

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2012

Public sitting

held on Friday, 30 November 2012, at 12 noon,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

## THE “ARA LIBERTAD” CASE

*(Argentina v. Ghana)*

---

**Verbatim Record**

---

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

---

*Argentina is represented by:*

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

*as Agent;*

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

*as Co-Agent;*

*and*

Mr Marcelo 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.

1 **THE PRESIDENT:** The Tribunal will continue the hearing in the “*ARA Libertad*”  
2 Case. We will now hear the second round of oral arguments presented by Ghana. I  
3 give the floor to Mr Sands.  
4

5 **MR SANDS:** Mr President, Members of the Tribunal, we shall be very brief in our  
6 second round. We do not want to repeat what is set out in our Written Statement or  
7 what we said yesterday. It is very clear to us that the Members of the Tribunal are  
8 fully on top of this dossier. Therefore, instead we will limit ourselves to responding to  
9 the points raised this morning. That is necessarily meant, and we apologize to the  
10 interpreters that we are not in a position to give them a written text in advance, but  
11 we thought that it would be more useful to home in on the most important points. I, of  
12 course, make the general reservation that we maintain the totality of our arguments  
13 and home in on these points because we think that they are usefully addressed at  
14 this stage.  
15

16 I will make six points in relation to what Argentina had to say this morning, and then I  
17 will invite you to ask the distinguished Agent of Ghana to come to the bar to  
18 conclude Ghana’s submissions for this stage of the proceedings.  
19

20 I should say that we were pretty surprised about what Argentina did not address this  
21 morning, and we thought that that was rather telling. It was quite selective in its  
22 choice of articles of the Convention, although we appreciate that they have now seen  
23 fit to go into some of the detail. They did not, for example, say anything about  
24 article 2, paragraph 3, of the Convention, which we had raised yesterday – and I will  
25 say more about that in due course; they did not say anything about the bond or its  
26 waiver of immunity. They seem to be saying to you that you can ignore that bond  
27 completely and can ignore completely the terms of their waiver of immunity,  
28 whatever it may mean, including waiver of immunity in relation to enforcement. We  
29 say that that is a surprising position to adopt in these proceedings.  
30

31 Let me deal with the first point, which is very brief, that is on the facts that led up to  
32 the arrest and impounding of the vessel. The point that I want to make here is a  
33 simple one. We were criticized very gently and generously by Professor Hafner for  
34 somehow suggesting that the judgments in the United States and the United  
35 Kingdom, to which we took you, were of significance or that they related to the  
36 vessel. Of course, we were very careful in what we said. We did not say that those  
37 judgments were about the vessel; we said that they were about the bond and the  
38 waiver of immunity, including in relation to enforcement, and that is a significant  
39 distinction.  
40

41 However, for the avoidance of doubt, we want to be clear that we took you to those  
42 cases because we do not think that you can understand the facts without having the  
43 totality of the context, and those cases, unhappy as they may be for Argentina, are a  
44 significant part of that context; they are not judgments that are immaterial to these  
45 proceedings, as Mr Hafner said this morning. We therefore rely on these cases not  
46 to express any view on their substantive content or their merits but simply to explain  
47 how the circumstances in which the events that have brought us here for the past  
48 couple of days have happened.  
49

1 In relation to those judgments, if we understood him correctly, Professor Hafner said  
2 that the proper place in which to raise those issues is before the courts of Ghana. Of  
3 course, we agree with that; that is exactly where those issues ought to be raised,  
4 and towards the end of my presentation I will come back to talk about the role of the  
5 courts of Ghana and their relationship to these proceedings.  
6

7 Let me turn to our second point in relation to *prima facie* jurisdiction. We are pleased  
8 that Argentina has finally decided to engage with this issue and has seen fit to  
9 descend into the details of the four provisions on which they rely in support of their  
10 claim. I have to say that overnight we have had an opportunity to read the transcript  
11 of yesterday's proceedings, to look at all the authorities cited and to note what  
12 authorities Argentina has and has not referred to. I mentioned yesterday that it was  
13 rather striking that Argentina had almost nothing to say about the four provisions of  
14 the Convention on which they purport to rely. Re-reading the transcript this morning  
15 for a second time, it is equally striking how little they had to say about your  
16 jurisprudence on all these matters. It is as though, rather like the waiver of immunity  
17 and the bond itself, they would like to wish away this Tribunal's jurisprudence on  
18 these matters.  
19

20 By way of an aside, I should say from experience as sitting as an arbitrator that I find  
21 it incredibly helpful when counsel address submissions on the authorities that are  
22 most unhelpful, because often judges faced with an authority that is on the point but  
23 unhelpful want an explanation of why it is distinguishable or should not be followed  
24 on the facts of a particular case. That is not a criticism; it is simply a different style of  
25 advocacy. We are in a fortunate position on the side of Ghana that there really are  
26 no authorities unhelpful to our case. We are able to rely very fully on the authorities.  
27

