the request for provisional measures contained in the Statement of Claims submitted by Argentina to Ghana pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

1. *Whereas*, on 14 November 2012, Argentina filed with the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in a dispute concerning the “detention by Ghana [...] of the warship ‘ARA Fragata Libertad’”;
2. *Whereas*, in a letter dated 9 November 2012 addressed to the Registrar and received in the Registry on 14 November 2012, the Minister of Foreign Affairs and Worship of the Argentine Republic notified the Tribunal of the appointment of Ms Susana Ruiz Cerutti, Legal Adviser of the Ministry of Foreign Affairs and Worship, as Agent for Argentina, and Mr Horacio A. Basabe, Head of the Direction of International Legal Assistance of the Ministry of Foreign Affairs and Worship, as Co-Agent for Argentina;

3. *Whereas*, on 14 November 2012, a certified copy of the Request was transmitted by the Registrar to the Minister for Foreign Affairs and Regional Integration of Ghana, and a further certified copy was transmitted to the Ambassador of Ghana to Germany;

4. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 14 November 2012;

5. *Whereas*, on 16 November 2012, the President, by telephone conference with the Agent of Argentina and the Minister-Counselor of the Embassy of Ghana in Germany, ascertained the views of the Parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

6. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President, by Order dated 20 November 2012, fixed 29 November 2012 as the date for the opening of the hearing, notice of which was communicated to the Parties on 20 November 2012;

7. *Whereas* States Parties to the Convention were notified of the Request, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 20 November 2012;

8. *Whereas*, in the Request for the prescription of provisional measures, Argentina requested the President to “urgently call upon the Parties to act in such a way as will enable any order the Tribunal may make on the request for the provisional measure to have its appropriate effects, as established by Article 90 of the Rules of the Tribunal”;

9. *Whereas*, on 20 November 2012, the President addressed a letter to both Parties calling upon them, in conformity with article 90, paragraph 4, of the Rules, “to avoid taking any measures which might hinder any order the Tribunal may make on the Request for provisional measures to have its appropriate effects”;

10. *Whereas*, by letter dated 22 November 2012, the Deputy Minister for Foreign Affairs and Regional Integration of Ghana notified the Registrar of the appointment of Mr Anthony Gyambiby, Deputy Attorney-General and Deputy Minister for Justice, as Agent for Ghana, and of Mr Ebenezer Appreku, Director/Legal and Consular Bureau, Ministry of Foreign Affairs and Regional Integration, and Ms Amma Gaisie, Solicitor-General, as Co-Agents for Ghana;

11. *Whereas*, since the Tribunal did not include upon the bench a judge of the nationality of Ghana, the Deputy Minister for Foreign Affairs and Regional Integration of Ghana, pursuant to article 17, paragraph 3, of the Statute, informed the Registrar by letter dated 22 November 2012 that Ghana had chosen Mr Thomas A. Mensah to sit as judge *ad hoc* in this case, a copy of which was transmitted to Argentina on 23 November 2012;

12. *Whereas*, since no objection to the choice of Mr Mensah as judge *ad hoc* was raised by Argentina, and no objection appeared to the Tribunal itself, Mr Mensah was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 28 November 2012;

13. *Whereas*, on 27 November 2012, Argentina submitted to the Tribunal an additional document containing the "Motion on Notice for an Order for Committal for Contempt Order 50, Rule 1", issued by the Superior Court of Judicature in the High Court of Justice (Commercial Division), Accra, against the Commander of the *ARA Libertad*, a copy of which was transmitted to Ghana on the same day;

14. *Whereas*, on 28 November 2012, Ghana filed with the Tribunal its Response, a certified copy of which was transmitted by bearer and electronically to the Agent of Argentina on the same day;

15. *Whereas*, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted

to the Tribunal by Argentina on 27 and 28 November 2012 and by Ghana on 28 November 2012;

16. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 28 November 2012 concerning the written pleadings and the conduct of the case;

17. *Whereas*, on 28 November 2012, in accordance with article 45 of the Rules, the President held consultations with the Agent of Argentina and the Co-Agent of Ghana with regard to questions of procedure and transmitted to them a request of the Tribunal pursuant to article 76, paragraph 1, of the Rules, to “receive from both parties precise information on the current situation of the vessel and its crew, including the type of assistance (e.g. water, fuel, food) provided to the vessel”;

18. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

19. *Whereas* oral statements were presented at four public sittings held on 29 and 30 November 2012 by the following:

On behalf of Argentina: Ms Susana Ruiz Cerutti, Legal Adviser, Ministry of Foreign Affairs and Worship,

as Agent,

Mr Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international,

Mr Gerhard Hafner, Professor of International Law, Member of the Institut de droit international,

as Counsel and Advocates;

On behalf of Ghana: Mr Ebenezer Appreku, Director/Legal & Consular Bureau, Legal Adviser, Ministry of Foreign Affairs and Regional Integration of the Republic of Ghana, Accra,

as Co-Agent and 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,

Ms Michelle Butler, Member of the Bar of England and Wales,

as Counsel and Advocates;

20. *Whereas*, in the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors;

21. *Whereas*, during the oral proceedings, on 29 November 2012, Ghana submitted additional documents to the Tribunal, consisting of a letter dated 27 November 2012 from the Ghana Ports and Harbours Authority addressed to Counsel of Ghana, a letter dated 19 November 2012 from the Financial Manager of Tema Port addressed to the Port Director, two affidavits of the Acting Director of Tema Port and a plan of Tema Port, copies of which were transmitted to Argentina on the same day;

22. *Whereas*, during the oral proceedings, on 30 November 2012, Argentina submitted additional documents to the Tribunal, consisting of an affidavit of the Commander of the *ARA Libertad* and an affidavit of the Ambassador of the Argentine Republic to Nigeria, concurrently accredited to Ghana, copies of which were transmitted to Ghana on the same day;

23. *Whereas*, after the closure of the oral proceedings, on 30 November 2012, Ghana submitted to the Tribunal an additional document to which it had referred during the oral proceedings on the same day;

24. *Whereas* a copy of the additional document submitted by Ghana was transmitted to Argentina on the same day and Argentina, by letter dated 3 December

2012, referring to article 90, paragraph 3, of the Rules, requested the Tribunal to determine that “the document produced by Ghana subsequently to the close of the hearing shall not be considered to form part of the case file”;

25. *Whereas* the Tribunal, on 3 December 2012, decided pursuant to article 90, paragraph 3, of the Rules that the document submitted by Ghana on 30 November 2012 after the closure of the hearing would not be considered part of the pleadings in the case and notice of this decision was communicated to both Parties on the same day;

* * *

26. *Whereas*, in the Notification and Statement of Claims dated 29 October 2012, Argentina requested the arbitral tribunal to be constituted under Annex VII (hereinafter “the Annex VII arbitral tribunal”):

to declare that the Republic of Ghana, by detaining the warship “ARA Fragata Libertad”, keeping it detained, not allowing it to refuel and adopting several judicial measures against it:

(1) Violates the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard;

(2) Prevents the exercise of the right to sail out of the waters subject to the jurisdiction of the coastal State and the right of freedom of navigation enjoyed by the said vessel and its crew, pursuant to Articles 18, paragraph 1(b), 87, paragraph 1(a), and 90 of UNCLOS;

[...]

to assert the international responsibility of Ghana, whereby such State must:

(1) immediately cease the violation of its international obligations as described in the preceding paragraph;

(2) pay to the Argentine Republic adequate compensation for all material losses caused;

(3) offer a solemn salute to the Argentine flag as satisfaction for the moral damage caused by the unlawful detention of the flagship of the Argentine Navy, ARA Fragata Libertad, preventing it from

accomplishing its planned activities and ordering it to hand over the documentation and the flag locker to the Port Authority of Tema, Republic of Ghana,

(4) impose disciplinary sanctions on the officials of the Republic of Ghana directly responsible for the decisions by which such State has engaged in the violations of its aforesaid international obligations;

27. *Whereas*, the provisional measure requested by Argentina in the Request to the Tribunal filed on 14 November 2012 is as follows:

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

28. *Whereas*, at the public sitting held on 30 November 2012, the Agent of Argentina made the following final submissions:

For the reasons expressed by Argentina before the Tribunal, pending the constitution of the arbitral tribunal under Annex VII of UNCLOS, Argentina requests that the Tribunal prescribes the following provisional measure:

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

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

29. *Whereas* the submissions presented by Ghana in its Response, and maintained in the final submissions read by the Co-Agent of Ghana at the public sitting held on 30 November 2012, are as follows:

