Immune or Not? Warships in Foreign Internal Waters and the UN Convention on the Law of the Sea

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On 20 December 2012, the International Tribunal for the Law of the Sea (ITLOS) rendered an order on provisional measures in rather extraordinary circumstances. It unanimously ordered that Ghana unconditionally release Argentina's frigate ARA *Libertad* and its crew and allow them to leave the port of Tema and the maritime areas under Ghanaian jurisdiction.[2] The vessel, the flagship of the Argentinean navy, had been detained by Ghana following an interlocutory injunction by a judge of the High Court of Ghana on 2 October 2012, upon the claim by a company in respect of sums due under bonds issued by Argentina.

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[2] *The ARA "Libertad" Case (Argentina v Ghana) (Provisional Measures) (Order)*, para108. Available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf (hereinafter 'Order').

In this, its sixth order on provisional measures since its establishment, ITLOS for the second time faced the criticism of some judges on the jurisdiction of the Tribunal to order the provisional measures sought by the Applicant. In the *Libertad* case, two judges questioned whether the arbitral tribunal to which the dispute was submitted would have *prima facie* jurisdiction over it.[3] The problem was raised starkly in the context of the immunity of a warship in a foreign port which, despite being a well-established rule of international law, was allegedly not a rule to be found in UNCLOS and, therefore, not one capable of being vindicated through its compulsory dispute-settlement mechanism. The case also raises issues of the relations between domestic law and the international obligations of States, and of the conditions to be fulfilled when provisional measures are sought.

[3] Art 290(5) of the 1982 UN Convention on the Law of the Sea (UNCLOS). In the *Southern Bluefin Tuna cases* (*New Zealand v Japan; Australia v Japan) (Provisional Measures) (Order)*(available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf) Judge Vukas dissented but on the basis that there was no urgency. So did Judge Eiriksson but he opposed the content of the Order.

Domestic judicial autonomy and nature of the dispute

The case startles the observer by the allegation that Ghana had no dispute with Argentina and that the dispute was between Argentina and a 'vulture fund'. In 2000, Argentina issued bonds pursuant to a Fiscal Agency Agreement (FAA) with Bankers Trust Company and, between 2001 and 2003, NML Capital Ltd, a Cayman Islands-registered company affiliate of a New York hedge fund, purchased bonds at a little over half their face value with a principal value over US$ 172 million.[4] Argentina having defaulted on its payments in 2001, in the middle of a dire

[4] See *NML Capital Ltd v Republic of Argentina*, [2001] UKSC 31, 6 July 2011 (*p*er Lord Phillips, President). Before ITLOS, the Agent of Argentina explained that Argentina restructured its debt between 2005 and 2010 and this was accepted by 92% of its creditors. She summarised the *modus operandi* of these funds as follows: 'Although the activities of the vulture funds first emerged in South America, since the 1990s they have got their claws, as it were, on a number of countries in sub-Saharan Africa, by acquiring their debts on the cheap. These funds then waited for financial aid and debt relief programmes to be offered by the World Bank, IMF and the developed countries before going on the attack, by presenting their bond certificates to American and European courts and seeking payment of the whole of the debt'. Verbatim Record, DocITLOS/PV.12/C20/3, 15 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV.12_C20_3_E.pdf).

economic crisis, the company commenced proceedings in the US District Court of New York under the FAA and, in December 2006, obtained a summary judgment for breach of contract in an amount in excess of US$284 million.[5] NML subsequently sought to have that judgment enforced in the UK and, on appeal, the UK Supreme Court agreed with the US District Court that Argentina was not entitled to immunity in light of the waiver contained in the Bonds Agreements.[6] The relevant terms of the Bonds read as follows:

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[5] See Written Statement by Ghana ('Statement'), Annex 4, 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. NRL also obtained several judgments against Argentina in the District Court in separate litigation on different bonds between 2009 and 2011, arguing that Argentina violated the *pari passu* and the equal treatment clauses in the FAA by subordinating their FAA Bonds to the Exchange Bonds and lowering the ranking of their FAA Bonds below the Exchange Bonds, following Argentina's sovereign debt restructuring. Argentina appealed from the various injunctions and declaratory orders. The Court of Appeals for the Second Circuit affirmed the judgements on 26 October 2012. See http://www.ca2.uscourts.gov/decisions/isysquery/698b4d40-9200-4c40-957f-c2bdf0a6374d/1/doc/12-105_opn.pdf.

[6] (n 5) para 3. NML's New York judgment was domesticated in the UK by Order of 5 December 2011. See Argentina's Request for the Prescription of Provisional Measures ('Request'), Annex C (submission of Argentina and

> 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… and the courts of the republic of Argentina (the 'specified courts')… To the extent that the republic or any of its … properties shall be entitled, 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 legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an

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Supplementary submission in the High Court of Justice of Ghana), note 8 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf and http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf).

> immunity, the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction.[7]

The UK Supreme Court *per* Lord Phillips found that under Section 3(1)(a) of the State Immunity Act 1978, a State is not immune as respects proceedings relating to a commercial transaction entered into by the State and, consequently, whether Argentina was immune from proceedings in the UK (as it claimed it was) depended upon the underlying transaction that had given rise to the claim. The transaction relating to the bonds being a commercial transaction entered into by a State with a company, Argentina was not immune from the proceedings commenced by NML in the UK. In any event, the Bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the 1978

[7] Reproduced in (n 5) Annex 5, 61.

Act, and the second paragraph of the terms of the Bonds constitutes an independent submission to English jurisdiction.[8]

On 4 June 2012, Ghana authorised the visit of the frigate ARA *Libertad*, a warship used for navy cadet training trips. The frigate arrived in Ghana on 1 October 2012 at the port of Tema whereupon it was served with a judicial order restraining the captain and crew from moving the vessel and from bunkering it. The Harbour Master was ordered to board the vessel and take possession of mandatory documents (e.g. ship's register, crew and passenger manifest and safety certificates). It was further ordered that the order shall not lapse unless Argentina provides sufficient security in Ghana to satisfy the plaintiff's claim.[9] NML's claim was for the amount of the judgment rendered by the US District Court plus interests. The plaintiff's statement of

[8] (n 4).

