

Acera, 29 de octubre de 2012

Excelexcia,

1. Por expresa instrucciones de mi Gobierno, me refiero por la presente a la situación que motivara la conversación telefónica que mantuviera con usted el pasado 3 de octubre el Ministro de Relaciones Exteriores y Culto de la República Argentina, D. Héctor Timerman, y la nota que el mismo funcionario le remitiera el 4 de octubre de 2012¹, en relación con la detención por parte de Ghana, en el puerto de Tema desde el día 2 de octubre de 2012, del buque de guerra "ARA Fragata Libertad" perteneciente a la Armada de la República Argentina.

2. En dichas comunicaciones la República Argentina manifestó claramente que la mencionada medida resulta contraria al derecho internacional, en particular, aunque no exclusivamente, una violación de las inmunidades que gozan los buques de guerra conforme al Artículo 32 de la Convención de Naciones Unidas sobre el Derecho del Mar (en adelante, "la CNUDM") y otras reglas de derecho internacional. La Argentina solicitó a su Gobierno que adopte con la mayor urgencia las medidas necesarias para poner fin a esta situación.

3. Con el objeto de resolver la controversia con la urgencia que el caso requiera y a fin de continuar sin demora el intercambio de opiniones que ya se había iniciado entre las partes, de conformidad con el artículo 283 de la CNUDM, mi Gobierno procedió a enviar a Acera una delegación de alto nivel constituida por el Vice-Ministro de Relaciones Exteriores, Embajador Eduardo Zuain y el Secretario de Asuntos

Al Señor Ministro de Relaciones Exteriores e Integración Regional de la
República de Ghana
Alhaji Muhammad Mumuni

¹ Anexo 1.



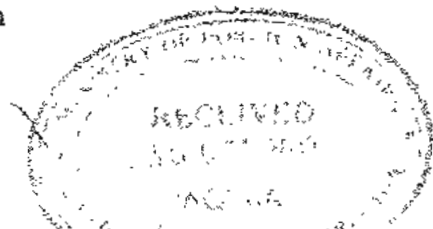
Internacionales del Ministerio de Defensa, Lic. Alfredo Forti. Entre el 16 y el 19 de octubre de 2012, dicha delegación se entrevistó en tres oportunidades con Vuestra Excelencia, dos veces con el Ministro de Defensa y en una oportunidad con el Ministro del Interior, el Fiscal General (Attorney General), el Fiscal General Adjunto (Deputy Attorney General), así como con asesores del Presidente de la República de Ghana y otros funcionarios. La República Argentina lamenta profundamente que tales intercambios de opiniones y negociaciones no hayan podido resolver la controversia que opone a nuestros dos Estados y que la "ARA Fragata Libertad" continúe ilícitamente detenida y sujeta a diversas medidas de apremio en el puerto de Tema en flagrante violación de normas básicas de Derecho Internacional.

4. Habida cuenta que tanto la Argentina como Ghana son partes a la CNUDM, pero no han aceptado el mismo procedimiento para la solución de la controversia, ésta debe ser sometida al procedimiento de arbitraje previsto en el Anexo VII de la CNUDM, en virtud del Art. 287 de tal Convención. Por la presente, mi Gobierno notifica al de Ghana el sometimiento de la presente controversia al procedimiento de arbitraje, de conformidad con el Artículo 1 del Anexo VII de la CNUDM (I). La Argentina solicita igualmente a Ghana que adopte la medida provisional consistente en permitir sin condiciones el reabastecimiento y la salida del buque de guerra argentino "ARA Fragata Libertad" de sus aguas jurisdiccionales, o en su defecto, en el plazo de 14 días de recibida la presente demandará esa medida al Tribunal Internacional del Derecho del Mar, como lo dispone el Artículo 290, par. 5 de la CNUDM (II).

(I) SOMETIMIENTO DE LA CONTROVERSIA A ARBITRAJE

5. La República Argentina somete al arbitraje previsto en el Anexo VII de la CNUDM contra la República de Ghana la controversia relativa a la detención y a las medidas judiciales tomadas en relación con el buque de guerra "ARA Fragata Libertad" por parte del Gobierno de Ghana.

(A) Exposición de las pretensiones de la República Argentina y de los motivos en que éstos se fundan



(a) Pretensiones

6. La República Argentina requiere del tribunal arbitral que declare que la República de Ghana, al detener el buque de guerra "ARA Fragata Libertad", al mantenerlo detenido, al impedirle abastecerse y al tomar diversas medidas judiciales en su contra:

- (1) Viola la obligación internacional de respetar la inmunidad de jurisdicción y de ejecución de la que goza el mencionado buque, de conformidad con el Art. 32 de la CNUDM, el Art. 3 de la Convención para la Unificación de Ciertas Normas relativas a la Inmunidad de los Buques de Propiedad del Estado de 1926, así como con las reglas bien establecidas de derecho internacional general o consuetudinario en la materia;
- (2) Impide el ejercicio del derecho de salir de las aguas jurisdiccionales del Estado ribereño y de la libre navegación que goza el mencionado buque y su tripulación, de conformidad con los artículos 18, par. 1 b), 87, par. 1 a) y 90 de la CNUDM.

7. Por consiguiente, la Argentina solicita al tribunal arbitral que, al hacer valer la responsabilidad internacional de Ghana, este Estado debe:

- (1) Cesar inmediatamente la violación de sus obligaciones internacionales descritas en el párrafo anterior;
- (2) Pagar a la República Argentina una indemnización adecuada para resarcir en su totalidad los perjuicios materiales ocasionados;
- (3) Presentar en forma solemne un saludo al pabellón argentino como satisfacción por el perjuicio moral ocasionado al detener ilícitamente al buque insignia de la Armada Argentina ARA Fragata Libertad e impedirle cumplir con su actividad y ordenarle la entrega de la documentación y del paño de señales del mencionado buque a las autoridades portuarias de Tema, República de Ghana.
- (4) Aplicar sanciones disciplinarias a los funcionarios de la República de Ghana directamente responsables de las decisiones por las cuales dicho Estado ha incurrido en las violaciones de sus obligaciones internacionales arriba mencionadas.

(b) Motivos que fundan las pretensiones de la Argentina

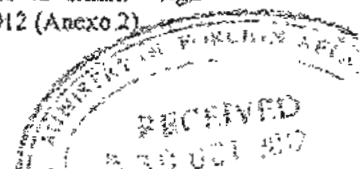


8. La "ARA Fragata Libertad" es un buque de guerra de la Armada de la República Argentina, en el sentido de la definición del Art. 29 de la CNUDM. Se trata del buque insignia de la Armada Argentina, como tal representa al Estado argentino y ha navegado por más de 50 años por todos los mares del mundo transmitiendo un mensaje de paz y amistad en procura de afianzar las relaciones de la Armada Argentina con sus pares de terceros Estados. La ARA Fragata Libertad es utilizada para la instrucción de cadetes de esa fuerza armada. Al momento de ser detenida por Ghana se encontraba realizando su cuadragésimo-tercer viaje de instrucción. La tripulación del buque detenido incluía oficiales invitados de las Armadas de Bolivia, Brasil, Chile, Paraguay, Perú, Sudáfrica, Surinam, Uruguay y Venezuela.

9. Los Gobiernos de Argentina y Ghana acordaron la visita de la ARA Fragata Libertad al puerto de Tema (República de Ghana). El Gobierno de Ghana autorizó el 4 de junio de 2012 tal visita y comunicó esa decisión al Gobierno argentino a través de la vía diplomática mediante correspondencia intercambiada por las respectivas representaciones en Abuja, Nigeria². Surgen con total claridad de la correspondencia intercambiada la condición de buque de guerra de la ARA Fragata Libertad, el propósito oficial de la visita y los arreglos de ceremonial correspondientes concertados por la Argentina y Ghana. Los últimos preparativos para la visita de la ARA Fragata Libertad a Ghana fueron acordadas por personal diplomático argentino, destacado en Ghana desde el 26 de septiembre, en contacto con las autoridades navales de ese país, según fuera requerido por el Gobierno local.

10. La ARA Fragata Libertad arribó en la fecha prevista (1º de octubre) y ese mismo día se realizó una recepción protocolar a bordo del buque a la que asistieron autoridades gubernamentales, representantes de las Fuerzas Armadas de Ghana y representantes del cuerpo diplomático acreditado en ese país, en un todo de acuerdo con las indicaciones recibidas del Gobierno local en los contactos previos.

² Notas de la Embajada de la Argentina en Abuja a la Ghana High Commission in Abuja EE/206/12 del 21 de mayo de 2012, Nota EE/209/12 del 24 de mayo de 2012, EE/218/12 del 19 de junio de 2012, EE/229/12 del 21 de junio de 2012, EE/238/12 del 28 de junio de 2012, EE/280/12 del 28 de agosto de 2012, EE/315/12 del 25 de septiembre de 2012; Nota ABJ/CON/38 VOL.8 de la Ghana High Commission in Abuja a la Embajada argentina en la misma ciudad del 4 de junio de 2012 (Anexo 2).



11. A las 20 horas del 2 de octubre de 2012, se presentó en la ARA Fragata Libertad un funcionario que alegó pertenecer al Servicio Judicial de la Corte Superior de Judicatura de Ghana - División Comercial- acompañado por otras personas, a los fines de diligenciar un oficio de la misma fecha que contenía una resolución de esa Corte, dictada por el Juez Richard Adjei-Frimpong, para retener a la ARA Fragata Libertad en el Puerto de Tema. El funcionario se retiró del buque sin que los oficiales a cargo de éste le aceptaran su pretensión de realizar semejante notificación.

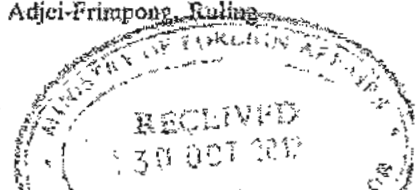
12. Al día siguiente, y pese a que ya se habían iniciado los contactos de las autoridades argentinas y las del Gobierno de Ghana, incluyendo conversaciones entre los respectivos Ministros de Relaciones Exteriores, en las cuales se exhortó a este último país a desistir de su conducta violatoria del derecho internacional, se presentó en el buque una persona que manifestó concurrir en nombre de la Autoridad Portuaria, junto con un Agente Marítimo, solicitando ver al Sr. Comandante de la ARA Fragata Libertad, con el fin de retirar la documentación del buque y el pañol de señales, en cumplimiento de lo ordenado por la Corte Superior de Justicia de Ghana -División Comercial- en la resolución antedicha, pretensión que también fue rechazada por los oficiales a cargo del buque.

13. A pesar del requerimiento de mi gobierno, el Gobierno de Ghana no desistió de su actitud ilícita. Frente a ello, el Gobierno argentino se presentó ante el juez que había ordenado la medida interlocutoria contra la ARA Fragata Libertad³, con el fin de informarle que carecía de jurisdicción y de rechazar su pretensión de tomar medidas en y contra la ARA Fragata Libertad, con la consiguiente violación de la inmunidad que posee ese buque.

14. Pese a todos los antecedentes, y no obstante la claridad del contenido de las normas internacionales en juego determinantes de la responsabilidad internacional de Ghana, el juez interviniente, Richard Adjei-Frimpong, confirmó el 11 de octubre de 2012 su decisión precedente que ordenaba el embargo sobre la ARA Fragata Libertad⁴.

³ In the Superior Court of Judicature in the High Court of Justice (Commercial Division), Accra, Order for Interlocutory Injunction and Interim Preservation of the « ARA Libertad », 2 October 2012 (Anexo 3).

⁴ In the Superior Court of Judicature, in the High Court of Justice Accra Commercial Division, held on Thursday the 11th day of October, 2012. Before His Lordship Justice Richard Adjei-Frimpong, Ruling (Anexo 4).



Por esta razón, el buque permaneció inmobilizado en el puerto de Tema hasta el día de la fecha, cuando debería haber zarpado -de acuerdo con lo previamente acordado por ambos Gobiernos- el 4 de octubre de 2012. Esta situación coloca al buque en la imposibilidad de cumplir con su programa, tal como fue acordado con los otros Estados a los que debía igualmente visitar (Angola, Namibia, Sudáfrica, Brasil y Uruguay), así como con aquellos cuyos agentes se encontraban a bordo del buque.

15. Debido a la orden interlocutoria del juez Adjei-Frimpong, ejecutada por las autoridades portuarias de Tema, la ARA Fragata Libertad está imposibilitada de abastecerse de combustible. El mencionado buque depende de dicho combustible para el mantenimiento de sus dos generadores eléctricos y su destilador de agua. Debido a esta imposibilidad, el buque agotará su combustible en los próximos días. Frente a esta situación, mi gobierno se vio obligado a repatriar a su costo el pasado 24 de octubre mediante un charter aéreo a la mayor parte de la tripulación del buque y a la totalidad de los agentes de Estados extranjeros que participaban de la expedición, es decir 281 personas. En la actualidad, se encuentran en la ARA Fragata Libertad el Capitán del buque y una tripulación de cuarenta y cuatro personas. El Gobierno argentino está también afrontando los gastos causados por la estadía involuntaria imputada al buque detenido y sus tripulantes. Mi gobierno hace responsable al de Ghana por la seguridad del buque y de su tripulación que permanece en él mientras dure su ilícita detención.