[T]he Republic of Ghana requests the Tribunal:

(1) to reject the request for provisional measures filed by Argentina on 14 November 2012; and

(2) to order Argentina to pay all costs incurred by the Republic of Ghana in connection with this request;

* * *

30. *Considering* that, in accordance with article 287 of the Convention, Argentina, on 30 October 2012, instituted proceedings under Annex VII to the Convention against Ghana in the dispute concerning the frigate *ARA Libertad*;

31. *Considering* that Argentina notified Ghana on 30 October 2012 of the institution of proceedings under Annex VII to the Convention which included a request for provisional measures;

32. *Considering* that, on 14 November 2012, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Argentina submitted to the Tribunal a Request for the prescription of provisional measures;

33. *Considering* that Argentina, in its instrument of ratification of 1 December 1995, made the following declaration under article 298 of the Convention:

The Argentine Government also declares that it does not accept the procedures provided for in Part XV, section 2, with respect to the disputes specified in article 298, paragraph 1(a), (b) and (c);

34. *Considering* that, on 26 October 2012, Argentina made a declaration by which it amended its declaration of 1995 under article 298 of the Convention:

[...] in accordance with article 298 of [the] Convention, the Argentine Republic withdraws with immediate effect the optional exceptions to the applicability of section 2 of part XV of the Convention provided for in that article and set forth in its declaration dated 18 October 1995 (deposited on 1 December 1995) to "military activities by government vessels and aircraft engaged in non-commercial service";

35. *Considering* that, on 15 December 2009, Ghana deposited the following declaration made under article 298 of the Convention:

In accordance with paragraph 1 of Article 298 of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), the Republic of Ghana hereby declares that it does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to the categories of disputes referred to in paragraph 1(a) of article 298 of the Convention;

36. *Considering* that article 290, paragraph 5, of the Convention provides that

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4;

37. *Considering* that therefore the Tribunal, before prescribing provisional measures under article 290, paragraph 5, of the Convention, must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

38. *Considering* that the visit of the frigate *ARA Libertad* to the port of Tema, a port near Accra, Ghana, from 1 to 4 October 2012 was the subject of an exchange of diplomatic notes between the Parties and that, in response to a note verbale of 21 May 2012 from the Embassy of Argentina in Abuja, Nigeria, concerning the organization of the visit of the *ARA Libertad* to the port of Tema from 1 to 4 October 2012, the High Commission of Ghana in Abuja, by a note verbale of 4 June 2012, informed the Embassy that “the Ghanaian Authorities have granted the request”;

39. *Considering* that Argentina contends that the detention of the *ARA Libertad* violates the rights recognized by the Convention and argues that the dispute between Argentina and Ghana relates to the interpretation and application of the Convention, in particular articles 18, paragraph 1 (b), 32, 87, paragraph 1 (a), and 90;

40. *Considering* that Argentina further contends that

[t]he fact that the *ARA Libertad* is currently in forced detention prevents Argentina from exercising its right to [have it] leave the port of Tema and Ghana’s jurisdictional waters, in accordance with the right of innocent passage [...]

The forcible detention of the frigate prevents Argentina from using this emblematic vessel to exercise its navigational rights, as guaranteed by the Convention, in the different maritime areas. It prevents the *ARA Libertad* from completing its itinerary, established in agreement with third countries, from ensuring it carries out its regular maintenance programme, and from

being used as a training vessel indeed from being used full-stop. Its detention is also in direct violation of Argentina's right to benefit from the immunity attaching to its warship;

41. *Considering* that Argentina states that, as set out in article 18, paragraph 1(b), of the Convention, "the definition of innocent passage includes not only the right to proceed to the internal waters, but also the right to proceed from the internal waters; and it is particularly this latter right that has been denied to Argentina with respect to the frigate *ARA Libertad*";

42. *Considering* that Argentina further states that "[t]he frigate *ARA Libertad* was anchored at Tema [...] on the basis of consent by Ghana" and "[a]ccordingly, the frigate was lawfully in the Tema port" and "[i]t was fully entitled to leave the port, as agreed, on 4 October 2012 and to make use of the right of innocent passage as guaranteed by article 17 of the Convention";