28 There is one recent authority that is very unhelpful to Argentina, and they made no  
29 effort to address it yesterday, nor did they mention it today, and we think that that  
30 absence is rather revealing. It is, of course, the case of the *Louisa*, which recently  
31 came before the Tribunal and with which many of you will be far more familiar than I,  
32 between Saint Vincent and the Grenadines and Spain. I re-read it at about 3 o'clock  
33 in the morning together with the separate and dissenting opinions, so I am a little  
34 more familiar with it than I was yesterday, though I had of course read it before. It is  
35 an instructive and rather helpful decision. Reading the separate and dissenting  
36 opinions helped me to re-frame the question of *prima facie* jurisdiction, which is  
37 addressed quite fully by some of the judges, in a slightly different way.  
38

39 Argentina has asserted that four provisions of the Convention have been violated  
40 because of Ghana's treatment of the *Libertad* in the internal waters of Ghana.  
41 Another way of putting the issue, perhaps in the form of a question, is: are any of the  
42 four articles of the Convention that have been invoked by Argentina, that is  
43 articles 18, 32, 87 and 90, relevant to the exercise by Ghana of its sovereign rights  
44 over activities conducted in its internal waters? In a sense, that is the nub of the  
45 issue.  
46

47 We need only raise that question to come immediately to the answer, which is  
48 obviously negative. On their face – we need not go any further – none of those  
49 provisions is applicable to acts occurring in internal waters. On their face, none has  
50 anything to say about any issue of immunity or waiver or immunity in internal waters.

1 Therefore, *prima facie* on the face of these provisions themselves, the Annex VII  
2 tribunal does not have jurisdiction and you are not able to prescribe any provisional  
3 measures under article 290, paragraph 5. We say that you do not need to go beyond  
4 the face of these four provisions to conclude that sovereign acts occurring in internal  
5 waters do not engage these provisions.

6  
7 This morning Professor Hafner put one of those provisions, article 32, up on your  
8 screen, but I fear that it did not help his cause. He did not put up articles 18, 87 or  
9 90. It is very clear – I read it on the screen, as you will have read it on your screens  
10 this morning – that nothing in this Convention affects the immunities of warships and  
11 other government ships operated for non-commercial purposes. The provision does  
12 not set forth an obligation establishing a rule of immunity. It is a saver clause. It  
13 merely makes clear that the Convention’s provisions in the territorial sea will have no  
14 impact on immunity rules, but it is only in relation to the territorial sea. Indeed,  
15 nothing in the Convention deals with the status of ships in port.

16  
17 We referred you to the writings of Professors Churchill and Lowe, and this morning  
18 counsel for Argentina said absolutely nothing to rebut the review of those two  
19 distinguished authorities, and there is nothing to rebut them, because they are right  
20 and because the Convention simply does not regulate these matters.

21  
22 We have not, and do not need to at this limited phase of the proceedings, burdened  
23 you with the history of the agreement that the 1982 Convention would not regulate  
24 the status of vessels in internal waters, but I will now refer you very briefly to the  
25 relevant little story of how that happened.

26  
27 If you go backwards in time from the 1982 Convention to the Conference on the Law  
28 of the Sea, to the 1958 Convention, back through the work of the International Law  
29 Commission, then back to the Preparatory Committee for the Hague Conference for  
30 the Codification of International Law and trace the work on the territorial waters, you  
31 will see that that is the starting point, and in that context the Hague Preparatory  
32 Committee asked States whether the subject of jurisdiction over foreign ships in  
33 ports should be included as a subject at the conference. The decision taken was not  
34 to include any clause on that subject in the proposed convention, and that set the  
35 scene for everything that followed.

36  
37 That work, five or so decades before the 1982 Convention, informed the subsequent  
38 work of the International Law Commission, the negotiations that led to the 1958  
39 Territorial Sea Convention and the later negotiations and the text that became the  
40 1982 Convention. At each stage it was understood that the regime of ports and  
41 internal waters was excluded from the relevant instrument and from the 1982  
42 Convention, on the basis, as one member of the International Law Commission put it  
43 in 1954, that it was “universally agreed” that the regime of ports and internal waters  
44 was “different from that of the territorial sea”.

45  
46 The 1982 convention contains no rule on the status of foreign vessels in internal  
47 waters and ports, on immunity in internal waters and ports or on the waiver of  
48 immunity in internal waters and ports of a kind that can be relied upon in these  
49 proceedings by Argentina. It is as simple as that. Argentina has provided you with

1 absolutely nothing that contradicts that position, and they have had quite a few  
2 weeks to prepare for this phase of the proceedings, unlike our side.  
3 What they did do is to ignore a provision that we think is rather relevant. They had nothing to  
4 say about article 2, paragraph 3. Let us have a look at that in a little more detail. The title is  
5 "Legal status of the territorial sea, of the air space over the territorial sea and of its bed and  
6 subsoil". Paragraph 1: "The sovereignty of a coastal State extends, beyond its land  
7 territory and internal waters and, in the case of an archipelagic State, its archipelagic  
8 waters, to an adjacent belt of sea, described as the territorial sea."

9  
10 Then we go to paragraph 3: "The sovereignty over the territorial sea is exercised  
11 subject to this Convention and to other rules of international law."