16. El Juez Richard Adjei-Frimpong, además de atribuirse una jurisdicción de la que carece, desconoce manifiestamente el Derecho Internacional al pretender justificar su decisión en el hecho de que la legislación de Ghana no le prohibiría tomar medidas de ejecución contra un buque de guerra extranjero. El mismo juez interpreta en un sentido manifiestamente absurdo y arbitrario el contenido de un título de deuda argentino emitido en 1994, al considerar que la Argentina sería prácticamente un Estado sin ningún tipo de inmunidad. Del texto mismo de tal cláusula surge que la Argentina no ha renunciado explícitamente a la inmunidad de sus buques de guerra. En efecto, la decisión del juez ghanés ignora el hecho fundamental y bien establecido en Derecho Internacional según el cual la renuncia a la inmunidad de ejecución de un bien público



del Estado debe ser expresa y que la Argentina no ha renunciado jamás a las inmunidades de que goza el buque de guerra ARA Fragata Libertad⁵.

17. Hasta el presente, el gobierno de Ghana no ha tomado ningún tipo de medidas para poner fin al acto ilícito generado por la decisión de su órgano judicial. Ello en clara contradicción con las normas aplicables de Derecho Internacional, según las cuales corresponde al gobierno del Estado velar por que sus tribunales resuelvan de oficio la cuestión del respeto de la inmunidad de los otros Estados, como lo expresa el Artículo 6 de la Convención de las Naciones Unidas sobre las inmunidades jurisdiccionales de los Estados y sus bienes⁶, que refleja una regla bien establecida de derecho consuetudinario.

18. El gobierno de Ghana tampoco ignora que el Estado es responsable por los actos de todos sus órganos, ya sea que éstos ejerzan funciones judiciales u otras, como lo establece el Derecho Internacional general y lo refleja el Artículo 4 de los Artículos sobre la responsabilidad del Estado por hechos internacionalmente ilícitos elaborados por la Comisión de Derecho Internacional⁷. Por lo demás, es la Autoridad Portuaria de Tema, órgano administrativo del Estado de Ghana, quien ha procedido a ejecutar las decisiones ilícitas del juez Richard Adjei-Frimpong.

19. A pesar de los esfuerzos de la Argentina para solucionar la controversia, los diferentes órganos del Estado de Ghana persisten en su comportamiento, que constituye una violación de las obligaciones internacionales reconocidas por la CNUDM y comprometen la responsabilidad internacional de Ghana, como surge de las pretensiones argentinas enumeradas en la sección (s).

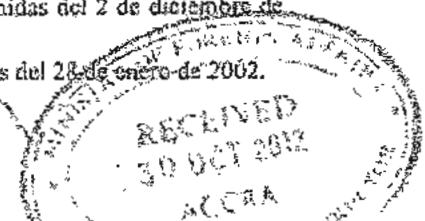
(B) Designación de un miembro del tribunal arbitral

20. De conformidad con el Art. 3 b) del Anexo VII de la CNUDM, la República Argentina notifica el nombramiento como miembro del Tribunal Arbitral de la Señora

⁵ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 118.

⁶ Anexo de la Resolución 59/38 de la Asamblea General de las Naciones Unidas del 2 de diciembre de 2004.

⁷ Anexo a la Resolución 58/63 de la Asamblea General de las Naciones Unidas del 28 de enero de 2002.



Elsa Kelly, miembro del Tribunal Internacional del Derecho del Mar, cuya noticia biográfica se acompaña ⁸.

21. La Argentina invita a Ghana a nombrar un miembro del Tribunal Arbitral en el plazo de 30 días y a iniciar contactos para nombrar a la brevedad los otros miembros, de conformidad con lo dispuesto en el Art. 3 c), d) y e) del Anexo VII.

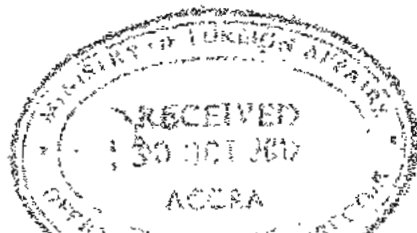
II. SOLICITUD DE MEDIDA PROVISIONAL

22. Pendiente la constitución del Tribunal Arbitral, de conformidad con lo dispuesto en el Artículo 290, par. 5 de la CNUDM, la Argentina solicita a Ghana que, como medida provisional, permita sin condiciones el reabastecimiento y la salida del buque de guerra argentino "ARA Fragata Libertad" del puerto de Tema y de sus aguas jurisdiccionales. De no procederse a tal medida en el plazo de 14 días, la Argentina demandará al Tribunal Internacional del Derecho del Mar que la decrete, como lo prevé la citada disposición.

23. La medida provisional solicitada tiende a preservar los derechos de la Argentina en virtud de la CNUDM mencionados en I (a). La pretensión de Ghana de ejercer jurisdicción sobre el ARA Fragata Libertad impide el ejercicio de tales derechos y puede tornarlos ilusorios por un período de tiempo indeterminado. La amenaza de ejecución de dicho buque de guerra que surge de las decisiones judiciales del 2 y 11 de octubre de 2012 y la voluntad del gobierno ghanés de no hacer nada para impedirlo, de ponerse en práctica, podría producir un perjuicio irreversible e irreparable a tales derechos.

24. Existe urgencia en la adopción de la medida solicitada. Mientras dura la detención de la ARA Fragata Libertad, la Armada Argentina se ve impedida de utilizar su buque insignia. Se trata de una medida a la vez disruptiva de la organización de las fuerzas armadas de un Estado soberano y de una ofensa a uno de los símbolos de la Nación que hiere a los sentimientos del pueblo argentino, cuyos efectos se agravan con el transcurso del tiempo. Por las razones indicadas en el párrafo 15, la mayor parte de la tripulación

⁸ Anexo 8.



debió ser evacuada. El número restringido de la tripulación actualmente existente hace imposible hacer frente al conjunto de las tareas de mantenimiento, lo que requiere normalmente una presencia mínima de 145 tripulantes. En caso de emergencia, lo escaso de la tripulación tampoco podría hacer frente a tal eventualidad. De ocurrir un incendio, el total de la tripulación actual sólo podría cubrir una de las tres brigadas necesarias a bordo. De no permitirse el abastecimiento y la salida del buque en forma inmediata, su actividad y la de su personal se verá alterada de manera grave, con riesgo inclusive para la seguridad del buque y para la salud y la integridad de la tripulación restante. Esta situación, de prolongarse, pone también en grave riesgo el funcionamiento futuro de la ARA Fragata Libertad.

25. La Convención de las Naciones Unidas para el Derecho del Mar ha tenido en cuenta la necesidad fundamental de garantizar la libertad de navegación a buques privados o que ejercen actividades de índole comercial⁹, previendo mecanismos de pronta liberación a su respecto¹⁰; con mayor razón un buque de guerra debe tener la posibilidad de ejercer tal derecho sin condición ni restricción alguna y en forma pronta. Ello así, a punto tal que inclusive si un buque de guerra viola disposiciones legislativas o reglamentarias del Estado ribereño, todo lo que éste puede hacer es ordenarle que salga inmediatamente de su mar territorial¹¹.

26. De no mediar la medida provisional, la presencia forzada de la ARA Fragata Libertad y de su tripulación en el puerto de Tema quedará a la merced de la decisión de un Estado que carece manifiestamente de toda jurisdicción sobre el buque de guerra detenido. La pretensión del gobierno y del sistema judicial ghaneses de ejercer jurisdicción sobre el buque de guerra y de ejecutarlo importan no solo la imposibilidad del ejercicio de los derechos por un lapso prolongado, sino la amenaza de su pérdida irremparable.

27. Por otra parte, el tiempo prolongado que requieren la constitución del tribunal arbitral, el procedimiento a seguir y la adopción del laudo, hacen imposible la espera del final del procedimiento sin grave perjuicio a los derechos que la Argentina invoca.

⁹ Por ejemplo, Arts. 27 y 28 de la CNUDM.

¹⁰ Art. 292 de la CNUDM.

¹¹ Art. 30 de la CNUDM.



28. Este hecho sin precedentes de violación flagrante de derechos que son por demás plausibles y que se fundamentan en reglas básicas y de larga data en la conducta de las relaciones internacionales, de tolerarse, no solo pondría en peligro los derechos de la Argentina, sino también crearía un precedente de incalculables consecuencias para los buques de guerra de todos los Estados, si los mismos debieran permanecer inmovilizados ante cualquier procedimiento judicial que se iniciare en su contra, en espera de la decisión de última instancia de los órganos judiciales internos.

Hago propicia la oportunidad para saludar a Vuestra Excelencia con mi más alta y distinguida consideración.

COPY RECEIVED WITH
FIVE (5) ANNEXES


María Soledad Patara
Embajadora





Accra, October 29th 2012

Excellency,

1. Upon express instructions of my Government, I am writing to refer to the situation that led to the telephone conversation held on October 3rd 2012 between you and the Minister of Foreign Affairs and Worship of Argentina, Héctor Timerman, and the note that he sent you on October 4th 2012, regarding the detention by Ghana in the port of Tema, since October 2nd 2012¹, of the warship "ARA Fragata Libertad", which belongs to the Argentine Navy.

2. In such communications, the Argentine Republic clearly stated that said measure is contrary to international law and, in particular, albeit not exclusively, is a violation of the immunities enjoyed by warships pursuant to Article 32 of the United Nations Convention on the Law of the Sea (hereinafter, "UNCLOS") and other international law rules. Argentina requested your Government to urgently adopt the necessary measures to put an end to this situation.

3. With a view to resolving the dispute as urgently as required by this case and for the purpose of continuing without delay the exchange of views already initiated between the parties, pursuant to Article 283 of UNCLOS, my Government sent to Accra a high-level delegation comprised of the

**To the Ministry of Foreign Affairs and Regional Integration
of the Republic of Ghana
Alhaji Muhammad Mumuni**

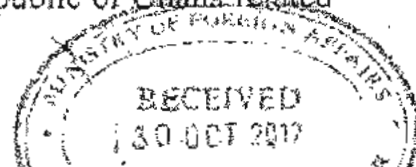
¹ Annex I.

Vice-Minister of Foreign Affairs, Ambassador Eduardo Zuain, and the Secretary of International Affairs of the Ministry of Defence, Couns. Alfredo Forti. On 16-19 October 2012, the delegation met three times with Your Excellency, twice with the Minister of Defence and once with the Minister of Interior, the Attorney General, the Deputy Attorney General and advisors to the President of the Republic of Ghana, in addition to other officials. The Argentine Republic deeply regrets that such exchanges of views and negotiations failed to resolve the dispute between our two States as well as the fact that the warship "ARA Fragata Libertad" remains unlawfully detained and subject to restraint measures in the port of Tema in flagrant violation of basic rules of international law.

4. Since both Argentina and Ghana are parties to UNCLOS, but have not accepted the same procedure for the settlement of the dispute, it must be submitted to the arbitral procedure provided for in UNCLOS Annex VII, by virtue of Article 287 of the said Convention. My Government hereby notifies to the Government of Ghana that this dispute is being submitted to the arbitral procedure, pursuant to Article 1 of Annex VII of UNCLOS (I). Argentina further requests Ghana to adopt the provisional measure of unconditionally enabling the warship "ARA Fragata Libertad" to be resupplied and to leave the Ghanaian jurisdictional waters. Otherwise, within 14 days as from the date of receipt hereof, Argentina shall demand that such measure be ordered by the International Tribunal for the Law of the Sea, as provided in Article 290, paragraph 5, of UNCLOS (II).

(I) SUBMISSION OF THE DISPUTE TO ARBITRATION

5. The Argentine Republic submits to arbitration as provided in Annex VII of UNCLOS the dispute that exists with the Republic of Ghana-related



to the detention of and the court measures adopted against the warship "ARA Fragata Libertad" by the Government of Ghana.

**(A) The Argentine Republic's Statement of Claims and
Grounds upon which it is based**

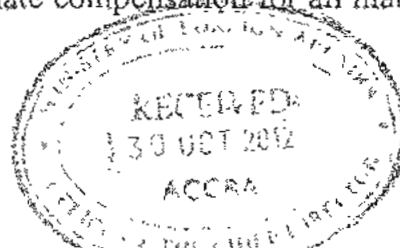
(a) Statement of Claims

6. The Argentine Republic requests the arbitral tribunal to declare that the Republic of Ghana, by detaining the warship "ARA Fragata Libertad", keeping it detained, not allowing it to refuel and adopting several judicial measures against it:

- (1) Violates the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard;
- (2) Prevents the exercise of the right to sail out of the waters subject to the jurisdiction of the coastal State and the right of freedom of navigation enjoyed by the said vessel and its crew, pursuant to Articles 18, paragraph 1 (b), 87, paragraph 1 (a), and 90 of UNCLOS.

