

**IN THE MATTER OF AN ARBITRATION BEFORE AN ARBITRAL TRIBUNAL
CONSTITUTED UNDER ANNEX VII OF THE 1982 UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA BETWEEN THE ARGENTINE REPUBLIC AND THE
REPUBLIC OF GHANA**

THE *ARA LIBERTAD* ARBITRATION (ARGENTINA v. GHANA)

The Agent of the Argentine Republic, Ambassador Susana Ruiz Cerutti, and the Agent of the Republic of Ghana Mrs. Marietta Brew Appiah-Opong have the honour to address the Honourable Arbitral Tribunal in order to transmit the following considerations:

1. As reported to the Honourable Arbitral Tribunal by the Ghanaian Delegation on May 21, 2013, at that moment there were ongoing judicial proceedings before the Ghanaian Supreme Court related to this case. The said proceedings had been instituted on December 19, 2012, following the provisional measure of the International Tribunal for the Law of the Sea adopted on December 15, 2012, by the Ghanaian Attorney General requesting the Supreme Court of Ghana to quash the orders of interlocutory injunction made on October 2, 2012, by Judge Frimpong against the Argentine warship – frigate “ARA Libertad”–, as well as the ruling delivered on October 11, 2012, by the same judge confirming such injunction order. In addition, the Attorney General requested the Supreme Court to issue an order of prohibition barring all Ghanaian lower Courts from entertaining any previous or further actions or proceedings in the suit in respect of which the orders sought to be quashed were made.
2. On June 20, 2013 the Supreme Court of Ghana delivered a judgment which sets out the Ghanaian law with regard to the arrest of warships and which upholds the customary international law position of immunity of warships.
3. The Republic of Ghana has committed to publicize at the international level the contents of the judgment of the Ghanaian Supreme Court mentioned above, in particular regarding the International Tribunal for the Law of the Sea, the Member States of United Nations and the States Parties of United Nations Convention on the Law of the Sea, as well as within the scope of the African Union and ECOWAS (Economic Community of West African States).
4. Notwithstanding its reservations regarding the interpretation by the Ghanaian courts of the rules applicable to this case, the Argentine Republic considers the above-mentioned judgment by the Supreme Court of Ghana, its dissemination at the international level and the considerations expressed by the Ghanaian government in the circular letters and the “*Aide Memoire*” attached to it, all documents to be distributed in the UN and other international organizations annexed to this Agreement, constitute sufficient satisfaction to discharge any injury occasioned by the injunction measure over the Argentine warship – frigate ARA Libertad – issued by a Ghanaian High Court in violation of the international obligation to respect the immunity that the said warship enjoys, according to Article 32 of the United Nations Convention on the Law of the Sea as well as the well-established general or customary international rules.

5. In light of the previous considerations, the Parties respectfully request the Honourable Arbitral Tribunal in the *ARA Libertad Arbitration* (Argentina v. Ghana) to issue an order for the termination of the arbitral proceedings pursuant to the Article 22 paragraph 1 of the Rules of Procedure.

The PCA certifies that the Spanish and English versions of this text and the attached Circular Letter and *Aide Memoire* are substantively identical.

Please accept the assurances of our highest consideration.

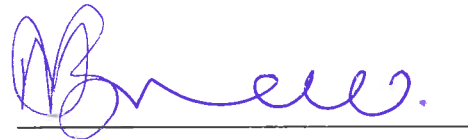
For the Argentine Republic:

For the Republic of Ghana:



A handwritten signature in blue ink, consisting of several loops and a long tail, positioned above a horizontal line.

By:



A handwritten signature in blue ink, appearing to be 'Brew', positioned above a horizontal line.

By:

CIRCULAR LETTER

The Permanent Mission of Ghana to the United Nations in New York presents its compliments to all Permanent Missions accredited to the United Nations and States Parties to the 1982 United Nations Convention on the Law of the Sea and has the honor to refer to Case No. 20 the *ARA Libertad* case (Argentina vs. Ghana) which was circulated among Member States in January 2013 by the International Tribunal of the Law of the Sea and wish to inform them that on 20 June 2013 the Supreme Court of the Republic of Ghana delivered a ruling setting aside orders made by the High Court of Ghana in October 2012 detaining the frigate *ARA Libertad*, the Argentine warship arrested at the port of Tema following an action to recover debt initiated by NML Capital against the vessel while on a goodwill visit to Ghana.

The Supreme Court of Ghana decided, *inter alia*, that the High Court erred in law in ordering the arrest and detention of the *ARA Libertad* in execution of foreign judgment at the instance of a foreign commercial creditor in violation of the immunity the *ARA Libertad* enjoys as a warship under customary international law.

The 20 June 2013 Judgment of the Supreme Court of Ghana reversing the High Court decisions was the result of action initiated by the Attorney General of Ghana with the support of the Ministry of Foreign Affairs and Regional Integration on behalf of the Executive Branch of the Government of Ghana.

Attached, herewith, is an *Aide Memoire* issued by the Ministry of Foreign Affairs and Regional Integration on the Judgment of the Supreme Court of Ghana.

The full text of the Judgment of the Supreme Court of Ghana is available on the website of the Permanent Court of Arbitration (www.pca-cpa.org).

