The Peculiar Case of the ARA *Libertad*: Provisional Measures and Prejudice to the Arbitral Tribunal's Final Result

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I. Introduction

The ARA *Libertad* sailed into the Ghanaian port of Tema, near the capital Accra, on October 1, 2012.[1] The ship itself is something of an oddity among the modern navies of the world. The *Libertad* is a so-called tall ship, equipped with three masts and full sails.[2] The *Libertad* serves as a diplomatic emblem of the Argentine state and its flagship, primarily functioning as a training ship for officers of the Argentine navy.[3] In early October, the *Libertad* was on a diplomatic mission that included scheduled stops in Angola, South Africa, Brazil, and Uruguay.[4] The vessel also bore representatives of several Central and South American navies, as well as the South African navy.[5]

Before the *Libertad* could set sail for Angola and South Africa,[6] the ship was visited by a Ghanaian Judicial Service official bearing an unwelcome message. According to a recent court order, the *Libertad* was to remain docked in Tema.[7] The order was the result of a civil action in the Ghanaian courts. NML Capital Limited ("NML"), one of Argentina's creditors, discovered that the *Libertad* would be in Tema and sought an injunction for satisfaction of judgments rendered against Argentina in NML's favor.[8] The injunction came with a

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1. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex A at ¶ 10, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf [hereinafter Req. for Prov. Measures Annex A] (Note dated 29 October 2012 from the Argentine Ambassador in Ghana to the Foreign Minister instituting proceedings against Ghana under Annex VII of the UNCLOS).

2. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex B at 1–3, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf [hereinafter Req. for Prov. Measures Annex B] (Report "Frigate ARA Libertad" by the Argentine Navy to the Ministry of Foreign Affairs and Worship. Updated review of the history of the Frigate ARA Libertad).

3. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 8.

4. Req. for Prov. Measures Annex B, *supra* note 2, at 4–6.

5. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 8.

6. Req. for Prov. Measures Annex B, *supra* note 2, at 4–6.

7. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex A3 at 1–3, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf [hereinafter Req. for Prov. Measures Annex A3] (Order for Interlocutory Injunction and Interim Preservation of the "ARA Libertad," NML Capital Ltd. v. Argentina).

8. NML's claim arises out of Argentina's massive debt problem, which stretches back to the country's financial crisis near the turn of the century. NML and other creditors have sought judgments against Argentina in courts across the globe seeking

ransom of sorts: pay the debt owed or at least a twenty million dollar down payment.[9] Later attempts by the Port Authority of Tema to board the *Libertad* were reportedly met with drawn Argentinian weapons.[10]

Furious negotiations between Argentine and Ghanaian diplomats ensued.[11] With its flagship detained at a foreign port and little headway being made via diplomatic channels, Argentina resorted to a trump card: the United Nations Convention on the Law of the Sea ("UNCLOS") and its arbitration provisions. The resulting proceedings of the International Tribunal of the Law of the Sea ("ITLOS") declared the Ghanaian injunction a violation of international law.[12]

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to collect the debt purchased near the time of Argentina's default. In fact, the U.S. Supreme Court recently decided an appeal from such a judgment against Argentina. *See* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014). How that decision will affect Argentina's obligations to its creditors, or the nation's willingness to pay the debt owed, remains to be seen. The controversy, and NML's place within the story, is described further at Part II, *infra*.

9. *See* Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex A4 at 25, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf [hereinafter Req. for Provisional Measures Annex A4] (*NML Capital Ltd. v. The Republic of Argentina*, Suit No. RPC/343/12, 25). In a number of filings and court records, reference is made to the "option of providing security" for the release of the *Libertad*. NML reportedly made known that it would apply to have the injunction lifted if Argentina posted a twenty million dollar million bond. *See NML Capital and Argentina: Ghanaian Court Rejects Argentina's Sovereign Immunity Challenge and NML Capital Targets Second Vessel in South Africa*, Herbert Smith Freehills Dispute Resolution, *Arbitration News* (Oct. 30, 2012, 12:27 PM), http://hsf-arbitrationnews.com/2012/10/30/nml-capital-and-argentina-ghanaian-court-rejects-argentinas-sovereign-immunity-challenge-and-nml-capital-targets-second-vessel-in-south-africa/.

10. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex I at 1, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf [hereinafter Req. for Prov. Measure Annex I] (Affidavit of Captain Lucio Salonio, Commander of the Frigate ARA Libertad).

11. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, ¶ 15, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012 *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf [hereinafter Req. for Prov. Measures].

12. ARA Libertad (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf, ¶¶ 93–108 [hereinafter ITLOS Order].

Soon afterward, on December 19, 2012, the *Libertad* set sail in an easterly direction, toward home.[13]

The *Libertad* returned to Mar del Plata, Argentina, on January 9, 2012.[14] The Argentine flagship's release followed a confusing and dramatic sequence of litigation, arbitration, and international law interpretation. This Article chronicles the unusual story of the ARA *Libertad*, with an emphasis on the ITLOS provisional measures. In asserting its preeminence in deciding issues of the law of the sea, ITLOS superseded both the Ghanaian High Court and the pending arbitral tribunal. Without regard to the wisdom of ordering the release of the *Libertad*, there is little question that in attempting to avoid prejudice to the final result of the pending arbitration, ITLOS managed to not only prejudice the final result but also to render moot any effort at arbitration.

II. The Course of Litigation

The story of the *Libertad*'s internment stretches back to Argentina's turn-of-the-century economic downturn. While Argentina's economy began to falter in the 1990s, the country continued to borrow money heavily.[15] As the debt grew, Argentina entered into increasingly risky bond sales, and so-called vulture funds began buying Argentina's public debt at pennies on the dollar.[16] One of these companies was NML, a subsidiary of the American hedge fund Elliot and Associates.[17]

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13. *ARA Libertad Leaves Ghana Following ITLOS Ruling on Argentina's Application for Provisional Measures*, Herbert Smith Freehills Dispute Resolution, *Arbitration News* (Dec. 20, 2012, 12:23 PM), http://hsf-arbitrationnews.com/2012/12/20/ara-libertad-leaves-ghana-following-itlos-ruling-on-argentinas-application-for-provisional-measures/.

14. *Enthusiastic Welcome for Seized Argentina Ship*, BBC News (Jan. 9, 2012, 7:57 AM), http://www.bbc.co.uk/news/world-latin-america-20966460.

15. Peter Katal, *Argentina's Crisis Explained*, Time (Dec. 20, 2001), http://www.time.com/time/world/article/0,8599,189393,00.html.