12  
13 Argentina wants you to re-write paragraph 3. It wants you to say "the sovereignty  
14 over internal waters and the territorial sea is exercised subject to this Convention  
15 and to other rules of international law"; but of course it does not say that, and the fact  
16 that it does not say that is absolutely dispositive of this case. It is plain the drafters of  
17 the Convention did not intend to regulate sovereign acts in internal waters by  
18 reference to the Convention or other rules of international law. If they had wanted to,  
19 they would have done that. So no reference is made to that, and we think that that is  
20 really very telling. Instead we did get references to new provisions that have never  
21 before been mentioned in these proceedings, for example reference to article 25. I  
22 have to say that we had to watch it as we were being addressed this morning. I put it  
23 up on my screen and I saw that article 25 says "rights of protection of the coastal  
24 State" and paragraph 1 says that the coastal State may take the necessary steps "in  
25 its territorial sea" to prevent passage that is not innocent. "In the case of ships  
26 proceeding to internal waters or a call at a port facility outside internal waters, the  
27 coastal State" has certain rights. It is just crystal clear from the text, that it has  
28 absolutely nothing to do with the regulation of matters in internal waters.

29  
30 Another provision that was thrown at us today for the first time was article 36. What  
31 does that say? It is in Part XII of the Convention. It is limited to the protection and  
32 preservation of the marine environment, which is not in issue in this case. It basically  
33 says that all the provisions of the Convention regarding the protection and  
34 preservation of the marine environment do not apply to warships and certain other  
35 ships. There you have a clear rule that extends to certain waters under article 218  
36 that are governed, but it is not a general rule. It is plainly not a general rule and it can  
37 provide no assistance in circumstances of a case that has nothing to do with the  
38 protection and preservation of the marine environment.

39  
40 Another provision that was mentioned newly this morning was article 8. What does  
41 that say? Well, finally we have a provision that does use the words "internal waters".  
42 Again, look at the text of the Convention to see what it says. Paragraph 1 says:

43  
44 Except as provided in Part IV, waters on the landward side of the baseline  
45 of the territorial sea form part of the internal waters of the State.

46  
47 2. Where the establishment of a straight baseline in accordance with the  
48 method set forth in article 7 has the effect of enclosing as internal waters  
49 areas which had not previously been considered as such, a right of  
50 innocent passage as provided in this Convention shall exist in those waters.  
51



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

13  
14 I come to my third point. Again, it is a brief one. Argentina is constantly taking you to  
15 rules of international law arising outside of the Convention. We were presented with  
16 a lengthy and excellent discourse yesterday by Professor Hafner on the law of State  
17 immunity and a little bit on waivers of immunity. We listened attentively and with  
18 great interest; but you will have seen that virtually the totality of that presentation was  
19 to do with rules that arise and exist outside of the Convention. They have done it  
20 again today. Today we were presented with an argument, bootstraps of sort, related  
21 to innocent passage, but the gist of the argument was that there had been an  
22 exchange of letters between Argentina and Ghana and that this somehow implicated  
23 a violation of Ghana's obligation to present Argentina with a right of innocent  
24 passage: it does absolutely nothing of the sort. Firstly, we do not accept that there is  
25 an agreement that has been violated. Even assuming that there had been an  
26 agreement in the exchange of letters, if anything has been violated it is the  
27 agreement in that exchange of letters, not anything else – not the Convention on the  
28 Law of the Sea. You cannot have two States enter into an agreement in that way and  
29 then argue, "it is not the agreement that has been violated but some other  
30 international agreement that is in some way connected, so we can bootstrap  
31 ourselves into a tribunal that doesn't have jurisdiction" in relation to a dispute  
32 concerning exchanges of letters.

33  
34 The fourth point that we make is in relation to the place of the merits on all of these  
35 issues: Mr Kohen said this morning, if I understood him correctly, that by addressing  
36 the merits of the four provisions on which Argentina rests its case for jurisdiction, we  
37 have sort of stumbled into confirming that there is an arguable or plausible case. It is  
38 plain that we have not done that. We read with interest paragraph 12 of Judge  
39 Wolfrum's opinion in the *M/V "Louisa" Case* which I think summarizes the position  
40 rather clearly in a really, I would have thought, non-contentious sort of way.

41  
42 On the basis of the jurisprudence of the ICJ it may be summarized that –  
43 for an international court or tribunal to assume *prima facie* jurisdiction – it is  
44 not sufficient that an applicant merely invokes provisions which, read in an  
45 abstract way, may provide theoretically a basis for the jurisdiction of the  
46 court or tribunal in question. On the contrary, it is necessary for the  
47 adjudicative body to take into account the facts...