7. Thus, Argentina requests the arbitral tribunal to assert the international responsibility of Ghana, whereby such State must:

- (1) immediately cease the violation of its international obligations as described in the preceding paragraph;
- (2) pay to the Argentine Republic adequate compensation for all material losses caused;



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- (3) offer a solemn salute to the Argentine flag as satisfaction for the moral damage caused by the unlawful detention of the flagship of the Argentine Navy, ARA Fragata Libertad, preventing it from accomplishing its planned activities and ordering it to hand over the documentation and the flag locker to the Port Authority of Tema, Republic of Ghana;
- (4) impose disciplinary sanctions on the officials of the Republic of Ghana directly responsible for the decisions by which such State has engaged in the violations of its aforesaid international obligations.

(b) Grounds for Argentina's claims

8. ARA Fragata Libertad is a warship of the Argentine Navy within the scope defined by Art. 29 of UNCLOS. It is the flagship vessel of the Argentine Navy and, as such, represents the Argentine State, and has been sailing the world's seas for more than 50 years, conveying a message of peace and friendship with a view to consolidating relations between the Argentine Navy and its counterparts in third countries. ARA Fragata Libertad is used for navy cadet training trips. At the time of its detention by Ghana it was on its 43rd instruction voyage. The crew of the vessel detained included guest officers from the Navies of Bolivia, Brazil, Chile, Paraguay, Peru, South Africa, Suriname, Uruguay and Venezuela.

9. The Governments of Argentina and Ghana agreed on the visit of ARA Fragata Libertad to the port of Tema (Republic of Ghana). The Government of Ghana on June 4th 2012 authorized such visit and notified its decision to the Argentine Government through diplomatic channels, by means of notes exchanged between the respective representations in Abuja,



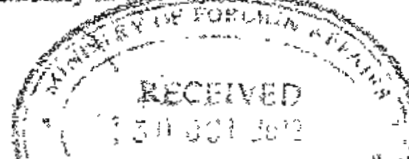
Nigeria². The notes exchanged clearly indicate that ARA Fragata Libertad is a warship, the official purpose of the visit and the relevant protocol arrangements between Argentina and Ghana. The final preparations for the visit by ARA Fragata Libertad to Ghana were agreed upon by Argentine diplomatic staff posted in Ghana since 26 September, which established contact with the naval authorities of that country as had been required by the local Government.

10. ARA Fragata Libertad arrived on the scheduled date (October 1st) and, on that same day, a formal welcome ceremony was held on board the ship to which governmental authorities, representatives of the Ghanaian Armed Forces and representatives of the diplomatic corps accredited to that country attended, in full compliance with the instructions received from the local Government in previous communications.

11. At 8:00 pm on 2 October 2012, a person claiming to be an official for the Judicial Service of the Superior Court of Judicature of Ghana — Commercial Division— appeared at ARA Fragata Libertad with other persons, for the purpose of delivering an official letter bearing the same date which contained an order by that Court, rendered by Judge Richard Adjei-Frimpong, requiring that ARA Fragata Libertad be held in the Tema Port. The official left the ship without the officers in charge of it accepting such service of process.

12. On the following day, and even though the contacts between the Argentine and Ghanaian authorities had already begun, including talks

² Notes from the Argentine Embassy in Abuja to the Ghana High Commission EE/205/12 of May 31 2012, EE/209/12 of May 24 2012, EE/218/12 of June 19 2012, EE/229/12 of June 21 2012, EE/238/12 of June 28, 2012, EE/280/12 of August 28 2012, EE/315/12 of September 25 2012; Note ABJCON/38 VOL.8 of the Ghana High Commission in Abuja to the Argentine Embassy in that city of 4 June 2012 (Annex 2).



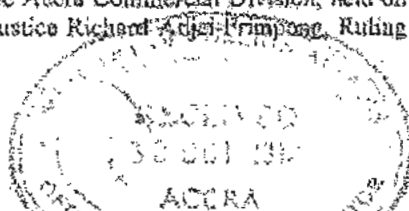
between their respective Ministers of Foreign Affairs, in which Argentina urged Ghana to desist from its conduct, which constituted a violation of international law, a person claiming to represent the Port Authority appeared at the ship, together with a Maritime Agent, and requested to meet with the Commander of ARA Fragata Libertad, for the purpose of taking the documents of the ship and the flag locker in pursuance of the above-mentioned order issued by the Superior Court of Judicature of Ghana—Commercial Division. This request was also rejected by the officers in charge of the ship.

13. Despite my government's request, the Government of Ghana has not desisted from its unlawful conduct. In view of this attitude, the Argentine Government appeared before the judge that had ordered the interlocutory measure³ against ARA Fragata Libertad for the purpose of informing that he lacked jurisdiction and rejecting his attempt to take steps in connection with and against ARA Fragata Libertad, as this entailed a violation of such ship's immunity.

14. In spite of all the precedents and of the clear content of the applicable international rules giving rise to Ghana's international responsibility, the acting judge, Richard Adjei-Frimpong, on October 11th 2012 confirmed his previous order of seizure of ARA Fragata Libertad⁴. The ship has thus remained stranded at the Tema port to this day even though it should have set sail—as previously agreed by both Governments—on 4 October 2012. This situation renders the ship unable to follow its program as agreed with the other States it was also going to visit (Angola, Namibia, South Africa,

³ In the Superior Court of Judicature in the High Court of Justice (Commercial Division), Accra, Order for Interlocutory Injunction and Interim Preservation of the « ARA Libertad », 2 October 2012 (Annex 2).

⁴ In the Superior Court of Judicature, in the High Court of Justice Accra Commercial Division, held on Thursday the 11th day of October, 2012. Before His Lordship Justice Richard Adjei-Frimpong, Ruling (Annex 3).



Brazil and Uruguay), as well as with the States whose officers were on board of it.

15. Due to the interlocutory order by judge Adjei-Frimpong, enforced by the port authorities of Tema, ARA Fragata Libertad is unable to refuel. The ship depends on fuel for the maintenance of its two electricity generators and water distiller. As a result of this impossibility, the vessel will run out of fuel in the coming days. Faced with this situation, my government on October 24th 2012 had to repatriate at its own cost, on board a charter flight, most of the vessel's crew and all of the officers of foreign States that were participating in the expedition, *i.e.*, 281 individuals. At present, the captain of the ship and 44 crew members are still on board ARA Fragata Libertad. The Argentine Government is also bearing all the costs arising from this involuntary stay imposed on it and its crew. My government holds Ghana responsible for the security of the ship and of the crew remaining in it for as long as its unlawful detention lasts.

16. Judge Richard Adjei-Frimpong, in addition to claiming a jurisdiction he does not have, manifestly disregards international law by attempting to justify his decision by reference to the fact that Ghana legislation would not prohibit him from taking enforcement measures against a foreign warship. This judge interprets in a downright absurd and arbitrary manner the content of an Argentine bond issued in 1994, virtually holding that Argentina would be a State without any kind of immunity. The language of the clause itself states that Argentina has not waived the immunities to which warships are entitled under international law. Therefore, the Ghanaian judge's decision ignores the fundamental and well-established international law fact that a waiver of immunity from enforcement of a government's public property must be express, and the fact that Argentina



never waived the immunities protecting the warship ARA Fragata Libertad⁵.

17. Until today the government of Ghana has not taken any kind of measures aimed at putting an end to the unlawful act generated by the decision of its judiciary. This is in flagrant violation of applicable international law rules providing that the government of a State shall ensure that its courts determine on their own initiative that the immunity of other States is respected, as set forth in Article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property⁶, which reflects a well-established rule of customary law.

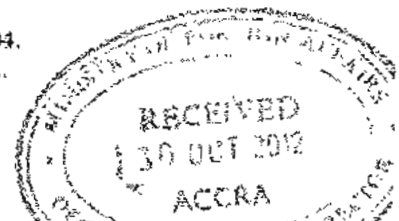
18. The government of Ghana is not unaware of the fact that the State is responsible for the acts of all its organs, whether they exercise judicial or other functions, as established by general international law and as reflected in Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission⁷. Furthermore, it is the Tema Port Authority, an administrative organ of the State of Ghana that has enforced the unlawful decisions of judge Richard Adjei-Frimpong.

19. Despite Argentina's efforts to resolve the dispute, the various State organs of Ghana persist in their conduct, which violates international obligations recognized by UNCLOS and entails international responsibility on the part of Ghana, as arises from the Argentine arguments set out in (a).

⁵ See International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 113.

⁶ Annex to United Nations General Assembly Resolution 59/38 of 2 December 2004.

⁷ Annex to United Nations General Assembly Resolution 58/63 of 28 January 2002.



(B) Appointment of a Member of the Arbitral Tribunal

20. Pursuant to Article 3 (b), Annex VII of UNCLOS, the Argentine Republic notifies the appointment of Ms Elsa Kelly, member of the International Tribunal for the Law of the Sea, a biographical summary of whom is enclosed⁶, as member of the Arbitral Tribunal.

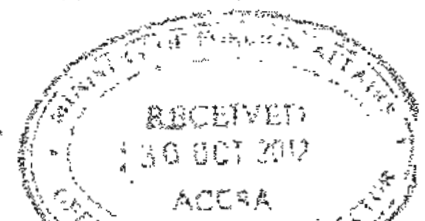
21. Argentina invites Ghana to appoint a member of the Arbitral Tribunal within 30 days and to begin contacts to appoint the other members as soon as possible, in accordance with Article 3 (c), (d) and (e) of Annex VII.

II. REQUEST FOR PROVISIONAL MEASURE

22. Pending the constitution of the Arbitral Tribunal, as provided in Article 290, paragraph 5, of UNCLOS, Argentina requests Ghana to adopt a provisional measure to unconditionally enable the Argentine warship "ARA Fragata Libertad" to be resupplied and to leave the Tema port and the jurisdictional waters of Ghana. If such measure is not adopted within a term of 14 days, Argentina shall request the International Tribunal for the Law of the Sea to order such measure as set forth in the aforesaid provision.

23. The purpose of the provisional measure requested is to preserve the rights of Argentina arising from UNCLOS and referred to in I (a). Ghana's attempt to exercise jurisdiction over ARA Fragata Libertad prevents the exercise of such rights and may render them illusive for an indefinite period of time. If carried out, the threatened execution of the said warship arising from the court decisions of 2 and 11 October 2012-- and in view of

⁶ Annex 5.



the reluctance of the Government of Ghana to do anything to prevent it --, this could cause an irreversible and irreparable impairment of such rights.

24. The requested measure must be adopted urgently. The Argentine Navy will be unable to use its flagship vessel for as long as the ARA Frigate Libertad remains detained. Such detention is, in turn, a measure that disrupts the organization of the armed forces of a sovereign State and an offence to one of the symbols of the Argentine Nation that hurts the feelings of the Argentine people, the effects of which are only compounded by the passage of time. For the reasons stated in paragraph 15, most of the crew had to be evacuated. The limited number of crewmembers that are now on board makes it impossible to carry out all maintenance tasks, which normally require at least 145 crew members. In case of an emergency, such a small number of crewmembers would be unable to respond. If a fire were to occur, the crew now present would merely be able to cover only one of the three brigades needed on board. If the vessel is not immediately allowed to refuel and sail off, its activities and those of the crew will be seriously disrupted, even jeopardizing the security of the vessel and the health and integrity of the crew remaining on board. If this situation persists, the future functioning of ARA Fragata Libertad will also be in peril.

25. The United Nations Convention on the Law of the Sea has taken into account the fundamental need to guarantee the freedom of navigation of private vessels or vessels operated for commercial purposes,⁹ providing mechanisms for prompt release in this regard¹⁰; and thus a warship has all the more reason to be able to exercise such right promptly and without any

⁹ For example, Articles 27 and 28 of UNCLOS.

¹⁰ Article 292 of UNCLOS.



condition or restriction. This holds true to such an extent that even if a warship does not comply with the laws and regulations of the coastal State, all that this State can do is to require it to leave its territorial sea immediately.¹¹

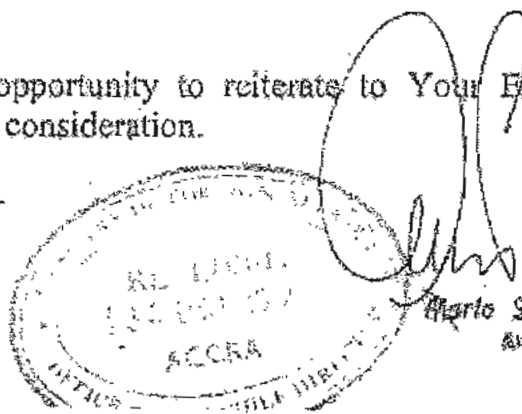
26. If the provisional measure is not adopted, the involuntary presence of ARA Fragata Libertad and its crew in the Tema port will be left at the mercy of the decision of a State that manifestly lacks any jurisdiction over the detained warship. The attempt by the government and judiciary system of Ghana to exercise jurisdiction over the warship and execute it not only entails the impossibility of exercising such rights for a prolonged period, but also the threat of irreparable loss.