16. *Argentina's Debt Restructuring: Victory by Default?*, Economist, Mar. 3, 2005, *available at* http://www.economist.com/node/3715779?story_id=3715779. Argentina's economic situation was, of course, much more complicated than this Article will seek to explicate.

17. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex C ¶ 13, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf) [hereinafter Req. for Prov. Measures Annex C] (Submission on behalf of the Republic of Argentina and Supplementary Submission on Behalf of the Republic of Argentina, NML Capital Ltd. v. The Republic of Argentina, Suit No. MISC/58/12).

Argentina defaulted on most of its external debt in 2001, which totaled more than $80 billion.[18] Many of Argentina's creditors accepted the default and subsequent restructuring, and therefore these creditors accepted significant losses.[19] Argentinian officials claim that nearly ninety-two percent of all of its public external debt was successfully restructured.[20] NML was among the creditors that refused to accept Argentina's default and later sought the money owed.[21]

A. *The New York Federal Court and the United Kingdom Supreme Court*

In disapproval of the debt restructuring, NML sought judgments against Argentina in a number of jurisdictions, including the United States. Judgment was rendered in NML's favor, totaling more than $280 million, in the Southern District of New York in December 2006.[22] According to the District Court for the Central District of California, the interest on that judgment had reached $66,570,917.36 by May 2011.[23] By NML's calculation, the interest on the judgment on October 1, 2012 was $91,784,681.30.[24] The original bond agreement contained a sovereign immunity waiver, allowing for jurisdiction in New York federal and state courts.[25] This waiver, particularly its seemingly expansive consent to foreign jurisdiction, would become a source of considerable debate in Ghana.

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18. *See id.* ¶ 7.
19. *Id.* ¶ 8.
20. *Id.*
21. *See* Adam Liptak, *Argentina's Debt Deal Is Rejected by Supreme Court*, NEW YORK TIMES (June 16, 2014), http://dealbook.nytimes.com/2014/06/16/supreme-court-denies-appeal-by-argentina/?_r=1.
22. *See* Req. for Prov. Measures Annex C, *supra* note 17, ¶ 6. This was not NML's only attempt to force Argentina to pay its debts in the United States. Another lawsuit sought to halt the launch of a multi-laterally built satellite. *See* NML Capital, Ltd. v. Spaceport Sys. Int'l., L.P., 788 F.Supp.2d 1111 (C.D.Cal. 2011). Reportedly, NML even aimed to detain Argentina's Air Force One equivalent and seize the fuel money the pilots carried. Agustino Fontevecchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina's 'Air Force One*,' FORBES (Oct. 5, 2012 6:50 PM) http://www.forbes.com/sites/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/.
23. NML Capital, Ltd., 788 F.Supp.2d at 1115. The calculation made by the court was the result of one of NML's many attempts to secure the judgment rendered in the Southern District of New York. *See supra* note 22.
24. Req. for Prov. Measures Annex A3, *supra* note 7, at 7. NML also kindly noted in its complaint that the *daily* interest on the New York judgment was accruing at the rate of $47,071.03.
25. *See* Req. for Prov. Measures Annex A4, *supra* note 9, at 10.

Following the New York judgment, NML "domesticated" the judgment in the English High Court.[26] Argentina appealed the decision all the way to the United Kingdom Supreme Court, which upheld the decision.[27] Argentina, on remand, submitted to the judgment and entered a consent order.[28] Presumably, the domestication was an attempt to bolster the credibility and enforceability of the American judgment. The domestication would come to have a noticeable effect on the *Libertad's* fate in Ghana, allowing the Ghanaian High Court to borrow rationale from the English High Court's decision.

B. *The Ghanaian High Court*

It was with the United States and United Kingdom rulings in mind that NML filed suit in Ghana. NML filed for an injunction on the *Libertad* on October 2, 2012, the day following the warship's arrival in Tema.[29] The injunction action was a sophisticated one, referencing Argentina's waiver of sovereign immunity in the bond agreement.[30] In the Fiscal Agency Agreement ("FAA"), Argentina agreed to waive sovereign immunity by:

> [S]ubmitt[ing] 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 [sic] ("the specified Courts") over any suit, action or proceedings against it or its properties assets or revenues with respect to the securities of this series or the fiscal [sic] Agency Agreement (a "Related Proceeding") . . . .[31]

In addition, Argentina agreed that any judgment rendered against it in the "specified Courts" would be "conclusive and binding upon it" and enforceable in specified courts or "any other courts to the jurisdiction of which the Republic is or may be subject."[32] Thus, NML sought to enforce the Southern District of New York judgment in Ghana by claiming that the Ghanaian court was an "other court[ ]"

26. Req. for Prov. Measures Annex C, *supra* note 17, ¶ 6. Domestication is simply a registration process by which foreign judgments become enforceable in another country. NML "registered" the judgment rendered in its favor in the United States, which essentially allowed NML to seek satisfaction for the judgment in the United Kingdom. *See* Req. for Prov. Measures A4, *supra* note 9, at 6.

27. *See* Req. for Prov. Measures Annex A4, *supra* note 9, at 3; Req. for Prov. Measures Annex C, *supra* note 17, at 4–5.

28. Req. for Prov. Measures Annex A4, *supra* note 9, at 3.

29. *See* Req. for Prov. Measures Annex A3, *supra* note 7, at 1.

30. *Id.* at 7.

31. *See* Req. for Prov. Measures Annex A4, *supra* note 9, at 10.

32. *Id.*

per the FAA.[33] In addition, NML claimed that Argentina, through the FAA, had effectively waived sovereign immunity altogether.[34] To enforce the "Related Judgment," NML pled that the *Libertad* was an "asset . . . within the jurisdiction available to be enforced against."[35] The injunction was granted.[36]

On appeal, the question then became twofold: (1) could the judgment rendered against Argentina in the United States be enforced in Ghana (in other words, was the Ghana court an "other court[ ]" per the terms of the FAA) and (2) if the judgment could be enforced, was it enforceable through an injunction on a military asset.[37] Justice Richard Adjei-Frimpong answered both questions in the affirmative.[38]

Based partly on reasoning used in the British enforcement action, Justice Adjei-Frimpong found that Argentina had waived sovereign immunity in the FAA and thus subjected itself to Ghanaian jurisdiction.[39] As to the immunity of military assets from seizure, Justice Adjei-Frimpong found the law to be inconclusive and immensely varied.[40] Despite finding that it was the "predominant practice" of the international community to grant immunity to sovereign military assets, Justice Adjei-Frimpong found, after surveying some academic authority and international cases, that there was no "clear rule of customary international law" on sovereign military asset immunity.[41]