[9] *NML Capital Ltd v Republic of Argentina* (n 4), Order for interlocutory injunction, Superior Court of Judicature in the High Court of Justice (Commercial division), 2 October 2012 (Order of Justice R Adjei-Frimpong). Reproduced in Request (n6), Annex 3 of Annex A. The Order was rendered *ex parte*. The amount of security was set at US$20 million. Verbatim Record, DocITLOS/PV.12/C20/1, 27 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV.12_C20_1_E.pdf).

claim argued that the issuance of Bonds was a transaction for which Argentina does not enjoy immunity and that immunity from execution of a related judgment was waived in the Bonds document anyway. The judicial order was sought on the ground that the frigate was 'an asset of the Defendant within the jurisdiction available to be enforced against'.[10] The consequence of *in rem* proceedings were spelled out starkly by Argentina which identified 'a concrete risk that, if ITLOS did not order the requested provisional measures, Ghana's organs would order the enforcement of the warship to satisfy the amount claimed'.[11] Argentina was convinced from the outset that the immobilisation of the vessel was a matter to be resolved with the Ghanaian authorities and that the substance of the dispute concerning the frigate was different from the execution of the New York or the UK judgment generally. Indeed, as early as 3 October Argentina requested Ghana to urgently adopt the necessary measures to put an end to the situation. Further similar requests remained unanswered, despite the fact that 4

[10] ibid.
[11] Request (n 6), para58.

October was the scheduled date of departure of the *Libertad*[12] and despite the rapid aggravation of the situation.[13]

The reasoning of Justice Adjei-Frimpong is explained in a further phase of the domestic proceedings following Argentina's request that the Injunction be set aside. Argentina contended that the US judgments may not be enforced in Ghana, for under the Ghana Courts Act 1993 only the judgements of countries listed under Ghanaian legislation may be recognised. While the UK is listed, the judgment underlying the Injunction was issued in the US, not the UK. Moreover, in order for an English judgment to be enforced in Ghana it must be duly registered with the High Court of Ghana and both Ghana and UK law prohibit the registration of a judgment on a judgment.[14] Furthermore, Argentina argued that its waiver of immunity from suit concerned only actions brought in New York and in

[12] Request (n 6), Annex 2 of Annex A.
[13] On 4 October the officers of the frigate rejected a request by a representative of the Ghana Ports & Harbour Authority to meet with the commander in order to take possession of the ship's documents. ibid para 8.
[14] Statement (n 6) paras 16-18.

Argentina[15] and then, rather ambiguously, that the waiver only be applied in proceedings to enforce judgments rendered in New York or Argentina, not in the UK.[16] One should presume in the first instance that the Ghanaian judge is in the best position to interpret Ghanaian law. The matter was not examined by ITLOS and is it likely to be examined by the arbitral tribunal on the merits, as a matter of judicial economy, only if it finds that Argentina did indeed waive immunity from execution against military property in the Bonds documents, for only then would the jurisdiction of the High Court over the dispute with NML be relevant.[17] Domestic law is only a fact for the international judge who may verify that the fact is actually established.[18]

[15] (n 6), Annex C, para19.

[16] ibid paras 30-32. NML also claimed that Argentina had consented to the UK judgment being entered against it. Statement (n 5) para 22.

[17] One may note that, in cases that came before ITLOS under Art292 on prompt release of vessels and crew, ambiguities in States laws were raised on occasion. Eg B H Oxman and V P Bantz, 'The Grand Prince' (2002) 96 *AJIL* 222; V P Bantz, 'Views from Hamburg: The Juno Trader Case or How to Make Sense of the Coastal State's Rights in the Light of its Duty of Prompt Release' (2005) 24 *UQLJ* 422.

[18] *Certain German Interest In Polish Upper Silesia (Germany v Poland) (Merits), PCIJ Ser.A No.7*, 19; *Flegenheimer (Italian-United States Conciliation Commission)*, 25 *ILR* 91, 99; *Grand Prince (Belize v France) (Application for Prompt Release) (Judgment)*, paras84, 93 (available at

While the New York judgment is not registrable, the High Court Justice considered that the common law regime, which permits a fresh action founded on a foreign judgment for purposes of enforcement was applicable in Ghana. This rests on the foreign judgment creating a simple contract debt between the parties.[19]

Argentina in its Submission to the High Court devoted several pages to recalling the immunity of warships under international law, immunity both from jurisdiction and from enforcement.[20] This was continued before ITLOS.[21] But there

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http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_8/Judgment.20.04.01.E.pdf).

[19] Request (n 6), Annex 4, 6-8. '[O]nce an asset of the Defendant/Applicant 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 terms and since the judgment constitutes a civil contract under common law, Order 8 rule 3 subrule 1(m) operates to properly invoke the jurisdiction of this court'. ibid 11. Interestingly, subrule 1(m) which concerns service out of jurisdiction of notice of writ says that it may be effected 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 Justice opined that the contract in question was the FAA, not the foreign judgment. ibid 9.

[20] Request (n6), Annex C; relying notably on the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of

was no issue, for the Ghanaian judge, as to the immunity of a State (thus arguably of its warship) before a foreign court.[22] The issue for him was the waiver of immunity in the FAA and the Bonds document, ie whether the 'vessel … is immuned to the judicial process of this court'.[23] Under Article 18 of the 2004 Convention on State Immunities, a State may *expressly*, by international agreement or written contract notably, consent to pre-judgment measures of constraint. Justice Adjei-Frimpong considered that the terms of the Bonds had that effect over military property as well[24] and that nothing in Ghanaian law

State-Owned Ships, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property and the opinion of writers (in particular at note 54).

[21] Verbatim Record (n 9), 11,13.

[22] Request (n 6), Annex 4, 12. The Judge later opined: '[T]hough there is no well established customary international law that warships enjoy immunity, the view in support of its is widespread'. ibid 21. This flies in the face of one of the most well-entrenched rule of international law, expressed in the famous US Supreme Court decision *Schooner Exchange v MacFaddon*, 11 US 116. The High Court Justice cited views that the *scope* of State immunity is a matter of controversy. This is not a novelty; but the immunity of *warships* is contested by no one.

[23] Request (n 6), Annex 4, 36.

[24] (n 7): 'the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity [i.e. immunity from pre- and post-judgment execution] to the fullest extent permitted by the laws of such jurisdiction'.

excluded military property from the applicability of a waiver of immunity from enforcement, unlike in US law.[25] But this presumed that customary international law itself, which is arguably incorporated in Ghana by its Constitution,[26] allows a waiver worded as it is in the Bonds documents to be interpreted as encompassing military property. Argentina repeatedly argued that military property is specially protected and immunity of execution may only be waived expressly, and that the waiver in the Bonds document, which does not refer to military property specifically, does not constitute express waiver. In support, Argentina in the Submission to the Ghana High Court referred to the work of the ILC on the topic which notably indicates that 'a general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of

[25] Request (n 6), Annex 4, 23. See US Code Title 28 Sec1611(2). 'Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding'. ILC Yearbook, 1991, vol II, part II, 56.

