

ROCK THE BOAT: HOW THE CONFLICT BETWEEN NML CAPITAL AND THE REPUBLIC OF ARGENTINA WILL AFFECT INTERNATIONAL INVESTMENT

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I. INTRODUCTION¹³⁰

President Barack Obama walks down the tarmac, only to find Air Force One missing. While this may sound like the harebrained plot to a new Tom Clancy novel, it is the genuine fear of the Argentine government, whose president recently expressed concerns about whether her private plane could be repossessed like a car that you could not afford out of your driveway.¹³¹ Since Argentina's economic crisis in 2001, it has been the subject of a near constant onslaught by international creditors.¹³² Most notably, in late 2012, American investment firm, NML Capital, made the completely unprecedented move of attempting to seize an Argentine naval vessel, the ARA Libertad, from a Ghanaian port.¹³³ NML's attempted seizure has sparked sharp debate among both the investment and legal communities, and raises serious concerns about the extent and limitations of sovereign immunity in the sovereign debt context.¹³⁴

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¹³¹ See Melissa Block, *Argentine Leader's Plane Grounded by Credit Holders*, WLRN (Jan. 10, 2013, 6:26 PM), <http://wlrn.org/post/argentine-leaders-plane-grounded-credit-holders> (noting that instead of flying the Presidential Plane, the Tango 1, the President of Argentina will be flying a rented charter plane out of fear of bond holder seizure).

¹³² See *Argentina's Debt Default Gauchos and Gadflies*, ECONOMIST, Oct. 22, 2011 (articulating the "mess" of Argentina's debt default).

¹³³ See Rich Smith, *Repo Man Goes to Ghana to Tow Away Argentinean Navy's Flagship*, DAILY FINANCE (Oct. 22, 2012, 3:14 PM), <http://www.dailyfinance.com/2012/10/22/repo-man-goes-to-ghana-to-tow-away-argentinean-navys-flagship/> (explaining how a Ghanaian court allowed the Argentinian frigate ARA Libertad to be seized as collateral pending Argentina's payment of several civil litigation awards).

¹³⁴ See e.g., Anna Gelpern, *Shipping News of the World: Round 2 for Argentina*, CREDIT SLIPS A DISCUSSION ON CREDIT, FIN., AND BANKR. (Dec. 17, 2012, 12:49 PM), <http://www.creditslips.org/creditslips/2012/12/shipping-news-of-the-world-round-two-for-argentina.html> (providing legal commentary on the ARA Libertad case); see also Julian Ku, *Don't Cry for the World's Greatest Sovereign Deadbeat*, OPINIO JURIS (Oct. 15, 2012, 12:24 PM), <http://opiniojuris.org/2012/10/15/dont-cry-for-the-worlds-greatest-sovereign-deadbeat/> (dispensing reasons not to lament for Argentina); Michael Risvas,

This article will analyze waivers of sovereign immunity in connection with civil litigation awards through the lens of the seizure of the ARA Libertad.¹³⁵

This year marks the thirteenth anniversary of the high-point of Argentina's most recent, and perhaps most disastrous, economic crisis, the nation's default on bonds it had issued in 1998.¹³⁶ Argentina, like many South American countries, has a long and storied history of unstable governing regimes.¹³⁷ As a result, the Argentinian economy has been in a near constant state of tumult since the 1980's.¹³⁸ As part of this economic disarray, Argentina defaulted on approximately \$80 billion in external public debt in late 2001.¹³⁹

NML Capital ("NML"), an American "vulture-fund"¹⁴⁰ and subsidiary of global financial powerhouse Elliot Capital, had been an investor in Argentinean bonds.¹⁴¹ Rather than participating in an exchange in 2005 and 2010 and receiving thirty cents on every dollar, NML Capital "held out" on the Argentinean debt restructurings.¹⁴² As an alternative to the exchange, NML invoked its contractual option to sue Argentina for its failure to pay under the bond's governing terms

Argentina's Debt Default Cases: Some Recent Developments in a Continuing Saga, EJIL: TALK! (Nov. 9, 2012), <http://www.ejiltalk.org/argentinas-sovereign-debt-default-cases-some-recent-developments-in-a-continuing-saga/> (analyzing the next step of the *NML Capital v. Argentina*, ARA Libertad dispute).

¹³⁵ See *infra* Part II.A-C and accompanying text.

¹³⁶ See *Argentina's Debt Default Gauchos and Gadflies*, ECONOMIST, Oct. 22, 2011 (describing how Argentina "should serve as a sobering reminder about the mess that can follow a sovereign default").

¹³⁷ See Maria Lambert, *Prospects of Political Stability in Argentina*, DISCOURSE, available at <http://smu.edu/center/discourse/MariaLambert.htm> (articulating Argentina's troubled past with "sporadic shifts of power").

¹³⁸ Eric Osborne, *The Origins Of Crisis – Understanding the Argentine Economic Collapse*, WINE REPUBLIC ARGENTINA, <http://wine-republic.com/mendoza/culture/178-the-origins-of-crisis-understanding-the-argentine-economic-collapse>; Commanding Heights: Argentina Economic (describing the Argentine economic turmoil from post-World War II until now).

¹³⁹ See *supra* note 6.

¹⁴⁰ A "vulture-fund" is an "exploitative financial fund[] in which a private fund buys up cheap foreign debt, and sells it at a much higher cost." Kenneth H. Fudka, *What is a Vulture Fund*, UNIVERSITY OF IOWA CENTER FOR INTERNATIONAL FINANCE AND DEVELOPMENT (May 2008), <http://ebook.law.uiowa.edu/ebook/faqs/what-is-a-vulture-fund> (providing a thorough description of "vulture funds").

¹⁴¹ See Naomi Burke, *Argentina v Ghana at ITLOS*, CJICL BLOG (Nov. 15, 2012), <http://www.cjicl.org.uk/index.php/component/easyblog/entry/argentina-v-ghana-at-itlos?Itemid=101> (enumerating the events that lead up to the Argentina – Ghana dispute at ITLOS).

¹⁴² See *id.* (explaining how NML Capital arrived at this breaking point of trying to seize an Argentine warship).

following the country's default.¹⁴³ NML won this battle in the British Supreme Court, resulting in a \$1.33 billion verdict.¹⁴⁴

In order to enforce this judgment, NML obtained an injunction from the Commercial Division of the Accra Fast Track High Court of Ghana.¹⁴⁵ This was the first step in seizing the ARA Libertad, an Argentine Navy training vessel, at Tema Port, a Ghanaian port.¹⁴⁶ NML secured a ruling that determined that Argentina had sufficiently waived its sovereign immunity in its Fiscal Agency Agreement in connection with the aforementioned bond issuance and default.¹⁴⁷ This ruling allowed NML to take the unprecedented action of seizing the ARA Libertad to satisfy the civil judgment issued by the British Supreme Court.¹⁴⁸ Argentina, unhappy with the Ghanaian court's decision, challenged the ruling by commencing arbitration proceedings against Ghana before the International Tribunal for the Law of the Sea ("ITLOS").¹⁴⁹ Argentina

¹⁴³ See *NML Capital v. Republic of Arg.*, 621 F.3d 230, 234 (2010).