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33. *Id.* at 11.
34. Req. for Prov. Measures Annex A3, *supra* note 7, at 8.
35. *Id.* at 9.
36. *Id.* at 1.
37. Req. for Prov. Measures Annex A4, *supra* note 9, at 16.
38. *See generally* Req. for Prov. Measures Annex A4, *supra* note 9.
39. *See* Req. for Prov. Measures Annex A4, *supra* note 9, at 16.
40. *Id.* at 21.
41. *Id.* at 19. Justice Adjei-Frimprong's analysis was lacking convincing support for his conclusion that military assets were attachable. His analysis seemed to rest mainly on the waiver of sovereign immunity. *Id.* at 19–21. His opinion did not address, in any great detail, the particular issue of the foreign seizure of sovereign military assets. *Id.* In contrast to Justice Adjei-Frimpong's rationale, commentators have noted that ITLOS eventually made the right decision — largely because the sovereign immunity of warships is generally accepted as international law. Retired U.S. Navy Admiral Gary Roughead and Retired Navy Rear Admiral James Houck perhaps said it best in their letter to the editor of the Wall Street Journal: "By ordering Ghana to respect the immunity of the Argentine naval training ship and its crew, the tribunal stood up for the time-honored rule of international law that a nation's warships are immune from the enforcement jurisdiction of other states, regardless of where the vessel is located." Gary Roughead & James Houck, *Sea Tribunal Was on the Mark*, WALL ST. J. (Jan. 3, 2013, 3:52 PM), http://online.wsj.com/news/articles/SB10001424127887323820104578211720798918776. The authors went on to note that the U.S.

In addition, the Ghanaian court ruled that even if military assets could be considered immune, Argentina waived such immunity by making its "revenues, assets, and properties" subject to the jurisdiction of "any specified court or other court" in which that property might lie.[42] Specifically, the FAA contained a waiver of "immunity from suit, from the jurisdiction of any court," as well as "attachment in aid of execution" and "any other such legal remedy or judicial process."[43] Where other national courts had hesitated to attach military assets, Justice Adjei-Frimpong expressed no such trepidation.[44]

NML successfully defeated Argentina's effort to set aside the injunction, and thus, the *Libertad* remained at Tema.[45] The Tema Port Authority later sought to move the *Libertad* due to the high costs of detention at the busy port.[46] Justice Adjei-Frimpong also granted this motion, and Argentina subsequently appealed.[47] Presumably, Argentina's lack of success in Ghanaian courts made litigation alternatives more attractive.[48]

Supreme Court decided a similar issue in the 1812 case Schooner Exchange v. McFaddon, 11 U.S. 116. In that case, Chief Justice John Marshall "ordered the release of a French warship that had been seized in a U.S. port to satisfy the claims of U.S. citizens." *Id.* The Court "recognized that naval vessels are agents of their sovereign and must be protected from an otherwise endless array of aggrieved claimants." *Id.*

42. Req. for Prov. Measures Annex A4, *supra* note 9, at 23–25.

43. *Id.* at 22–23.

44. *Id.* at 24.

45. *Id.* at 25.

46. *See* Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex E at 1, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf (Motion on Notice for Variation of Order of Injunction by Ghana Ports and Harbour Authority).

47. Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex G at 4, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf (Ruling granting the motion on the relocation of the vessel, dated Nov. 5, 2012); Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex H at 3–4, ARA Libertad (Arg. v. Ghana) Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf (Notice of Appeal, Nov. 5, 2012).

48. Although measured in tone, the Argentine request for provisional measures revealed Argentine frustration at Ghanaian reluctance to resolve the dispute diplomatically and the Ghanaian court decision to intern the *Libertad*. *See* Req. for Prov. Measures, *supra* note 11, ¶¶ 7–18.

III. The Resort to Arbitration

A. *UNCLOS Arbitration*

In a letter dated October 29, 2012, Argentina's Ambassador to Ghana formally invoked the United Nations Convention for the Law of the Sea ("UNCLOS") and its arbitration clause, evincing Argentine frustration with the diplomatic and judicial processes.[49] UNCLOS was first ratified in 1982.[50] It prescribes internationally accepted norms for maritime law.[51] Examples of UNCLOS provisions include articles on innocent passage and territorial waters.[52] In addition, UNCLOS created a number of United Nations organizations, such as the International Seabed Authority and the International Tribunal for the Law of the Sea ("ITLOS"), to detail the scope of UNCLOS and adjudicate disputes.[53] With some notable exceptions, many of the world's major players are members to the Convention.[54] Argentina and Ghana are both members.[55]

UNCLOS also contains a dispute resolution mechanism, Part XV, which is largely dependent on arbitral proceedings.[56] Any disputes under the auspices of UNCLOS and between member states

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49. Req. for Prov. Measures Annex A, *supra* note 1, ¶¶ 1–4. UNCLOS Annex VII arbitration has been invoked on a fairly regular basis since the Convention was ratified. Arbitration has been invoked in a number of high-profile cases, including The Mox Plant Case (Ir. v. U.K.), 13 R.I.A.A. 59 (Perm. Ct. of Arb. 2008), Land Reclamation by Singapore In and Around the Straits of Jahor (Malay. v. Sing.), 17 R.I.A.A. 133 (Perm. Ct. Arb. 2005), and Arbitration Between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Econ. Zone and the Cont'l Shelf Between Them, 17 R.I.A.A. 147 (Perm. Ct. Arb. 2006); *see Past Cases*, Permanent Court of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=1029 (last visited May 13, 2015).

50. *The United Nations Convention on the Law of the Sea: A Historical Perspective*, United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited May 13, 2015).

51. *Id.*

52. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, at 404 [hereinafter UNCLOS].

53. *See id.* at 457–58, 566.

54. The United States is not a member of UNCLOS. 167 nations, including Australia, China, France, Germany, Russia, and the United Kingdom, are official signatory members. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 03 October 2014*, United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Jan. 07, 2015).

55. *Id.* Ghana joined the convention on June 7, 1983. Argentina joined on December 1, 1995.

56. UNCLOS, *supra* note 52, at 508–16.

can be resolved via Part XV at the election of one of the parties involved in the dispute.[57] Annex VII to UNCLOS describes the arbitration process, one of four methods of resolving disputes.[58] Argentina invoked Part XV, specifically Annex VII, roughly one month after the Ghanaian judgment.[59] As Argentina and Ghana did not agree to the precise method by which the dispute should be resolved, Annex VII's default provision for arbitration took effect.[60]

B. *The Argentine Claim*

Argentina's claim to UNCLOS was based primarily on the immunity of warships as a symbol of state sovereignty.[61] According to the Argentine claim, warships are traditionally immune from "jurisdiction and execution," a convention arguably embodied in UNCLOS Article 32.[62] Article 32, titled "Immunities of warships and other government ships operated for non-commercial purposes," declares "nothing" in the Convention "affects the immunities of warships."[63] Argentina also argued that Ghana's action violated the right of innocent passage embodied in Article 18, freedom of the high seas memorialized in Article 87, and the right to navigation of the high seas in Article 90.[64]

Argentina sought four distinct remedies for the claimed violations of UNCLOS: (1) the release of the *Libertad*, (2) "adequate compensation for all material losses caused" as a result of the detention, (3) the offer of a "solemn salute to the Argentine flag as a satisfaction for the moral damage caused by the detention," and (4) disciplinary sanctions for the Ghanaian officials who were "directly responsible" for the claimed violations of international law.[65] Argentina also raised two procedural issues. First, Argentina named a member of

57. *Id.* at 509.