The Permanent Mission of Ghana accredited to the United Nations avails itself of this opportunity to renew to all Permanent Missions of Member States of the United Nations and States Parties to the 1982 United Nations Convention on the Law of the Sea the assurances of its highest consideration.

New York, __ September 2013

Copy: Permanent Mission of Argentina to the United Nations, New York

AIDE MEMOIRE ON ARA LIBERTAD CASE (ARGENTINA VS. GHANA)

On 1st October 2012, the frigate *ARA Libertad*, a warship of the Argentine Republic, was warmly welcomed by the competent military authorities of Ghana upon her arrival at the port of Tema at the start of a friendly and goodwill visit to Ghana. Shortly upon its arrival, but unknown to the Government of Ghana, on 2 October 2012, NML Capital Limited of the Cayman Islands and a subsidiary of an American company based in New York, initiated an *ex parte* motion (meaning a legal action without notice to the affected party, Argentina) at the Commercial Division of the High Court of Ghana seeking an order of the High Court to seize the *ARA Libertad* in order for NML to recover from Argentina some Judgment Debts that the NML had previously obtained from various courts in the United States and the United Kingdom. The Order of the High Court was served on the port authorities of the Tema Port who carried out the order of the High Court

2. Argentina immediately applied to the same Ghanaian High Court for an order to set aside the order of the High Court arguing that Argentina was not subject to the jurisdiction of the High Court and furthermore the *ARA Libertad* was entitled to immunity under the relevant rules of international law. During the hearing of Argentina's application in the High Court, the Legal Adviser of the Foreign Ministry of Ghana, with the assistance of the Attorney General's Department of Ghana, appeared as an *amicus curiae* on behalf of the Executive Branch of the Government of Ghana and argued in support of Argentina's position that under international law, Argentina as a foreign state and the *ARA Libertad* as a military vessel were entitled to immunity from jurisdictional and execution or attachment in Ghana. The High Court refused to rescind its earlier order detaining the warship (*ARA Libertad*) of the Argentine Republic.

3. Argentina filed an appeal and while the appeal was pending also instituted Annex VII compulsory arbitral proceedings against Ghana under the 1982 United Nations Convention on the Law of the Sea. Argentina instituted Case No. 20 at the International Tribunal of the Law of the Sea against Ghana for provisional measures pending the Annex VII arbitral proceedings and obtained an order of the Tribunal (ITLOS) for the release of the *ARA Libertad* pending the Annex VII arbitration. The Order of ITLOS was read on 15 December 2012 and it prescribed the immediate release of the vessel based on the United Nations Law of the Sea Convention. The *ARA Libertad* sailed out of Ghana's territorial waters on 19 December 2012.

4. In this context, the Government of Ghana, represented by the Attorney General, decided to initiate an action for a Writ of Certiorari at the Supreme Court of Ghana to quash the order of the High Court detaining the *ARA Libertad* on the grounds that the order of the High Court was a violation of the rules of customary international law concerning the immunity of warships in peace time.

5. In its ruling on 20 June 2013, the Supreme Court agreed with the Government of Ghana that the Commercial Division of the High Court committed a fundamental error of law on the face of the record and issued an order of certiorari quashing the decisions of the High Court as wrong for the following reasons, *inter alia*:

*i. That under customary international law which forms part of the common law of Ghana warships are covered by sovereign immunity in foreign ports (citing **The Schooner Exchange v. McFaddan** case).*

ii. That the general principle of international law recognizes the sovereign immunity of states in the courts of other states (citing the recent case of the ICJ on Jurisdictional immunities (Germany v, Italy: Greece Intervening)). That notwithstanding that recent state practice has carved out an exception in relation to the commercial acts of sovereigns; other non-commercial acts of sovereigns remain immune.

iii. That Ghana's common law subscribes to the position that 'the property of a foreign state that is used or intended to be used in connection with a military activity and that is military in nature or under the control of a military authority or defence agency is immune from attachment and execution and from arrest, seizure and forfeiture'.

iv. That the waiver of immunity clause, contained in the bonds issued by Argentina to various creditors in New York were not effective to be enforced against military assets.

v. That the attachment of a foreign military asset in Ghana in execution of a foreign debt obtained is against the fundamental public policy of Ghana, since it imperils to a degree, the peace and security of Ghana. A State's sovereign right to waive its sovereign immunity in relation to its military assets, through a contractual provision, would not be recognized in Ghanaian common law because of the public policy implications stated above.

vi. That the learned High Court Judge was in fundamental error in holding that, as a result of a contractual provision, he had jurisdiction, through a contractual waiver to arrest a warship. By this decision the Judge made new law which had the potential of endangering the peace and security of Ghana. The order to attach the ARA Libertad, a military vessel, was on its face palpably and fundamentally wrong in law and principle.

6. The full text of the Judgment of the Supreme Court of Ghana is available at the website of the Permanent Court of Arbitration (www.pca-cpa.org).

7. The Government of Ghana wishes to express its appreciation to the Government of Argentina for its cooperation in terminating the arbitral proceedings in favour of a diplomatic settlement and bringing an amicable closure to this matter.