JOINT SEPARATE OPINION OF JUDGES WOLFRUM AND JUDGE COT

1. We have voted in favour of the measures as prescribed in the Order, however, we cannot join in a significant part of the reasoning. In particular, we disagree with the reasoning of the Tribunal as to whether the arbitral tribunal to be established under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (the Convention) *prima facie* has jurisdiction to decide on the merits of the case.

2. Article 290, paragraph 5, of the Convention entrusts the Tribunal with the task of establishing whether *prima facie* an arbitral tribunal to be established has jurisdiction according to article 288 of the Convention. In our view the Tribunal does not construct its reasoning on this central issue as predetermined by the jurisprudence of the International Court of Justice and of this Tribunal.

3. Before delving into the question of the *prima facie* jurisdiction, several general considerations concerning the object and purpose of provisional measures, the scope of the settlement-of-disputes system under Part XV of the Convention, the relationship between jurisdiction and the question which law may be applied and the relationship between this case before the Tribunal and cases pending before national courts of several countries are called for.

Object and purpose of provisional measures

4. Provisional measures may only be requested and decided in the context of a case submitted on the merits. Provisional measures are meant to protect the object of the litigation in question and, thereby, the integrity of the decision as to the merits. Neither party to the conflict shall change the relevant situation that prevailed on the initiation of the proceedings on the merits and thus render the proceedings meaningless by frustrating their potential result. This equally embraces the objective of ensuring the proper conduct of the proceedings or the possibility of the execution of whatever judgment may finally be rendered. This objective is reflected, although in abbreviated form, in article 290, paragraph 1, of the Convention which states that provisional measures are meant "to preserve the respective rights of the parties to the dispute . . . pending the final decision".

5. In this context it seems appropriate to refer to an important consideration concerning provisional measures under article 290 of the Convention. One has to distinguish between provisional measures taken under article 290, paragraph 1, of the Convention and those under article 290, paragraph 5, of the Convention. Whereas under article 290, paragraph 1, of the Convention, the Tribunal is called upon to decide *prima facie* on its own jurisdiction, under article 290, paragraph 5, of the Convention, it must decide on the *prima facie* jurisdiction of another court or tribunal. Out of respect for the other court or tribunal the Tribunal has to exercise some restraint in questioning *prima facie* jurisdiction of such other court or tribunal. This has to be taken into account in the context of this case. The Tribunal still has to develop a jurisprudence to specify the applicable threshold more clearly. What counts, among other possible considerations, is the urgency and which rights or interests are at stake. It is equally unsatisfactory if the arbitral tribunal under Annex VII denies its jurisdiction which the Tribunal has established *prima facie* as it is for the settlement of the said dispute if the Tribunal denies *prima facie* jurisdiction in a situation where the arbitral tribunal would have voted otherwise.

6. A further consideration is called for since it has to be taken into account when establishing jurisdiction and, in particular, *prima facie* jurisdiction under article 290 of the Convention. The competences of the Tribunal under Part XV, Section 2, of the Convention have to be seen against the background of the dispute settlement system under the Convention. Whereas the International Court of Justice enjoys a general competence as far as are concerned disputes it may decide upon, the competences of the Tribunal under article 288 of the Convention are limited to disputes concerning the interpretation and application of the Convention. Such limitation is the counterpart of and in fact balances the obligatory character of the dispute settlement system under Part XV of the Convention. Any attempt to broaden the jurisdictional power of the Tribunal and that of arbitral tribunals under Annex VII going beyond what is prescribed in article 288 of the Convention is not in keeping with the basic philosophy governing the dispute settlement system of the Convention. It undermines the understanding reached at the Third UN Conference on the Law of the Sea, namely that the dispute settlement system under the Convention will be mandatory but limited as far its scope is concerned. This limitation is not only reflected in the wording of article 288 of the Convention but equally in Section 3 of Part XV enumerating various limitations and exceptions. In our view this fundamental consideration has not been taken into account by the Order in interpreting article 32 of the Convention (see below).