43. *Considering* that Argentina argues that a "right in relation to which Argentina seeks protection is the freedom of the high seas regarding navigation [...] as guaranteed by article 87 of the Convention", and that the detention of the frigate *ARA Libertad* by Ghana "prevents it from exercising also this fundamental freedom";

44. *Considering* that Argentina states that article 32 of the Convention confirms a well-established rule of general international law, and that, "under customary international law, as it is recognized and enshrined in the Convention, the immunity of warships is a special and autonomous type of immunity which provides for the complete immunity of these ships";

45. *Considering* that Argentina further states that article 32 of the Convention "uses the formulation 'nothing in this Convention' instead of 'nothing in this part'", which "clearly proves that its application extends beyond the part regarding the territorial sea";

46. *Considering* that Argentina argues that article 32 of the Convention determines the immunity of warships "with respect to the entire geographical scope of the

Convention” and that the “immunity accorded to warships is identical in internal waters as it is in the territorial sea”;

47. *Considering* that, contrary to Ghana’s position that article 32 of the Convention does not set forth an obligation, establishing a rule of immunity, and is a mere “saver clause”, Argentina argues that, “article 32 explicitly refers to such immunity so that warship immunity is incorporated into the Convention”;

48. *Considering* that Argentina argues that article 8 of the Convention concerning the definition of internal waters also comes under the provisions of Part II of the Convention entitled “Territorial Sea and Contiguous Zone”;

49. *Considering* that Argentina refers to article 236 of the Convention which states that

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

50. *Considering* that Argentina contends that the immunity of warships relates to the whole maritime area, and points in particular to the provisions of the Convention regarding the protection and preservation of the marine environment, such as article 211, paragraph 3, concerning the entry of foreign vessels into ports or internal waters and article 218 concerning enforcement by port States, which according to Argentina, shows clearly that article 236 applies to the regime of ports;

51. *Considering* that Ghana maintains that there is no dispute between Ghana and Argentina on the interpretation or application of the Convention and that consequently the Tribunal does not have jurisdiction to order the provisional measures requested by Argentina;

52. *Considering* that Ghana contends that the Annex VII arbitral tribunal has no *prima facie* jurisdiction concerning the dispute presented by Argentina since “[o]n their face [...]”

none of those provisions [articles 18, paragraph 1 (b), 32, 87, paragraph 1 (a), and 90] is applicable to acts occurring in internal waters”;

53. *Considering* that Ghana is of the view that article 18, paragraph 1, of the Convention, which defines “passage” as navigation through the territorial sea without entering the internal waters of the coastal State or for the purpose of entering or leaving the internal waters, is of no relevance for the present case as the ship “is not in Ghana’s territorial sea”;

54. *Considering* that Ghana contends that articles 87 and 90 of the Convention relate to freedom of the high seas and the right of navigation on the high seas, respectively, and that they are not directly relevant to the immunity of a warship in internal waters;

55. *Considering* that Ghana argues that article 32 of the Convention refers to the immunity of warships in the territorial sea and does not refer to any such immunity when in internal waters and that “it was understood that the regime of ports and internal waters was excluded [...] from the 1982 Convention”;

56. *Considering* that Ghana maintains that the coastal State enjoys full territorial sovereignty over internal waters, and that any foreign vessel located in internal waters is subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State;

57. *Considering* that Ghana contends that the immunity of a warship in internal waters does not involve the interpretation and application of the Convention and that, to the extent that such rules might exist, they could only be found outside the Convention, whether under other rules of customary or conventional international law;

58. *Considering* that Ghana maintains that “[a]rticle 288(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”;

59. *Considering* that Ghana states that article 236 of the Convention “is limited to the protection and preservation of the marine environment, which is not in issue in this case”;

* * *

60. *Considering* that at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

61. *Considering* that article 18, paragraph 1(b), of the Convention on the meaning of passage in the territorial sea and articles 87 and 90 concerning the right and freedom of navigation on the high seas do not relate to the immunity of warships in internal waters and therefore do not seem to provide a basis for *prima facie* jurisdiction of the Annex VII arbitral tribunal;

62. *Considering* that article 32 of the Convention reads:

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

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

63. *Considering* that article 32 of the Convention states that “nothing in this Convention affects the immunities of warships” without specifying the geographical scope of its application;

64. *Considering* that, although article 32 is included in Part II of the Convention entitled “Territorial Sea and Contiguous Zone”, and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention;