58. UNCLOS*, supra* note 52, at 572–74. In addition to standard Annex VII arbitration, parties may resolve to submit their disputes directly to ITLOS, the International Court of Justice, or a special arbitral tribunal for a specific set of disputes involving ecological issues. *Id.* at 510. The importance of arbitration to UNCLOS is clear from the list of specified dispute resolution options at Article 287(1), but also from Article 287(5), which mandates arbitration if the parties fail to agree to a procedure for resolving the dispute. *See id.*, at 509–10.

59. Req. for Prov. Measures Annex A, *supra* note 1, ¶¶ 4, 5.

60. UNCLOS, *supra* note 52, at 510–11; ITLOS Order, *supra* note 12, at 2.

61. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 6.

62. *Id.*

63. UNCLOS, *supra* note 52, at 409.

64. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 6.

65. *Id.* ¶ 7.

the Arbitral Tribunal, per UNCLOS Annex VII Article 3(b), and invited Ghana to do likewise.[66] Second, Argentina notified Ghana that it would be seeking provisional measures.[67]

Per UNCLOS Article 290(5), a party to a dispute in which an arbitral tribunal has not yet been formed may seek provisional measures.[68] If the parties do not agree on a court or tribunal for the dispute on provisional measures within two weeks of the request, then ITLOS becomes the default forum.[69] Argentina sought only one provisional measure: the unconditional release of the ARA *Libertad*.[70]

C. *The Default to ITLOS*

Unsurprisingly, the parties did not agree on the appropriate forum for the resolution of the requested provisional measure.[71] Thus, the question went to ITLOS. The Tribunal is the main adjudicatory body of UNCLOS, tasked with handling treaty disputes.[72] ITLOS has a pseudo-judicial nature, but also follows many procedures and rules that typically govern arbitral tribunals.[73]

ITLOS maintains some auspices of a judicial body. For instance, the ITLOS website refers to the Tribunal as an "independent judicial body," and the members who make rulings are referred to as judges.[74] ITLOS also has prescribed jurisdiction, detailed in UNCLOS, much like a traditional court of law.[75]

In its procedural approach to resolving disputes however, ITLOS has a distinctive arbitral flavor. The Tribunal takes party choice into

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66. *Id.* ¶¶ 20–21. Annex VII calls for an arbitral tribunal consisting of five members. Each party state selects one arbitrator, who may be a national of the party state. The other three members are selected by agreement between the parties, or failing that, by the President of ITLOS. *See* UNCLOS, *supra* note 52, at 572.

67. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 22. Provisional measures are meant to provide relief to a party before the final resolution of the dispute. *See infra* Part IV.A for a more complete description of provisional measures.

68. UNCLOS, *supra* note 52, at 511.

69. *Id.*

70. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 22.

71. *Id.* ¶ 4.

72. *See The Tribunal*, International Tribunal of the Law of the Sea, http://www.itlos.org/index.php?id=15&L=0 (last visited May 13, 2015); UNCLOS, *supra* note 52, at 515.

73. *Rules of the Tribunal*, International Tribunal of the Law of the Sea, March 17, 2009, at 19 *available at* http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf [hereinafter ITLOS Rules].

74. *The Tribunal*, *supra* note 72.

75. *See* UNCLOS, *supra* note 52, at 566.

consideration on procedural issues and matters come before the Tribunal via submission.[76] In addition, the ITLOS rules make clear that the proceedings should be "conducted without unnecessary delay or expense," a hallmark of arbitration.[77] Further blurring the line between litigation and arbitration was Argentina's arbitrator selection: Judge Elsa Kelly of ITLOS.[78] If ITLOS is truly an arbitral body, the selection of a judge — particularly a judge with authority over subject-matter arbitrability — to decide the underlying issue would be unusual. As either a court or an arbitral body, ITLOS wields a great deal of authority over pending UNCLOS arbitration.

ITLOS' authority over UNCLOS arbitral proceedings flows from ITLOS' ability to render provisional measures and is greater than it may first appear.[79] The ability to control front-end subject-matter arbitrability issues that would normally be decided by the arbitral tribunal but for the application for provisional measures may put parties at a distinct disadvantage.[80] The inability to express choice of forum in front-end arbitrability issues may force parties into unfavorable forums that base decisions on unfavorable law or are simply predisposed to a particular result. What is more, such forums can and do wield an enormous amount of authority to decide issues normally left to the agreed-upon arbitral forum. As such, where subject-matter arbitrability issues are heard can effectively decide the underlying

76. ITLOS Rules, *supra* note 73, at 19. That is, of course, unless the parties fail to agree on a forum to decide provisional measures, as was the case here. UNCLOS, *supra* note 52, at 511.

77. ITLOS Rules, *supra* note 73, at 20. "The reduction of litigious obfuscation" in arbitration "results in an economy of time and money." THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 11 (6th ed. 2012).

78. *See* Request for Prescription of Provisional Measures Under Art. 290, Para. 5, of the United Nations Convention on the Law of the Sea, Annex A5, ARA Libertad (Arg. v. Ghana), Case No. 20, Nov. 14, 2012, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf (Résumé of Judge Elsa Kelly). Judge Kelly is both an ITLOS judge and an Argentine national. Potential conflict of interest or partiality concerns are precluded by a unanimous ITLOS decision. However, the fact remains that one of Argentina's selected arbitrators also decided the subject-matter arbitrability issue.

79. ITLOS Rules, *supra* note 73, art. 89(1).

80. A joint opinion by two ITLOS judges even noted, "the prescription of provisional measures constitutes an infringement of the sovereign rights of the responding State" and should only be prescribed if the "State concerned has consented thereto by accepting the jurisdiction of the court or tribunal in question." ARA Libertad (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, Joint Separate Opinion of Judge Wolfrum and Judge Cot ¶ 14, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_orig-no_gutter.pdf [hereinafter ITLOS Joint Separate Opinion].

case. This reality was made all too clear in Argentina's request for provisional measures.