27. Furthermore, the long time required for the constitution of the arbitral tribunal, for the conduct of the relevant procedure and for the award to be rendered makes it impossible to wait for the completion of the procedure without seriously impairing the rights invoked by Argentina.

28. Should this unprecedented flagrant violation of these more than plausible rights that arise from basic and long-standing rules regarding the conduct of international relations be tolerated, not only would Argentina's rights be in jeopardy. This would also set a precedent that would have incalculable consequences for the warships of all States, if they would have to remain stranded upon any lawsuit being brought against them and until a final decision of the highest domestic judicial authorities is rendered.

I avail myself of this opportunity to reiterate to Your Excellency the assurances of my highest consideration.

¹¹ Article 30 of UNCLOS.



María Susana Pátero
Embajadora

COPY RECEIVED WITH
FIVE (5) ANNEXES

ANNEX 1

Ministro de Relaciones Exteriores y Culto

BUENOS AIRES, 4 de octubre de 2012.-

EXCELENCIA:

Continuando nuestra conversación telefónica de ayer, quisiera reiterarle nuestra gran preocupación en cuanto a la resolución de la Corte Superior de Judicatura (División Comercial) de su país de fecha 2 de octubre de 2012 por la cual se trabó embargo sobre el buque de guerra "ARA Fragata Libertad" perteneciente a la Armada de la República Argentina, que se encuentra en el puerto de Tema.

La República Argentina lamenta profundamente que la Fragata Libertad haya sido retenida indebidamente en ese puerto como consecuencia de la mencionada orden judicial.

Esta orden resulta contraria al derecho internacional toda vez que viola las inmunidades de las que gozan los buques de guerra conforme al Artículo 32 de la Convención de las Naciones Unidas de 1982 sobre el Derecho del Mar y la Convención de las Naciones Unidas sobre las Inmunidades Jurisdiccionales de los Estados y de sus Bienes de 2004 cuyas disposiciones reflejan el derecho consuetudinario en la materia, normas en virtud de las cuales un buque de guerra como la Fragata Libertad es inembargable.

La Fragata Libertad está actualmente en su cuadragésimo tercer viaje de instrucción con una tripulación compuesta, además de oficiales argentinos, de personal militar que representa a las Fuerzas Navales de Bolivia, Brasil, Chile, Paraguay, Perú, Sudáfrica, Surinam, Venezuela y Uruguay. Cabe destacar que la Fragata Libertad se encuentra en visita en el Puerto de Tema sobre la base de una invitación oficial de su Gobierno con lo cual sorprende la medida tomada por las autoridades de su país.

La Fragata Libertad es venerada como un símbolo argentino con alto valor histórico y cultural, y representa ante el mundo a la República Argentina y a su pueblo.

AL SEÑOR CANCELLER DE LA REPÚBLICA DE GHANA
ALHAJI MUHAMMAD MUMUNI

S. _____ / _____ D.

Ministro de Relaciones Exteriores y Culto

Los viajes anuales de instrucción alrededor del mundo de la Fragata Libertad sirven al importante rol de promover las relaciones de amistad y cooperación entre la República Argentina y las naciones visitadas entre las cuales se encuentra su país. Además de Ghana, dentro del actual viaje está programada la visita a otros 12 países (Brasil, Surinam, Guyana, Venezuela, Portugal, España, Marruecos, Senegal, Angola, Namibia, Sudáfrica y Uruguay) bajo un estricto cronograma que fue previamente acordado con autoridades militares y civiles de los países visitados, incluyendo al Gobierno de Ghana. Cualquier retraso en el Puerto de Tema afecta la agenda oficial y pone en riesgo la misión del viaje de instrucción.

La medida dictada por el poder judicial de su país, además de contravenir el derecho internacional, causa un grave perjuicio a la República Argentina y repercutirá, sin dudas, negativamente en el normal desarrollo de las relaciones bilaterales de no ser la misma dejada sin efecto con la mayor urgencia, a fin de que la Fragata Libertad pueda continuar con su viaje de instrucción tal como ha sido planeado.

Es por ello que, en homenaje a la histórica amistad que une a nuestros dos países y en virtud del favorable escenario que presenta hoy la cooperación sur-sur, solicito muy especialmente al Gobierno de VE —y agradezco desde ya— adoptar con la mayor urgencia las medidas que estén a su alcance para poner fin a esta situación que lamentablemente empaña la exitosa gira por países amigos del emblemático buque escuela de la Argentina.

Puedo asegurarle que para mi país, la elección del puerto de Tema como una de las escalas del itinerario de la Fragata Libertad fue motivo de enorme satisfacción por permitimos honrar los vínculos de fraternidad que nos unen.

Aprovecho esta ocasión para renovar a V.E. las seguridades de mi más alta y distinguida consideración.



HECTOR TIMERMAN
Ministro de Relaciones Exteriores
y Culto

COURTESY TRANSLATION

BUENOS AIRES, 4 October 2012

EXCELLENCY:

Further to our telephone conversation yesterday, I would like to reiterate to you our deep concern about the Ghana Superior Court of Judicature (Commercial Division) order dated 2 October 2012, issuing an attachment against the "ARA Fragata Libertad" warship that belongs to the Navy of the Argentine Republic, and which is at Tema port.

The Argentine Republic is deeply distressed that Frigate Libertad has been unduly withheld at that port as a result of the aforesaid order.

Such order is contrary to international law, insofar as it violates the immunities enjoyed by warships pursuant to Article 32 of the 1982 United Nations Convention on the Law of the Sea and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, the provisions of which reflect the customary law in this regard, by which a warship such as Frigate Libertad cannot be subject to any measure of attachment.

Frigate Libertad is currently on its 43rd crew training trip, and its crew comprises, in addition to Argentine officers, military personnel representing the Naval Forces of Bolivia, Brazil, Chile, Paraguay, Peru, South Africa, Suriname, Venezuela and Uruguay. It is worth noting that Frigate Libertad is visiting Tema Port on an official invitation from your Government, and therefore the measure adopted by the authorities of your country has taken us by surprise.

Frigate Libertad is revered as an Argentine symbol that boasts a high historic and cultural value, and represents Argentina and its people before the world.

The annual training trips around the world of Frigate Libertad serve the significant role of promoting ties of friendship and cooperation between the Argentine Republic and the nations visited, including your country. In addition to Ghana, the frigate is planned to continue this trip in 12 other countries (Brazil, Suriname, Guyana, Venezuela, Portugal, Spain, Morocco, Senegal, Angola, Namibia, South Africa and Uruguay) on a strict schedule that has been previously agreed with military and civil authorities of the countries visited, including the Government of Ghana. A delay in Tema Port adversely affects the official schedule and jeopardizes the mission of the training trip.

The measure adopted by the Ghana judiciary, in addition to violating international law, causes serious harm to the Argentine Republic and will certainly have an adverse impact on our normal bilateral relations if this measure is not set aside promptly, so that Frigate Libertad can continue its training trip according to plan.

Hence, as a way of paying homage to the historic friendship between our two countries and in view of the positive outlook of South-South cooperation nowadays, I kindly request Your Excellency's Government – and I thank Your Excellence in advance for this – to adopt as soon as possible such measures as may be within your reach to put an end to a situation that unfortunately tarnishes the successful visit to countries that are friends of Argentina's emblematic school ship.

I can assure you that for my country, the election of Tema port as one of the stops on the itinerary of Frigate Libertad was a source of enormous satisfaction as it allows us to honour the fraternal ties between our countries.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

TO THE MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF GHANA
ALHAJI MUHAMMAD MUMUNI

ANNEX 2



*Embassy of the
Argentine Republic*

NOTE: EE/206/12

The Embassy of Argentine Republic in Nigeria presents its compliments to the High Commission of Ghana in Nigeria and has the honor to inform, that in the frame of deepening the warm bilateral relations and the initiatives already in place since recent years, the Argentinean Navy has organized the visit to Tema Port of the Instruction Frigate A.R.A. Libertad from 1st till 4th of October in the course of it annual instruction trip for graduating naval cadets.

This occasion will be the first for the School Ship to anchor in a Ghanaian port ever, and we hope, it will be an unforgettable occasion for Ghanaians to visit and get acquainted with the museum-ship.

In this light, and following a special request from the authorities of the above mentioned vessel, we wish to request for information regarding the contact details of authority, contact person, focal point in Ghana in order to facilitate proper arrangements, discuss logistics and operational details with the Argentinean side in the Frigate.

More information on the A.R.A. Frigata "Libertad" can be found at www.armada.mil.ar/informacion/2006 (in Spanish)

Our contacts are as follows: Embassy of Argentina, Plot 1611, Yusuf Maitama Sule street, Asokoro, Abuja. Email: embaar@nigeria.gov.ar, Tel: 09-7800651, 08065292334

The Embassy of Argentina in Nigeria avails itself of this opportunity to renew to the High Commission of Ghana in Nigeria the assurances of its highest consideration.

Abuja, May 21, 2012



High Commission of Ghana
Abuja

*Original copy received by
Eme [Signature] 20/5/12*



*Embassy of the
Argentine Republic*

NOTE: EE/25/12

The Embassy of Argentine Republic in Nigeria presents its compliments to the **High Commission of Ghana in Nigeria** and with reference to our previous Note Verbal has the honor to request for the Permit from the appropriate authorities of Your Esteemed Country to enter the jurisdictional waters of Ghana and stop over at the Tema Port.

Details of the Frigate:

Crew:

- Officers: 25 (Twenty five)
- Official Guests (Domestic and Foreign): 16 (Sixteen)
- Midshipmen in commission: 71 (seventy one)
- Midshipmen in commission (Foreign): 23 (Twenty three)
- Assistant Officers: 21 (Twenty one)
- Caporals: 172 (One hundred and seventy two)
- Civil personnel: 04 (four)

Entry to Jurisdictional waters: 29 SEP 07:00 GMT; Lat. 00°24',80(N); Long: 000°00',90(W)
Exit: 05 OCT 15:00GMT; Lat: 00°24',80(N); Long: 000°00',90(W)

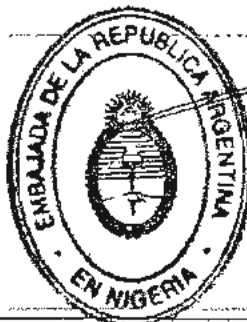
Entry to Tema Port: 01 OCT 09:00 GMT
Exit from the Tema Port: 04 OCT 15:00 GMT

Our contacts are as follows: Embassy of Argentina, Plot 1611, Yusuf Maitama Sule street, Asokoro, Abuja. Email: embae@mrccis.gov.ng, Tel: 09-7800651, 08065292334

The Embassy of Argentina in Nigeria avails itself of this opportunity to renew to the **High Commission of Ghana in Nigeria** the assurances of its highest consideration.

Abuja, May 24, 2012

High Commission of Ghana
Abuja



Original copy received by
Eme [Signature] 24/5/12



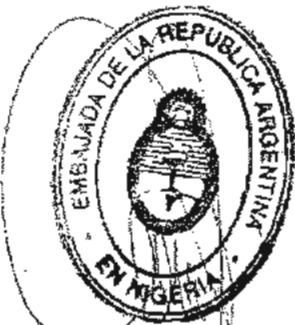
*The Embassy of
the Argentine Republic*

NOTE: EE/ 218 /12

The Embassy of the Argentine Republic in Nigeria presents its compliments to the -High Commission of Ghana- in Nigeria and regarding the visit to Ghana of the Argentinean Ship A.R.A. LIBERTAD from the 1st to 4th October 2012, has the honor to forward additional information attached to this Note.

The Embassy of the Argentina Republic avails itself of the opportunity to renew to the -High Commission of Ghana- in Nigeria the assurances of its highest consideration.

Abuja, 19 June 2012



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THE HIGH COMMISSION OF GHANA
Abuja



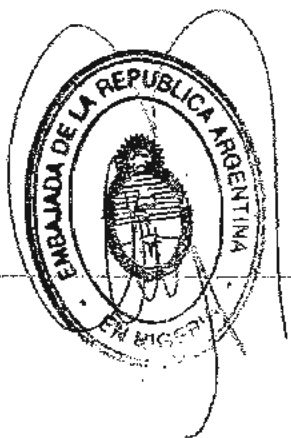
*The Embassy of
the Argentine Republic*


NOTE: EE/229/12

The Embassy of the Argentine Republic in Nigeria presents its compliments to the **-High Commission of Ghana-** in Nigeria and with reference to the Note Verbal EE/218/12 dated 19th June 2012, has the honor to forward the C.V. (English version) of the Captains of the Argentinean Ship A.R.A. LIBERTAD: Executive Officer Mr. Carlos Maria Allievi and Commanding Officer Mr. Pablo Lucio Salonio.