7. We would like to emphasize a central point concerning the interpretation of article 288 of the Convention. According to that provision the Tribunal is mandated only to decide on disputes concerning the interpretation and application of the Convention. In that respect the mandate of the Tribunal is limited

compared to the one of the International Court of Justice. Article 293 of the Convention provides that the Tribunal may have recourse to general international law not incompatible with the Convention. These two issues have to be separated clearly, which the Order does not do (compare paragraphs 62 *et seq.* with paragraph 100). A dispute concerning the interpretation and application of a rule of customary law therefore does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention. In our view the question of the immunity of warships in foreign internal waters, including ports, is a rule of customary international law which is not being incorporated in the Convention. It is on this issue that we disagree with the reasoning of the Order; this issue will be elaborated further below.

8. We believe it necessary to underline a final general point. The Respondent emphasized that the case should be considered in its broader context, namely the cases pending before national courts dealing with bonds of the Argentine Republic. The Respondent indicated that the Tribunal should not interfere with the ongoing litigation against Argentina since it lacked judicial competence to deal with state bonds and waivers. We disagree with this approach. The case before the Tribunal is an independent albeit limited one. It only requires a decision on the jurisdiction *prima facie* of the arbitral tribunal under Annex VII and as to whether and which provisional measures may be prescribed. However, these are questions to be decided on the basis of the Convention and have to be clearly distinguished from other issues to be considered before national fora. Also this issue will be elaborated further below. Anything that goes beyond the limited scope of the case before the Tribunal would exceed the jurisdiction the Tribunal has in this case so far.

9. We shall now turn to the issue of *prima facie* jurisdiction as indicated above.

Prima facie jurisdiction of the arbitral tribunal under Annex VII

10. According to article 290, paragraph 5, of the Convention the Tribunal may prescribe provisional measures if the case is duly submitted to it and if, pending the establishment of the arbitral tribunal, under the circumstances of the case a decision to preserve the rights of the parties is necessary before the arbitral tribunal may be established. The Tribunal does not have to establish that the arbitral tribunal has jurisdiction to entertain the case on the merits; it is sufficient but also necessary to establish that the arbitral tribunal has jurisdiction *prima facie* taking into consideration the caveat expressed in paragraph 5 above.

11. The decisive provision governing the jurisdiction of the courts and tribunals referred to in article 287 of the Convention is article 288 of the Convention, according to which these courts and tribunals have the jurisdiction to decide disputes concerning the interpretation and application of the Convention. But, as already stated in this case, the Tribunal has a more limited function; it is only mandated to establish whether the arbitral tribunal constituted under Annex VII *prima facie* has jurisdiction. To come to a conclusion three steps have to be taken, namely to establish which threshold has to be applied in deciding whether the arbitral tribunal *prima facie* has jurisdiction, whether a legal dispute exists between the parties and, finally, whether the Applicant in its discourse with the Respondent has presented facts and law which allow the Tribunal to conclude that the arbitral tribunal *prima facie* has jurisdiction.

12. Article 290 of the Convention does not provide much guidance concerning the threshold to be applied by the Tribunal when deciding on the question on *prima facie* jurisdiction. However, the International Court of Justice has developed jurisprudence in this respect. This case law is of relevance beyond the Court for the jurisprudence of other international courts including the Tribunal. We see no reason to deviate from this jurisprudence as the Tribunal seems to do.

13. Since the Icelandic *Fisheries Jurisdiction* cases the International Court of Justice (*Interim protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 12 at p. 16 (para. 17)) uses a standard formula, namely that the instrument invoked by the parties as conferring jurisdiction "appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded". The International Court of Justice has further stated that, in taking such measures, it must remain within its jurisdiction both *ratione personae* and *ratione materiae* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, pp. 11-12 (para. 14)). The ICJ denied the indication of provisional measures in several cases for lack of jurisdiction on the merits. In this context, the decision to deny the indication of provisional measures in the case *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case* (*I.C.J. Reports 1995*, p. 288 *et seq.*) is enlightening. In this case, the applicant had invoked a paragraph ("Paragraph 63") of a previous judgment of the International Court of Justice as the basis of jurisdiction. The ICJ dismissed both the request for provisional measures and the application stating that this paragraph could only be invoked in respect of atmospheric nuclear tests but not in respect of underground nuclear tests. This means that the International Court of Justice did not simply follow the assertion of the applicant but found it necessary to compare the jurisdictional basis with the facts on which the claim of the applicant was based. In its Order of 15 October 2008 on *Application of the International Convention on the*

Elimination of all Forms of Racial Discrimination (Georgia v. *Russian Federation)*, after having stated that both parties were parties to the said Convention and neither of them had entered any reservation, the International Court of Justice, in examining whether it had *prima facie* jurisdiction, scrutinized carefully whether the actions undertaken by the Russian Federation were covered by article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination (see paragraphs 104-117). The International Court of Justice correlated the alleged jurisdictional basis for entertaining the case on the merits with the claims advanced by the applicant and ascertained whether there was a link between the claims on the merits and the request for provisional measures.