65. *Considering* that, in the light of the positions of the Parties, a difference of opinions exists between them as to the applicability of article 32 and thus the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention;

66. *Considering* that, having regard to the submissions of the Parties and the arguments presented in support of these submissions, the Tribunal is of the view that article 32 affords a basis on which *prima facie* jurisdiction of the Annex VII arbitral tribunal might be founded;

67. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

* * *

68. *Considering* that article 283, paragraph 1, of the Convention reads as follows:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

69. *Considering* that Argentina contends that the requirements of article 283 of the Convention have been satisfied in light of its efforts to exchange views and resolve the dispute and that it refers in this respect to the letter dated 4 October 2012 sent by the Minister of Foreign Affairs of Argentina to his Ghanaian counterpart, to requests made by the Argentine Ambassador accredited to Ghana as well as to the fact that it sent to Accra a high-level delegation which met with high officials of Ghana from 16 to 19 October 2012, and *considering* that these facts are not disputed by Ghana;

70. *Considering* that Argentina maintains that such exchanges of views and negotiations have failed to resolve the dispute;

71. *Considering* that the Tribunal has held that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (*MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60);

72. *Considering* that, in the circumstances of the present case, the Tribunal is of the view that the requirements of article 283 are satisfied;

* * *

73. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and that the urgency of the situation so requires;

74. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision;

75. *Considering* that, with reference to the preservation of the rights of the parties, Argentina states that

Ghana’s action is producing an irreparable damage to the Argentine rights in question, namely the immunity that the Frigate ARA Libertad enjoys, the exercise of its right to leave the territorial waters of Ghana, and its freedom of navigation more generally;

76. *Considering* that Argentina states that “[o]n 7 November the Port Authority agents forcibly attempted to board and move the Frigate ARA Libertad” and contends that

[t]he attempt by the government and judiciary system of Ghana to exercise jurisdiction over the warship, the application of measures of constraint and the threat of further measures of attachment against the Frigate ARA Libertad,

not only preclude Argentina from exercising its rights for a prolonged period, but also entail a risk that these rights will be irreparably lost;

77. *Considering* that Argentina further states that

[t]he detention of the warship is [...] a measure that disrupts the organisation of the armed forces of a sovereign State and an offence to one of the symbols of the Argentine Nation that hurts the feelings of the Argentine people, the effects of which are only compounded by the passage of time;

78. *Considering* that Ghana maintains that it “does not accept that Argentina has suffered irreparable harm due to the temporary holding of the ARA Libertad at the Tema Port pursuant to an order of the Ghanaian High Court”;

79. *Considering* that Ghana further maintains that “there is no real or imminent risk of irreparable prejudice to Argentina’s rights caused by the ongoing docking of the vessel” at the port of Tema;

80. *Considering* that Ghana contends that

Argentina has not established that the provisional measures it has requested are necessary or appropriate because it has not demonstrated that it will suffer a real and imminent risk of irreparable prejudice to its rights such as to warrant the imposition of the measures;

81. *Considering* that, with reference to the urgency of the situation, Argentina states that

[i]f the provisional measure requested is not ordered, the involuntary presence of Frigate ARA Libertad and its crew in the Tema port will be left at the mercy of the will of the Ghanaian State, which continues to detain the warship contrary to international law;

82. *Considering* that Argentina states that “[f]urther attempts to forcibly board and move the Frigate without the consent of Argentina would lead to the escalation of the conflict and to serious incidents in which human lives would be at risk”;

83. *Considering* that Argentina contends that the risk of disregard of the warship’s immunity is real and serious because “the Ghanaian judicial authorities have stated their intention to rule on the merits [of the case] and, notwithstanding the immunities

enjoyed by the *ARA Libertad*, on the application for execution of the judgment concerning the warship”;

84. *Considering* that Argentina states that the threat to prosecute the Commander of the *ARA Libertad* “for being in contempt of court as a result of the events of 7 November adds a new and flagrant denial to the immunities of Argentina, the *ARA Libertad* and its military staff”;

85. *Considering* that Argentina maintains that “the degradation of the general conditions of the warship due to the impossibility to carry out the scheduled maintenance of its systems, [is] compromising the vessel's safety for prolonged navigation”;