48  
49 which we have done

50

1 ...which are known to it at the moment of deciding on provisional measures  
2 and to consider whether on this basis, together with legal basis invoked by  
3 the applicant, *prima facie* jurisdiction on the merits may be established.  
4 Such considerations cannot be left to the merits phase.  
5

6 With great respect to all members of the Bench, we think that that is the right  
7 approach. You cannot just keel over the moment a Party invokes certain provisions  
8 which, as we have explained to you, on their face have nothing to do with the subject  
9 matter that has arisen in these proceedings.  
10

11 Let me turn to the fifth point, which is more on the factual side, and move on to the  
12 question of irreparable harm and urgency. We do not have very much to add to what  
13 was said yesterday. The facts on the ground, frankly, are rather clear and there is  
14 not much of a difference between the two Parties as to the present situation. There is  
15 no denial on the part of Argentina that the crew is anything other than completely  
16 free to come and go as they wish, and there really is not any claim that anything  
17 untoward has happened except on 7 November. We have explained what happened  
18 in those circumstances, and we read with great interest the affidavits that have come  
19 in today which are, frankly, completely consistent with the account that we have  
20 given.  
21

22 We read that the gravamen of the distinguished Argentinian Ambassador in Ghana's  
23 affidavit is that she was delayed for fifteen minutes from entering the port. That is  
24 what this is about: fifteen minutes. She confirmed that she was in a rented vehicle  
25 that did not have diplomatic plates. Just pause for a moment and ask yourself the  
26 question: comparing the situation that was raised by our distinguished friends in  
27 relation to the Iran hostages case - a delay of fifteen minutes to enter a port facility. It  
28 was then followed by, apparently, a further delay as it says here of 45 minutes to get  
29 on board the boat. We explained yesterday that that was due to the gangway being  
30 raised and there was an issue about bringing the gangway down, and that took some  
31 time to resolve until apparently the crew realized who the individual was who wanted  
32 to get on board.  
33

34 If at the end of the day this case and the facts on 7 November are about an hour's  
35 delay, this really is not something that ought to be detaining the International  
36 Tribunal for the Law of the Sea in Hamburg, with great respect to our friends and  
37 with even greater respect to this Tribunal.  
38

39 We heard more about re-fuelling in the presentation this morning. This really is not a  
40 significant issue, but since the other Party keeps coming back to it, let us just be  
41 clear about what the situation is here. Justice Frimpong's order is silent on the  
42 question of re-fuelling. Overnight I asked for an account of what has actually  
43 happened in relation to the re-fuelling issue and what we understand to be the case  
44 is that at the end of the hearing in which the order was being determined Judge  
45 Frimpong was asked by counsel for Argentina how they were to go about re-fuelling  
46 the ship consistent with the terms of the order. Apparently it is not on the transcript  
47 because by this point he was walking away from his desk but Justice Frimpong  
48 replied by stating that this was such a minor matter that it was not something that he  
49 ought to be called upon to consider but rather that the parties themselves ought to

1 discuss and agree upon, and then file a clarification of their agreement with the  
2 registry of the court to the extent that this was necessary.

3  
4 The results of our inquiries overnight have been that counsel for NML and Argentina  
5 have apparently not been able to reach an agreement on that matter. That is all  
6 there is to it. Ghana is entirely comfortable with whatever agreement the Parties  
7 come up with on that issue and has not in any way supported or is associated with a  
8 desire to prevent the re-fuelling of the vessel. That is what it is about.

9  
10 Since we are on the subject of the Ghanaian courts, let me come to my sixth point,  
11 the courts of Ghana. It does seem that Argentina has a certain reluctance to engage  
12 with the internal judicial processes in Ghana to resolve this matter, and we can  
13 understand that there would be a general reluctance. What we find more difficult to  
14 understand is that they put great store in seeking a solution from the executive  
15 branch, from the Government of Ghana, whilst apparently not appreciating the extent  
16 to which that branch is distinct from and constrained by a completely independent  
17 judicial branch, but even against this background, having accepted the jurisdiction by  
18 participating in the proceedings and having obtained the order, it is very striking as to  
19 what they have and have not done. When the order came down, they did not rush to  
20 instruct their lawyers to file and appeal against the ruling of the Ghanaian court that  
21 was detaining their ship. In fact, they waited a full 12 days before filing an appeal.

22  
23 I have to tell you, from my own practice as a barrister involved in several cases of  
24 this kind, when you are facing a situation of urgency, as we have been told is the  
25 case, you file immediately. In fact, you usually have the appeal ready when the order  
26 comes down, and it goes in straight away because you want the clock to start  
27 running to get the proceedings going forward as quickly as you can. That has  
28 certainly happened in the *Pinochet* case in the English courts, a case in which I was  
29 involved.

30  
31 The appeal was filed in the Ghanaian courts and there it has sat, because under the  
32 law of Ghana it is in part for the appellant in that case to seek to expedite  
33 proceedings and to move things on, and Argentina cannot be said to be apparently  
34 seeking a vigorous prosecution or appeal of this matter in the courts of Ghana. The  
35 necessary administrative steps that Argentina, as appellant, needs to take in order to  
36 have the case heard quickly are all outstanding. For example, it has not yet procured  
37 the service on the parties of something I am told is called a Form 6 document, which  
38 signals the point from which time begins to run for the appeal and requires the  
39 judges to act within limited time frames. When I heard that, I was surprised. We have  
40 been hearing about all this urgency but in fact, if you look at the matter, they do not  
41 seem to be treating it with any degree of urgency in the Ghanaian court system, in  
42 which appeal is available before an independent judiciary.