¹⁴⁴ NML sued Argentina in the United States on one set of bonds and in the United Kingdom on another set of bonds resulting in multiple judgments. *Id.*; *NML Capital Ltd. v. Republic of Argentina*, [2011] UKSC 31 (appeal taken from EWCA); see generally, Alison Frankel, *How Argentina Lost Game of Chicken with Renegade Bondholders*, REUTERS (Nov. 26, 2012) (recounting how Argentina got into its current position and how NML Capital started seeking to enforce the United States decision).

¹⁴⁵ See Sandra Cofie, *Ghana-Establishment of the Commercial Court*, SMARTLESSONS IN ADVISORY SERVICES (Dec. 2007), available at <http://www.doingbusiness.org/~media/FDPKM/Doing%20Business/Document%20s/Reforms/Case-Studies/Smart-Lessons/DB07-SL-Ghana-Commercial-Court.pdf> (explaining that the Commercial Court was created in 2005 and is composed of six judges who hear disputes of a commercial nature, including: banking and finance, restructuring debt, and intellectual property).

¹⁴⁶ See Ghana Superior Court of Judicature, High Court of Justice Accra Commercial Division, 11/10/2012, "NML Capital Ltd. vrs Republic of Arg.," (RPC/343/12), [hereinafter Ghanaian Decision] (summarizing the limited interlocutory injunctive relief restricting movement of the ARA Libertad from the port of Tema, to maintain the status quo until the Court's final decision was made); see also Paula Hodges et al., *NML Capital and Argentina: Ghanaian Court Rejects Argentina's Sovereign Immunity Challenge and NML Capital Targets Second Vessel in South Africa*, LEXOLOGY, Oct. 30, 2012 (expounding upon the NML v. Argentina events that lead up to the seizure of the warship); Shane Romig, *Ghana Seizes Argentine Ship in Spat With Creditors*, WALL ST. J. (Oct. 5, 2012, 1:02 PM) <http://online.wsj.com/news/articles/SB10000872396390443768804578038503927633038> (relaying various perspectives on the seizure of the Argentine Warship).

¹⁴⁷ See Ghanaian Decision, *supra* note 146 (finding that customary international law allows for the seizure of a military vessel, or warship, so long as there is express consent of the state owner).

¹⁴⁸ See *id.*

¹⁴⁹ See "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS reports, to be published (holding that the ARA Libertad should be released); Michael Risvas, *The Saga Continues: Argentina's Request for Provisional Measures v Ghana Before the ITLOS*, EJIL: TALK! (Nov. 20, 2012), <http://www.ejiltalk.org/the-saga-continues-argentinas-request-for-provisional-measures-v-ghana-before-the-itlos/>

was ultimately successful in receiving a verdict determining that, as a warship, the ARA Libertad enjoyed immunity from seizure in connection with civil litigation awards and ordering Ghana to unconditionally release the ship.¹⁵⁰

This article will explore the now-growing conflict over the proper interpretation of the extent of a waiver of sovereign immunity in connection with civil litigation awards.¹⁵¹ As the global economy flounders, situations like this may become more prevalent, particularly as governments struggle to repay what they have borrowed in the private markets.¹⁵² Steps should be taken to ensure that there is a clear legal regime going forward defining the rights and responsibilities of nations when dealing with another sovereign's assets, particularly military assets. Part I of this article will discuss the background of the dispute between NML Capital and the Republic of Argentina.¹⁵³ Additionally, it will provide a primer on international customary law, sovereign immunity, and waivers to sovereign immunity.¹⁵⁴ Part II will argue that: (1) neither the Ghanaian Court nor ITLOS conducted the proper analysis regarding NML's attempted seizure of the Frigate ARA Libertad and (2) the proper legal analysis would have taken into account a broader body of customary international law.¹⁵⁵ Part III will advocate that the current regime must be amended to add clarity on the important issue of what types of state property may be properly seized in connection with civil litigation awards, specifically when the state property is, as is the case here, of a military nature.¹⁵⁶ Finally, Part IV will conclude that the ARA Libertad should not have been seized because the Fiscal Agency Agreement did not provide a clear waiver of sovereign enforcement immunity as required by customary international law.¹⁵⁷

II. BACKGROUND

This article begins by examining the background of the dispute over the ARA Libertad, the lens through which contractual

(explaining Argentina's request for provisional measures under UNCLOS and potential outcomes).

¹⁵⁰ *Id.*

¹⁵¹ *See infra* Part IV and accompanying text.

¹⁵² *See, e.g., supra* note 6 (acknowledging that Greece is on the verge of default); *Debt Rising in Europe*, THE NEW YORK TIMES, <http://www.nytimes.com/interactive/2010/04/06/business/global/european-debt-map.html?ref=global-home&r=0> (illustrating on various maps how Greece is not the only country in the Eurozone that was struggling from a debt crisis); Sean Tully, *The Euro Crisis No One is talking about: France is in Free Fall*, CNN MONEY (Jan. 9, 2013, 9:26 AM), <http://finance.fortune.cnn.com/2013/01/09/france-economy-crisis/> (pointing to France as a danger because it has weathered the crisis no better than the PIIGS).

¹⁵³ *See infra* Part I and accompanying text.

¹⁵⁴ *See id.*

¹⁵⁵ *See infra* Part II and accompanying text.

¹⁵⁶ *See infra* Part III and accompanying text.

¹⁵⁷ *See infra* Part IV and accompanying text.

waivers of sovereign immunity will be examined.¹⁵⁸ Next, it will look at how sovereign immunity is governed and how that immunity can be waived.¹⁵⁹

A. BACKGROUND BEHIND THE DISPUTE BETWEEN NML CAPITAL AND THE REPUBLIC OF ARGENTINA

Due to a severe economic crisis,¹⁶⁰ Argentina defaulted on approximately \$80 billion in external public debt in late 2001.¹⁶¹ In 2005 and 2010, Argentina restructured its debt, which had been issued during a period of relative economic stability,¹⁶² with ninety-one percent of creditors agreeing to new repayment terms that offered significantly reduced returns on the original investments.¹⁶³ However, under the Fiscal Agency Agreement (“FAA”),¹⁶⁴ the failure to service

¹⁵⁸ See *infra* Part I.A and accompanying text.

¹⁵⁹ See *infra* Part I.B and accompanying text.

¹⁶⁰ See Anna Gelpern & Brad Setser, *Argentina’s Pathway Through Financial Crisis* (Rutgers Sch. Of Law-Newark Research Papers Series, Paper No. 016, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=884225 (hypothesizing that the severity of Argentina’s economic crisis was caused by three crisis that were interlinked: (1) an economic crisis that was caused by Brazil’s devaluation and a tightening of external capital markets that combined to push Argentina into a recession; (2) an external sovereign debt crisis caused by Argentina’s economy cooling and international investors losing interest in Argentinean bonds; and (3) a domestic banking crisis that required large-scale restructuring).