86. *Considering* that Argentina states that

the time required for the constitution of the arbitral tribunal, for the conduct of the relevant procedure and for the award to be rendered makes it impossible for Argentina to wait for the completion of the procedure without seriously impairing the exercise of its rights, or their very existence;

87. *Considering* that Argentina further states that

any measure which would imply a condition for the release of the *ARA Libertad*, whether it be financial or otherwise, would mean a denial of the immunity enjoyed by warships under the Convention and international law;

88. *Considering* that Ghana contends that “there is no urgency such as to justify the imposition of the measures requested, in the period pending the constitution of the Annex VII arbitral tribunal”;

89. *Considering* that Ghana states that, “[c]ontrary to the Argentina’s submission, there is no real or imminent risk of prejudice to Argentina’s rights caused by the ongoing docking of the *ARA Libertad* at Port Tema”;

90. *Considering* that Ghana argues that “[t]he events of 7 November 2012 in no way demonstrate that there is a risk of irreparable prejudice to Argentina’s rights prior to the imminent formation of the Annex VII Tribunal”;

91. *Considering* that Ghana states that “the Port Authority has been very careful to ensure that the ship and its remaining crew have been and will continue to be provided with all requirements to ensure their full liberty, safety and security” and that

in exercising their duty to enforce the order of the Ghanaian High Court, the Port Authority has acted reasonably in avoiding the use of excessive force and has taken into account the historical and cultural value of the vessel in trying to protect it from all possible risks – including risks to navigational safety and risks of clinker and cement contamination;

92. *Considering* that Ghana claims that “Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security to the Ghanaian courts” and that “[a]ccordingly, while the dispute remains pending before the Ghanaian courts, there is no need for any additional remedy by this Tribunal in order to prevent any prejudice being caused to the rights of Argentina”;

* * *

93. *Considering* that in accordance with article 29 of the Convention

“warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;

94. *Considering* that a warship is an expression of the sovereignty of the State whose flag it flies;

95. *Considering* that, in accordance with general international law, a warship enjoys immunity, including in internal waters, and that this is not disputed by Ghana;

96. *Considering* that, in accordance with article 279 of the Convention, “States Parties shall settle any dispute between them concerning the interpretation or

application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations”;

97. *Considering* that any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States;

98. *Considering* that actions taken by the Ghanaian authorities that prevent the *ARA Libertad*, a warship belonging to the Argentine Navy, from discharging its mission and duties affect the immunity enjoyed by this warship under general international law;

99. *Considering* that attempts by the Ghanaian authorities on 7 November 2012 to board the warship *ARA Libertad* and to move it by force to another berth without authorization by its Commander and the possibility that such actions may be repeated, demonstrate the gravity of the situation and underline the urgent need for measures pending the constitution of the Annex VII arbitral tribunal;

100. *Considering* that, under the circumstances of the present case, pursuant to article 290, paragraph 5, of the Convention, the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties;

101. *Considering* that Argentina and Ghana shall each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal;

102. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

103. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

104. *Considering* that, in the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that parties also submit reports to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise;

105. *Considering* that it may be necessary for the Tribunal to request further information from the Parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

106. *Considering* that the present Order in no way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the merits themselves, and leaves unaffected the rights of Argentina and Ghana to submit arguments in respect of those questions (see *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010*, *ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 80);

107. *Considering* that, in the present case, the Tribunal sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

108. *For these reasons*,

THE TRIBUNAL,

(1) Unanimously,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

Ghana shall forthwith and unconditionally release the frigate *ARA Libertad*, shall ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the

port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate *ARA Libertad* is resupplied to that end.

(2) Unanimously,

Decides that Argentina and Ghana shall each submit the initial report referred to in paragraph 103 not later than 22 December 2012 to the Tribunal, and authorizes the President to request such information as he may consider appropriate after that date.

(3) Unanimously,

Decides that each Party shall bear its own costs.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this fifteenth day of December, two thousand and twelve, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Argentine Republic and the Government of the Republic of Ghana, respectively.

(signed)

Shunji YANAI
President

(signed)

Philippe GAUTIER
Registrar

Judge Paik appends a declaration to the Order of the Tribunal.

Judge Chandrasekhara Rao appends a separate opinion to the Order of the Tribunal.

Judges Wolfrum and Cot append a joint separate opinion to the Order of the Tribunal.

Judge Lucky appends a separate opinion to the Order of the Tribunal.