[26] Request (n 6), Annex C (Submission), para22.

constraint against property in the categories listed in paragraph 1', ie those listed in Article 21(1) of the 2004 Convention which notably refers to military property.[27] It repeated its view in its Request for provisional measures[28] and in the oral proceedings before ITLOS.[29]

One of the most intriguing aspects of the case is that, during the oral phase, the Ghanaian Agent argued that Ghana had no dispute with Argentina since Ghana was not party to the

[27] ILC Yearbook, 1991, vol II, part II, 59. Argentina also relied on domestic judgments: Request (n6), Annex C (Submission), 20 (USA); (Suppl. Submission) , 3-5 (France, Germany).

[28] Request (n 6), paras41-48 (relying also on domestic laws such as the US Foreign Sovereign Immunities Act 1976). Para41: 'Judge Frimpong interprets in an unreasonable and arbitrary manner the content of a waiver clause'.

[29] Verbatim Record (n 9), 15: '[A] general waiver does not apply to warships'. Argentina made it clear that the immunity of warships, regardless of a general waiver clause, applies to both adjudicatory and enforcement jurisdiction of the State of the forum. ibid 16-17. Only enforcement jurisdiction was raised before the Ghanaian court. See Verbatim Record, DocITLOS/PV.12/C20/4, 1-2 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV_12_C20_4_E.pdf).

dispute between NML and Argentina.[30] Furthermore, the executive branch of the Government supported Argentina before the High Court, an officer of the Ministry for Foreign Affairs having stated on 9 October 2012 that 'as the department responsible for the conduct of our relations we want to ride on the established principles that we need the express waiver of a foreign government to subject that government to your foreign jurisdiction'.[31] This is often practiced elsewhere with government intervention by *amicus* brief.[32] It was also pointed by Argentina that the retention of the frigate was against public interests (arguably both of Argentina and Ghana) since the

[30] Verbatim Record, DocITLOS/PV.12/C20/2, 2 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV_12_C20_2_E.pdf).

[31] Annex D. 'I want to refer to a ruling by a U.S. Court in the case of Ex-parte Republic of Peru in which Chief Justice Stone in ruling upon Peru's claim of sovereign immunities stated that the department of state has allowed the claim of immunity and caused its actions to be certified to the District Court through the appropriate channels. The certification and the request that the vessel … be declared immuned must be accepted by a court as conclusive determination by the political arm of government that the continued retention of the vessel interferes with the proper conduct of our foreign relations'. ibid.

[32] Eg in Australia through the general entitlement of the Commonwealth Attorney-General to intervene in judicial proceedings.

granting of the Injunction would be manifestly unjust.[33] By restricting the dispute to one between Argentina and the judicial branch of Government, Ghana in effect purported to insulate that dispute from the international plane, arguing that Argentina should proceed with the Ghanaian judicial remedies at its disposal.[34] Ghana did not suggest that it was not responsible for the actions of its judiciary.[35] However it indicated that 'the executive is unable to intervene directly to effect the release of the vessel… The Constitution of Ghana provides for a clear separation of powers between the three branches of the

[33] Request (n 6), Annex C (Submission), para41 (citing the Ghana High Court (Civil Procedure) Rules 2004). Argentina was not ambiguous about possible countermeasures: 'The Injunction directly threatens Ghana's own relationship with *all* of these countries [i.e. those that have taken part on the training mission of the frigate or whose crew were aboard] – indeed, despite the law, these countries may well refuse to grant reciprocal military and diplomatic immunity to Ghana in the future if the Injunction is not set aside'. ibid 43 (emphasis in text). One should nevertheless point to Article 50(2)(b) of the ILC Draft Articles on State Responsibility (2001): 'A State taking countermeasures is not relieved from fulfilling its obligations: …To respect the inviolability of diplomatic or consular agents, premises, archives and documents'.

[34] Verbatim Record (n 29), 7-8; Statement (n5), para18.

[35] E.g. Art6 of the ILC Draft Articles on State Responsibility 2001; *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)*, ICJ Rep 1998, paras87-88.

government'.[36] Hence it seems that, in a dispute before Ghanaian courts, even if the executive agrees with the defendant State that that State is entitled to a right under international law, the executive has no option but to face international responsibility, including before an international court or tribunal if it has jurisdiction, or to let political tensions exacerbate, or both.[37] This curious result was justified by Ghana by relying on its commitment to the rule of law and separation of powers, a principle endorsed by the UN.[38] However, regardless of the normative status of the independence of the judiciary in international law,[39] it cannot be a direct duty of Ghana to

[36] Statement (n 5), 5, note 16.
[37] Eg the Argentinean statement in Verbatim Record (n9), 26.
[38] Verbatim Record (n 30), 3.
[39] Basic Principles on the Independence of the Judiciary, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan (26 August to 6 September 1985), UN Doc.A/CONF.121/22/Rev.1, 59: 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'. A/RES/61/39 (2006): '*Reaffirming further* the need for universal adherence to and implementation of the rule of law at both the national and international levels'. A/RES/67/1 (2012): Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels: '13. We are convinced that the

Argentina in the case at hand, for the direct duty was the duty to respect the immunities of a warship.[40] While the rule of law may be conveniently defined as subjecting State officials to legal rules and, therefore, it requires an independent judiciary, the rule of law cannot be interpreted to have the fantastic effect of allowing a domestic court to prevent the State from complying with its international obligations. An essential element of the rule of law is the rule *by* law and this encompasses international law as well and it is a well-established principle of international law that a State may not invoke the provisions of its internal law as justification for its failure to comply with international law.[41]

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independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice'.

[40] Verbatim Record (n 9), 5-6; Verbatim record (n29), 1.

[41] Eg Art 27 of the Vienna Convention on the Law of Treaties. The point was made starkly by Counsel for Argentina: Verbatim Record (n 4), 9. Argentina had appealed the High Court's Injunction and the appeal was pending during the proceedings before ITLOS. The High Court also issued an Order providing for the relocation of the vessel to another berth within the Port; Argentina appealed this order which was also pending. There is automatic stay of execution by virtue of Rule 27(3) of the Court of Appeal Rules. One may also express surprise at the Counsel for Ghana's argument that, before the Court of Appeal, he would 'probably personally lead the judge to assist'. Verbatim Record (n 29), 13.

Urgency and circumstances requiring provisional measures

Under Article 290(5) of UNCLOS, 'pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the [ITLOS] may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires'.