14. It should always be borne in mind that the prescription of provisional measures constitutes an infringement of the sovereign rights of the responding State. This infringement is only legitimized if the State concerned has consented thereto by accepting the jurisdiction of the court or tribunal in question. This consideration is well reflected in the jurisprudence of the ICJ when the Court states that it gives jurisdiction over the merits "fullest consideration compatible with the requirement of urgency" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169 at p. 179 (para. 25)).

15. In the present case, the principal measure prescribed by the Tribunal and in which we concur – i.e. the release of the *ARA Libertad* – is undoubtedly an infringement of the sovereign right of Ghana to apply its jurisdictional decisions within the port of Tema, due to the superior obligation imposed upon Ghana by customary international to respect immunity of warships within its internal waters.

16. On the basis of the jurisprudence of the International Court of Justice it may be summarized that – for an international court or tribunal to assume *prima facie* jurisdiction – it is not sufficient that an applicant merely invokes provisions which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question. On the contrary, it is necessary for the adjudicative body to take into account the facts which are known to it at the moment of deciding on provisional measures and to consider whether on this basis, together with the legal basis invoked by the applicant, *prima facie* jurisdiction on the merits may be established. Such considerations cannot be left to the merits phase. This applies equally to the decisions under article 290, paragraphs 1 and 5, of the Convention. Whether the facts and the law presented and argued are sufficient is to be decided on a case-by-case basis, the dominant factor being urgency.

17. As indicated above it is necessary next to establish whether a legal dispute exists between the parties.

18. It is the particularity of this case that the Respondent emphasized that there was no legal dispute between Ghana and Argentina but rather a dispute between Argentina and MLN, an entity under private law. Such approach makes it necessary to deal with the meaning of the term "dispute" as referred to in article 288, paragraph 1, of the Convention and the relationship between this case before the Tribunal and the ones pending before various national courts touched upon in general terms above.

19. There is a certain confusion as to the nature of the dispute. In fact, there are two distinct disputes. The first is a dispute between NML, claimant, and the Argentine Republic, defendant. It is subject to private law and private international law. NML bought Argentine obligations and is asking for full repayment with interest. NML is asking the courts of Ghana to implement judicial decisions taken by courts in the United States and in the United Kingdom by way of seizure of the frigate *ARA Libertad* in the port of Tema. This first dispute is governed by the law of the State of New York, the law of England or the law of Ghana.

20. The second dispute, the only one concerning this Tribunal and the Annex VII tribunal, opposes the Argentine Republic, claimant, and the Republic of Ghana, defendant, on the issue of immunity from jurisdiction and enforcement of warships in ports. This dispute is governed by public international law, as stated *inter alia* by the 1982 Convention, but also by those other rules of international law referred to in article 293 of the Convention. The International Court of Justice has recently noted that "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts" (*Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening), Judgment*, para. 113). It is the existence of this second alleged dispute the Tribunal is to establish.

21. As far as the existence and scope of the alleged legal dispute is concerned, it is appropriate to refer to the established jurisprudence of the International Court of Justice according to which "it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it." (*Fisheries Jurisdiction* case (*Spain* v. *Canada*), *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432 at p. 447). According to the International Court of Justice, those requirements are "essential from the point of view of legal security and the good administration of justice" (Ibid. 448). According to the well-established jurisprudence of the International Court of Justice, the jurisdiction of the Court regarding disputes between States is of an adversarial nature and extends only to the terms of the legal dispute submitted to it. In this regard it should be