43  
44 You heard yesterday from the distinguished Agent of Ghana what the position of  
45 Ghana was in relation to the first instance proceedings, and you also heard that  
46 position would be maintained in future proceedings, but Ghana is merely *amicus* in  
47 the proceedings and, as an *amicus*, the executive branch has no power to move the  
48 proceedings along. You heard yesterday and you will hear again shortly that if  
49 Argentina wants to expedite the proceedings, Ghana will be completely supportive of

1 that, and that Ghana will maintain the position that it is taking in the domestic  
2 proceedings.

3  
4 Similarly, despite the passage of time since the order having been adopted,  
5 Argentina has filed no application to abridge the time for the hearing of the appeal,  
6 and it has filed no application, for example, to have judges sit during the impending  
7 vacation from the legal term, which is about to hit us. These are all things that  
8 normally one would expect to happen but none of them have been done.

9  
10 While I am on the subject of proceedings in the Ghana courts, can I just show you  
11 the file? This is the court file. (*Indicating*) I must say, I have just seen this since I  
12 arrived in Hamburg and I am not going to claim that I have read the whole thing.  
13 I have not read the whole thing. I assume our distinguished friends on the Argentine  
14 side have access to the file. They are a party to it. So this is not a matter which has  
15 been dealt with lightly, it has to be said.

16  
17 However, I did take some time very late into the morning to have a look at what was  
18 in the file. We are perfectly happy to make the entire contents of the file available to  
19 this Tribunal. Frankly, we did not do so because we thought a 1,000-page document  
20 was not likely to provide great reading material in the days to come but there is quite  
21 a lot of interesting stuff in it. For example, at page 751 of the file is a letter from the  
22 Secretary of Foreign Affairs in Buenos Aires dated 23 May 2012 which is addressed,  
23 I think, as an internal letter to other parts of the Foreign Mission Service in Argentina,  
24 including, I suspect, missions abroad. This is 23 May 2012. Let us just read one  
25 paragraph, and I quote, and I do so simply on the basis that this is in the court file, so  
26 I am not speaking to the veracity, the accuracy of the translation of this document. It  
27 is simply one of the documents in the file, apparently not challenged:

28  
29 The frigate *Libertad* enjoys the immunities provided for the State's public  
30 property. However, bearing in mind the existence of judicial proceedings  
31 against the Republic in various foreign jurisdictions, it is not possible to  
32 guarantee that its training voyage might not result in potential claims,  
33 precautionary measures or enforcement measures during its stay in foreign  
34 ports.

35  
36 We place reliance on this simply for the following point. They knew in May 2012 that  
37 there were serious risks involved with this vessel. Ghana did not know about any of  
38 this in relation the exchange of letters but still the vessel was allowed to sail, and  
39 difficulties did in due course ensue, and people have lost their jobs as a result of  
40 those difficulties, people in Argentina.

41  
42 I make only this point: this was entirely preventable. The costs that Ghana has been  
43 put to in participating in these proceedings, in devoting human resources to the  
44 management of this issue, in the loss of revenue to its port authority of US \$160,000  
45 a day, all could have been prevented if Argentina had acted differently.

46  
47 I would simply say, in assessing the balance of equities in this matter, and when you  
48 hear the critique that Ghana has been put to yesterday and again today, this is not  
49 Ghana's dispute, this is not Ghana's case, this is not something of Ghana's making.  
50 It was known, it was predictable, it was predicted, it could have been prevented, and  
51 nothing was done to stop that. That, I think, is why the history of this case, the bond,

1 the waiver of immunity, the court proceedings in New York and in London, are all  
2 highly relevant.

3  
4 We will make this file available to the Tribunal if that would be helpful.

5  
6 By contrast, what we do see is that Argentina moved with considerable haste to  
7 bring proceedings to an Annex VII tribunal and to this Tribunal. It filed an application  
8 to establish an Annex VII tribunal – I am just going to say that I wrote these words  
9 last night, before the distinguished Agent’s intervention this morning – “but everyone  
10 in this room knows that it is most unlikely that an arbitration tribunal will ever hear  
11 this matter.” We then heard the offer that was made by the distinguished  
12 representative of Argentina, and I leave it to you, individual members of the Bench,  
13 to work out for yourselves the motivation behind that offer.

14  
15 Argentina has had its day in court, it has had its international day in court, the media  
16 is here, in particular the Argentinean media, the matter has been widely reported in  
17 certain parts of the world, and we say that is the end of the matter. It is time for these  
18 proceedings to end in the oral phase today and in the order that will follow in due  
19 course. We say therefore you really cannot make any sort of an order for provisional  
20 measures in such circumstances as we find in this case, where there is plainly no  
21 jurisdiction, where Argentina by its own actions has not pursued the matter with  
22 urgency in all the fora that are available to it, in which there is no irreparable harm,  
23 and in which the Annex VII arbitral tribunal on the present schedule will be  
24 constituted very shortly.