Urgency of the situation is tied to the circumstances that exist and that will justify the prescription of provisional measures to preserve the respective rights of the parties under Article 290(1).[42] The indication of such measures will take

[42] Order, para 100. See also *Southern Bluefin Tuna* (n3), para 67; *Mox Plant Case (Ireland v UK) (Provisional Measures) (Order)*, para 64 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf). Judge Paik in the *Libertad* case considered that the time frame envisaged under Art290(5) is much tighter than under Art290(1) which provides for the prescription of provisional measures *pendente lite.* Decl Judge Paik, para3 (available at

account of the time it takes to set up an arbitral Tribunal under Annex VII.[43] In its Request, Argentina claimed that the detention of the frigate hindered the Argentinean Navy from using it for its specific function and that its rights where therefore made nugatory for an indefinite period of time,

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http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Paik_E_orig-no_gutter.pdf). Judge Treves in the *Southern Bluefin Tuna* case, para4, considered that the requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of article 290 as regards the moment in which the measures may be prescribed. In particular, there is no 'urgency' under paragraph 5 if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted. Available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Treves.27.08.99.E.pdf. Under the Rules of ITLOS, a request for provisional measures has priority (Art90).

[43] *Mox Plant* (n 42) para64; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures) (Order),* para68 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf). Argentina noted that action prejudicial to its rights is not only likely to be taken before the constitution of the tribunal, but that it has already taken place. Request (n6), para 63. 'To date, Ghana has not appointed a member of the arbitral tribunal and has not reacted to the invitation of Argentina … to [appoint] the other members'. ibid para70. During the oral proceedings on 30 November 2012, Ghana announced that it had appointed an arbitrator and was ready to move speedily to the appointment of the three remaining arbitrators. (n29), 12. See Annex VII of UNCLOS, Art3.

including a risk that they would be irreparably lost if enforcement measures were to be taken against the ship.[44] The risk here was certainly more than possible: in addition to the Injunction of 2 October confirmed on 11 October, Judge Adjei-Frimpong on 5 November 2012 granted a motion requested by the Ghana Ports and Harbour Authority to relocate the ship to another berth, on the ground that the continued presence of the frigate at its berth was economically detrimental to Ghana.[45] Argentina immediately appealed but, on 7 November 2012, the Port Authority threatened to and attempted to board and move the ship; this precipitated another diplomatic crisis. Urgency of the situation, assessed by the risk of irreparable damage pending the constitution of the arbitral tribunal,[46] was emphasized by the fact that the limited number of crew on board (the majority having been evacuated) made it impossible to carry out standard maintenance tasks, compromising the vessel's safety and also disrupting the organisation of the armed forces of a sovereign

[44] Request (n 6), paras 54-58.
[45] ibid Annexes E and G.
[46] (n 42, 43) and *Southern Bluefin Tuna* (n 3), paras79-80.

State.[47] Despite Ghana's contrary view,[48] ITLOS determined that Ghanaian activities against the ship 'affect the immunities enjoyed by… warships under general international law'. Attempts by Ghana to move the ship by force to another berth and the possibility that such actions may be repeated 'demonstrate the gravity of the situation' and therefore provisional measures 'will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the parties'.[49]

A real risk to rights that need to be fully preserved is inherent in the phrasing used by the Tribunal here. In its very first Order on provisional measures, the Tribunal made it clear that the rights of the Applicant had to be 'fully preserved'.[50] In

[47] Request (n 6), paras 62-68.
[48] Statement (n 5), para 21: 'The Port authority has been very careful to ensure that the ship and its remaining crew have been and will continue to be provided with all requirements; para23: 'The grant of provisional measures now sought by Argentina is entirely inappropriate as Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security'. This prompted Argentinean outrage during the oral proceedings.
[49] Order, paras 98-110.
[50] *The M/V "Saiga' (No.2) case (St Vincent v Guinea) (Provisional Measures) (Order)*, para 41 (available at

the *Louisa* case ITLOS emphasized the lack of real and imminent risk that irreparable prejudice would be caused to the rights of the parties.[51] It had done so, too, in the *Reclamation* case.[52] Irreparable prejudice is the test adopted by the ICJ itself.[53] Argentina relied on the standard established by President Huber in the *Sino-Belgian Treaty* case that the prejudice should be one that could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form.[54] This is not a test that ITLOS has followed in its case law and Sztucki convincingly argues that absolute irreparability has been abandoned, and that interim

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http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/provisional_measures/order_110398_eng.pdf).

[51] *The M/V "Louisa" case (St Vincent v Spain) (Provisional Measures) (Order)*, para 72 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Order_23-12-10_final_E_elec_signed.corr_for_publication.pdf).

[52] (n 43), para72.

[53] *Fisheries Jurisdiction (UK v Iceland) (Provisional Measures) (Order)*, ICJ Rep 1972, para21. Under Art41 of the ICJ Statute, the 'Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'.

[54] PCIJ Ser.A No. 8, 7. See Verbatim Record (n 9), 25.

protection has been granted on less demanding grounds.[55] Irreparability in law (the Huber test) means that the right could not be repaired (eg by restitution, compensation or satisfaction) by the final judgment. But 'there are no violations of rights which could not be made good in law by a reparation'.[56] On the other hand, irreparability in fact means that the prejudice under consideration makes impossible full execution of the impending judgment and thereby full restoration of the prejudiced position of the judgment creditor, regardless of whether he might be compensated.[57] Furthermore, interim measures will be appropriate even if the prejudiced rights are capable of restoration in the final judgment. In the *US Staff* case the ICJ adopted the position that interim measures are to be indicated whenever there is a need to prevent the actual question of restoration of the prejudiced rights from arising upon the

[55] J Sztucki, *Interim Measures in the Hague Court* (Kluwer 1983), 111. However, in light of the discretionary assessment of 'circumstances' by the international judge, irreparability in law may be reintroduced as an additional criterion. ibid.
[56] ibid 109.
[57] ibid 110. *Fisheries Jurisdiction* (n 53), para 22.

delivery of the final judgment.[58] This is admittedly the standard adopted here by ITLOS which emphasized the preservation of the rights at stake: prejudice to the immunity of a warship makes full *restoration* impossible as soon as the prejudice arises. In addition, ITLOS took account of the risk of escalation inherently linked.[59]

Rights protected by the indication of provisional measures are those which may be subsequently adjudged on the merits. Hence, an international court is more inclined to interpret 'irreparability' as 'impossibility of full execution of the final judgment'. Even if the infringement could be alleviated by appropriate means, the Court could grant the provisional measures if otherwise it would prejudice the full execution of

[58] ibid 111-112: 'The Court obviously could not content itself with the finding that the restoration of the embassy premises to the possession … of the requesting State was possible upon the delivery of the final judgment'. This case was relied upon by Argentina. Request (n 6), para 55.