recalled that article 24, paragraph 1, of the Statute of the Tribunal and article 54, paragraph 1, of its Rules provide that the application shall indicate "the subject of the dispute". Article 54, paragraph 2, of the Rules of the Tribunal further provides that the application shall also specify "the precise nature of the claim". The principles underlying these provisions have been highlighted in the jurisprudence of the Permanent Court of International Justice as well as in that of the International Court of Justice. In an often quoted dictum of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case (Greece v. United Kingdom), the Court gave a definition of a dispute: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties." This definition has been referred to by the International Court of Justice in a number of decisions (see, inter alia, *Certain Property (Liechtenstein/ Germany), Preliminary Objections*, para. 24). The Tribunal also quoted the PCIJ's dictum in its Order in the *Southern Bluefin Tuna Cases* (*ITLOS Reports 1999*, at p. 293, para. 44) and added a reference to the jurisprudence of the International Court of Justice in the *South West Africa, Preliminary Objections,* case (*I.C.J. Reports 1962*, p. 328). Paragraph 44 of the Order of ITLOS reads:

> *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1824, P.C.I.J, Series A, No. 2*, p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

22. The Respondent advances two arguments in support of its denial that there is a legal dispute, namely that the Convention does not cover the internal waters and that none of the provisions of the Convention provide for the immunity of warships in the internal waters of a foreign State.

23. As far as the first argument is concerned, we agree in principle with the Respondent. We note, though, that there are certain provisions in the Convention having a bearing on the legal regime governing internal waters; these are article 2, paragraph 1, article 7, paragraph 3, article 8, article 10, paragraph 4, article 18, paragraph 1, article 25, paragraph 2, article 27, paragraph 2, article 28, paragraph 3, article 35 (a), article 50, article 211, paragraph 3, and article 218 of the Convention.

24. But even a cursory assessment of these provisions clearly indicates their limited scope. They only deal with the status of internal waters, equating that area with the land territory, the access thereto, their delimitation *vis-à-vis* the territorial sea, the rights of coastal States exercising their jurisdiction *vis-à-vis* vessels having left internal waters and the rights of coastal States to prevent the entry of vessels into their internal waters. However, all these provisions taken

together do not constitute a comprehensive legal regime comparable to the one on the territorial sea (see the different approach taken in the Order). In particular, an equivalent to article 21 of the Convention describing the laws and regulations of the coastal State relating to innocent passage in the territorial sea is missing. The principle governing internal waters is the sovereignty of the coastal State concerned. This is clearly expressed in article 2, paragraph 1, of the Convention, which reads:

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

25. The provision is quite telling. It equates internal waters and archipelagic waters with the land territory whereas it "extends the sovereignty to an adjacent belt of sea called the territorial sea". This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof limitations of the coastal States' sovereignty over internal waters cannot be assumed.

26. Our analysis that internal waters in principle are not covered by the Convention but by customary international law is largely confirmed by the travaux préparatoires of the Convention. It is telling that during the long years of the Third Conference on the Law of the Sea, not a word was said about including provisions on the legal regime of ports and inland waters in the Convention. No delegation at any moment suggested otherwise.

27. In 1928 at Stockholm, the Institut de droit international adopted a comprehensive resolution on the rules of customary international law governing the regime of ships and crews in foreign ports in peacetime (Gilbert Gidel, Rapporteur). It drafted a full 17 articles on the status of warships. The main provisions included article 15, stating that foreign warships must respect the local laws and regulations, in particular those concerning navigation, docking and sanitary police. In case of a serious violation, the commander, after having been duly notified, may be invited to leave the port. Article 16 provides that military vessels admitted in a foreign port are subject to the action of their State; the local authorities may not take acts of authority on these warships or exercise

any act of jurisdiction over the persons on board the ship, except in the cases expressly provided for in the present rules.

28. It is noticeable that the Institut refrained from using the term "immunity". At no moment did the Institut suggest the item be addressed by the forthcoming 1930 Codification Conference of The Hague.

29. The Hague Codification Conference of 1930 addressed the issue of "Exercise of Jurisdiction over Foreign Vessels in Ports". The Second Committee of the Conference, on Territorial Waters (Rapporteur: Mr. François), decided not to include the subject for the following reasons:

> The Preparatory Committee, when drawing up its questionnaire, observed that this issue did not quite lie within the programme of questions with which the Conference would have to deal. The Committee found that the opinions of Governments were divided as to the desirability of embodying this point in the future Convention.
>
> The Committee agreed not to include any clause of this kind in the Convention It was pointed out that the subject was a very complex one, lying outside the scope of the Convention, and could not be treated in full in the two Bases of Discussion drawn up by the Preparatory Committee . . . (*Acts of the Conference for the Codification of International Law, vol. III (Minutes of the Second Committee, Territorial Waters, p. 209.*)

30. The Conference recommended ". . . that the Convention on the International Regime of Maritime Ports signed at Geneva on December 9th 1923 be supplemented by the adoption of provisions regulating the scope of the judicial powers of States with regard to vessels in their inland waters."