The Embassy of the Argentina Republic avails itself of the opportunity to renew to the **-High Commission of Ghana-** in Nigeria the assurances of its highest consideration.

Abuja, 21 June 2012



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THE HIGH COMMISSION OF GHANA

Abuja



*The Embassy of
the Argentine Republic*

NOTE: EE/238 /12

The Embassy of the Argentine Republic in Nigeria presents its compliments to the **High Commission of Ghana** in Nigeria and regarding the visit to Ghana of the Argentinean Frigate A.R.A. LIBERTAD, which was authorized by the Ghanaian Authorities to dock at Tema harbour, and in order to comply with the visit, has the honor to request the following:

1) -Protocol list of Port Authorities and city of Tema suggested for courtesy visit.

2) - Authorities and personalities that Ghanaian protocol would kindly advice to include in a list of possible guests for the reception to be hosted on board by Commander of the Frigate.

Our contact is as follows: Plot 1611, Yusuf Maitama Sule Street, Asokoro District, Abuja, Nigeria. Tel: +234 9 7800651; e-mail: enige@mrecic.gov.ar

The Embassy of the Argentina Republic avails itself of the opportunity to renew to the **High Commission of Ghana** in Nigeria the assurances of its highest consideration.

Abuja, 28th June 2012



Original copy received by
Eme [Signature] 29/6/12



*The Embassy of
the Argentine Republic*

NOTE: EE/ 280/12

The Embassy of the Argentine Republic in Nigeria presents its compliments to the High Commission of Ghana in Nigeria and with reference to the previous Note Verbal: EE/238/12 dated 28th June 2012 regarding the visit to Ghana of the Argentinean Frigate A.R.A. LIBERTAD, which was authorized by the Ghanaian Authorities to dock at Tema harbour, has the honor to request the following:

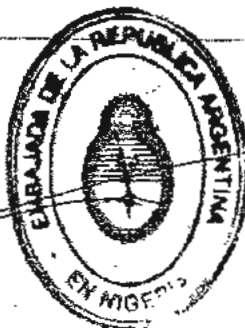
1) -Protocol list of Port Authorities and city of Tema suggested for courtesy visit.

2) - Authorities and personalities that Ghanaian protocol would kindly advice to include in a list of possible guests for the reception to be hosted on board by Commander of the Frigate.

The Embassy contact details are as follow: Plot 1611, Yusuf Maitama Sule Street, Asokoro District, Abuja, Nigeria. Tel: +234 9 7800651; e-mail: enige@mrecic.gov.ar

The Embassy of the Argentine Republic avails itself of the opportunity to renew to the High Commission of Ghana in Nigeria the assurances of its highest consideration.

Abuja, 28th August 2012



Received by Enle
~~Enle~~ 28/8/12

THE HIGH COMMISSION OF GHANA
Abuja



**Embassy of the
Argentine Republic**

NOTE: EE/3/12

The Embassy of Argentine Republic in Nigeria presents its compliments to the **High Commission of Ghana in Nigeria** and has the honor to inform, that the Instructional Frigate A.R.A. Libertad will arrive to the Tema port at 12.00 noon on 1st of October. Therefore the official cocktails on board is scheduled for same day at 7.30pm.

We would humbly suggest that through the good offices of the Ghanaian Ministry of Foreign Affairs, the ceremony on board stated (Monday, October 1st at 7.30am) be put into knowledge of the authorities of the Ministry of Defense, Ministry of Agriculture, Accra city Authorities, traditional rulers, Members of International Organizations and Diplomatic Missions.

In order to participate in the official welcoming ceremony of the Instruction Frigate A.R.A. Libertad, Ambassador - H.E. Maria Susana Pataro will arrive to Accra on 28th September 2012 by Arik flight W3 61 at 17.50hrs and depart from Accra on 05th October by Arik flight W3 64 at 06.00hrs. During the visit, Her Excellency will stay in Lahadi Beach Hotel.

In order to coordinate the visit of the Frigate, Secretary - Mr. Gustavo Fernandez Briozzo is arriving today - 26th of Septemebr from Spain. His contacts are as follows: +34-606067882

For further information you can kindly contact us as follows: Embassy of Argentina, Plot 1611, Yusuf Maitama Sule street, Asokoro, Abuja. Email: enise@mrccic.gov.ng, Tel: 09-7800651, 08065292334

The Embassy of Argentina in Nigeria avails itself of this opportunity to renew to the **High Commission of Ghana in Nigeria** the assurances of its highest consideration.

Abuja, September 25, 2012



High Commission of Ghana
Abuja

Received by Enel
26/9/12



GHANA HIGH COMMISSION
OLUSEGUN OBASANJO WAY
AREA 10 GARKI
P. O. BOX 2025 GARKI, ABUJA - NIGERIA
TEL: 09-461 5400, 09-461 5417-20,
Fax: 09-461 5407

ABJ/CON/38 VOL.8

The High Commission of the Republic of Ghana presents its compliments to the Embassy of the Republic of Argentina and with reference to the latter's Note Verbale No. EE/206/12 dated 21st May, 2012, requesting for its Naval ship to dock at Tema harbour from 1st to 4th October, 2012 has the honour to inform that the Ghanaian Authorities have granted the request.

The High Commission of the Republic of Ghana avails itself of this opportunity to renew to the Embassy of Argentina the assurances of its highest consideration.

ABUJA, 4th JUNE 2012

**THE EMBASSY OF ARGENTINE
ABUJA**

ANNEX 3

IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)
ACCRA, A. D. 2012

SUIT NO.MISC/58/12

NML CAPITAL LIMITED
HUNTLAW CORPORATE SERVICE
THE HUNTLAW BUILDING
75 FOR STREET, GRAND CAYMAN
CAYMAN ISLANDS


PLAINTIFF/APPL.

VERSUS

THE REPUBLIC OF ARGENTINA
MINISTRY OF FOREIGN AFFAIRS
& WORSHIP ESMERALDA

DEFENDANT/RESPT.

1212 C1007 ABR BUENOS AIRES
ARGENTINA



[SGD]
RICHARD ADJEI-FRIMPONG
JUSTICE OF THE HIGH COURT

ORDER FOR INTERLOCUTORY INJUNCTION
AND INTERIM PRESERVATION OF THE "ARA
LIBERTAD"

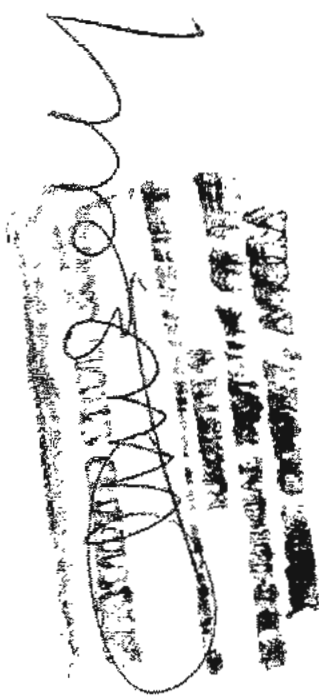
COMMERCIAL DIVISION

UPON READING the affidavit of KWEKU AGGREY-ORLEANS, of House No.7 Abokobi Close, East Cantonments filed on 2nd October 2012, in support of the motion ex-parte for interlocutory injunction and interim preservation:

AND UPON HEARING ACE ANAN ANKOMAH ESQ, Counsel for and on behalf of the Plaintiff/Applicant herein:

IT IS HEREBY ORDERED THAT the "Ara Libertad" be enjoined and preserved as follows:

1. The Defendant, its servants, agents, privies and/or assigns including the captain (Capitán de Navío Pablo LucioSalonio) and crew are restrained from moving the *ARA Libertad* from the Port of Tema without further order of the court.
2. The Defendant, its servants, agents, privies and/or assigns including the captain (Capitán de Navío Pablo LucioSalonio) and crew are restrained from bunkering the *ARA Libertad* without further order of the court.
3. The Harbour Master, his servants, agents, privies, assigns are ordered to preserve the presence of the *ARA Libertad* in



Handwritten signature and stamp, possibly indicating the date or location of the order.

Ghana and ordered to board the *ARA Libertad* forthwith and take possession of all copies, whether electronic or otherwise, of the *ARA Libertad's* mandatory documents as listed in schedule 1 below and to refrain from permitting pilots, tugs or other personnel and services of Tema Port in assisting the *ARA Libertad* departing from its berth.

4. The Defendant, its servants, agents, privies and/or assigns including the captain of the *ARA Libertad* (Capitán de Navío Pablo LucioSalonio), are ordered to surrender to the Harbour Master his servants, agents, privies, assigns at the Port of Tema all copies, whether electronic or otherwise, of the *ARA Libertad's* mandatory documents as listed in schedule 1 below.
5. The Harbour Master his servants, agents, privies, assigns at the Port of Tema are ordered not to issue the *ARA Libertad* with a Clearance certificate or Departure permit without further order of the court.
6. The Harbour Master his servants, agents, privies, assigns at the Port of Tema are ordered to take possession of the flag locker of the *ARA Libertad* until further order of the court.

Schedule 1 List of mandatory documents

- i. Crew and passenger manifest.
- ii. The international tonnage certificate (1969).
- iii. The international Load Line Certificate.
- iv. The international Load Line exemption certificate.
- v. The intact stability booklet.
- vi. Damage control plans and booklets.
- vii. Minimum safe manning document.
- viii. On board training and drills record.
- ix. Certificates for masters, officers or ratings.
- x. International oil pollution prevention certificate
- xi. Oil record book
- xii. International sewage pollution prevention certificate.
- xiii. Voyage data recorder system-certificate of compliance.
- xiv. Cargo securing manual.
- xv. Document of compliance.
- xvi. Safety management certificate.
- xvii. International Ship Security Certificate (ISSC) or Interim International Ship Security Certificate.
- xviii. Ship Security Plan and associated records.
- xix. Continuous Synopsis Record (CSR).
- xx. Exemption Certificate.
- xxi. List of operational limitations.
- xxii. Ship's register.

- xxiii. Safety Radiotelegraphy Certificate.
- xxiv. Safety equipment Certificate.
- xxv. Bill of Health.
- xxvi. Vaccination List.
- xxvii. Cargo Manifest

IT IS HEREBY FURTHER ORDERED that leave is granted the Plaintiff to serve a copy of this order of injunction and preservation together with the Notice of the Writ on the Defendant outside the jurisdiction.

The Order of interlocutory injunction shall remain in force for ten (10) days save that pursuant to Order 25 Rule 1 (10) of C.I. 47 the said Order shall not so lapse after the expiration of ten (10) days unless the defendant provides sufficient security acceptable to this or any other court of competent jurisdiction within Ghana to satisfy the Plaintiff's claim against the Defendant.

GIVEN UNDER MY HAND AND THE SEAL OF THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA THIS 2ND DAY OF OCTOBER 2012.

[SGD]
GLORIA E. OCANSEY (MRS)
REGISTRAR

PAID
COURT

GH/6-2



REPUBLIC OF GHANA

REGISTRAR
COMMERCIAL DIVISION OF THE
HIGH COURT, ACCRA

FILED PURSUANT TO LEAVE GRANTED BY THE HONOURABLE COURT ON
2ND OCTOBER 2012

WRIT ISSUED FROM

.....20..... NO.....
R/C/343/12

~~7789587~~
7789587
2-10-12

IN THE COMMERCIAL DIVISION OF THE HIGH COURT
ACCRA

BETWEEN

NML CAPITAL LIMITED
Huntlaw Corporate Services
The Huntlaw Buildings
75 Fort Street, Grand Cayman-
Cayman Islands

PLAINTIFF

Plaintiff

VERSUS

And

To

THE REPUBLIC OF ARGENTINA
Ministry of Foreign Affairs and Worship
Esmeralda 1212
C1007 ABR, Buenos Aires
Argentina

DEFENDANT

Defendant

Of

An ACTION having been commenced against you by the issue of this Writ by the above-named Plaintiff

NML Capital Limited

YOU ARE HEREBY COMMANDED that within eight days after the service of this Writ on you inclusive of the day of service you do cause an appearance to be entered for you.

The Republic of Argentina

2/10/12
11:30
M

AND TAKE NOTICE that in default of your so doing this, Judgement may be given in your absence without further notice to you.

HIGH COURT, ACCRA



Chief Justice of Ghana, the

2nd day October 2012

N.B. This writ is to be served within twelve calendar months from the date of issue unless it is renewed within six calendar months from the date of last renewal.