[59] (n 49) and Decl. Judge Paik, para6. ITLOS emphasized the preservation of the rights of both parties but Argentina claimed that Ghana had made no effort to show that it had a right that needs to be protected. Verbatim Record (n 4), 12. Judge Paik raised the point as well, in particular because Ghana did not differ from Argentina on the point that the frigate was entitled to immunity.

the final judgment.[60] At the stage of provisional measures, the rights invoked cannot with certainty be attributed to one party or the other (but they must be preserved).[61] However Judge Shahabudden in the *Great Belt* case rightly wondered whether the Court could order provisional measures without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought.[62] Thus the ICJ also referred to the existence of a legal *interest* to be protected.[63] This is conceptually different from the question of *prima facie* jurisdiction of the court, for a given alleged right may be within the jurisdiction *ratione materiae* of the court without such right

[60] B Kempen and Z He, 'The practice of the International Court of Justice on Provisional Measures: The Recent Development' (2009) 69 *Zaörv* 922 and the case law cited there.

[61] Eg *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Provisional Measures) (Order),* ICJ Rep. 1996, para. 35; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measure) (Order),* ICJ Rep. 2008, para 118.

[62] *Passage Through the Great Belt (Finland v Denmark) (Provisional Measures) (Order),* ICJ Rep. 1991, Sep Op Judge Shahabuddeen, 28.

[63] *Nuclear Tests Case (New Zealand v France) (Provisional Measures) (Order),* ICJ Rep 1973, para24.

being, in the case at hand, a plausible right of the applicant.[64] This view is also supported in doctrine[65] and was examined as such in some of the World Court's cases.[66] The ICJ now expressly requires that it must be satisfied that the rights asserted by a party are at least plausible.[67] This is how Argentina presented its claimed for, after dealing with the *prima facie* jurisdiction of the Annex VII tribunal, it indicated that 'the rights that must be preserved are more than plausible'. It notably noted that, so far as the Bonds documents were concerned 'a general waiver cannot affect any military or any diplomatic assets, no matter whether either a broad or strict

[64] 'But jurisdiction over the merits is merely one element which the applicant must establish in order to succeed in the substantive case which it has brought … It is easy to appreciate that proof of the definitive existence of the right claimed cannot be part of the "circumstances" within the meaning of Article 41 of the Statute, but is rather a matter for the merits. It is less easy to accept that this applies to the establishment of a possibility of the existence of the right'. (n 62), para31.

[65] Eg M H Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972-73) 46 *BYIL* 315-316.

[66] (n 62) 31 et seq.

[67] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures) (Order)*, ICJ Rep. 2009, para 57; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures) (Order)*, ICJ Rep. 2011, para 53.

approach is followed in this regard'.[68] While ITLOS noted in its Order that the latter '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 question relating to the merits themselves',[69] one wonders whether the complete ignorance by ITLOS of the waiver issue is sound. No right of Argentina to immunity of its warship could have been the object of protection by provisional measures if that right was not plausible, that is, if it was not manifestly non-existent. Such would be the case if Argentina had arguably agreed in the Bonds documents to enforcement measures against its military assets.[70]

The fact that an order for provisional measures must not prejudge the merits of the case is well-established and ITLOS relied here on the expressed requirement by the ICJ in the

[68] Request (n 6), para 41.
[69] Order, para 106.
[70] And an argument could be made that, even if no right of Argentina to immunity was plausible because it had apparently been lifted in the Bonds documents, Ghana was not allowed to invoke the manifest absence of such right it in its own court if NML could not enforce the US judgment under Ghanaian law.

Fisheries Jurisdiction case.[71] In its prompt release cases, ITLOS refused not to make any determinations at all that bear on the merits of the case, for if the bond determined under Article 292 is based in part on the imposable penalties, and if these must be proportionate to the gravity of the alleged offence, ITLOS's appreciation of the merits of the case is at stake.[72] In the ARA *Libertad* Order, only Judge Paik alluded to the fact that 'provisional measures are prescribed without there being any need to prove the conclusive existence of jurisdiction or the *validity of claims*' but he did not elaborate.[73] Previous orders made by ITLOS are not incompatible with the view that plausibility of the existence of the right the protection of which is sought by the Applicant is implied in the Tribunal's reasoning. In the *Saiga (No.2)* case it was evident that St Vincent had plausible rights in relation to a vessel flying its flag.

[71] (n 53), para 20 ; *Louisa* (n 51), para 80.
[72] V Cogliati-Bantz, 'Hoshinmaru (Japan v Russian Federation) and Tomimaru (Japan v Russian Federation) Prompt Release Judgments' (2009) 58 *ICLQ* 249. '*The Hoshinmaru* case clearly suggests that the bond will be reduced by the Tribunal if the seriousness of the offence as alleged by the detaining State is unlikely to be borne by the facts'. ibid 251.
[73] Decl. Judge Paik, para 8. Emphasis added.

Judge Laing precisely noted that 'the rights need not be definitively vested but might comprise a claim by the party in question which the Judges, in their discretion, conclude has juridical substance or significance'.[74] In the *Southern Bluefin Tuna* cases, too, the plausibility of Australia and New Zealand's rights, allegedly prejudiced by Japan's fishing programme, appeared straightforward under Articles 64, 116 and 119 of UNCLOS. The same logic underpinned Ireland's claim in the *MOX Plant* case.[75]

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[74] *Saiga (No.2)* (n50), Sep. Op. Judge Laing, para20 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/provisional_measures/order_110398_so_laing_eng.pdf).

[75] In that case, Judge Wolfrum nevertheless wondered whether Ireland had a right to be informed in the first place: 'Ireland argues … that its procedural rights (rights concerning information and cooperation) have been violated and will be prejudiced if the MOX plant is commissioned. The obligation to cooperate with other States whose interests may be affected is a *Grundnorm* of Part XII of the Convention, as of customary international law for the protection of the environment. In general it has to be taken into consideration, though, that the provisions of the Convention on the Law of the Sea formulate obligations rather than rights. Is it possible to argue that obligations of States Parties under a multilateral treaty create, as a corollary, rights for every other individual State Party? This is correct in bilateral relations. It would, however, be a simplification to say so in multilateral relations, such as those established by [UNCLOS].' Sep Op Judge Wolfrum, 4 (available at

In the *Louisa* case, ITLOS for the first time expressly considered that it does not need to establish *definitively* the existence of the rights claimed by the Applicant.[76] ITLOS however did not elaborate on the plausibility of the rights claimed by St Vincent; it noted that the Applicant contended that the Tribunal had jurisdiction on the basis of Articles 73, 87, 226, 245, 290, 292 and 303 and that Spain had detained the vessel in breach of Articles 73, 87, 226, 245 and 303.[77] Spain on the other claimed that the M/V "Louisa" had not been detained for any offences relating to Articles 73 and 226 of UNCLOS and that the facts of the case did not reveal any violation of Articles 87, 245, and 303.[78] ITLOS limited itself to stating that it had *prima facie* jurisdiction over the dispute,[79] attracting the criticism of several judges.[80] The fact that there may be parallelism between the provisions founding jurisdiction

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http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf).