¹⁶¹ See *NML Capital v. Republic of Arg.*, 621 F.3d 230 (2d. Cir. 2010) (summarizing how in late 2001 Argentina announced that it would no longer service its external debt, including the FRANS in this case, causing the floating interest rate of Argentina’s FRANS to rise reaching approximately 101% per annum in April 2005); see also Paula Hodges et al., *ARA Libertad leaves Ghana following ITLOS ruling on Argentina’s Application for Provisional Measures*, LEXICOLOGY (Dec. 20, 2012), <http://www.lexology.com/library/detail.aspx?g=e8c27516-1d90-47da-9b6e-52b10bbde08a> (summarizing the events that lead up to the release of the ARA Libertad from the Tema port).

¹⁶² See Jessica M. Garrett & William M. Regan, *Investors in Argentine Bonds Entitled to Millions in Additional Interest*, CORP. & FIN. WKLY. DIG. (Jul. 8, 2011), <http://www.corporatefinancialweeklydigest.com/2011/07/articles/litigation/investors-in-argentine-bonds-entitled-to-millions-in-additional-interest/> (providing that in 1998 Argentina issued a series of Floating Rate Accrual Notes scheduled to mature in 2005; and, under the terms of the bond documents, Argentina assumed the obligation to pay bondholders interest-only payments twice a year until the principal was paid at a floating interest rate that would rise or fall based on changes in Argentina’s financial condition).

¹⁶³ *Id.*

¹⁶⁴ A Fiscal Agency Agreement is, “[a]n alternative to a bond trust deed. Unlike the trustee, the fiscal agent acts as a representative of the borrower.” Campbell R. Harvey, HYPertextual FINANCE GLOSSARY, available at <http://people.duke.edu/~charvey/Courses/wpg/bfglosf.htm>.

the Floating Rate Accrual Notes (“FRANS”) triggered an alternative: the right of bondholders to accelerate payment on the FRANS.¹⁶⁵

In 2005, NML Capital, an American vulture-fund and one of the few investors to not accept the revised bond terms, sued the Republic of Argentina for the country’s failure to pay the accelerated maturity of \$32 million of the \$102 million of the FRANS’s principal.¹⁶⁶ In 2011, after years of contentious proceedings, the English High Court issued a judgment ordering the Republic of Argentina to pay NML approximately \$1.33 billion.¹⁶⁷ Although the judgment out of the United Kingdom was just a consent judgment, the Ghanaian Court found that Argentina did not pay any part of the sum awarded.¹⁶⁸ This award, representing both the unpaid principal and interest on the bonds, had ballooned because, under the terms of the bond documents, the interest rate had increased substantially upon Argentina’s default.¹⁶⁹

1. *The Ghanaian Court’s Decision*

NML scoured the globe looking for a way to enforce its multi-billion dollar judgments, ultimately landing in Ghana.¹⁷⁰ Relying on a particular provision of the FAA and the bond documents that waived Argentina’s jurisdictional immunity,¹⁷¹ NML sought and obtained an injunction from the Commercial Division of the Accra Fast Track High Court of Ghana detaining the Argentine Navy training vessel, the

¹⁶⁵ See Jessica M. Garrett & William M. Regan, *Investors in Argentine Bonds Entitled to Millions in Additional Interest*, CORP. & FIN. WKLY. DIG. (Jul. 8, 2011), <http://www.corporatefinancialweeklydigest.com/2011/07/articles/litigation/investors-in-argentine-bonds-entitled-to-millions-in-additional-interest/> (highlighting NML Capital was not part of the majority who restructured their debt, rather it chose to accelerate approximately \$32 million of the Argentinean debt).

¹⁶⁶ *NML Capital Ltd. v. Republic of Argentina*, No. Civ. 2434(TPG), 2009 WL 721736, at *1-2 (S.D.N.Y. Mar. 18, 2009).

¹⁶⁷ See *NML Capital Ltd. v. Republic of Arg.*, [2011] UKSC 31 (appeal taken from EWCA) (trying to enforce the United States Second Circuit ruling, NML sued Argentina abroad). See generally Enforcement of Judgments, U.S. DEPARTMENT OF STATE, http://www.travel.state.gov/law/judicial/judicial_691.html (last visited Jan. 12, 2013) (clarifying that there is no bilateral or multilateral convention in force between the United States and any other country for reciprocal recognition and enforcement of judgments).

¹⁶⁸ Ghana Superior Court of Judicature, High Court of Justice Accra Commercial Division, 11/10/2012, “NML Capital Ltd. vrs Republic of Arg.,” 3 (RPC/343/12), [hereinafter Ghanaian Decision].

¹⁶⁹ *Id.*

¹⁷⁰ See Naomi Burke, *Argentina v Ghana at ITLOS*, CJICL BLOG (Nov. 15, 2012), <http://www.cjicl.org.uk/index.php/component/easyblog/entry/argentina-v-ghana-at-itlos?Itemid=101> (explaining how NML Capital has sought to enforce the United States judgment in the United Kingdom, France, and now Ghana to recover its civil litigation award).

¹⁷¹ See Ghanaian Decision, *supra* note 39, at 23 (looking at the waiver language of the Fiscal Agency Agreement).

ARA Libertad, at the Tema Port, off of the coast of Ghana.¹⁷² NML further sought a completely unprecedented ruling permitting it to seize the frigate ARA Libertad in order to partially satisfy British civil litigation award.¹⁷³ The Ghanaian Court found that: (1) there is no well established “customary international law” that warships enjoy immunity from seizure in connection with civil litigation;¹⁷⁴ (2) if there was such a customary international law, that a waiver of such immunity would be permissible;¹⁷⁵ and (3) if such a waiver was permissible, the Republic of Argentina had waived the Libertad’s immunity.¹⁷⁶ Since the Libertad was docked in Ghanaian waters, the Court looked to Section 392 of the Ghana Shipping Act:

Non Commercial Cargoes owned by a state and entitled at the time of salvage operations to sovereign immunity under recognized principles of public international law are not subject to seizure, arrest or detention by legal process or to an action in rem without the express consent of the state owner of the Cargo.¹⁷⁷

The Ghanaian court based its decision primarily on two issues: (1) whether waiver of sovereign immunity had occurred and (2) how the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 (“UNCSI”) and potentially applicable

¹⁷² See *id.* at 4 (summarizing the limited interlocutory injunctive relief restricting movement of the ARA Libertad from the port of Tema, to maintain the status quo until the Court’s final decision was made); see also Paula Hodges et al., *NML Capital an Argentina: Ghanaian Court Rejects Argentina’s Sovereign Immunity Challenge and NML Capital Targets Second Vessel in South Africa*, LEXOLOGY, Oct. 30, 2012; Shane Romig, *Ghana Seizes Argentine Ship in Spat With Creditors*, WALL ST J. (Oct. 5, 2012, 1:02 PM) (relaying various perspectives on the seizure of the Argentine Warship).