25  
26 That is not to say that your order might not be very useful in certain respects. You  
27 have heard from us a great number of assurances that are given fully, openly  
28 transparently and in good faith. We have assured Argentina of our total desire to  
29 work cooperatively with them in the courts of Ghana. We have provided assurances  
30 that, working with them, we will do everything we can to expedite the appeal  
31 process, and you have a mechanism that you have used in your previous orders in  
32 which you record those assurances, which contribute both to reconciling the parties  
33 and bringing them together but also to signalling to other entities – and here I am  
34 going to tread very carefully because it would be completely inappropriate for the  
35 executive of Ghana, through me or through anyone else, to indicate what the courts  
36 of Ghana should or should not do, and that of course is not something I am doing,  
37 but a view from this Tribunal indicating that such cooperation as Argentina and  
38 Ghana can muster to expedite proceedings to resolve this matter would be a jolly  
39 good thing, and that is something you can record in your order, whilst rejecting the  
40 Request for provisional measures.

41  
42 By way of conclusion, it is not just that Argentina’s problems remain after we have  
43 heard them this morning; I would say to you that they are compounded, because we  
44 really did hear nothing. Argentina still has to persuade you that there are two rules in  
45 UNCLOS, one providing for the immunity of a vessel such as this in the internal  
46 waters of Ghana and the other providing a clear rule that Argentina is not entitled to  
47 waive any such immunity, assuming it to exist. We just do not see how they can  
48 possibly succeed in relation to these matters. We do not see that Argentina has put  
49 anything before the Tribunal which allows an argument to be made that the  
50 Convention precludes it, for example, from waiving immunity by prior written

1 agreement in respect of a vessel that is located in another State's internal waters.  
2 That is not a matter for this Tribunal in interpreting a contractual agreement  
3 governed by New York law in a bond issued in a faraway place.  
4

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

11  
12 That is a decision which would have very significant and global consequences. It  
13 would create huge uncertainty in the commercial marketplace not just for sovereign  
14 bond issues, of which, as you all know, there is a great number, but also for a great  
15 number of other commercial transactions in which security is a vitally important  
16 matter.

17  
18 Mr President, Mr Vice-President, Members of the Tribunal, that concludes my part of  
19 the presentation this morning. We now invite you to call to the bar the distinguished  
20 Agent of Ghana to conclude Ghana's submissions.

21  
22 **THE PRESIDENT:** Thank you, Mr Sands. I now give the floor to the Co-Agent of  
23 Ghana, Mr Ebenezer Appreku.

24  
25 **MR APPREKU:** Mr President, distinguished Members of the Tribunal, it falls to me to  
26 conclude Ghana's oral presentation this afternoon.

27  
28 With the greatest of respect, a signed copy of Ghana's submission will be handed to  
29 the Registry shortly.

30  
31 Mr President, it has been a great honour for me to be a member and Co-Agent of  
32 Ghana's representation and first appearance before this Tribunal. Ghana is proud to  
33 have been able to contribute over many decades to the development of international  
34 law, and not least our contribution to the law of the sea. My country has a strong  
35 tradition in this regard: we were active participants in the Law of the Sea Conference,  
36 then led by the Attorney General of Ghana; Kofi Annan, the former UN Secretary-  
37 General, who showed enormous interest in law of the sea matters, is from Ghana;  
38 the General-Secretary of the International Seabed Authority, who has recently been  
39 elected for a second term, is also from Ghana; and, even closer to Hamburg, as you  
40 know, my country considers it a great honour that the first President of this Tribunal is  
41 from Ghana. We were the second African country, only after Mauritius, to make a  
42 submission to the UN Commission on the Limits of the Continental Shelf, on 28 April  
43 2009. So, Mr President, you can see that Ghana is mindful of its rights and  
44 obligations under the 1982 Convention on the Law of the Sea, especially so since  
45 traditionally we have been the Chair of the Programme of Assistance for the  
46 Sustained Teaching and Wider Appreciation of International Law under the UN.

47  
48 Mr President, Ghana has been strongly supportive of the 1982 Convention since its  
49 inception, and equally supportive of this Tribunal. That does not mean, however, that  
50 Ghana should simply accept jurisdiction in Part XV proceedings without any regard to

1 what the drafters of the 1982 Convention contemplated. That is why we have  
2 expressed regret that the Annex VII proceedings were initiated against us in the first  
3 place, in circumstances that were not appropriate in our view. For the reasons  
4 explained by Professor Sands yesterday afternoon, this Tribunal has not been called  
5 upon to adjudge a dispute falling under the 1982 Convention. This is not an  
6 “international law of the sea” dispute. It is not an inter-State dispute in the traditional,  
7 strict sense. We are not in dispute with Argentina, a friendly country, with regard to  
8 any of the provisions of the 1982 Convention. There is no rule or provision of the  
9 1982 Convention to interpret and apply, within the meaning of article 288.

10  
11 Mr President, the obvious jurisdictional flaw at the heart of Argentina’s case cannot  
12 be overstated. Professor Sands took the Tribunal to all four provisions of UNCLOS  
13 cited in Argentina’s Request for provisional measures. None of these four provisions  
14 contains any right that Argentina can invoke in this case. We listened attentively to  
15 the arguments put to us yesterday morning and today by Argentina. With the greatest  
16 respect, nothing that we have heard causes Ghana to change her position.