IV. ITLOS Provisional Measures

A. *Provisional Measures*

A provisional measure, also known as an interim measure, is a blanket term for relief awarded before an arbitral tribunal issues a final decision on the merits of a case.[81] Provisional measures may be invoked in order to preserve assets, secure satisfaction of an award, or protect against the removal of property from a particular jurisdiction.[82] In addition, provisional measures may be orders for the "preservation of evidence related to the subject matter of the dispute, orders for the sale of perishable goods to minimize damages," or "orders ensuring confidentiality of information disclosed during the proceedings."[83] Generally speaking, provisional measures are aimed at minimizing loss and ensuring the enforceability of an award once rendered.[84] Provisional measures may be invoked in accordance with the arbitral agreement either before the constitution of the arbitral tribunal or after the tribunal's formation but before a decision on the merits.[85]

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81. The United Nations Commission on International Trade Law (UNCITRAL) provides a well-accepted definition of interim measures (a synonym for provisional measures) in the Commission's arbitration rules:

> An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
> (a) Maintain or restore the status quo pending determination of the dispute;
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

UNCITRAL Arbitration Rules as Revised in 2010, G.A. Res. 65/22, art. 26(2)(a)–(d), U.N. Doc. A/RES/65/22 (Jan. 10, 2011).

82. Colleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 Tul. L. Rev. 1519, 1522 (1991).

83. Dana Renee Bucy, Comment, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 Am. U. Int'l L. Rev. 579, 586–87 (2010).

84. *Id.*

85. Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 Am. Rev. Int'l Arb. 317, 321 (2009).

In the case of UNCLOS arbitration, the stated purpose of provisional measures is preservation of the "respective rights of the parties to the dispute."[86] To issue provisional measures, the tribunal considering them must establish (1) whether the tribunal that will hear the case on the merits would have *prima facie* jurisdiction and (2) that the urgency of the situation requires provisional measures.[87] If those elements are satisfied, then ITLOS has the authority to render any and all provisional measures deemed necessary to preserve the rights of the parties.[88]

B. *The Parties' Positions*

As mentioned above, Argentina simultaneously invoked Annex VII arbitral proceedings and applied for provisional measures via UNCLOS Article 290.[89] Argentina sought the unconditional release of the *Libertad*[90] and argued that the rights mentioned in its arbitral claim could only be preserved via provisional measures.[91] The right argued for most vehemently was the immunity of warships, which Argentina believed to be blanket immunity.[92] Argentina also urged ITLOS to consider the *Libertad*'s "right to leave the territorial waters of Ghana" and the freedom to navigate more generally.[93] The emphasis on "territorial waters" was a tactical move: UNCLOS Article 17 provides for innocent passage through territorial waters.[94]

Having in effect already made a strong case for the *prima facie* jurisdiction of the Annex VII tribunal in the notification of arbitration, the Argentine claim heavily emphasized the urgency of the situation. Argentina argued that the detention was disruptive of the

86. UNCLOS, *supra* note 52, at 511.

87. *Id.* Disagreement abounds regarding the appropriate standard for granting provisional measures, ranging from calls for higher standards in granting provisional measures to more guidelines and requirements in order to increase uniformity and decrease arbitrator reluctance to grant provisional measures. *See* Jarrod Wong, *The Issuance of Interim Measures in International Disputes: A Proposal Requiring a Reasonable Possibility of Success on the Underlying Merits*, 33 GA. J. INT'L & COMP. L. 605, 606 (2005) (calling for a standard of a "reasonable possibility of success" on the merits); Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENTS: INT'L TRADE L.J. 55, 60 (2003) (suggesting that the reluctance of arbitral tribunals to issue provisional measures is a result of "almost complete discretion").

88. ITLOS Order, *supra* note 12, ¶ 74.

89. *See* Req. for Prov. Measures Annex A, *supra* note 1, ¶¶ 5, 22.

90. Req. for Prov. Measures, *supra* note 11, ¶ 28.

91. *Id.* ¶ 29.

92. *See* Req. for Prov. Measures Annex A, *supra* note 1, ¶ 6(1).

93. ITLOS Order, *supra* note 12, ¶ 75.

94. UNCLOS, *supra* note 52, at 404.

armed forces and an "offence to one of the symbols of the Argentine people, the effects of which [were] only compounded by the passage of time."[95] Also included, to highlight the urgency of the situation, were more specific problems. For instance, the detention of the *Libertad* created a supply shortage, which required much of the crew to be evacuated.[96] The crew shortage meant many maintenance tasks could not be performed and left the ship susceptible to emergencies, especially fire.[97] The commander of the *Libertad* documented in detail the hardships that the crew faced.[98] Another issue noted by the Argentine delegation was an attempted boarding by Tema port officials, which nearly resulted in violence.[99] Finally, Argentina argued that the length of time necessary to convene the arbitral tribunal would by default result in deprivation of rights as the illegal detention continued indefinitely.[100] By relying on a clear dictate of UNCLOS, Argentina's representatives attempted to give ITLOS a simple choice: either release the ship, or maintain its internment in clear violation of the very international law upon which ITLOS authority and jurisdiction is based.

Ghana's argument simply refuted the necessary elements of a provisional measures claim, pleading that the "Annex VII tribunal" would not have "jurisdiction over the dispute submitted," that the "provisional measures requested" were neither necessary nor appropriate, and that there was no "urgency such as to justify the imposition of the measures" before the Annex VII tribunal was formed.[101] Ghana argued that jurisdiction could not be established because the dispute was not governed by UNCLOS.[102] This claim was based largely on an argument that Article 32, establishing immunity for warships, did not refer to internal waters.[103] While the technical details of the differences between territorial and internal waters are beyond the purview of this Article, the port at Tema is considered to be

95. Req. for Prov. Measures Annex A, *supra* note 1, ¶ 24.

96. *Id.*

97. *Id.*

98. *See* Req. for Prov. Measures Annex B, *supra* note 2, at 4–6 and Req. for Prov. Measure Annex I, *supra* note 10 *passim*.

99. Req. for Prov. Measures, *supra* note 11, ¶ 30.

100. *Id.* ¶ 71.

101. Written Statement of the Republic of Ghana of November 28, 2012, ¶ 9, ARA Libertad (Arg. v. Ghana) Case No. 20, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/WRITTEN_STATEMENT_OF_THE_REPUBLIC_OF_GHANA_-_28_NOVEMBER_2012__2_.pdf [hereinafter Ghana Statement].

102. *Id.* ¶ 10.