¹⁷³ See Sam Jones & Jude Webber, *Argentine Navy Ship Seized in Asset Fight*, FIN. TIMES ONLINE (Oct. 3, 2012 9:24 PM), <http://www.ft.com/intl/cms/s/0/edb12a4e-0d92-11e2-97a1-00144feabdc0.html#axzz2HuwjXsN8> (recalling that NML Capital had been closely monitoring the Libertad in hopes to enforce its U.S. and U.K. civil litigation awards).

¹⁷⁴ See Ghanaian Decision, *supra* note 39, at 19-21 (noting that some states do not excuse security and enforcement measures against foreign states when measures are taken against assets which do not serve governmental purposes).

¹⁷⁵ See Rep. of the Ad Hoc Comm. on Jurisdiction Immunities of the States and Their Property, 1-5 March 2004, UN Doc. A/69/22; GAOR 59th Sess., Supp. No. 22, Annex I (2004).

¹⁷⁶ See Ghanaian Decision, *supra* note 39, at 25 (noting that the closest legal regime to the Foreign Sovereign Immunities Act, which specifically forbids the detention of assets or properties used in connection with a military activity or of military character, is Section 392 of Ghana Shipping act which provides for immunity of Non-Commercial cargoes unless there is express consent of the state owner of the cargo).

¹⁷⁷ *Id.*

domestic law, the Ghana Shipping Act, applied.¹⁷⁸ Upon determining that Argentina had provided consent under the UNCSI and, therefore, waived its sovereign immunity, the Ghanaian court issued an order that would have, absent subsequent proceedings, allowed NML to seize the ARA Libertad.¹⁷⁹

2. ITLOS's Decision

Dissatisfied with the Ghanaian Court's ruling, Argentina informed Ghana that it was submitting the dispute to the ITLOS under Annex VII of the United Nations Convention of the Law of the Sea ("UNCLOS").¹⁸⁰ Two weeks later, Argentina filed a request for provisional measures¹⁸¹ with the ITLOS.¹⁸²

ITLOS is an independent body created by the United Nations.¹⁸³ A "prima facie" case exists for provisional measures from the tribunal if: (1) ITLOS has jurisdiction and (2) the urgency of the situation so requires.¹⁸⁴ Argentina was able to take NML's attempted seizure of the ARA Libertad before the Tribunal because it claimed that the question was the interpretation of Article 32 of the

¹⁷⁸ See *id.* at 24 ("... the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction.").

¹⁷⁹ See *id.* at 25 (finding that the Republic of Argentina had in "clear terms waived the immunity" of the frigate ARA Libertad).

¹⁸⁰ See Susan Simpson, *Argentina's Sham Annex VII Arbitration and ITLOS' Provisional Measure Ruling on the Merits of the ARA Libertad Case*, THE VIEW FROM LL2 (Feb. 9, 2013), <http://viewfromll2.com/2013/02/09/argentinas-sham-annex-vii-arbitration-and-itlos-provisional-ruling-on-the-merits-of-the-ara-libertad-case/> (alluding to this dispute's questionable jurisdiction in the International Tribunal of the Law of the Sea arbitration).

¹⁸¹ See Michael Risvas, *The Saga Continues: Argentina's Request for Provisional Measures v Ghana Before the ITLOS*, EJIL: TALK! (Nov. 20, 2012), <http://www.ejiltalk.org/the-saga-continues-argentinas-request-for-provisional-measures-v-ghana-before-the-itlos/> (enumerating that Argentina's application for provisional measures must satisfy the two conditions of Article 290 of the United Nations Convention of the Law of the Sea).

¹⁸² See *Request for Prescription of Provisional Measures, Under Art. 290, para. 5, of UNCLOS* (2012), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf (claiming that Ghana was violating the United Nations Convention of the Law of the Sea by illegally detaining the frigate ARA Libertad).

¹⁸³ See INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, available at <http://www.itlos.org/index.php?id=15&L=0> (last visited Jan. 18, 2013) ("The tribunal was established to adjudicate disputes arising out of the interpretation and application of the convention").

¹⁸⁴ See Craig Allen, *Law of the Sea Tribunal Resoundly Affirms Sovereign Immunity of Warships and Orders Ghana to Release Argentine Tall Ship ARA Libertad*, OPINIOJURIS (Dec. 15, 2012 8:25 PM), <http://opiniojuris.org/2012/12/15/law-of-the-sea-tribunal-resoundingly-affirms-the-sovereign-immunity-of-warships-and-orders-ghana-to-release-argentine-tall-ship-ara-libertad/> (describing how the ITLOS gained jurisdiction over this dispute).

Convention was at issue and that, as a result, the case under the jurisdiction of ITLOS.¹⁸⁵

The Tribunal determined that the UNCLOS controlled the outcome of the dispute.¹⁸⁶ The Tribunal focused exclusively on the issue of whether warships enjoyed immunity from seizure in connection with civil litigation awards.¹⁸⁷ It ultimately held that under Article 32 of UNCLOS,¹⁸⁸ warships were immune from seizure and ordered Ghana to unconditionally release the ARA Libertad.¹⁸⁹

ITLOS, notably, completely ignored the issue of whether Argentina's Fiscal Agency Agreement had waived sovereign immunity; it is questionable if ITLOS' failure to address this seemingly critical issue was proper.¹⁹⁰ This left NML to search for other ways to enforce its judgments, as Argentina quickly sailed the ARA Libertad from port immediately following the decision.¹⁹¹

B. WHAT IS SOVEREIGN IMMUNITY?

Sovereign immunity is a shield, which prevents many types of legal action against foreign states.¹⁹² There are two primary types of

¹⁸⁵ *Id.*

¹⁸⁶ See *M/V Saiga (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, not yet reported* (finding that some provisions under Part 2, entitled "Territorial and Contiguous Zone" can apply to all maritime areas).

¹⁸⁷ *Id.*

¹⁸⁸ See *United Nations Treaty Collection, United Nations Convention On The Law Of The Sea 1982* (Dec. 30, 2012), http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (looking to Article 32 which contains no section providing information regarding waivers of this immunity).

¹⁸⁹ See *id.* (prescribing unanimously that: (1) Ghana unconditionally release the Frigate ARA Libertad; (2) ensure that the captain and crew are able to leave the port of Tema and maritime areas under jurisdiction of Ghana; (3) and ensure that the frigate is resupplied).

¹⁹⁰ See Anna Gelpert, *Shipping News of the World: Round 2 for Argentina*, CREDIT SLIPS A DISCUSSION ON CREDIT, FIN., AND BANKR. (Dec. 17, 2012, 12:49 PM), <http://www.creditslips.org/creditslips/2012/12/shipping-news-of-the-world-round-two-for-argentina.html> (arguing that ITLOS ignored a key part of the ARA Libertad analysis).

¹⁹¹ See *Cristina at the helm for ARA Libertad grand welcome party in Mar del Plata*, MERCOPRESS (Jan. 8, 2013, 8:20 PM), <http://en.mercopress.com/2013/01/08/cristina-at-the-helm-for-ara-libertad-grand-welcome-party-in-mar-del-plata> (explaining how "nothing can spoil the welcome party" for the ARA Libertad).