17  
18 However, even putting the jurisdictional hurdle to one side and for argument’s sake  
19 ignoring article 288, paragraph 1, the requirements for provisional measure are  
20 plainly not met. Put simply, Mr President, this case also fails on the facts. That is why  
21 we have taken the time to take the Members of this distinguished Tribunal through  
22 the facts of the case, the various proceedings in national courts, the terms of the  
23 waiver of immunity contained in the bond issued by Argentina, the proceedings  
24 brought in Ghana, and all the steps taken by the executive branch of my government  
25 to ensure the welfare of the *Libertad’s* crew.

26  
27 Mr President, Members of the Tribunal, for me it was disconcerting and  
28 discomfoting, because we are dealing in a friendly atmosphere, to hear Argentina’s  
29 account of the facts yesterday. In her opening speech, the distinguished Agent for  
30 the Argentine Republic went as far as to state that the crew of the *Libertad* “is living  
31 practically in a state of arrest”. Needless to say, the welfare of the *Libertad’s* crew is  
32 taken very seriously by the Ghanaian authorities. Anticipating that the welfare of the  
33 crew would also weigh on the Members of this Tribunal, Ghana sought a clarification  
34 of the situation from the ports authority; this is to be found at Tab 1 of the Judge’s  
35 Folder. It is clear from this evidence that the ports authority has taken all possible  
36 measures to ensure the welfare of the vessel’s crew. The crew members are not  
37 under arrest; they are free to leave and return to the vessel as they deem fit. No crew  
38 member has been prevented from disembarkation nor has any crew member been  
39 detained in any way, shape or form. We invite this honourable Tribunal to assess the  
40 real facts with as much care as we know it will when it looks as the law.

41  
42 There is another point that I feel bound to mention. We have listened most attentively  
43 to the presentations made on behalf of Argentina. They are entitled to the fullest  
44 respect, and they have our fullest respect. However, I am bound to say that I was  
45 surprised that the esteemed Agent of Argentina made as much as she did of the  
46 statement that I made to the High Court in Accra, setting forth the views of the  
47 Government of Ghana on certain matters before the High Court. It seemed as though  
48 the distinguished Agent was portraying my submissions before the High Court as  
49 somehow inconsistent with Ghana’s submissions before this Tribunal. You will have  
50 recognized immediately that there is no inconsistency. In the proceedings between

1 NML and Argentina, the executive arm of the Ghanaian Government, represented by  
2 the Attorney General's Department and the Ministry of Foreign Affairs, intervened as  
3 a friend of the court – in the capacity of *amicus*. The government adopted a position  
4 before the High Court that was supportive of Argentina. We realized that the  
5 Argentine Republic had found itself in a difficult position and therefore intervened to  
6 assist.

7  
8 I appeared before the High Court not, I underscore with the greatest respect, in my  
9 personal capacity but in my official capacity as a legal adviser to the Ministry of  
10 Foreign Affairs, and the views that I expressed reflected what I was authorized to say  
11 by the Foreign Minister. In expressing its views, the Government of Ghana acted  
12 within the confines of Ghana's domestic laws and in accordance with its Constitution.  
13 Despite our best efforts, the High Court's decision did not go Argentina's way, and  
14 the views expressed by the executive arm of government of Ghana, which it  
15 continues to hold, were not accepted. That case is on appeal, and it is a matter of  
16 surprise to us that Argentina has not sought to expedite those proceedings. Given all  
17 that you heard yesterday about urgency, one would have thought that Argentina  
18 would do all it could to move the appeal along as fast as possible. The Government  
19 of Ghana would support such an endeavour, but as it is a mere *amicus* it is not in a  
20 position to move matters along at any greater speed than the appellant – Argentina.

21  
22 Mr President, we hope that Argentina moves those proceedings along with greater  
23 speed, and we will do all we can to support them in that endeavour. Indeed, you  
24 heard us say yesterday that we are willing to work with Argentina to achieve the  
25 earliest possible resolution of this matter. My government does not stand to gain  
26 anything from this unhappy state of affairs – in fact, quite the opposite. However,  
27 such efforts must be conducted in accordance with our laws and consistent with our  
28 strong commitment to the rule of law at both national and international levels.

29  
30 In coming before this Tribunal, we have had to pay the closest attention to the limits  
31 of the Tribunal's jurisdiction. It is plain to us that there is no dispute under the  
32 Convention. It is plain to us that the Annex VII tribunal will not have jurisdiction to  
33 resolve a dispute in respect of articles 18, 32, 87 and 90 of the Convention, because  
34 those provisions are simply not engaged. The fact that Argentina invokes them  
35 cannot be sufficient to found jurisdiction. This honourable Tribunal has to take those  
36 provisions and the facts and decide whether, *prima facie*, the jurisdiction of the Annex  
37 VII tribunal on the merits may be established. We do not see how this honourable  
38 Tribunal could possibly conclude that it may. None of the articles of the Convention  
39 invoked by Argentina is relevant to the exercise by Ghana of its sovereign rights over  
40 activities conducted in its internal waters.