103. *Id.* ¶ 11. Ghana's point is bolstered by the location of Article 32. Article 32 is contained within section 3 of UNCLOS, which lays out the right of innocent passage

internal water.[104] Thus, the Ghanaian position was that if UNCLOS did not refer to the matter at hand, then customary international law prevailed and neither the pending arbitral tribunal nor UNCLOS had authority over the dispute.[105] Without regard to the accuracy of the internal waters argument, the attempt to avoid Article 32 altogether appeared to be at least in part a concession by Ghana that warships are beyond the purview of foreign courts according to UNCLOS. Beyond the technical UNCLOS arguments, Ghana invoked the rationale of the Ghanaian High Court case, claiming that the pertinent issue was not UNCLOS interpretation but rather the alleged waiver of sovereign immunity found in the FAA.[106] Again, the contention was that this dispute was beyond the purview of UNCLOS.[107]

As for Argentina's claimed rights, Ghana dismissed any potential for irreparable harm.[108] In fact, Ghana made note of amenities afforded to the crew of the *Libertad*, including the use of a generator and the use of the wharf for physical activities.[109] This rosy image of the *Libertad's* detainment was not shared by the Argentine representatives and was seemingly overstated. Ghana feebly denied the urgency of the situation, blaming "language difficulties" for any perceived hostile acts on the part of the Tema port authority.[110] By failing to focus on the crux of the Argentine claim — Article 32 and the daily harm that was occurring — Ghana's response seemed to foreshadow the result. While a successful defense regarding the jurisdiction of ITLOS to decide the dispute would have resulted in outright success for Ghana, the lack of reasonable responses to Argentina's claim that the *Libertad* was immune from attachment proved telling.

C. *The Decision*

Argentina first invoked arbitration and requested provisional measures on October 29, 2012. Per UNCLOS Article 290, Argentina

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on territorial sea. UNCLOS, *supra* note 52, at 404. Territorial sea is simply an expanse of water covering twelve nautical miles from a nation's coast. *Id.* at 400.

104. ITLOS Order, *supra* note 12, ¶ 55.

105. Ghana Statement, *supra* note 101, ¶¶ 11–12; ITLOS Order, *supra* note 12, ¶¶ 57–58.

106. Ghana Statement, *supra* note 101, ¶ 16.

107. *Id.* ¶ 17.

108. *Id.* ¶ 19.

109. *Id.* ¶ 21.

110. *Id.* ¶ 26; *see also supra* Part IV.B. In light of these alleged, serious concerns raised by Argentina, Ghana's responses suffer from a noticeable lack of credibility.

waited the requisite two weeks before submitting the request for provisional measures to ITLOS.[111] The final ITLOS decision on provisional measures was rendered on December 15, 2012.[112] ITLOS granted the Argentine request for provisional measures, resulting in the unconditional release of the *Libertad*.[113]

Argentina's claim was based on four separate articles of UNCLOS.[114] In the end, only Article 32 was relevant and dispositive.[115] ITLOS simply had to determine that the pending arbitral tribunal would have *prima facie* jurisdiction and then determine whether the requested measures would serve to preserve party rights.[116] While the *Libertad* was ultimately released, several Argentine claims were rejected outright. ITLOS granted a measure of credence to the Ghanaian argument by noting that the referenced provisions of UNCLOS simply did not apply to internal waters.[117] These Argentine claims included the right to innocent passage and navigation of the high seas, as well as the freedom of the high seas.[118]

ITLOS found a jurisdictional hook in Article 32.[119] While Article 32 is contained within the section of UNCLOS dealing with territorial waters, ITLOS ruled that the language of Article 32 was silent on the "geographical scope of its application."[120] Because the detention of the *Libertad* implicated the immunity of warships, ITLOS found that the pending arbitral tribunal would have *prima facie* jurisdiction.[121]

As for the preservation of rights and the urgency of the situation, ITLOS ruled that the *Libertad*, as a warship and an "expression of . . . sovereignty," could not be detained according to international custom and that the detention of the ship prevented the *Libertad* from "discharging its mission."[122] More concerning to the tribunal was the attempted boarding by port authorities in Tema, which ITLOS deemed to "demonstrate the gravity of the situation and underline the urgent need for measures pending the constitution of the Annex VII arbitral

111. ITLOS Order, *supra* note 12, ¶ 1.
112. *Id.* at 1.
113. *Id.* at 21–22.
114. Req. for Prov. Measures, *supra* note 11, ¶ 23.
115. ITLOS Order, *supra* note 12, ¶¶ 66, 67.
116. *Id.* ¶¶ 60, 73.
117. *Id.* ¶ 61.
118. *Id.* ¶¶ 52–57.
119. *Id.* ¶ 66.
120. *Id.* ¶ 63.
121. ITLOS Order, *supra* note 12, ¶¶ 62–67.
122. *Id.* ¶¶ 94, 95, 98.

tribunal."[123] Thus, in order to prevent either party from aggravating or extending the dispute, ITLOS ordered the *Libertad*'s release.[124]

V. Analysis: The Effect of ITLOS Provisional Measures

The *Libertad* case is rife with implications for state-to-state arbitration. First, the case demonstrates the value of state-to-state arbitration — a common and essential element in many multilateral treaties.[125] Argentina, unable to obtain relief in the courts of a sovereign state, instead turned to a widely-accepted treaty for a remedy. As an alternative to the Ghanaian court process, arbitration (or perhaps pre-arbitral gatekeeping) was effective in freeing the *Libertad*. Although there is much disagreement in the international community about the case itself and Argentina's debt, there seems to be less debate regarding the release of the *Libertad*.[126]

Second, another facet of the case is the interplay between international treaty-based arbitration and sovereignty, which manifested in the question of the primacy (or seeming lack thereof) of national courts on the international stage. ITLOS, acting as a kind of pre-arbitral forum, effectively overruled the Ghanaian state courts by focusing on the treaty obligations imposed on Ghana, as opposed to the presumed waiver of immunity in a bond agreement.[127] The ability of ITLOS to command this result, and especially the Ghanaian response, indicates the importance of international treaty obligations in the resolution of disputes.

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123. *Id.* ¶ 99.

124. *Id.* ¶ 101. ITLOS ordered that neither Argentina nor Ghana should take action to aggravate the dispute, but only referenced Ghana in the preceding paragraphs describing the gravity of the situation. *See id.* ¶¶ 98, 99.

125. *See* Carla S. Copeland, Note, *The Use of Arbitration to Settle Territorial Disputes*, 67 Fordham L. Rev. 3073 (1999). Examples of successful treaty-based arbitration include arbitration between the United States and Great Britain pursuant to Jay's Treaty, Israeli-Egyptian arbitration based on the 1979 peace treaty, and arbitration between Serbia and Croatia per the Dayton Accords. *Id.* at 3073, 3082, 3090; *see also* The Indus Waters Treaty 1960, Sept. 19, 1960, 419 U.N.T.S. 126.