¹⁹² See Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law*, STATE IMMUNITY, [http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-)

[e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL) (last visited Jan. 3, 2013) (explaining that Sovereign immunity covers "administrative, civil, and criminal court proceedings . . . as well as enforcement measures"); see also Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L LAW 853, 857 (2010) (providing an introduction to sovereign immunity).

accepted sovereign immunity: (1) jurisdictional immunity and 2) enforcement immunity.¹⁹³ Jurisdictional immunity refers to limitations on the adjudicatory power of national courts, particularly regarding whether a litigant may even properly file suit against a foreign state.¹⁹⁴ While states originally took an “absolute” stance in regards to jurisdictional immunity that barred most types of legal actions against foreign sovereigns,¹⁹⁵ in the twentieth century many courts shifted towards a less burdensome “restrictive jurisdictional immunity” system.¹⁹⁶ Under this system, courts have been much more willing to entertain legal actions against foreign sovereigns.¹⁹⁷

This shift did not come quite as quickly for enforcement immunity.¹⁹⁸ “[E]nforcement immunity” is an offshoot of jurisdictional immunity that prevents the property of a state from being taken in connection with an adjudicatory ruling.¹⁹⁹ Enforcement immunity protects government property including “immovables, land, movable assets, and rights such as intellectual property, and bank accounts.”²⁰⁰ While jurisdictional immunity typically focuses on the nature of the action against the state, enforcement immunity tends to focus on the purpose of the property being examined in connection with a potential seizure.²⁰¹ The limitations on enforcement immunity are, therefore, typically less “intrusive” than those of jurisdictional immunity, because they merely affect the remedies available as a result of a proceeding as opposed to considering whether a proceeding is appropriate at all.²⁰² Recently there has been a trend toward courts taking a more lenient approach in connection with the seizure of state property, particularly state-owned commercial property and other

¹⁹³ Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L LAW 853, 857 (2010).

¹⁹⁴ See Stoll, *supra* note 63 (providing that under jurisdictional immunity the State itself and its property are not a party to any court proceedings; however, that does not prevent service of process or an admissibility decision).

¹⁹⁵ See Finke, *supra* note 64, at 859 (expounding on sovereign immunity by explaining that under the Absolute Immunity regime states enjoyed unrestricted immunity from the jurisdiction and enforcement of forum states).

¹⁹⁶ See August Reinisch, *European Court Practice Concerning State Immunity and Enforcement Measures*, 17 EUR. J. INT’L LAW 803, 803-05 (2006) (recounting the shift from the view of absolute adjudicatory immunity to relative immunity in European courts).

¹⁹⁷ *Id.*

¹⁹⁸ See *id.* at 804. (explaining that immunity from enforcement was still considered absolute and since the shift, courts “wrestle[d] with the precise conditions and criteria under and by which enforcement immunity should be granted or denied”).

¹⁹⁹ See *id.* n.6 (providing that enforcement immunity is all-encompassing, including any measures of constraint, such as: attachment, arrest, and execution).

²⁰⁰ See Stoll, *supra* note 63 (explaining what enforcement immunity protects).

²⁰¹ See Reinisch, *supra* note 67, at 803 (explicating the different focuses of jurisdictional immunity and enforcement immunity).

²⁰² *Id.* at 804.

types of government property that does not serve a “public” purpose.²⁰³

1. Sources of Sovereign Immunity

Sovereign Immunity is predominately based upon customary international law.²⁰⁴ Sovereign immunity is a creature of both treaty and domestic law.²⁰⁵ Each nation tends to have domestic laws regarding sovereign immunity; thus, the analysis of sovereign immunity can vary depending upon the country where the dispute is adjudicated.²⁰⁶ As a result, rulings on sovereign immunity disputes, such as the disposition of the ARA Libertad, can find their guiding principles from myriad sources.²⁰⁷

The Permanent Court of International Justice and International Court of Justice are in agreement that two elements are required to form a customary international law.²⁰⁸ First, actions by the state must have amounted to a settled practice. Second, the actions by the state “must be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it” (*opinio iuris*).²⁰⁹ “The International Court will often infer the existence of *opinio iuris* from general practice, from scholarly consensus or from its own, or other tribunals’, previous determination.”²¹⁰

The language in treaties also guides sovereign immunity determinations.²¹¹ Beginning from the International Law

²⁰³ See *id.* (highlighting the most important trend in this area of sovereign immunity).

²⁰⁴ See Stoll, *supra* note 63 (explaining that Sovereign Immunity has its roots and is still primarily based on international customary law).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See *id.* (explaining that Sovereign Immunity has its roots and is still primarily based on international customary law).

²⁰⁸ See Tullion Treves, *The Max Planck Encyclopedia of Public International Law*, CUSTOMARY INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e1393?rskey=rZDtLO&result=1&q=CUSTOMARY%20INTERNATIONAL%20LAW,&prd=EPIL> (last visited Jan. 4, 2013) (explaining the development and requirements of customary international law).

²⁰⁹ *Id.*; see also James Crawford, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 26 (8th ed. 2012) (enumerating the factors examined in determining whether a concept is customary international law).

²¹⁰ JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 26 (8th ed. 2012).

²¹¹ See Stoll, *supra* note 63 (explaining that numerous treaties since World War I have guided this concept); see, e.g., United Nations Convention on Jurisdictional Immunity of States and Their Property of 2004, U.N. GAOR, 59th Sess., Supp. No. 22 A/59/22, Annex I (Dec. 16, 2004) (The Convention was opened for signature on Jan. 17, 2005) (providing the most guidance on the concept of sovereign immunity; however, not yet in force), see also U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (giving warships and non-commercial warships

Commission's Draft Articles on Jurisdictional Immunities of States and Their Property,²¹² the UNCSI has been identified as a "comprehensive legal instrument" that covers the issue of sovereign immunity.²¹³ This document provides for the immunity of a state for itself and its property the jurisdiction of the courts of another sovereign.²¹⁴ Furthermore, the UNCSI provides measures of constraint in pre-judgment and post-judgment circumstances.²¹⁵ The UNCLOS also provides for immunity of warships and other governmental ships in certain circumstances.²¹⁶

2. *How Sovereign Immunity is Waived*

Customary international law recognizes that a state may waive either its jurisdictional or enforcement immunity (or sometimes both).²¹⁷ This waiver can be accomplished through various avenues: international agreement, arbitration agreement, written contract, declaration before the court, or written communication after the dispute has arisen.²¹⁸ Waivers of sovereign immunity are "narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires."²¹⁹ However, these waivers "must give a clear, complete, unambiguous and unmistakable manifestation of the

immunity in Article 32).

²¹² The International Law Commission's Draft Articles have been considered "customary international law." See Crawford, *supra* note 81, at 42-3 (providing information regarding how other sources of customary international law are examined); see also Stoll, *supra* note 63 (proffering background on the history and development of state immunity).

²¹³ Although this Convention is not yet in force, it has been "acknowledged as an accurate, extensive, learned, and systematic reflection of this field of the law, and is widely used as a basis for legal practice and scholarly reflection." See Stoll, *supra* note 63 (expounding upon the factors that are examined in determining sovereign immunity).