31. The Council of the League took note of the proposal and, on proposal of Mr. Grandi, transmitted the recommendation to the Organization for Communications and Transit (June 1930 *League of Nations – Official Journal,* p. 545). No further action was taken at the time.

32. The issue was re-examined and disposed of in the Geneva Conventions on the Law of the Sea and, more specifically, during the meetings of the International Law Commission on the subject. In 1954, Hersch Lauterpacht pointed out that ". . . nothing had been said of the obligations of States from the point of view of the regime of the ports". He added that "[t]he Commission was codifying and consolidating international law and should lay down in its draft the obligations of States on the basis of the 1923 Geneva Convention."

33. J.P.A. François, who was reappointed as Rapporteur in the International Law Commission, answered the following:

> Mr. François, Special Rapporteur, said he was opposed to the discussion of the regime of ports. The subject was outside the scope of the Commission's work which dealt exclusively with the regime of the territorial sea. He had already agreed to include in article 9 a stipulation originally contained in the comment to that article. However Mr. Lauterpacht wished the Commission to go still further and actually to determine the regime of the ports. That question had been entirely omitted from his report, and, if it was decided to introduce it, the Commission would have to take up the whole problem of inland waters, which would greatly complicate matters. He appealed to Mr. Lauterpacht not to press for a discussion on the regime of ports. (*Yearbook of the International Law Commission*, 1954, vol. I, p. 91).

G. Amado, J. Zourek and G. Scelle supported the views of the Special Rapporteur. H. Lauterpacht complied and the matter was settled.

34. The considerations set out above, namely the textual analysis of article 2, paragraph 1, of the Convention as well as the legislative history concerning the treatment of internal waters in the ILC, the Geneva Law of the Sea Conference of 1958 and the Third UN Conference on the Law of the Sea, have not been taken into account by the Order of the Tribunal. For that reason we cannot assume that all activities of the coastal State in its internal waters and its ports are governed by the Convention and accordingly come under the jurisdiction of the Tribunal.

35. To establish that there is a legal dispute between the Parties it is not sufficient that the Applicant takes a different view on the status of internal waters than the Respondent. It is for the Applicant, in accordance with the jurisprudence referred to above, to invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the views on the interpretation of these provisions are positively opposed by the Respondent.

36. On this basis we will deal with the provisions invoked by the Applicant, arguing that the Tribunal has jurisdiction according to article 288, paragraph 1, of the Convention.

37. We agree with the Order as far as article 87 of the Convention is concerned. It has to be noted that this provision deals with the freedom of the high seas, in particular the freedom of navigation. Evidently, the Applicant takes the position that the arrest and detention of the *ARA Libertad* constitutes an infringement on the freedom of navigation. In our view this approach is not sustainable considering the situation of the vessel, which is detained in Tema, a port of the Respondent. It is hard to imagine how the detention of a vessel in port in the course of national civil proceedings can be construed as violating the freedom

of navigation on the high seas. To take this argument to the extreme, it would, in fact, mean that the principle of the freedom of navigation would render all vessels immune from civil proceedings and in consequence from the implementation of the national law of the port State in question. This leads us to the conclusion, and insofar we follow the reasoning of the Tribunal, that on the facts provided by the Applicant article 87 of the Convention does not form a plausible basis for a claim of the Applicant.

38. We disagree with the Order of the Tribunal in its interpretation of article 32 of the Convention. Article 32 reads:

> 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.

39. The Order maintains that article 32 provides for the immunity of warships and that this rule applies to the internal waters. We disagree with both.

40. As far as the interpretation of article 32 of the Convention is concerned article 31 of the Vienna Convention on the Law of Treaties is to be applied; thus text, context, object and purpose as well as the legislative history of this provision are of relevance.