[76] *Louisa* (n51), para 69.

[77] ibid paras 46-47.

[78] ibid para 53.

[79] ibid para 70.

[80] Infra, III.

and those plausibly creating rights of the Applicant,[81] does not render the distinction irrelevant, as noted above. The Tribunal said that it does not need to establish definitively the existence of the rights claimed by Argentina, but went on immediately to establish its *prima facie* jurisdiction.[82] Furthermore, in its Order ITLOS considered that, in accordance with general international law, a warship enjoys immunity, including in internal waters, and that this was not disputed by Ghana.[83] The Ghanaian position however was not so straightforward, for it claimed both that the central issue was whether Argentina had waived immunity, an issue which it considered did not fall within an Annex VII arbitral tribunal, and that the immunity of a warship in internal waters does not involve the interpretation and application of UNCLOS.[84] If ITLOS considered that the right to

[81] Art 288(1) of UNCLOS: 'A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part'. Contrast with, eg, *Border Area* case (n67), para50 (jurisdiction of the ICJ under a compromissory clause and optional declaration of acceptance of the Court's jurisdiction) and para58 (plausible rights of sovereignty).
[82] Order, para 60. See infra, III for *prima facie* jurisdiction.
[83] Order, para 95.
[84] Statement (n 5), paras 12, 16-17.

immunity claimed by Argentina was one that belonged to it (with all plausibility), because that was also the view of the executive branch of Ghana's Government,[85] it should perhaps have stated that more clearly.[86] The issue would be whether absence of challenge by the Defendant, at some stage during the procedure, that the right claimed by the Applicant is plausible, suffices to make that right plausible.[87]

[85] (n 31) and accompanying text.

[86] 'the State which is sought to be constrained may itself have an interest in showing that the requesting state has failed to demonstrate a possibility of the existence of the right sought to be protected'. Sep Op Shahabudden (n 62), 29.

[87] An estoppel argument was used by Judges Cot and Wolfrum, but in relation to the jurisdiction of the arbitral tribunal. See infra. In the *Border Area* case, the ICJ did not consider the plausibility of the right claimed by the Defendant, but only that of the Applicant and it is that right which was challenged by the Defendant. 'It appears to the Court, after a careful examination of the evidence and arguments presented by the Parties, that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible; whereas the Court is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua'. (n 67), para 58.

Prima facie jurisdiction

Under Article 290(5), ITLOS may grant provisional measures if it considers that the arbitral tribunal to which a dispute is being submitted would have *prima facie* jurisdiction. The Tribunal need not satisfy itself that the arbitral tribunal would have jurisdiction on the merits,[88] but it must be convinced that the provisions invoked appear to afford a basis on which the arbitral tribunal's jurisdiction over the dispute might be founded.[89]

Argentina instituted proceedings against Ghana on 29 October 2012 before an arbitral tribunal to be established under Annex VII of UNCLOS, since Argentina and Ghana had not accepted the same procedure for the settlement of disputes under Article 287(5) of UNCLOS.[90] Only three days before, on 26

[88] The same reasoning applies to Article 290(1) when ITLOS is seised of the merits. See *Saiga (No.2)* (n50), para 29.
[89] Order, para 60; *Southern Bluefin Tuna* (n 3), para52.
[90] Argentina notably requested the arbitral tribunal to declare that Ghana violated its obligations under UNCLOS and pay adequate compensation, offer a solemn salute to the Argentinean flag and impose disciplinary sanctions on the officials of Ghana responsible for the breach of international law committed. Request (n6), Annex A. The President of ITLOS appointed three arbitrators on 4 February 2013. See

October 2012, Argentina withdrew with immediate effect, in accordance with Article 298(2) of UNCLOS, the optional exception to the applicability of Section 2 of Part XV of UNCLOS set forth in its declaration dated 18 October 1995 (deposited on 1 December 1995) to 'military activities by government vessels and aircraft engaged in non-commercial service' under Article 298(1)(b).[91] Ghana had made no such declaration. Article 298(2) allows a State Party which had made a declaration to withdraw it at any time. On its face, this poses none of the difficulties that the ICJ faced when the US purported to modify, on 6 April 1984 with immediate effect, its 1946 Declaration of acceptance of the jurisdiction of the Court.[92]

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http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_189_E.pdf. Argentina and Ghana had each nominated one.

[91] Under Art 298(3), a State Party which has made a declaration shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in UNCLOS as against another State Party, without the consent of that party.

[92] The ICJ noted that the 1946 Declaration contained a 6 months' notice clause which formed an integral condition that had to be complied with. In addition, it noted that the right of immediate termination of declarations with infinite duration was far from established and that a reasonable period of notice would be required. *Military and Paramilitary in and against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility) (Judgment)*, ICJ Rep 1984, 420-421.

Withdrawals of declarations must be deposited with the UN Secretary-General, who must transmit copies to States Parties (Article 298(6)). One therefore assumes that Ghana had been made aware of the withdrawal prior to the institution of proceedings, as the matter was raised at no time during the written and oral phases before the ITLOS, and that the right to withdraw a declaration at any time under Article 298(2) means a right to withdraw with immediate effect. One also presumes that it was open to Ghana to deposit a declaration under Article 298(1)(b) immediately upon receipt of the Argentine withdrawal, so as to exclude the dispute from the jurisdiction of an arbitral tribunal under Article 288. It is perhaps also important to stress that the Argentinean declaration and its withdrawal are not restricted to disputes arising after a certain date. Hence the Argentinean withdrawal also applies to the dispute with Ghana that arose before 26 October 2012, arguably in the days following the Injunction of 2 October.[93]

[93] One may contrast this with the declaration of acceptance of jurisdiction of the ICJ deposited on 26 April 1999 by the Federal Republic of Yugoslavia under Article 36(2) of its Statute, which applies to disputes arising after 25

The test of *prima facie* jurisdiction is well-established in the case law of the ICJ. In his Separate Opinion in the *Interhandel* case, Judge Lauterpacht considered that the 'Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest'.[94] This was endorsed by the ICJ in the *Fisheries Jurisdiction* case.[95] The Court need not satisfy itself in a definitive manner that it has jurisdiction on the merits.[96] For Judge Laing in the *Saiga (No.2)* case, the Applicant must 'sufficiently' establish the tribunal's jurisdiction.[97] Under Article 288 of UNCLOS, a court or tribunal has jurisdiction over any dispute concerning the

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April. Yugoslavia initiated proceedings against NATO member States on 29 April but the Court was of the opinion that the dispute had already arisen when the acceptance of jurisdiction was deposited, for the bombings began on 24 April. Hence the declaration could not constitute a basis on which the jurisdiction of the Court could be founded *prima facie*. *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures) (Order)*, ICJ Rep 1999, 135.