²¹⁴ United Nations Convention on Jurisdictional Immunity of States and Their Property of 2004, U.N. GAOR, 59th Sess., Supp. No. 22 A/59/22, Annex I (Dec. 16, 2004). (The Convention was opened for signature on Jan. 17, 2005).

²¹⁵ Article 19 provides that in post-judgment circumstances, such as the NML-Argentina dispute, the types of measures of constraint allowed are: (1) the state has "expressly consented to the taking of such measures as indicated;" (2) the parties have "allocated or earmarked property for the satisfaction of the claim; or (3) the property is in use for a "commercial purpose" by the government. *Id.*

²¹⁶ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; see also 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels, 1934 Additional Protocol, May 24, 1934, 1646 U.N.T.S. 28262 (also providing for sovereign immunity of warships).

²¹⁷ See Stoll, *supra* note 63 (proffering an introduction to the subject of restricting immunity by consent).

²¹⁸ The Draft Convention on State Immunity prepared by the International Law Association and the 1991 Basel Resolution of the Institut de Droit International permit measures of constraint in cases of waiver. See *id.* (referring to Articles 18 and 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004).

²¹⁹ *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002).

sovereign's intent to waive immunity."²²⁰

Articles 18 and 19 of the UNCSI provide methods of pre-judgment and post-judgment constraint to be followed.²²¹ Consent to measures of enforcement cannot be found from consent to jurisdiction;²²² rather a separate express waiver of consent for enforcement measures is required.²²³ Furthermore, under Article 19 of the UNCSI, property that is specifically in use or intended for use by the State for other than government non-commercial purposes can be seized as a measure of post-judgment constraint.²²⁴ Five categories of property are enumerated in the UNCSI as a non-exhaustive list of "non-commercial" property presumed to be immune from seizure; the ARA Libertad is an example of one of the listed categories--"property of military character."²²⁵ Article 21 of the Convention provides for immunity for non-commercial and related military property.²²⁶ Presumably, warships also retain this immunity.²²⁷ These categories are protected so long as a state has not waived its immunity from execution as part of a contract or explicitly earmarked the property as

²²⁰ *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999); *see also* *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47,49 (2d Cir. 1982).

²²¹ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (The Convention was opened for signature on 17 Jan. 2005).

²²² Stoll, *supra* note 63.

²²³ *See id.* (setting out the standards for waivers from enforcement of jurisdiction). *But see Société Creighton v. Ministre des Finances de l'Etat du Qatar et autre*, Cour de cassation (1st Civil Chamber), 6 July 2000, Bulletin civil I, n°207, [2001] *Revue de l'arbitrage* 114 (finding that the undertaking to "carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver could be validly be made," could be read as consent to execution and jurisdiction).

²²⁴ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (The Convention was opened for signature on 17 Jan. 2005).

²²⁵ *See* James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 503 (8th ed. 2012) (explaining the exception to the exception that property will not be immune if it used or intended to be used other than for government non-commercial purposes).

²²⁶ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (The Convention was opened for signature on 17 Jan. 2005).

²²⁷ Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law*, STATE IMMUNITY, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL> (last visited Jan. 3, 2013) (explaining that warships are also considered immune from enforcement but, have been subject to more specific rules regarding immunity for a long time).

seizable in connection with court proceedings.²²⁸ It is not clear where the ARA Libertad would fit in this type of analysis aside from being “non-commercial” property.²²⁹

III. ANALYSIS

Because of the complex cross-border character of this dispute, it is difficult to determine the proper law to apply.²³⁰ The two bodies that have examined this case have reached conflicting results on the propriety of the seizure because they have identified different documents as the “proper” international law to apply and, at least partially as a result, focused on different issues.²³¹ There are major flaws in how the Ghanaian Court and ITLOS analyzed this case.²³² Additionally, both the Ghanaian court and ITLOS failed to recognize that there is a third body of law that this case could have been analyzed under, customary international law, that would have led to the correct result.²³³

This section first analyzes the Ghanaian Court’s faulty approach to the ARA Libertad decision.²³⁴ Next it analyzes ITLOS’s

²²⁸ See James Crawford, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 503 (8th ed. 2012) (furthering the explanation of why the “purpose exception” is “most commonly invoked”).

²²⁹ See Stoll, *supra* note 98 (stipulating that an express waiver in certain instances is allowed; a waiver requiring language specifically waiving certain property is allowed; or has no immunity due to being commercial in nature).

²³⁰ See Naomi Burke, *Argentina v Ghana at ITLOS*, CAMBRIDGE J. INT’L & COMP. L. BLOG (Nov. 15, 2012), <http://www.cjicl.org.uk/index.php/component/easyblog/entry/argentina-v-ghana-at-itlos?Itemid=101> (providing background on how this is a dispute about an Argentinean naval vessel located in Ghana based on a court decision from the United States).

²³¹ See Ghana Superior Court of Judicature, High Court of Justice Accra Commercial Division, 11/10/2012, “NML Capital Ltd. vrs Republic of Arg.,” (RPC/343/12), [hereinafter Ghanaian Decision] (deciding that under International Customary Law the ARA Libertad could be seized because Argentina waived its immunity); *M/V Saiga* (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, not yet reported (finding that under the United Nations Convention on the International Law of the Sea military warships have immunity).

²³² See Anna Gelpern, *Shipping News of the World*, CREDIT SLIPS A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Oct. 12, 2012 11:09 am), <http://www.creditslips.org/creditslips/2012/10/shipping-news-of-the-world.html> (questioning the Ghanaian court’s decision); see also Gelpern, *Shipping News of the World: Round 2 for Argentina*, CREDIT SLIPS A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Dec. 17, 2012, 12:49 PM), <http://www.creditslips.org/creditslips/2012/12/shipping-news-of-the-world-round-two-for-argentina.html> (nothing that the ITLOS tribunal did not address waiver).

²³³ See Ghanaian Decision, *supra* note 102, at 18 (acknowledging customary international law but only looking at one treaty), *M/V Saiga* (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, not yet reported (focusing only on the United Nations Convention on the Law of the Sea, and ignoring customary international law all together).

²³⁴ See *infra* Part II.A and accompanying text.

misguided decision that ignored Argentina's waiver of sovereign immunity.²³⁵ Lastly, this section analyzes the dispute under Customary International Law and comes to the conclusion that the ARA Libertad should not have been seized due to the unclear language regarding Argentina's waiver of immunity in its FAA.²³⁶

A. THE GHANAIAN COURT'S ANALYSIS OF THE FRIGATE ARA LIBERTAD DECISION WAS INCORRECT

The Ghanaian Court determined that there was no customary international law that warships enjoy immunity from seizure in connection with civil litigation awards.²³⁷ Furthermore, the court held that even if warships did enjoy such immunity, that the sovereign could waive the immunity.²³⁸ The court reached this conclusion by looking to the UNCSI, which it held made such a waiver permissible.²³⁹

1. *The Ghanaian Court Improperly Assumed That The UNCSI Was Binding*

The Ghanaian court's analysis was flawed as it failed to correctly identify the difference between analysis under a treaty and analysis under customary international law.²⁴⁰ The Ghanaian court correctly looked at the UNCSI for guidance in analyzing whether Argentina had waived its enforcement immunity in such a way that seizure of the ARA Libertad would be proper.²⁴¹

However, the court's opinion improperly treats the Convention as if it was binding, and therefore, dispositive on this issue.²⁴² For example, the court directly analyzed whether the FAA contained language that would constitute a waiver under the treaty, nothing that "[c]ounsel on both sides seem to agree then the waiver may be done by the process specified under Articles 18 and 19" of the UNCSI.²⁴³ However, neither Argentina nor Ghana is a signatory to

²³⁵ See *infra* Part II.B and accompanying text.