41. The wording of this provision makes it plain that this provision does not establish the immunity of warships. Instead the immunity of warships is taken for granted. Therefore article 32 constitutes a reference rather than a regulation in itself. In that respect article 32 of the Convention corresponds to the last preambular paragraph of the Convention, which states: "*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

42. Further, the wording of article 32 of the Convention also clearly spells out that it addresses limitations and exceptions to immunity. This textual interpretation is reinforced by the wording of article 95 of the Convention, which reads: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

43. Comparing the wording of these two provisions on the immunity of warships makes it very clear that only article 95 of the Convention contains a regulation on immunity whereas article 32 does not; any other interpretation disregards the difference in wording while making it obsolete. That having been said, this must not be misunderstood to mean that warships have no immunity in internal waters; they have but the basis thereof is in customary international law and not in the Convention.

44. It having been established on the basis of a textual analysis that article 32 of the Convention constitutes a reference to immunity and not a regulation as far as the establishment of immunity is concerned, it is easier to understand the reference to "nothing in this Convention". This reference does not apply to an establishment of immunity but rather to exceptions. It means that, apart from the exceptions specifically referred to articles 30 and 31 and in subsection A of Section 3 (Innocent Passage in the Territorial Sea), the Convention does not contain any further exceptions for the immunity of warships. Therefore it is unsustainable to conclude from this reference in article 32 of the Convention to the potential sources of exceptions that article 32 of the Convention is to be applied beyond the territorial sea.

45. This brings us to the second point, namely whether article 32 of the Convention on the immunity of warships if understood as in the Order may be considered to be a general clause governing the immunity of warships in all ocean spaces, including the internal waters (see paragraph 64 of the Order). It has to be acknowledged, though, that article 32 of the Convention is placed in the Section on innocent passage in the territorial sea. This means *prima facie* that this provision is meant to be applicable in the territorial sea only. One cannot disregard the location of a provision and the impact this location may have on the interpretation of the said regulation easily. It has already been pointed out above that the reference to the Convention refers to exceptions rather than to the establishment of immunity itself. Having said so, we are aware that the Convention is not always consistent in this respect. Article 29 of the Convention, providing the definition of the term "warship", applies to the Convention as a whole. But it does so explicitly by saying: "For the purposes of this Convention, 'warship' means . . .". Such an indication concerning the applicability is missing in article 32 of the Convention. It has already been pointed out that the reference to the Convention has a different meaning in the context of article 32 of the Convention. Finally the Order should have considered what it means to attribute a wider scope of application to article 32 of the Convention. The immunity of warships on the high seas is covered by article 95 of the Convention and this provision applies, according to article 58, paragraph 2, of the Convention, also to the exclusive economic zone. This means the Order only advocates the extension of article 32 of the Convention to the internal waters, although it refers to "all maritime areas" which is in contradiction to the wording of that rule, its placement and in particular the distinction being made between internal waters and the territorial sea in article 2, paragraph 1, of the Convention (see above, paragraphs 25 and 26).

46. Our reading of article 32 of the Convention is endorsed by the legislative history of this provision. This provision developed out of article 23 of the International Law Commission's draft articles prepared in 1956. The main issue at that time was not warships but government ships operated for non-

commercial purposes. The ILC draft was taken over and expanded by article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. What is of interest in this context is that its paragraph 2 emphasized that the rules regarding the enjoyment of the rights of innocent passage of government ships operated for non-commercial purposes were without prejudice to whatever immunities such ships might enjoy under the provisions of the 1958 Convention or other rules of international law. This, at least, provides for a clear indication that the issue of immunity had its basis outside treaty law in customary international law. This reference to customary international law was repeated for warships in article 31 ISNT/Part II. This reference was dropped in article 31 RSNT/Part II. The ultimate reason for that was the general reference to customary international law in the last preambular paragraph.

47. That warships in internal waters enjoy immunity from the exercise of coastal State jurisdiction, which includes immunity from judicial proceedings or any enforcement measure, is well established in customary international law and recognized in legal doctrine. This was affirmed *inter alia* by the International Law Institute in its Resolution of 1897 and of 1928. The Institute's Stockholm Resolution, "Règlement sur le régime des navires de guerre et de leurs équipages dans les ports étrangers en temps de paix" of 1928, provided (articles 15 and 26) that warships cannot form the subject of seizure, arrest, or detention by any legal means whatsoever or by any judicial procedure (article 24). This customary international law is confirmed by a judgment of the US Supreme Court in the Case *Schooner Exchange v. McFaddon*. The relevant passage reads:

> The Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. (at 147).