[94] *Interhandel (Switzerland v US) (Provisional Measures) (Order)*, ICJ Rep 1957, 118-119.

[95] (n 53), para15.

[96] Eg *Border Area* (n 67), para49.

[97] (n 50), Sep Op Judge Laing, para11 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/provisional_measures/order_110398_so_laing_eng.pdf).

interpretation or application of UNCLOS. This raised considerable controversy in the *Southern Bluefin Tuna* cases where ITLOS considered that a dispute between Australia, New Zealand and Japan over the latter's experimental fishing programme was one over the interpretation or application of UNCLOS (Articles 64, 116 and 119), despite Japan's contention that the dispute concerned the 1993 Convention for the Conservation of Southern Bluefin Tuna, a Convention the compromissory clause of which excludes any further procedure, thus preventing the applicability of UNCLOS's compulsory dispute settlement mechanism (Article 281 of UNCLOS).[98] In

[98] ITLOS considered that 'the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna'. (n 3), para 51. The Arbitral Tribunal itself, while recognising that 'it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty' (para 52), held that to find that 'there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial' (para54). It considered that it was without jurisdiction. Award available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&Ann

the ARA *Libertad* case, Argentina invoked several provisions of UNCLOS over which a dispute with Ghana existed: Articles 18, 87, 90 and 32. With respect to the first three, it claimed that the detention of the vessel interfered with its right of innocent passage and its freedom of navigation[99] was challenged by Ghana which considered that Argentina's rights of navigation were not engaged in proceedings concerning enforcement measures taken in internal waters.[100] ITLOS did not consider that these rights could *prima facie* found the jurisdiction of the arbitral tribunal, for they do not relate to the immunity of warships in internal waters.[101] There was no contention over the fact that warships enjoy immunities, including in internal

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ounceNo=7_10.pdf. ITLOS repeated its approach in the *MOX Plant* case (n 42).

[99] Request (n 6), paras34-36. Verbatim Record (n9), 9-10.

[100] Statement (n 5), para14.

[101] Order, para61. In his Separate Opinion, Judge Lucky considered that 'preventing the vessel from leaving its berth … appears to be depriving [Argentina] of its rights under articles 18, 87(1) and 90 of the Convention'. Sep Op Lucky, para29 (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). But if that were the case, any domestic proceeding affecting the movement of a vessel could fall under Art288 of UNCLOS.

waters, although Ghana's position was 'fraught with contradiction'.[102] Ghana considered that the central question was whether Argentina had waived immunity, a matter irrelevant to UNCLOS; but also that Article 32 of UNCLOS does not refer to the immunities of warships when in internal waters; and finally that the executive branch of government had stated its position with regard to the immunity of warships but was unable to intervene as Argentina requested.[103] Article 32, which is contained in Part II on the territorial sea and contiguous zone, is worded as follows:

> *Immunities of warships and other government ships operated for non-commercial purposes.*
>
> With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

[102] Joint Sep Op Judges Cot and Wolfrum, para52 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_E_corr.pdf).
[103] Statement (n 5), paras11, 15-17.

For Argentina, Article 32 confirms the existence of immunity enjoyed by warships with effect and for the purpose of UNCLOS as a whole. It used both textual and a teleological interpretation to justify that the immunity of warships relates to the whole maritime area.[104] This was repeated later during the oral proceedings with the support of writers.[105] Argentina's position is that warship immunity is incorporated into UNCLOS and any relevant article cannot but be read in connection with Article 32.[106] Conversely Ghana, on the considered that Article 32 only applies to the territorial sea and that the immunity of warships in internal waters is not governed by UNCLOS but by

[104] Verbatim Record (n 9), 12. It relied on the phrase 'nothing in this Convention' as opposed to 'nothing in this part'. It also indicated that the Convention in other provisions applies to internal waters (eg Art25(2) and Part XII) and that the principle of effectiveness in the interpretation of treaties requires that the immunity of warships apply to internal waters. ibid. The exceptions (which are in fact not exceptions to immunities in the first place) mentioned in Art32 did not apply to the question at issue in the ARA *Libertad's* case. Request (n6), para37.

[105] Notably B H Oxman, (1983-84) 24 *VJIL* 816-817. 'This understanding of article 32 … is clearly established in all relevant works that have appropriately synthesised the law of the sea'. Verbatim Record (n4), 4.

[106] ibid.

general international law.[107] For Ghana, the regime of internal waters and the status of foreign vessels in ports are excluded from UNCLOS.[108]

ITLOS agreed with Argentina. Its power to indicate provisional measures is dependent upon the *prima facie* jurisdiction of the Annex VII tribunal over a dispute concerning UNCLOS. ITLOS acknowledged that there was a dispute over the applicability of Article 32.[109] A dispute between the parties over the applicability of UNCLOS is not sufficient to found jurisdiction under Article 288, for the dispute must *prima facie* be one that concerns the interpretation of the Convention.[110] ITLOS was much more explicit in its Order than it was in the *Louisa* case where it appears to have merely tacitly endorsed St Vincent's claim that the dispute fell within certain UNCLOS

[107] Verbatim Record (n 30), 19-20. 'Where the drafters of the Convention wanted to incorporate general international law into the Convention so that it became part of the Convention, they did so'. ibid (quoting Art2(3)).
[108] Verbatim Record (n 29), 3.
[109] Order, para 65.
[110] *Convention on the Elimination of All Forms of Racial Discrimination* (n61), paras112-13. Joint Sep Op Cot and Wolfrum (n 102), paras 10-13.

provisions, despite Spain's objection,[111] thereby attracting four dissenting opinions.[112] In the *Libertad* case, ITLOS considered that Article 32 is not, on its face, restricted to the territorial sea.[113] But the dispute could only concern UNCLOS if the question of warships immunities in internal waters, which was a right claimed by the Applicant, concerns the interpretation or application of UNCLOS. Judges Cot and Wolfrum opined that this was not the case. Firstly, they argued that internal waters are in principle not covered by UNCLOS (but by different sources). Thus they cannot 'assume that all activities of the coastal State in its internal waters ... are governed by the Convention'.[114] This is undoubtedly true, for the Convention is one on the law of the *sea*. But it is also true that UNCLOS directly imposes