²³⁶ See *infra* Part II.C and accompanying text.

²³⁷ See Ghanaian Decision *supra* note 102 at 21.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *id.* at 21-25 (looking at the UN Convention on Jurisdictional Immunities of States and Their Property as custom, rather than the Convention's concepts as custom).

²⁴¹ See James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 490 (8th ed. 2012)(explaining that the UN Convention on Jurisdictional Immunities of States and their Property has "been understood by several courts to reflect an international consensus on state immunity"); see also Stoll, *supra* note 98 (providing that while the Convention on Sovereign Immunities is still waiting for ratifications or approvals to be in force, "it is already widely acknowledged as an accurate, extensive, learned, and systematic reflection of this field of law, and is widely used as a basis of legal practice . . .").

²⁴² U.N. GAOR, 59th Sess., Supp. No. 22, U.N. Doc. A/59/22 (Dec. 16, 2004).

²⁴³ Ghanaian Decision *supra* note 102 at 22.

the UNCSI, so the court's rigid adherence to and reliance on the convention and its protocols was likely incorrect.²⁴⁴

Although Argentina and Ghana are not signatories to the UNCSI, the Ghanaian court would have been correct to look to it as a guide for customary international law in this situation.²⁴⁵ The UNCSI is one of the few bodies of customary international law that addresses both sovereign immunity in connection with warships and provides guidance on waivers.²⁴⁶ However, since the UNCSI is not yet in force,²⁴⁷ the Ghanaian court's analysis should have been significantly more complex and nuanced in so far as it needed to recognize and address this fact. Here, since the court ignored the fact that the treaty was not in force, it did not have to engage in the more complex analysis of whether the treaty could properly be considered international custom.²⁴⁸ For example, the Court could have reasonably found that since the convention has not yet been ratified, it could not properly be elevated to the level of "custom."²⁴⁹ The failure of the international community to embrace the convention, with only twenty-eight nations having signed and a mere thirteen having ratified the convention, strongly suggests that the principles set out in the convention are, in fact, not "custom."²⁵⁰

The Ghanaian court's failure to undertake such an analysis on whether the Convention could be properly elevated to the level of customary international law undercuts the credibility of the court's

²⁴⁴ See UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (The Convention was opened for signature on 17 Jan. 2005) (listing the parties to the Convention).

²⁴⁵ *Id.*

²⁴⁶ *Id.*; James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 502 (8th ed. 2012).

²⁴⁷ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. (The Convention was opened for signature on 17 Jan. 2005).

²⁴⁸ The convention currently stands far from ratification, and will not be ratified until thirty days after the requirement in Article 30 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 is fulfilled, "the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary of the United Nations". UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. (The Convention was opened for signature on 17 Jan. 2005).

²⁴⁹ See James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24-26 (8th ed. 2012) (enumerating the requirements of customary international law: the Statute of the International Court refers to a requirement of opinion juris sive necessitates, or "a general practice accepted as law," it could be argued that not being in force, the Convention is not a general practice accepted as law).

²⁵⁰ See *id.* (providing a list of signatories to the convention, Argentina and Ghana are neither one of the twenty-eight signatories nor one of the thirteen parties that have ratified the convention; this leaves room to question the applicability of the convention on these states).

findings.²⁵¹ While it is likely that a proper analysis of the customary international law on this issue would look to the same source as the court ultimately did, the court's failure to recognize that the UNCSI was not yet in force and to "show its work" by partaking in an analysis of which was the proper customary international law to apply makes its ruling suspect.²⁵²

2. *The Ghanaian Court's Analysis Of The Waiver Was Flawed Because It Did Not Adequately Address Competing Concerns Between Contract Law And International Customary Law*

Even if the Ghanaian court was correct in directly applying the UNCSI, its analysis was flawed because it improperly examined the issue of waiver.

a. *The Ghanaian Court Failed to Resolve the Competing Concerns of Contractual Interpretation and Adherence to the UNCSI*

The UNCSI requires waivers of jurisdictional immunity and enforcement immunity to be clear, explicit, and, perhaps most importantly, separate.²⁵³

The Ghanaian Court determined that the language of the FAA stating that ". . . the Republic has irrevocably waived such immunity to the fullest extent permitted by laws of such jurisdiction" was a sufficient statement of waiver of immunity for enforcement against the ARA Libertad.²⁵⁴ But, this was likely error. Article 20 of the UNCIS stipulates that a waiver of jurisdictional immunity does not constitute a waiver of enforcement immunity.²⁵⁵ Here, Argentina explicitly waived its jurisdictional immunity in all circumstances, but, whether the waiver contained in the FAA can also be read to be a

²⁵¹ See generally Ghanaian Decision, *supra* note 102 (looking only to the United Nations Convention on Jurisdictional Immunities of State and Their Property and not explaining why it is customary international law).

²⁵² The United Nations Convention on Jurisdictional Immunities of States and Their Properties is one of the few sources of international "custom" examining both the issue of whether warships enjoy immunity and whether such immunity could be waived. See *id.* (looking only to the United Nations Convention on Jurisdictional Immunities of State and Their Property).

²⁵³ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. (The Convention was opened for signature on 17 Jan. 2005).

²⁵⁴ Ghanaian Decision, *supra* note 102 at 24.

²⁵⁵ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. (The Convention was opened for signature on 17 Jan. 2005).

waiver of enforcement immunity is unclear and, at best, ambiguous.²⁵⁶

Typically in contract law, vague or ambiguous terms are construed against the drafter of the contract, in this case Argentina.²⁵⁷ If the contract were to be construed against Argentina, the FAA could be read to include both a waiver to jurisdictional immunity and a waiver of immunity of execution.²⁵⁸

However, the rules of contractual interpretation would have to be weighed against the customary international law that the court purported to be applying.²⁵⁹ These modes of interpretation are not always in accord and could have led to divergent results.²⁶⁰ Conversely, the customary international law the court sought to apply required both waivers to be made explicitly and separately.²⁶¹ Furthermore, in the context of sovereign immunity, “explicit waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires,” allowing the language to be construed in a manner finding Argentina to not have waived its sovereign immunity.²⁶² The court’s analysis is, again, deficient for its failure to analyze (or even address) this critical issue.²⁶³

b. The Court’s Analysis of the Waiver Under the Convention was Incorrect

Even if the Ghanaian court was correct in concluding that strict adherence to the Convention was appropriate, its conclusion that Argentina waived its enforcement immunity in the FAA was

²⁵⁶ See Ghanaian Decision, *supra* note 102, at 23 (“ . . . to any immunity from suit, from jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other such legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such as immunity. . .”).