41  
42 That does not mean we will not move speedily to constitute the tribunal: in  
43 accordance with article 3(c) of Annex VII of the Convention we have appointed an  
44 arbitrator, and we are ready to move speedily to the appointment of the three  
45 remaining arbitrators. But I must be very clear on our position: we will be bound to  
46 oppose the jurisdiction of the Annex VII tribunal; and since that tribunal will have no  
47 jurisdiction, it is evident that this Tribunal cannot accede to Argentina's Request for  
48 provisional matters to order the provisional measures it has requested – or any  
49 provisional measures at all – to cover the short period between now and the



1 constitution of the Annex VII tribunal. This will not be the first case in which the  
2 Tribunal has declined to order provisional measures.

3  
4 That does mean that an order of this Tribunal declining to order provisional measures  
5 might not provide some measure of assistance to the parties. It could, for example,  
6 record our commitment to the utility of continued cooperation between the parties in  
7 achieving a speedy resolution of the matter, and our commitment to be as supportive  
8 as we can in expediting the proceedings before the courts of Ghana if that is an  
9 approach to which Argentina is attached. Our commitment to work with Argentina is  
10 strong and unwavering.

11  
12 I must say that I was therefore a bit surprised when we heard the proposal that came  
13 from the distinguished Agent of Argentina that they do not want to hear anything  
14 about the Court of Appeal case, but I want to assure my distinguished counterpart  
15 that when the matter comes before the Court of Appeal, if they are minded to activate  
16 the process that is available to them, probably I personally will lead the judge to  
17 assist, but the ball is in their court.

18  
19 Mr President, an hour ago we heard the proposal, as I have hinted, by the Argentine  
20 Agent, my distinguished counterpart, Ms Susana Ruiz Cerutti, on behalf of her  
21 government that Argentina has now decided to withdraw from the Annex VII  
22 arbitration and instead to have the matter submitted to a panel before this  
23 distinguished Tribunal – provided that Ghana accepts this proposal. We have noted  
24 the proposal and it will be considered in due course, after the Tribunal has given its  
25 order.

26  
27 Mr President, by way of conclusion, I would like to take this opportunity to reiterate  
28 my sincere gratitude to the Registrar, his staff and also express my thanks to the  
29 translators for the exemplary way they have carried out their work. We thank our  
30 distinguished colleagues from Argentina for contributing to the positive atmosphere in  
31 cooperating with us in these proceedings. We thank you, Mr President and Members  
32 of the Tribunal, for according us your attention and your commitment to promoting the  
33 rule of law with respect for the 1982 Convention.

34  
35 Finally, pursuant to article 75 of the Rules of the Tribunal, it remains for me to read  
36 out Ghana's submissions.

37  
38 **THE PRESIDENT:** Thank you, Mr Appreku. I understand that this was the last  
39 statement made by Ghana during this hearing. As you said, article 75, paragraph 2,  
40 of the Rules of the Tribunal provides that at the conclusion of the last statement  
41 made by a Party at the hearing its Agent, without recapitulation of the arguments,  
42 shall read the Party's final submissions. The written text of these submissions signed  
43 by the Agent shall be communicated to the Tribunal and a copy of it shall be  
44 transmitted to the other Party.

45  
46 I now invite the Co-Agent of Ghana, Mr Appreku to take the floor to present the final  
47 submissions of the Respondent. You have the floor.

48  
49 **MR APPREKU:** Mr President, distinguished Members of the Tribunal, for the reasons  
50 set out in our Written Statement and on the basis of the facts and the legal argument

1 put before you today and yesterday afternoon, the Republic of Ghana requests the  
2 Tribunal: to reject the request for provisional measures filed by Argentina on  
3 14 November 2012; and to order Argentina to pay all costs incurred by the Republic  
4 of Ghana in connection with this request.

5  
6 Thank you Mr President.

7  
8 **THE PRESIDENT:** Thank you, Mr Appreku. This brings us to the end of the hearing.  
9 On behalf of the Tribunal, I would like to take this opportunity to express our  
10 appreciation for the high quality of the presentations of the representatives of both  
11 the Argentine Republic and the Republic of Ghana. I would also like to take this  
12 opportunity to thank both the Agent of Argentina and the Co-Agent of Ghana for their  
13 exemplary spirit of cooperation.

14  
15 The Registrar will now address questions in relation to documentation.

16  
17 **THE REGISTRAR** (*Interpretation from French*): Mr President, pursuant to article 86,  
18 paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of  
19 the Tribunal, correct the transcripts of speeches and statements made on their  
20 behalf, but in no case may such corrections affect the meaning and scope thereof.  
21 These corrections relate to the verified versions of the transcripts in the official language  
22 used by the Party in question. The corrections should be submitted to the Registry as  
23 soon as possible and by Friday, 7 December 2012 at 5.00 p.m. Hamburg time, at the  
24 latest

25  
26 Thank you.

27  
28 **THE PRESIDENT:** The order in this case is tentatively set to 15 December 2012. The  
29 Agents of the Parties will be informed reasonably in advance of any change to this  
30 date.

31  
32 In accordance with the usual practice, I request the Agents to kindly remain at the  
33 disposal of the Tribunal in order to provide any further assistance and information  
34 that it may need in its deliberations prior to the delivery of the judgment.

35  
36 The hearing is now closed.

37  
38 *(The sitting closed at 1.10 p.m.)*