The defendant may appear hereto entering appearance either personally or by solicitor, at the Registry of the Court of issue of the Writ at A defendant appearing personally may, if he desires enter his appearance by post and the appropriate forms may be obtained from the registrar after paying the appropriate fees

STATEMENT OF CLAIM

- The Plaintiff's claim is for:
- (a) The sum of US\$284,184,632.30 being the amount of the judgment awarded by the United States District Court for the Southern District of New York;
 - (b) Interest on the sum of US\$284,184,632.30 at the rate of 4.95% per annum (compounded annually) and amounting to US\$91,784,681.30 as at 1st October 2012;
 - (c) Continuing interest at the rate of 4.95% per annum (compounded annually) currently amounting to US\$49,071.03 per day from 1st October 2012 until judgment or sooner payment; or
 - (d) Alternatively, interest on the said amount at the prevailing commercial bank rate from 18th December 2006 to the date of final payment.

This Writ was issued by *Frank Ankomah*
 Bentsi-Enchill, Letsa & Ankomah
 & SOLICITORS PUBLIC
 Address 1st Floor Teachers' Hall Complex, Education Loop, Off Barnes Road, Adabraka,
 Accra
 Whose address for service is
 Agent for NML Capital Limited

Solicitor for the Plaintiff Bentsi-Enchill, Letsa & Ankomah who
 Resides at Accra

Endorsement to be made within 3 days after service

This Writ was served by me at

On the defendant

On the _____ day of _____ 20

Indorsed the _____ day of _____ 20

Signed.....
 Address.....

Note: Any defence or other pleadings should be filed in the Court in which you have entered an appearance. Any other communication should be sent to _____ if in doubt as to where you should send document in relation to the case the Registrar at the court where you entered an appearance will tell you where you should send it.

IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)
ACCRA - A.D. 2012

2/10/12
11:30
PLAINTIFF Registrar
COMMERCIAL DIVISION OF THE
SUPERIOR COURT, ACCRA

NML CAPITAL LIMITED
Huntlaw Corporate Services
The Huntlaw Buildings
75 Fort Street
Grand Cayman
Cayman Islands

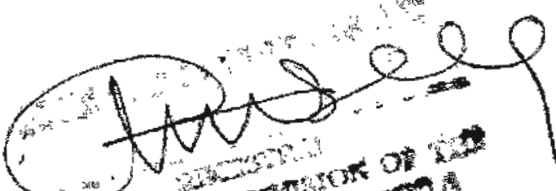
VERSUS

THE REPUBLIC OF ARGENTINA
Ministry of Foreign Affairs and Worship
Esmeralda 1212
C1007 ABR
Buenos Aires
Argentina

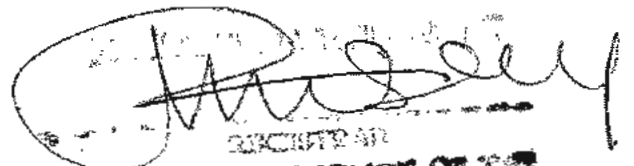
DEFENDANT

STATEMENT OF CLAIM

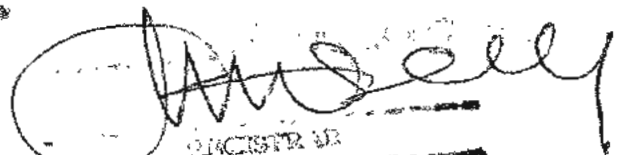
1. The Plaintiff is a company registered and incorporated under the laws of the Cayman Islands engaged in the business of management of investments on behalf of, among others, university endowments and pension funds.
2. The Defendant is a foreign state.
3. The Plaintiff states that on 7th November 2003, it commenced an action against the Defendant in the United States District Court for the Southern District of New York (the "New York Action").
4. The Plaintiff states that its claims in the New York Action were for sums due and payable under two series of bonds issued by the Defendant, namely 12% Global Bonds CUSIP No. 040114FBI (the "12% Bonds") authenticated on 3rd February 2000; and 10.25% Global Bonds CUSIP No. 040114GBO (the "10.25% Bonds") authenticated on 21st July 2000 (together, the "Bonds").
5. The Plaintiff adds that at all material times it has been the beneficial owner of US\$60,244,000.00 principal amount of the 12% Bonds, and US\$111,909,000.00 principal amount of the 10.25% Bonds.


REGISTRAR
COMMERCIAL DIVISION OF THE
SUPERIOR COURT, ACCRA

6. The Plaintiff further states that both series of bonds were issued pursuant to and under the terms of a Fiscal Agency Agreement dated 19th October 1994 made between the Defendant and Bankers Trust Company (the "FAA".)
7. The Plaintiff states that under the terms of the Bonds, the Defendant submitted to the jurisdiction of the New York Courts in respect of any proceedings relating to the Bonds.
8. The Plaintiff adds that the Defendant agreed under the terms of the Bonds that:
The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought in an inconvenient forum. The Republic agrees that a final non-appealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment.
9. The Plaintiff states that on 11th May 2006, the United States District Court for the Southern District of New York (the "District Court") granted the Plaintiff's motion for summary judgment in respect of the sums due and payable to the Plaintiff from the Defendant under the Bonds.
10. The Plaintiff states that on 18th December 2006, judgment was entered in the New York Action in favour of the Plaintiff in the sum of US\$284,184,632.30 (comprising US\$180,652,105.58 for unpaid principal, unpaid contractual interest and full statutory interest due in respect of the 10.25% Bonds; and US\$103,532,526.72 for unpaid principal, unpaid contractual interest and further statutory interest due in respect of the 12% Bonds) (the "New York Judgment.")
11. The Plaintiff states that interest on the New York Judgment continues to run from 18th December 2006 at a rate of 4.95% per annum compounded annually pursuant to Title 28 of the United States Code Section 1961 and that as at 1st October 2012, the amount of interest that had accrued on the judgment sum was US\$91,784,681.30.


SECRETARY
COMMERCIAL DIVISION OF THE
HIGH COURT, ACCRA

12. The Plaintiff states that the District Court had jurisdiction to determine the matter and that the proceedings took place in accordance with both the state laws of New York and the federal laws of the United States.
13. The Plaintiff adds that the New York Judgment is a final judgment and is enforceable.
14. The Plaintiff states that by the terms of the Bonds the Defendant waived and agreed not to plead any immunity in respect of proceedings brought for the purposes of enforcing or executing any Related Judgment.
15. The Plaintiff states that, in any event, the FAA and the issuance of the Bonds were transactions for which the Defendant cannot claim, and does not enjoy, state immunity.
16. The Plaintiff states that on 15th May 2008, it instituted an action against the Defendant before the High Court of England and Wales (the "English Action") suing on the New York Judgment.
17. The Plaintiff states that on 2nd April 2008, the English High Court granted the Plaintiff leave to serve the proceedings on the Defendant out of the jurisdiction.
18. The Plaintiff states that the Defendant applied to set aside the order on the grounds that the Defendant enjoyed state immunity and that the English Courts did not have jurisdiction in the proceedings.
19. The Plaintiff states that the dispute between the parties as to state immunity and as to the jurisdiction of the English Courts to hear the action was heard by the English High Court and then on appeal by the Court of Appeal and the United Kingdom Supreme Court.
20. The Plaintiff states that on appeal to the United Kingdom Supreme Court, following objections that the Defendant raised regarding state immunity and jurisdiction, the Court by its judgment dated 6th July 2011 held that the Defendant did not enjoy state immunity and that the English Courts had jurisdiction.
21. The Plaintiff states that ultimately, in its Defence filed on 22nd August 2011, the Defendant admitted the sum of US\$284,184,632.30 as owing to the Plaintiff.
22. The Plaintiff states that on 5th December 2011, the Defendant consented to judgment being entered against it in the principal sum of US\$284,184,632.30 and interest of US\$48,095,940.91 (not including post-judgment interest) (the "English Consent Order").


REGISTRAR
JUDICIAL DIVISION OF THE
HIGH COURT, ACCRA

23. The Plaintiff states that despite numerous requests made by it to the Defendant to satisfy the New York Judgment debt, the Defendant has failed and/or refused to pay any of the said judgment debt and has publicly admitted to organising its affairs so as to evade enforcement of judgment debts generally.
24. The Plaintiff states that the Defendant is the owner of a vessel named *ARA Libertad*, which berthed at location B 11 in the commercial port at the Port of Tema on 1st October 2012.
25. The Plaintiff contends that the *ARA Libertad* is an asset of the Defendant within the jurisdiction available to be enforced against.

WHEREFORE the Plaintiff claims against the Defendant as follows:

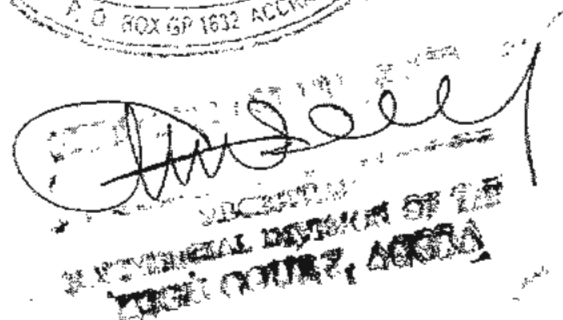
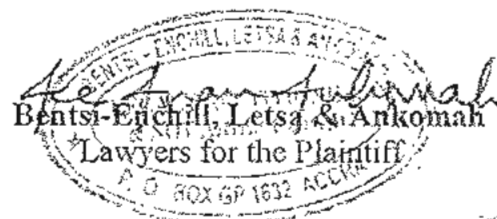
- i. The sum of US\$284,184,632.30 being the amount of the judgment awarded by the United States District Court for the Southern District of New York;
- ii. Interest on the sum of US\$284,184,632.30 at the rate of 4.95% per annum (compounded annually) and amounting to US\$91,784,681.30 as at 1st October 2012;
- iii. Continuing interest at the rate of 4.95% per annum (compounded annually) currently amounting to US\$49,071.03 per day from 1st October 2012 until judgment or sooner payment; or
- iv. Alternatively, interest on the said amount at the prevailing commercial bank rate from 18th December 2006 to the date of final payment.

Dated in Accra this 2nd day of October 2012

Licence No.: 05482/12 dated 23rd April 2012

The Registrar
High Court (Commercial Division)
Accra

And to the above named Defendant



ANNEX 4

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE ACCRA COMMERCIAL DIVISION, HELD ON THURSDAY THE 11TH DAY OF OCTOBER, 2012. BEFORE HIS LORDSHIP JUSTICE RICHARD ADJEI-FRIMPONG.

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SUIT NO. RPC/343/12

NML CAPITAL LIMITED - PLAINTIFF/APPLICANT

VRS

THE REPUBLIC OF ARGENTINA - DEFENDANT/RESPONDENT

PARTIES: PLAINTIFF REPRESENTED BY MICHAEL FIELDS - PRESENT

DEFENDANT REPRESENTED BY SUSANA PATARO - PRESENT

COUNSEL: ACE ANAN ANKOMAH FOR PLAINTIFF/RESPONDENT

APPEARING WITH HIM KWEKU AGGREY ORLEANS - PRESENT

LARRY OTOO FOR DEFENDANT/APPLICANT APPEARING WITH

HIM OPOKU AMPONSAH AND NII ODOI ODOTY - PRESENT



RULING

It will be extremely useful, I suppose, in determining the instant application, to recount the background events that resulted in the commencement of this suit, in particular to explain how the Plaintiff, a foreign corporate body and the defendant a foreign state are before the High Court of Ghana.

Sometime in October 1994, the Defendant/Applicant entered into a Fiscal Agency Agreement ("FAA") with the BANKERS TRUST COMPANY, New York banking corporation under which agreement the Defendant/Applicant issued securities and bonds for purchase by the public.

The Plaintiff purchased two series of the bonds issued by the Defendant/Applicant namely 12% Global Bonds CUSIP No. 040114FB1 ("the 12% bond") authenticated on 3rd February 2000 and 10:25% Global Bonds CUSIP No. 040114GBO ("the 10:25% Bonds") also authenticated on 21st July 2000. The Plaintiff thus became the beneficial owner of the interest in the bonds.

When the Defendant/Applicant defaulted on the bond the Plaintiff subsequently sued and obtained judgment in the United States District Court for the Southern District of New York against the Defendant/Applicant to recover the sums due. The Defendant/Applicant did not settle the debt.

On the 15th of May 2005, the Plaintiff commenced an action in the English High Court suing on the simple debt obligation imposed on the Defendant/Applicant by the New York Judgment.

Significantly, in its commencement of the two aforesaid actions and of course the present one, the Plaintiff had relied on a particular provision in the Fiscal Agency Agreement (FAA) and in the bonds as the impetus for invoking the jurisdiction of those and this court. I shall refer to this provision in extenso soon hereafter. But from the facts available the Defendant/Applicant raised an objection to the suit in the U. K. High Court on the ground that it enjoyed state immunity under English law and that the English court had no jurisdiction to entertain the matter. This question went before the Supreme Court of the United Kingdom which held that the defendant did not enjoy state immunity and that the English Court had jurisdiction to entertain the suit.