126. For a different take on Argentina's debt and ITLOS authority, see Lawrence Kogan *"ARA Libertad" Case Ruling Suggests Ever-Expanding ITLOS Jurisdiction*, 2013 Emerging Issues 6879. Mr. Kogan concludes that the ITLOS decision to release the *Libertad* represents the latest attempt by the tribunal to expand its authority, "at the expense of private domestic and international law, national sovereignty, and international market for sovereign debt." *Id.* at 12; *see also Chasing Deadbeat Argentina: A U.S. Investor Tries to Get Its Money Back from Buenos Aires*, Wall St. J., Oct. 16, 2012, *available at* http://www.wsj.com/articles/SB10000872396390444799904578048272515265276.

127. *See generally* ITLOS Order, *supra* note 12.

Finally, and perhaps most importantly, the ITLOS determination had the ironic effect of weakening the resort to arbitration as an effective means to resolve disputes on the international stage. This weakening is the result of two interrelated factors: (1) the involuntariness of UNCLOS arbitration and the ITLOS hearing and (2) the prejudicial effect of provisional measures on the forthcoming arbitral hearing.

A. *Party Choice as the Foundation of Arbitration*

In the end, Ghana was subjected to the authority of UNCLOS and ITLOS despite disputing the jurisdictional authority of both.[128] Throughout the dispute, Ghana considered the central issues to be the interpretation of the FAA and the enforcement of judgments rendered in other jurisdictions.[129] Yet Ghana never had an opportunity to argue its interpretation of the relationship between international law and the domestic results of previous judgments in NML's favor.[130]

That Ghana's views were largely ignored by ITLOS indicates a serious problem: when parties disagree as to the very nature of the dispute and therefore the appropriate forum, provisional measures can subject a party to unfavorable jurisdiction. On the one hand, allowing a tribunal — that is not the final arbitral tribunal selected by the parties — to decide threshold subject-matter arbitrability questions threatens the purpose of arbitration as a party-based system of adjudicating disputes.[131] On the other hand, arbitration advocates argue almost universally that provisional measures are necessary to protect party rights.[132] When *kompetenz-kompetenz*[133] cannot yet be

128. *See, e.g.*, Ghana Statement, *supra* note 101 at ¶ 10.

129. *Id.* at ¶¶ 16, 17.

130. *Id.* at ¶¶ 15–17.

131. Arguably, Ghana chose to have ITLOS resolve subject-matter arbitrability when it became a signatory to UNCLOS. *See supra* note 55. However, Ghana maintained throughout the proceedings that the issue was not one that UNCLOS could resolve. *See supra* Part IV.B. By the time the matter was resolved, Ghana had essentially been compelled to accept the jurisdiction of two dispute resolution forums that it felt lacked authority to resolve the dispute. Strictly as an arbitrability issue, and given the centrality of party choice of forum in arbitration generally, Ghana's inability to control the forum or the method upon which the conflict was resolved is particularly troublesome.

132. *See, e.g.*, Ferguson, *supra* note 87, at 55 (noting that provisional measures have the effect of "compelling parties to behave in a way that is conducive to the success of the proceedings, preserving the rights of the parties, preventing self-help, keeping peace among the parties, and ensuring that an eventual final award can be implemented"); Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 Am. Rev. Int'l

exercised by the arbitral tribunal because the tribunal has yet to form, someone or something must work to provide parties with relief in emergency situations. Quickly moving events require nimble decision-making.

One's perspective on the interplay between party choice, arguably recalcitrant parties, and provisional measures depends on one's position as to the merits of each party's respective claims. Ghana's reluctance to accept arbitration or ITLOS proceedings, coupled with Ghana's insistence on supporting the Ghanaian High Court ruling, has given some in the international law community cause for concern.[134] However, Ghana's stance was likely due, at least in part, to continued reluctance to accept UNCLOS procedures as the appropriate method of resolving the dispute and a strict separation of powers.[135] For Argentina, the lack of Ghanaian choice in the matter was tactical and necessary, given the results of Argentine claims in Ghanaian courts.

When arbitration becomes mandatory and can be enforced without the consent of one of the parties to the dispute, the result is the weakening of party choice — the very foundation of arbitration. Arguably, Ghana agreed to resolve UNCLOS disputes via arbitration when it became a party to the treaty on June 7, 1983.[136] But the likely Ghanaian response would be that Ghana did not agree to have non-UNCLOS disputes resolved by arbitration and, moreover, to have the subject-matter arbitrability question decided by ITLOS. The

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ARB. 317, 317 (2009) (calling provisional measures "critical" in order to guard against adversaries that "threaten to take action that cannot be undone by after-the-fact damages.").

133. *Kompetenz-kompetenz* is the principle that allows arbitrators to decide their own jurisdiction. 2 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 41:65 (2012). Without an arbitral panel to determine whether or not the dispute falls under UNCLOS, ITLOS must make a subject-matter jurisdiction determination as to whether the pending arbitral tribunal has jurisdiction, thus vesting initial *kompetenz-kompetenz* with ITLOS. The arbitral tribunal could also consider the jurisdictional decision rendered by ITLOS, and might have ruled that ITLOS was mistaken.

134. Ghana's willingness to support vulture fund speculation by enforcing "excessive claims" has generated debate and concern among other indebted nations and international finance observers. *See, e.g.*, Mark Tran, *Hopes of Indebted Countries Anchored on Argentinian Ship in Ghanaian Port*, GUARDIAN, (Dec. 14, 2012, 10:41 AM), http://www.guardian.co.uk/global-development/2012/dec/14/indebted-countries-argentinian-ship-ghanian-port.

135. ARA Libertad (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, Separate Opinion of Judge Lucky, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Lucky_E_orig-no_gutter.pdf, ¶ 32 (noting that Ghana defended Argentina's claim that Ghanaian officials should be held responsible for the detention of the *Libertad* with a separation of powers argument).

136. UNCLOS, *supra* note 52, at 397.

issue of party consent is inexorably intertwined with the potential effects of provisional measures. Party disagreement as to the nature of the dispute, in this case either treaty-based or contract-based, can result in extremely one-sided decisions in provisional measures.