48. There are several national court decisions which confirm and honour this legal principle of customary international law, such as that of the *Cour d'appel de Paris* on 10 August 2000 ordering the release of vessel Sedov, a training vessel of Russia. The question remains whether this customary international law

has been incorporated (incorporation by reference) through article 32 into the Convention.

49. The mechanism to incorporate rules from one set of rules into another one is well established in many national legal systems. However, it always has to be established whether the norm in question incorporates another one by reference or whether that norm only refers to another norm without incorporating it, thus leaving the issue to be regulated by the other set of norms, in our case by customary international law.

50. Article 32 of the Convention does not indicate that through it the customary international law is being incorporated into the Convention. It simply takes the immunity of warships as a fact. It becomes evident upon scrutiny of the Convention that there are very few references to customary international law – except the already mentioned last preambular paragraph. This is due to the overall policy towards customary international law, whose universality was, at the time of the drafting of the Convention, put into question.

51. This leads us to the conclusion that there are valid considerations which would preclude the Tribunal from deciding that *prima facie* the arbitral tribunal under Annex VII would have jurisdiction.

Estoppel

52. Although we disagree with the finding of the Tribunal that the arbitral tribunal under Annex VII has jurisdiction in accordance with article 288, paragraph 1, of the Convention, in our view, Ghana is estopped from opposing the proceedings at this phase.

53. The position of Ghana is fraught with contradictions. On one hand, the Government of Ghana supports the position of Argentina. The Co-Agent for Ghana, Mr. Appreku, legal counsel, appeared as *amicus curiae* in the domestic courts of Ghana in support of the position of the Argentine Republic to the effect that the Libertad was entitled to full immunity in the port of Tema (Statement before the High Court of Accra, Request of the Republic of Argentine, 14 November 2012, Annex D). The Courts of Ghana had to respect the obligation imposed upon Ghana to allow the Libertad to leave Ghana's waters and continue its voyage, as formally agreed between the two countries.

54. Mr Appreku repeated this commitment of the Government of Ghana during the oral proceedings on provisional measures before this Tribunal (ITLOS/PV.12/C20/2, p. 2, lines 13-27). He announced that he would be personally appearing in his official capacity before the High Court of Accra to call for

the release of the vessel in conformity with Ghana's international obligations (ITLOS/PV.12/C20/4, p. 11, lines 12-17). But, on the other hand, Ghana has asked the Tribunal to dismiss the Argentine request for provisional measures. The gist of the argument of Ghana is the independence of the Ghana judiciary, guaranteed by the Constitution of the country. The Government of Ghana had no other choice but to support the actions of the Ghana courts and enforce the decision of Justice Frimpong to seize the ship.

55. The argument of the Government of Ghana founded on the Constitution of Ghana does not hold water. International law considers that a State may not hide behind its Constitution to shed its international obligations. International courts have repeated this position time and again since the Permanent Court of International Justice. The ILC, more recently, has enshrined the rule in its draft articles on international responsibility. Article 4 of the draft clearly provides for the responsibility of States for all actions of their organs:

> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central Government or of the territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

56. To sum up the situation, the Parties agree as to the substance of the case. The *ARA Libertad* is entitled to full immunity within the port of Tema and must be allowed to sail out of the port and continue its voyage. Mr. Appreku repeated in the oral proceedings that Ghana had no dispute with Argentina on the issue.

57. The role of the Tribunal is to help the Parties implement their understanding under international law and to insure the respect of a fundamental rule of international law, namely immunity of warships moored in a port in time of peace.

58. We consider that the notions of fairness and of good faith can be of some help in this situation and must prevail. Ghana, having given official assurances to Argentina as to the visit of the *ARA Libertad* in the port of Tema, cannot object today to a procedure ensuring implementation of the assurances.

59. More specifically, Ghana is estopped from objecting to the jurisdiction of the Annex VII tribunal and to the provisional measures this Tribunal is entitled to prescribe, pursuant to article 290 of the Convention.

60. Estoppel is an accepted principle in international law. It has two faces: a procedural one, with consequences as to the possibility for a party to object to proceedings before a Court or a Tribunal; a more substantive aspect, barring contradictory legal positions taken by a party to the dispute.

