Provisional Measures in *ARA Libertad*: On the Margins of Jurisdictional Discourse

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**Introduction**

The *ARA Libertad*, the recent case of provisional measures from the International Tribunal for the Law of the Sea (ITLOS, or the “Tribunal”), reflects the problem of attempting to accommodate a dispute involving the detention of a warship in a port within the jurisdictional parameters of the United Nations Convention on the Law of the Sea (UNCLOS).¹ The Tribunal, as a provisional measure, ordered the release of the Argentine warship *ARA Libertad*, which was held in detention by a Ghanaian court. The arrest of this warship was made in pursuance of an action instituted by NML Ltd., which owns Argentina’s defaulted sovereign bonds.

This case reflects, in general, how when the Tribunal overcomes a jurisdictional objection, it still faces the challenge of determining the extent and scope of remedial measures within the provisions of UNCLOS. The Tribunal, in the main, had to consider the applicability of UNCLOS to internal waters and whether a general rule on a warship’s immunities was incorporated within Article 32. Both of these issues created perceivable difficulties at the beginning, during the hearing, and at the stage of granting relief. Hence, this article attempts to give an account of this case of provisional measures and examines how the Tribunal approached these issues.

**Factual Matrix**

The series of sovereign bonds had been issued by Argentina from February to July 2000. The Fiscal Agency Agreement (FAA) between Argentina and the Bankers Trust Company had a New York law as the applicable proper law.

The FAA also contained a sovereign immunity waiver clause, whereby from Clause 22 of the FAA, Argentina waived and agreed not to plead any immunity in respect of these proceedings. Argentina declared a moratorium in December 2001 on all its sovereign debts.

NML Ltd., a company registered in the Cayman Islands and an affiliate of a New York-based hedge fund entity, Elliott Management, purchased Argentine sovereign bonds between June 2001 and 2003 at nearly half of the discounted face value on the principal value of US$172,153,000 and was in a relentless chase to enforce on Argentine property. The company obtained a summary judgment on the bonds from a Federal Court in New York for a value of US$284,184,632.30, including interest. NML Ltd. thereafter obtained a summary judgment in the United Kingdom from the final appellate court, the Supreme Court. NML Ltd. tried the same judicial process before a Ghanaian court, which led to the arrest of ARA Libertad.

The facts of this case in the main were undisputed.2 ARA Libertad was an Argentine frigate warship for naval cadet training,3 which arrived in the Ghanaian port of Tema on October 1, 2012. On its arrival she was ceremoniously welcomed by the Government of Ghana. But on the next day it was detained and the crew was arrested through an interlocutory injunction issued by the Ghanaian High Court4 pursuant to an enforcement application filed by NML Ltd. on the unsettled value of the bonds.

Argentina entered an appearance in Court to protest and sought to set the order aside on the grounds of warship immunity.5 The Court refused. Argentina filed an appeal in the Court of Appeal where an outcome would have been reached by the end of January 2013. However, before the outcome, Argentina made a request for provisional measures to ITLOS on October 29, 2012,6 and filed a request for provisional measures to ITLOS on November 14, 2012.7

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5 See request for provisional measures by Argentina, n. 3 above, para. 11.

6 See Ghana’s response, n. 4 above, paras. 6–7.

7 Request for Provisional Measures, n. 3 above.