B. *Prejudice to the Final Result*

Through its order to release the *Libertad*, ITLOS effectively decided both Ghana's contract-based sovereign immunity waiver argument and Argentina's UNCLOS Article 32 argument. In stark opposition to the effect of this ruling is the stated purpose of provisional measures: to avoid prejudice to the final result of arbitration.[137] Provisional measures enhance and supplement arbitral decisions and awards in order to ensure the efficacy of arbitration.[138] ITLOS paid lip service to this notion in its decision:

> [T]he present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the merits themselves, and leaves unaffected the rights of Argentina and Ghana to submit arguments in respect of those questions.[139]

This assertion was tenuous at best. The likelihood that Argentina would seek the remaining forms of relief originally sought in the request for arbitration was slim.[140] What is more, the only clear beneficiary of arbitral proceedings after the ship's release would have been Argentina if it continued to seek damages for the detention of the *Libertad*. Ghana no longer had a claim, except perhaps that ITLOS overstepped its authority in rendering a decision that affected the merits of the case.

Despite ITLOS's admonitions, the provisional measures effectively decided the matter of the *Libertad*. Although an arbitral tribunal was formed and set a preliminary schedule for the arbitral hearings and submissions,[141] Ghana and Argentina have since requested that the arbitral tribunal be terminated.[142] The move to terminate followed a Ghana Supreme Court decision in Argentina's

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137. *See* 3 Oehmke, *supra* note 133, § 117:1.

138. *See id.*; *see also* Wong, *supra* note 87, at 607.

139. ITLOS Order, *supra* note 12, ¶ 106.

140. *See ARA Libertad Leaves Ghana Following ITLOS Ruling on Argentina's Application for Provisional Measures*, *supra* note 13.

141. *See* ARA Libertad Arbitration (Arg. v. Ghana), Procedural Order No. 1 (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1526.

142. *See* ARA Libertad Arbitration (Arg. v. Ghana), Termination Order (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1526.

favor,[143] but was presumably made with an eye toward the sheer inevitability of the result. With the *Libertad* safely back in Argentina, there was no longer an issue worth arbitrating. The arbitral tribunal officially terminated the dispute on November 2, 2013.[144]

There are two primary lessons to be learned from the provisional measures rendered by ITLOS and their effect on arbitration. First, tribunals hearing applications for provisional measures must avoid rendering decisions that will go directly to the merits of the case. Second, provisional measures tribunals must remain aware of the scope of the dispute in order to avoid deciding questions beyond the scope of the particular tribunal.

The first issue is simply solved. Decisions that might affect the merits of the case should not be decided in a provisional measures hearing and should instead be made through common sense orders and temporary relief. For instance, ITLOS might have ordered the release of the *Libertad* to a more friendly location and maintained close supervision of the ship's movement until the arbitral tribunal issued a decision. Another possible solution would be the posting of the bond that NML sought: $20 million.[145] This bond could have been posted and held by the Ghanaian court system pending the result of the arbitral tribunal. Because the *Libertad* was the center of the case, its release decided the case and commanded the eventual termination of the arbitral tribunal. ITLOS would have done well to craft a more even-handed solution than the unconditional release of the *Libertad*, despite the relative justice in the decision.

The second lesson of the ITLOS provisional measures is the need for a better understanding of the effects of provisional measures and higher standards for their issuance by the bodies that issue them. Because Article 32 was ruled dispositive of the UNCLOS dispute,

143. The Republic v. High Court (Comm. Div.) Accra, (Sup. Ct. of Ghana 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1526.

144. ARA Libertad Arbitration (Arg. v. Ghana), Termination Order (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1526.

145. It might be said that the posting of a bond defeats the very purpose of warship immunity. This may be true; however, the Ghanaian position was not that warships are not immune. Rather, it was that Argentina waived said immunity in the FAA. Thus the posting of a bond would effectively ensure that neither party's rights were prejudiced by the provisional measures. Argentina would get its flagship initially, and the posted bond, if it succeeded in its case on the merits. Ghana would maintain the legitimacy of its national court decisions (as the security was ordered in the original injunction) and have the bond in satisfaction of the NML judgment if it succeeded on the merits. While the bond's legitimacy is debatable, Argentina undoubtedly owes NML for the defaulted debt, notwithstanding the unseemly business model of vulture funds.

ITLOS effectively dismissed Ghana's claims that Argentina waived sovereign immunity in the FAA.[146] Despite its reluctance to consider Ghana's position, ITLOS was aware that Ghana and Argentina disagreed about the nature of the dispute.[147] The problem might be solved with a more thorough understanding of the nature of provisional measures and their relation to the final arbitral ruling. Related to that notion is an idea posited by some scholars: higher standards for rendering provisional or interim measures.[148] A more nuanced approach could set higher standards for provisional measures that will undoubtedly affect the final decision. In other words, ITLOS could have remained honest about the effect the release of the *Libertad* would have on any subsequent proceedings and still rendered a just result.

VI. Conclusion

When parties disagree as to the nature of the dispute and the appropriate forum for the resolution of disputes, provisional measures can have the effect of rendering party arguments null and void. The consequence of provisional measures that go to the merits of the case is often to make arbitration a moot point. Perhaps Ghana did not suffer any real harm in the release of the *Libertad*, but the finality and effectiveness of state-to-state arbitration did not fare well. The dispute has effectively been resolved, and Ghanaian courts overruled, by ITLOS.

In the peculiar case of the ARA *Libertad*, two things are clear. First, the correct result was reached. It is highly likely that the arbitral tribunal would have reached a similar result as to sovereign immunity, especially the immunity of military assets from judgment — a nearly inviolate concept in international law.[149] Second, state-to-state treaty-based arbitration demonstrated a fatal flaw: the resort to

146. UNCLOS Article 32 establishes that nothing in the treaty affects the "immunities of warships." ITLOS did not delve into this language. A more thorough analysis might have questioned the basis of the immunities to which Article 32 refers, as none is described in the treaty. This conundrum is addressed in one of the separate opinions issued by ITLOS judges. ITLOS Joint Separate Opinion, *supra* note 80, ¶¶ 40–46.

147. ITLOS Order, *supra* note 12, ¶¶ 50–51.

148. Wong, *supra* note 87, at 620.

149. ITLOS Order, *supra* note 12, ¶ 95; *see also* United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, at 1, U.N. Doc. A/59/49 (Dec. 2, 2004) ("[T]he jurisdictional immunities of States and their property are generally accepted as a principle of customary international law."). Some countries also have domestic laws governing sovereign immunity and the immunity of state assets. United States law, for instance, specifically exempts military assets from attachment. 28 U.S.C. §§ 1609, 1611 (1996).

provisional measures. Without high standards to allow such measures, states (however justly) will seek and successfully obtain interim relief, which will inevitably affect the outcome of pending arbitration. Those tribunals that hear requests for interim or provisional measures must tread carefully and avoid rendering decisions that will significantly disadvantage responding arbitral parties. Careful application of provisional measures will allow each party to air its qualms in the appropriate forum: the arbitral tribunal.