In the subsequent proceedings in the English High Court, the Defendant/Applicant submitted to judgment and that court made a consent order against the Defendant/Applicant and in favour of the Plaintiff for the payment of the principal sum of US\$284,184,632.30 and interest of US\$48,095,940.91.

Though that judgment was a consent judgment, the Defendant/Applicant did not pay any part of the sum awarded.

The records available before me speak of various attempts by the Plaintiff to execute the judgment with of course a corresponding strong resistance on the part of the judgment debtor who from all indications is not in the prospect of paying the debt.

Then on or about 1st October 2012, the vessel "ARA Libertad" (hereinafter called the vessel) belonging to the Defendant/Applicant entered Ghana's territorial waters and docked at the port of Tema. The Plaintiff thus with the leave of the court commenced the instant suit in this court claiming as follows:

- a. The sum of US\$284,184,632 being the amount of the judgment awarded by the United States District Court for the Southern District of New York.
- b. Interest on the sum of US\$284,184,632.30 at the rate of 4.95% per annum (compounded annually) and amounting to US\$91,784,681.30 as at October 1st 2012.
- c. Continuing interest at the rate of 4.9% per annum (compounded annually) currently amounting to US\$49,071.03 per day from 1st October 21012 until judgment on sooner payment or
- d. Alternatively, interest on the amount at the prevailing commercial bank rate from 18th December 2006 to date of final payment.

Having filed the claim the Plaintiff obtained in this court an Exparte limited order of interlocutory injunction in effect restraining the movement from the port of Tema, the vessel and the interim preservation of same.

It is this order the Defendant/Applicant seeks to set aside by the instant motion. The grounds for this relief have been set out in an affidavit sworn to by Lawrence Otoo Esquire Counsel for the Defendant/Applicant which affidavit has quite a number of annexures.

The application has been vehemently opposed. The first issue I think I should deal with is jurisdictional in nature. I consider it fundamental not just relative to the application but to the action itself. It was argued on behalf of the Defendant/Applicant that the laws of Ghana do not permit this court to entertain proceedings to execute a judgment from the court of the United States of America i.e. the New York Judgment. Reference was made to Section 81 of the Courts Act 1993, Act 459 and its pursuant instrument, THE FOREIGN JUDGMENTS AND MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) INSTRUMENT 1993 LI 1575. The argument on behalf of the Defendant/Applicant is that since United States of America and for that matter the State of New York has not been listed in the schedule to the instrument as one of the states recognized for reciprocal enforcement of judgments, this court wrongfully entertained the Plaintiff's action and on that wrongful footing granted the interlocutory orders.

I do agree that the provisions in the whole of part 5 of the Courts Act and the LI 1575 provide a regime of reciprocal enforcement of foreign judgments. The mode of enforcement in those provisions is by registration of the judgment. And I do not find any controversy about the fact that the United States of America or any of its states has not been listed for reciprocal enforcement of judgments under that regime.

Clearly therefore the New York judgment is not registrable under the law and hence unenforceable under that. But then the qualm about the Defendant/Applicant's argument lies in the suggestion that every foreign judgment must necessarily go through the regime of registration under the

provisions of part 5 of the courts Act and LI 1575 before a court in Ghana can entertain an action in relation to its enforcement.

That is not my understanding of the law. I am of the view that the common law regime which permits the filing of a fresh action founded on a foreign judgment for purposes of enforcement is still applicable in Ghana. Under English law where specific statutory provisions are available for registration of foreign judgments for reciprocal enforcement, there is still the avenue outside the statutes to maintain a cause of action to enforce foreign judgments. The rationale behind that avenue is that the foreign judgment creates an enforceable contract between the parties which can found an action at common law. The English position finds explanation in Halsbury Laws of England Vol. 8 4th edition paragraph 997.

Thus:

"ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW".

"Actions on foreign judgments: Subject to certain qualifications, a judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England.

Apart from statute, it will not be enforced directly by execution or any other process, but will be regarded as creating a debt between the parties to it; the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt created is a simple contract debt and not a specialty debt and is subject to the appropriate limitation period"

Whilst there is paucity of local authorities on the applicability of the common law regime in the jurisdiction. I find what should be Ghana's position on the matter summed up by the Learned Author of CIVIL PROCEDURE, A PRACTICAL APPROACH (S. KWAME TETTEH) at page 690 as follows:

"A foreign judgment not registrable under LI 1575 may be enforced by fresh action. The basis of the action for enforcement is that the judgment constitutes a simple contract debt between the parties to the judgment, the judgment debtor impliedly promising to pay the judgment debt. The relative limitation period is applicable. The Plaintiff may apply for summary judgment on ground that the defendant had no defence to the action. The judgment in such action would be the judgment of the domestic court and capable of enforcement as such".

Now, at common law, the general rule is that a party who has obtained judgment against a Defendant is barred from suing again on the original cause of action. The original cause of action is said to have merged in the judgment - "transit in rem judicatam" and therefore is extinguished. The authorities however suggest that this is not the rule relative to foreign judgments. A foreign judgment does not occasion a merger of the original cause of action and therefore the Plaintiff has the option either to resort to the original ground of action or to sue on the judgment obtained.

See SMITH VS NIGOLLS (1839) 3 SIM 438.

If I have understood the Plaintiff's action and not misformulated it, this suit was commenced on the basis of the latter option. The judgment of the New York was not registrable under the law and so the Plaintiff chose to sue on the

judgment and I am satisfied that that was permissible under Ghana law. One should not be lured into thinking that the provisions in part 5 of the Court's Act and LI 1575 cannot co exist with the common law position. Indeed a careful reading of Section 86 of the Court's Act will reveal that the provision envisages a situation where an action could be commenced and proceeded with other than by registration strictly as a procedure.

The Head note of Section 86 reads

"GENERAL EFFECT OF CERTAIN FOREIGN JUDGMENTS" and

Subsection 1 states:

"Subject to this section, a foreign judgment to which this Act applies or would have applied if a sum of money had been payable under it, shall be recognized in a court as conclusive between the parties to it in proceedings founded on the same cause of action and may be relied upon as a defence or counterclaim in those proceedings".

Subsection 2 is also relevant:

"Subsection 1 applies whether the foreign judgment is registered, can be registered or it not registered".

Having said that, the next immediate question is whether in suing on the New York Judgment, the Plaintiff properly invoked the jurisdiction of this court.

When the Plaintiff sought leave of this court to issue a notice of a writ and service out of the jurisdiction, it relied on Order 8 of the (High Court) Civil Procedure Rules 2004 CI 47. The defendant is without doubt a foreign entity. The general rule is that courts exercise jurisdiction only over persons who are

within the territorial limits of their jurisdiction. It therefore requires a special statutory power for the court to order a defendant beyond its jurisdiction to appear before it either by a writ, a notice of writ or any other originating process.

See RE BUSHFIELD (1886) 32 CHD 123. That statutory Power to assume that jurisdiction in my opinion is what is contained in Order 8 of the CI 47. The Plaintiff therefore had to show that it could come within any of the specific provisions stated under subrules 1 (a) to (m) of rule 3 of Order 8.

The Plaintiff relied on subrule 1 (m) which provides as follows:

"3. (1) Service out of jurisdiction of notice of a writ may be effected with leave of the court in the following cases:

(m) If the action begun by writ is in respect of a contract which contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract".

The contract in the question is the Fiscal Agency Agreement (FAA).

The particular term in contention is contained in clause 22 and same is repeated in the two bonds in question.

The Fiscal Agency Agreement is annexed to the Plaintiff's affidavit in opposition to the motion as Exhibit KAO 1' whilst the two bonds are annexed as Exhibits KAO 2 and KOA 3.

The term in contention reads as follows:

"The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York State or Federal Court sitting in the borough of Manhattan, the City of New York and the Courts of the Republic of Argentine ("the specified Courts") over any suit, action or proceeding against it or its properties assets or revenues with respect to the securities of this series or the fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States Federal security laws. The Republic has in the fiscal Agency Agreement waived any objection to the Related proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related proceedings have been brought in an inconvenient forum. The Republic agrees that a final non-appealable Judgment in any such Related proceeding (i.e. "Related Judgment") shall be conclusive and binding upon it and may be enforced in any specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the other courts") by a suit upon such a judgment

To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located, in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties or in any jurisdiction in which any specified court or other court is located in which any suit action or proceedings may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit from the jurisdiction of any such court, from set off from attachment prior

to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction...."

Counsel for the Plaintiff submitted whilst invoking the jurisdiction of this court for leave to issue and serve the notice of the writ and has re submitted in arguing the instant motion that, this court is perfectly within the description of the designation "other courts" specified in the term of the agreement. He argues that once an asset of the Defendant/Applicant being the vessel has found itself in the territorial waters of Ghana which asset being the property of the Judgment Debtor is liable to be attached in aid of execution of the Plaintiff's subsisting Judgment, the Ghana court becomes one of the "other courts" envisaged by the term and since the judgment constitutes a civil contract under common law, Order 8 rule 3 subrule 1 (m) operates to property invoke the jurisdiction of this court.

I find the logic in the argument sound just as I did when the court was invited to assume jurisdiction over the matter. My appreciation of Order 8 rule 3 subrule 1 (m) is that it is anticipatory in nature ready to embrace whichever parties have left their jurisdictional demand open in their contract as the parties herein did in the FAA and the bonds.

As noted earlier, the argument of Counsel for the Defendant/Applicant on this jurisdiction question is mainly founded on the provisions in the courts Act and the LI 1575 about which I have already expressed my opinion, I do not find sufficient basis to come to a conclusion that this court wrongfully assumed jurisdiction over the matter.

The opinion of the court on this question is just as it was in the beginning. The jurisdiction of this court was validly invoked.

But almost inseparably linked to the foregone issue is the question of sovereign immunity being raised by the Defendant/Applicant in the instant motion. The argument simply is that the Defendant is a sovereign state and is entitled to immunity.

I think of no question about the Defendant/Applicant's status of a sovereign state and its immunity to the court's jurisdiction.

The Plaintiff did not argue that and I find no need to cite authorities for it. Neither do I think of any question about the universally recognized right of sovereign state to waive immunity.

The question arises out of the assertion the Plaintiff makes that the Defendant/Applicant waived its immunity under the Fiscal Agency Agreement and the bonds.

Nation states' historical enjoyment of absolute immunity from adjudication by foreign courts has given way to the common law restrictive immunity approach whereby a claim to state immunity would not be upheld in disputes arising out of transactions entered into between states and entities which were of commercial or private law nature. Various states have varied legal regimes on the restrictive immunity approach. E.g. The U. K. has the state immunity act 1978 whilst the US has the Foreign Sovereignty Immunity Act of 1976.

It is also universally recognized that states may irrevocably waive immunity by express contract.

PHILIP R. WOOD in his work LAW AND PRACTICE OF INTERNATIONAL FINANCE (1995) at page 88-89 writes on principles of waiver clauses as follows:

"It appears to be universally recognized in most industrialized state that a state may irrevocably waive immunity by express contract in advance and there is some support for the principle that a waiver from jurisdiction is not a waiver from enforcement".

I agree with this view. So has the Defendant/Applicant waived its sovereign immunity to the jurisdiction of this court?

Reading and re-reading the waiver provision in the Fiscal Agency Agreement and the bonds which I have already cited, my understanding is that not only did the Defendant/Applicant waive its sovereign immunity to the specified

courts", but it did so to the "other courts" of which in the opinion of this court once again it is one.

Aside my understanding of the provision, the record before me shows that the prime issue before the U. K. Supreme Court when the case travelled there was whether the Defendant/Applicant has waived its immunity to the jurisdiction of the U. K. High Court which to my understanding was one of the "other courts".

In the decision of the U. K. Supreme Court which is now reported in the (2011) 4 ALL ER 1191, holding 3 of the head note reads:

"The bonds contained a submission to the jurisdiction of the English Court; Argentina had unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment"

In construing the provision in the bond Lord PHILIPS P delivered himself at page 1210 to 1211 as follows:

"... if a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not cover jurisdiction where, in the case of another Defendant it would not exist. If however state immunity is the only bar to jurisdiction, an agreement to waive is tantamount to a submission to the jurisdiction.

In this case Argentine agreed that the New York Judgment could be enforced by a suit upon the judgment in any court to its jurisdiction of which absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New

York Judgment could be sued on it any country that state immunity apart would have jurisdiction. England is such a country The provision in the first paragraph constituted a submission to the jurisdiction of the English court. If consideration of the first paragraph alone left any doubt that the terms of the bonds included a submission to this jurisdiction, this would be dispelled by the second paragraph"

"The words 'may at any time be brought' which I have emphasized once again constitute Argentina's agreement that the waiver of immunity applies respect of any country where immunity apart there is jurisdiction to bring a suit for the purpose of enforcing a judgment on the bonds. England is such a jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English Court (no doubt among other) courts".