61. Estoppel by deed, to use the English vocabulary, finds its equivalent in international law in "estoppels by treaty, compromise, exchange of notes, or other undertaking in writing" (cf. Bowett, *BYB 1957*, vol. 33, p. 181). Such is the situation here, where Argentina and Ghana proceeded to an exchange of notes organizing the visit of the *ARA Libertad*. Bowett notes that the wording must be clear and unambiguous. Bowett quotes the *Eastern Greenland* case, the *Sharp* case, the *Canevaro* case and the *Salem* case. In the *Serbian Loans* case, the Permanent Court refused to apply estoppel because: "There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied." (*Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 39). By contrast, the exchange of notes on the *ARA Libertad* leaves no doubt as to the conditions of the visit of the ship.

62. In the present case, we are concerned with the procedural aspect of the rule of estoppel. The essence of the rule was stated by Judge Sir Percy Spender in the *Temple of Preah Vihear* case in 1962:

> The principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*Temple of Preah Vihear (Cambodia* v. *Thailand) Merits, Dissenting Opinion of Sir Percy Spender, I.C.J. Reports 1962*, 143–44)

63. As Sir Gerald Fitzmaurice noted in the *Temple* case:

> Such a plea is essentially a means of excluding a denial that might be *correct* – irrespective of its correctness. It prevents the assertion of what might in fact be *true*. (*I.C.J. Reports 1962*, p. 63)

64. The Court spelled out its position in the *North Sea Continental Shelf* cases:

> It appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to . . . [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf]—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 30).

65. More recently, the Court had this to say:

> . . . the Court points out that a party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party's statement (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30). The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behaviour; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century. While some of the conduct in the 1970s, which the Court next reviews, has a different character, Singapore does not contend that those actions were taken in reliance on the Johor response given in its letter of 1953. The Court accordingly need not consider whether other requirements of estoppel are met. (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12 at p. 81)

66. In the *Bay of Bengal* case, this Tribunal summed up the situation:

> 124. The Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation. The Tribunal notes in this respect the observations in the *North Sea Continental Shelf* cases (*Judgment, I.C.J. Reports 1969*, p. 3, at p. 26, para. 30) and in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment, I.C.J. Reports 1984*, p. 246, at p. 309, para. 145).
>
> 125. In the view of the Tribunal, the evidence submitted by Bangladesh to demonstrate that the Parties have administered their waters in accordance with the limits set forth in the 1974 Agreed Minutes is not conclusive. There is no indication that Myanmar's conduct caused Bangladesh to change its position to its detriment or suffer some prejudice in reliance on such conduct. For these reasons, the Tribunal finds that Bangladesh's claim of estoppel cannot be upheld.
> (*Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, 14 March 2012*).

67. The conditions attached to procedural estoppel are strict. They are obviously present in this case. Argentina, when deciding to sail the *ARA Libertad* to the port of Tema, did rely on the official assurances of Ghana. The Embassy of the Argentine Republic sent notes to the High Commission of Ghana in Abuja on 21 May 2012, 24 May 2012, 19 June 2012, 21 June 2012, 28 June 2012, 28 August 2012 and 25 September 2012 with all the details of the proposed visit: dates, crew, welcoming ceremony, etc. On 4 June 2012, the Ghana High Commission in Abuja informed the Embassy of Argentina that the Ghanaian Authorities had granted the request "for its naval ship to dock at Tema harbour from 1st to 4th October 2012" (Request for Prescription of Provisional Measures, Annex 2). Ghana did at no moment question the specifics of the visit as provided for by Argentina in its further notes and thus tacitly assented to them.

68. Argentina relied on these assurances. It did so to its detriment, as the ship was and still is detained in the port, contrary to the assurances given. Ghana is thus in no position to oppose a judicial procedure whose object is to resolve the dispute that arose out of Argentina's reliance on the assumption that Ghana

would extend to the ship all the privileges and immunities which Argentina could expect under customary international law for a military vessel on a visit of friendship.

69. The Tribunal cannot accept the submission of Ghana "to reject the provisional measures filed by Argentina on 14 November 2012". Ghana is estopped from presenting any objection on the matter, whatever the validity of the arguments presented to that effect.

70. Given the very particular circumstances of this case, the International Tribunal for the Law of the Sea can thus proceed to prescribe appropriate provisional measures pending the constitution of the Annex VII tribunal.

(signed) R. Wolfrum

(signed) J.-P. Cot