[111] *Louisa* (n 51), paras 47-48,50-51,70.
[112] Eg Judge Cot, paras1,19 (available athttp://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Cot_E_edited_version.corr_for_publication.pdf) ; Judge Treves, paras5,7 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Treves_electronically_signed.pdf).
[113] Order, paras 63-64.
[114] Joint Sep Op (n102), paras 26,34.

obligations on the Parties applicable in their territories.[115] Judges Cot and Wolfrum went into a rather detailed analysis to prove that the regime of ports is left out of the Law of the Sea Conventions:[116] that it was not the regime of ports at large that was under consideration, but the immunity of a warship in a foreign port. One wonders whether their standard of depth is appropriate for considerations that must remain *prima facie.* Secondly, for them, ITLOS interpreted Article 32 as providing for the immunity of warships in internal waters.[117]

But this is not what the Order says; the Order in essence says that Article 32 may be applicable outside the territorial sea. Article 32 refers to the immunity of warships without regulating such immunity itself, contrary to Article 95 applicable to the high seas and EEZ.[118] For the two judges, Article 32 contains exceptions to the immunity of warships and makes it clear that no exceptions in the Convention apart from those in Article 32

[115] Eg Arts 212, 125.
[116] Joint Sep. Op. (n 102), paras 23-34.
[117] ibid para 30.
[118] 'Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State'. See Art 58(2) for the EEZ.

exist, but the Article's place in Part II means that it is *prima facie* applicable to the territorial sea only.[119] But one may note that Article 31 itself, which is referred in Article 32, does not on its face exclusively apply to the territorial sea ('damage to the coastal State'). Thirdly, since Article 32 does not incorporate the customary law on immunity of warships, but merely refers to such immunity, the basis of such immunity is not found in UNCLOS.[120] Would this also mean that no *prima facie* jurisdiction would have existed had the incident taken place in the territorial sea?[121]

Under Article 32, warships immunity is not affected, that is, prejudiced, by UNCLOS and the meaning and scope of such immunity is admittedly determined elsewhere in international law. But the issue here is whether the right to immunity of warships in internal waters is manifestly outside the scope of the

[119] Joint Sep Op (n 102), paras 44-45.
[120] ibid, paras 43, 50.
[121] If 'nothing in this Convention' includes the powers that the Convention attributes to the coastal State in its territorial sea but if warships immunity is not a right under UNCLOS, then the reasoning seems to be that the breach of such right is not justiciable under Art 288.

UNCLOS, not whether the scope of such immunity is determined by the UNCLOS itself (a court or tribunal with jurisdiction under Article 288 is allowed to apply other sources of law when settling a dispute).[122] It cannot be said that a dispute over the application of a Convention which acknowledges a right by expressly refusing to limit it and which involves a coastal State's enforcement jurisdiction prejudicing this right is not *prima facie* one falling within that Convention. Uncertainties on the geographical scope of the right or the scope of the Convention's impact on the coastal State's powers in its internal waters would arguably not suffice to place the dispute manifestly outside the Convention. ITLOS may have actually been convinced that customary immunities of warships were incorporated into UNCLOS, for it referred to the definition of a warship in Article 29, applicable to the Convention at large, which is also placed in Part II.[123]

[122] Art 293. See eg Articles 35(c) and 303(3) for a similar issue.

[123] Order, para 64. The argument may be made that immunities are an inherent characteristic of the armed forces of a foreign State. ITLOS made it clear that 'in accordance with general international law, a warship enjoys immunity, including in internal waters'. ibid para95. But it said so after it had

Interestingly, the two Judges were ready to accept that the arbitral tribunal's jurisdiction may be founded on the basis of estoppel. The argument is that Ghana is estopped from objecting to the jurisdiction of the arbitral tribunal, given the assurances it gave to Argentina in an international agreement regarding the vessel's departure from Tema. Argentina relied to its detriment on those assurances.[124] Argentina emphasised the existence of this agreement.[125] While estoppel is accepted in international law to prevent a party from contesting a situation[126] and, therefore, it may also play a role in the challenge to the admissibility of a request,[127] one fails to see how Ghana being estopped from objecting to the jurisdiction of the arbitral tribunal actually founds such jurisdiction.

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established the *prima facie* jurisdiction of the arbitral tribunal and in order to determine whether provisional measures were required.

[124] (n 102), paras 58-59,68. The exchange of notes regarding the dates and protocol of travel of the frigate are presented in the Request (n 6).

[125] Verbatim Record (n 9), 19.

[126] (n 102), paras61-66 and the PCIJ, ICJ and ITLOS cases cited.

[127] Eg the ITLOS position in *M/V "Saiga"(No.2) (Merits) (Judgment)*, paras67-72 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf); B H Oxman and V P Bantz, 'M/V Saiga (No.2)' (2000) 94 *AJIL* 141-142.

Furthermore, if, for Judges Cot and Wolfrum, the arbitral tribunal could not have jurisdiction under Article 32, it is difficult to support that it could have jurisdiction under the exchange of notes.[128]

Conclusions

One can only be satisfied that Argentina saw the return of its historic frigate, released by Ghana shortly after the Order was rendered. Provisional measures here safeguard the asset against a decision where the domestic judge arguably misconstrued international law. This is the Argentinean argument and it will need to be examined by the arbitral tribunal if it decides it has jurisdiction. Undoubtedly, the risk to Argentina's sovereign assets abroad is very high, should the arbitral tribunal decide that it has jurisdiction and that immunity regarding these assets was actually lifted in the Bonds documents.

[128] See also Sep Op Judge Rao , para12 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Ch_Rao_E_.pdf).

One nevertheless hopes that ITLOS will clarify its approach to provisional measures and the standard it uses towards *prima facie* jurisdiction. The dissenting judges in the *Louisa* case[129] regretted the laxity with which the Tribunal examined its jurisdiction, and the Joint Separate Opinion in the *Libertad* case also arguably requires ITLOS to exercise more rigour.[130] More rigour does not mean that the standard should go beyond a manifest lack of jurisdiction, but it signifies that ITLOS must actually satisfy itself that a dispute is grounded on a right within the scope of UNCLOS. The perception could be formed that ITLOS was unduly liberal to Argentina by not examining whether, on its face, the claimed right to immunity actually existed, that is, it had not been foregone in the Bonds document.

[129] (n 112).

[130] In a different context, one recalls that in the *M/V "Saiga" (Prompt Release)* case, several dissenting judges strongly disagreed with ITLOS accepting to characterise that the arrest of the vessel was falling within Art 73 of UNCLOS.