Lord Collins SCJ also said at page 1225 to 1226 thus:

"The New York Judgment was in any view a "Related Judgment". Argentina agreed that it could be enforced in any other courts to the jurisdiction of which the Republic is or may be subject". This was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English Court since the English Court had a discretion to exercise jurisdiction in an action on the New York Judgment by virtue of CPR 6.20 (9) (Now CPR P.D 6B para. 3)"

And so the opinions went on and on. But what is the effect of this decision on this issue of waiver of sovereign immunity?

I am of the view that since the issue was determined as between the same parties by a court of competent jurisdiction, the question of waiver of immunity is res judicata and the Defendant/Applicant is estopped from relitigating the same issue before this court.

In effect on this question of waiver of immunity, my own reading of the provision leads me to the conclusion that the defendant waived it. The decision of the U. K. Supreme Court which is of persuasive effect reinforces my conclusion. And the same issue by virtue of the U. K. Supreme Court's decision is res judicata. From all that has been said, I hold that the Defendant/Applicant is properly before this court as a defendant in the present action and is unless otherwise ordered amenable to all the orders of this court.

The next issue is about the vessel Libertad itself. The vessel has been described as a military vessel or a warship used by the Argentine Navy for training and other military activities. It has been urged on this court to note that by the status of the vessel it is immune to the judicial process of this court.

Before considering the strong arguments made on this issue, it is important foremost to establish that status of the vessel on record. Fortunately Counsel on both sides agree on the definition of warship under Article 29 of the law of the sea convention. I have also read the affidavit sworn to by Mr. Auturo Puricelli the Minister of Defence of the Republic of Argentina about the envious profile of the vessel. From the various documentations made

available on record and given also that Counsel for the Plaintiff did not contest the status of the vessel in any resolute manner, I hold that the vessel Libertad is a military asset of the Republic of Argentina the Defendant/Applicant.

The following depositions in the affidavit of Lawrence Otoo Esquire in support of the application are at the core of the Defendant/Applicant's argument.

"7. That the provisions of the United Nations Convention on Jurisdictional Immunities of States and their property 2004 and the United Nations Convention on the law of the sea excludes (sic) property of a military character or used or intended for use in the performance of military functions from measures of constraint or attachment."

"8. That I am informed and verily believe the same to be true that the principle of exclusion of military equipment and assets from attachment or constraint is a customary international law."

"9. That the United States District Court for the Southern District of New York in granting an order for attachment of the Defendant's assets in New York in respect of the same suit excluded at page 5 of the order, military assets pursuant to the said customary international law inspite of the Defendant's waiver of immunity regarding the enforcement of the debt"

The Plaintiff's response to these depositions are contained in a number of paragraphs of the affidavit of Kweku Aggrey Orleans which I have attempted to summarize as follows:

1. That the United Nations Conventions which recognize the immunity of warships as principle of customary international law equally permit the waiver of the immunity.
2. That while the Convention on Jurisdictional Immunities of State and their property 2004 has not been ratified by both Ghana and Argentina and has not even come to force, it recognizes immunity of warship just as it recognizes the right to waive it including by contract.
3. That if the defendant claims that itself and the vessel are entitled to immunity under international law then it should be deemed to accept that the immunity can be waived.
4. That the defendant has irrevocably waived the immunity claimed to be attached to the vessel by the terms of the contract exhibited as Exhibit KAO2 and KAO 3.
5. That the effect of the defendant's undertaking not to assert the immunity and the irrevocable waiver of same is that both the defendant and the vessel do not enjoy any immunity under customary international law.
6. That the order contained in the order of attachment by the New York was directed to its Marshall and has no application or relevance to and not binding on this Court. In any case that order was made pursuant to and in line with the U.S. statutory law namely Foreign Sovereign Immunity Act which specifically forbids the detention of assets or properties used in connection with military activity, or of military character or under the control of a military authority or defence agency.

From these specific assertions and the responses delivered which of course formed the basis of the strong arguments made before this Court I think the questions to answer are simply as follow:

1. Is it a rule of customary international law that warships enjoy immunity from judicial processes?
2. Can that immunity be waived under international law?
3. If it can be waived how can the waiver be done and
4. Has the Defendant/Applicant in this case waived the immunity?

In the first question learned Counsel for the Defendant/Applicant in his submission referred to a number of authorities including judicial decisions text writers and international treaties and argued that immunity of warships is now recognized as a rule of customary international law.

Counsel for the Plaintiff did not seem to contest that but has stuck to the position that the same international customary law which his friend alludes to also recognizes the right to waive the immunity. That should have ended the controversy but I think I need to comment that it will be too sweeping a conclusion to state that there is a clear rule of customary international law on the matter even though one should concede to a predominant practice towards the attainment of that. Indeed the fact that the 2004 convention has not taken effect for the main reason that many states have not ratified it should buttress the view being expressed. And if this specie of immunity is considered as a component of the whole regime of sovereignty in international law then it is difficult to talk of a clear cut rule of customary international law.

In the "American Journal of International Law," vol.75 James Crawford at page 82 has noted:

"The extent to which foreign sovereigns are entitled to immunity in municipal courts has attracted a vast literature in recent years especially the majority view now seems to be that immunity need not extend to commercial transactions entered into by the state although the precise scope of this "exception" remains unsettled, and the role of international law in "extending" or "withholding" immunity has not yet perhaps been clearly analyzed. Indeed, it has been denied that there is any international law rule at all on the subject, a view that would presumably leave each state free to formulate or negotiate its own rule."

But let me refer to one authority which for me represents the international thinking of the issue. The Court in the case of *In Re REPUBLIC OF THE PHILIPINES* 46 B ver FGE (1977) after examining several authorities on the subject conclude:

"There is no sufficient general practice, supported by the necessary opinion juris, to establish a general rule of customary international law prohibiting the state of the forum absolutely from compulsory execution against assets of a foreign state situated in the state of the forum. A number of states in their judgment, legislation or treaty practice do not exclude security and execution measures against foreign states, at least not when such measures are based upon activities of the foreign state which are iure gestions, and when such measures are taken against assets which do not serve governmental purposes. The attitudes of these states are of sure weight that there can be no question of a general practice

pursuant to international law which prohibits compulsory execution, whatever the requirement of generality of a practice before it can become the basis of a rule of customary international law”.

This court shares in the opinion expressed by the court and if I should answer the first question I posed, I will say that though there is no well established customary international law that warships enjoy immunity, the view in support of it is widespread.

Can the immunity be waived? If immunity in whatever form is understood as a right exerciseable by state entity then it is difficult for anyone to convince me that immunity enjoyed by warships can never be waived. Indeed as one example in the United Nations Convention on jurisdictional Immunities of States and their property 2004 which the Defendant/Applicant relies on as representing a rule of customary international law, waiver is permissible.

Under both Articles 18 at 19 which respectively deal with State Immunity from pre judgment measures of constraint and post Judgment measures of constraint, waiver is permitted by the means of international agreement, or by an arbitration agreement or in a written contract or by a declaration before the court or by a written communication after a dispute between the parties has arisen.

I think it would have required of the Defendant/Applicant to provide strong authorities to support its position that waiver is not permissible. This is because its own recent conduct does not indicate so. It has been

demonstrated in this court that in the Defendant/Applicant's recent issuance of new securities filed with the United States Security Exchange Commission governed by Trust Indenture dated 5th June 205 (copies of which have been annexed to the affidavit of ERIC C. KIRSCH, Attorney the New York firm of Dechert LLP), the Defendant/Applicant has inserted limitations with respect to its military assets and properties. The logical inference is that if Defendant/Applicant believes strongly in its view of the immutability of the waiver, there would not have been any need to insert that limitation because in that case whether it is there or not the law should recognize it.

On the whole I think a stronger case has been demonstrated for me to come to the conclusion that the immunity can be waived and if the provisions in the 2004 convention do represent the rule of customary international law as Counsel on both sides seem to agree then the waiver may be done by the processes specified under articles 18 and 19 i.e. by international agreement; arbitration agreement; written contract; Declaration before the court or a written communication after the dispute between the parties has arisen.

Final question is did the Defendant/Applicant waive the immunity?

In answering this question I am compelled to sacrifice brevity and at the risk of being repetitive re state the second bit of the term in the FAA and the bonds on which the Plaintiff relies to claim waiver. The second part is what directly relates to assets. It states:

"To the extent the Republic or any of its assets or properties shall be entitled in any jurisdiction in which any specified court is located, in which

any related proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any specified court or other court is located in which any suit action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a Judgment or from any other such legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such as immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction"

It was not for nothing that Lord Collins of the U. K. Supreme Court describes the provision as "the clearest possible waiver" of immunity Argentina could have given.

What is essential to note is that the Defendant/Applicant gives a proviso and proceeds to list a number of things which the immunity does not cover. Even there the Defendant/Applicant names another category of courts as the "Republic's Courts" and places the list within the purview of those courts.

Learned Counsel for the Defendant/Applicant has argued that the courts of the United States of America where the judgment was given has failed to recognize the inclusion of military assets in those properties that could be attached. I do agree that the U.S Court have done so. But what I think Counsel

fails to recognize is the aspect of the provision which subjects the threshold of the assets attachable to the municipal law of the court exacting the attachment. The relevant portion reads:

"... the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction".

So that if under U. S law, it is not permissible to attach military assets, then that is the U. S. Law not Ghana law.

In fact it has been shown that the U. S. has a specified legal regime under the Foreign Sovereign Immunities Act which specifically forbids the detention of assets or properties used in connection with a military activity or of military character or under the control of a military authority or defence agency.

I do not know of any such legal regime in Ghana. The closest I think Counsel could come to any such regime was his reference to Section 392 of Ghana Shipping Act.

The Section provides:

"Non Commercial Cargoes owned by a state and entitled at the time of salvage operations to sovereign immunity under recognized principles of public international law are not subject to seizure, arrest or detention by legal process or to an action in rem without the express consent of the state owner of the Cargo".

As it can be seen the whole of part 12 of the Act under which Section 392 falls is on salvage. The vessel Libertad is not on salvage in Ghana. In any case, the same provision recognizes waiver because of the phrase:

“without the express consent of the state owner of the Cargo”.

Having examined the arguments from both sides, and upon reading the parties own agreement, I find that the Defendant/Applicant has in clear terms waived the immunity attributed to the vessel Libertad through the mode of a written contract which made is recognized by the rules of international law.

CONCLUSION

In the end I come to the conclusion that no sufficient basis has been demonstrated by the Defendant/Applicant for me to set aside the order I gave on the 2nd October 2012. The order was properly and validly made. It gave the Republic of Argentina the option of providing security and taking away the ship.

If that option is unattractive for whatever reason, so be the order of the Court. The motion is accordingly dismissed.

(SGD)

RICHARD ADJEI-FRIMPONG
JUSTICE OF THE HIGH COURT



ANNEX 5

Judge Elsa Kelly

Member of the Tribunal since 1 October 2011

Born: Buenos Aires, Argentina, 28 February 1939.

Education: Lawyer, School of Law and Social Sciences, University of Buenos Aires (1960); postgraduate studies in jurisprudence, University of Buenos Aires (1968-1969) Fellow (scholarship), Center for International Affairs, Harvard University (1977-1978).

Academic Activities Professor of International Law, Foreign Service Institute, Ministry for Foreign Affairs (1967-1970, 2009-2011); University of Buenos Aires, School of Law and Social Sciences: Professor of Philosophy and History of Philosophical Ideas (Assistant, 1970-1973); Full Professor of Public International Law (1984).

Professional Experience: Ministry for Foreign Affairs: Legal Advisor's Office (1962-1973, 1976-1977, 1979, Member and Deputy Head of Delegation, Third United Nations Conference on the Law of the Sea), Legal Advisor (1980-1981), Secretary of State for International Relations (1983-1985); Ambassador to UNESCO and Member of the Executive Council (1985-1989); Vice-Chairperson, Executive Board, UNESCO (1986-1988); Director-General of Cultural Affairs, Ministry for Foreign Affairs (1990-1992); Director-General for International Environmental Affairs, Ministry for Foreign Affairs (1996-2000); Ambassador Extraordinary and Plenipotentiary of Argentina to Italy (2000-2003); Ambassador of Argentina to Austria and Permanent Representative of Argentina to the UN Office in Vienna, to the International Atomic Energy Agency and Member of its Board of Government (2003-2006); Director of International Security and Nuclear and Spatial Affairs (2006-2009).

Member: Inter-American Commission of Human Rights, Organization of American States (1985-1989); Argentine Council for International Relations (CARI); Foundation for the New Human Rights (Fundación Nuevos Derechos del Hombre).

Publications: Author of many articles, monographs and papers on public international law, law of the sea, nuclear non-proliferation and other related issues.

Distinctions: Decorations from Mexico, Ecuador and France (Palme Académique).