²⁵⁷ See *RLS Associates, LLC v. United Bank of Kuwait PLC*, 380 F.3d 704, 712 (2d Cir. 2004) (“Ambiguities are generally interpreted against the drafter”).

²⁵⁸ See Ghanaian Decision, *supra* note 102, at 23 (referencing waiver language out of the Fiscal Agency Agreement).

²⁵⁹ Some customary norms such as the American rules on contract interpretation may only be practiced within a particular region leaving the need to weigh the two concepts. See BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 29 (8th ed. 2012) (explaining local custom and bilateral relations).

²⁶⁰ Compare *RLS Associates, LLC v. United Bank of Kuwait PLC*, 380 F.3d 704, 712 (2d Cir. 2004) (“Ambiguities are generally interpreted against the drafter”), with Stoll, *supra* note 98 (providing that Jurisdictional Immunity and Enforcement Immunity are separate and require separate waivers).

²⁶¹ Stoll, *supra* note 98.

²⁶² *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1163 (D.C. Cir. 2002).

²⁶³ See Ghanaian Decision, *supra* note 102 at 21-25 (failing to analyze the clarity of the waiver of sovereign immunity).

incorrect. Argentina undisputedly waived jurisdictional immunity.²⁶⁴ But, it is not clear, and the Ghanaian Court cites no evidence supporting the notion, that Argentina also waived enforcement immunity.²⁶⁵ Under the UNCSI, express sovereign immunity waivers must be clear, complete, and unambiguous; and in the absence of a clear waiver, it must be assumed that Argentina did not waive its enforcement immunity.²⁶⁶ If the court's conclusion regarding whether Argentina had waived its enforcement immunity is incorrect, then its ultimate decision that the ARA Libertad could be seized is also incorrect.²⁶⁷

The Ghanaian Court's decision is plagued by a failure to fully analyze the complex issues before it.²⁶⁸ To a certain extent, this failure is excusable, as NML's attempted seizure of the ARA Libertad is completely unprecedented.²⁶⁹ But, the court's refusal to adhere to a single line of reasoning regarding the waiver issue is inexcusable. The choice before the court was clear: either the UNCSI applied and the waiver had to be explicit or the convention did not apply and the waiver could be imputed from the vague language of the FAA.²⁷⁰ The Court's attempt to have it both ways by holding that the convention applied but that the waiver need not be explicit was clearly in error.²⁷¹

B. ITLOS'S APPROACH TO THE FRIGATE ARA LIBERTAD DECISION

²⁶⁴ See Ghanaian Decision, *supra* note 102, at 23-25 (referencing the waiver language in the Fiscal Agency Agreement, but relying on one clause of the waiver and not looking to the entire waiver as a whole).

²⁶⁵ *Id.*

²⁶⁶ Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1292 (11th Cir. 1999); see also *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47, 49 (2d Cir. 1982).

²⁶⁷ See *infra* Part II.C.

²⁶⁸ See Ghanaian Decision, *supra* note 102 (failing to fully analyze various parts of customary international law and the waiver).

²⁶⁹ See, e.g., Anna Gelpert, *Shipping News of the World: Round 2 for Argentina*, CREDIT SLIPS A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Dec. 17, 2012, 12:49 PM), <http://www.creditslips.org/creditslips/2012/12/shipping-news-of-the-world-round-two-for-argentina.html> (looking to ITLOS' decision regarding the dispute after the ARA Libertad was released); Susan Simpson, *Argentina's Sham Annex VII Arbitration and ITLOS' Provisional Measure Ruling on the Merits of the ARA Libertad Case*, THE VIEW FROM LL2 (Feb. 9, 2013), <http://viewfromll2.com/2013/02/09/argentinas-sham-annex-vii-arbitration-and-itlos-provisional-ruling-on-the-merits-of-the-ara-libertad-case/> (analyzing the dispute two months after the ARA Libertad was welcomed home).

²⁷⁰ UN GAOR, 59th Session, Supp. No. 22, U.N. Doc. A/59/22 (16 Dec. 2004), Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. (The Convention was opened for signature on 17 Jan. 2005) (requiring a waiver of sovereign immunity for military vessels); see also Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1292 (11th Cir. 1999) (requiring a clear and unambiguous waiver of sovereign immunity).

²⁷¹ See Ghanaian Decision, *supra* note 102 (analyzing the dispute erroneously).

ITLOS's approach to the ARA Libertad decision was also flawed. Under questionable jurisdiction,²⁷² ITLOS held that the ARA Libertad was a warship that enjoyed sovereign immunity; and therefore, ordered Ghana to release the naval vessel as a "provisional measure."²⁷³ However, ITLOS also failed to properly examine the issue of Argentina's waiver of sovereign immunity in the FAA, and therefore, failed to grapple with the issue of whether the UNCLOS was the appropriate source of law to examine the case under.²⁷⁴

1. *The UNCLOS Was Not The Proper Source Of Law To Analyze The Dispute*

Although this dispute did have to do with an Argentine²⁷⁵ naval vessel in Ghanaian waters,²⁷⁶ the UNCLOS was not the correct document to use to analyze this dispute. The UNCLOS was not optimal because it does not contain a section directly addressing the issue of a waiver of enforcement immunity in connection with warships.²⁷⁷ As a result, it is unclear whether the tribunal was correct in holding that the convention was directly binding here.²⁷⁸

However, the UNCLOS is a good source of supporting customary international law on this issue because: both parties are signatories to the convention;²⁷⁹ the convention does contain a section dealing with the immunity of warships generally;²⁸⁰ and it is a set of laws that has been widely acknowledged and enforced.²⁸¹ On this last point, in particular, the Convention of the Laws of the Sea could be argued to be a significantly more appropriate source of law to

²⁷² See Susan Simpson, *Argentina's Sham Annex VII Arbitration and ITLOS' Provisional Measure Ruling on the Merits of the ARA Libertad Case*, THE VIEW FROM LL2 (Feb. 9, 2013), <http://viewfromll2.com/2013/02/09/argentinas-sham-annex-vii-arbitration-and-itlos-provisional-ruling-on-the-merits-of-the-ara-libertad-case/> (pointing out that "Argentina began an arbitration that it did not intend on following through on).

²⁷³ See *M/V Saiga (No. 2) (Argentina v. Ghana)*, Case No. 20, Order of Dec. 15, 2012, not yet reported (focusing on the Immunity of the Warship under the United Nations Convention on the Law of the Sea).

²⁷⁴ See Anna Gelpert, *Shipping News of the World: Round 2 for Argentina*, CREDIT SLIPS A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Dec. 17, 2012, 12:49 PM), <http://www.creditslips.org/creditslips/2012/12/shipping-news-of-the-world-round-two-for-argentina.html> (pointing at ITLOS' "avoidance of . . . the heart of the issue: waiver of sovereign immunity with respect to warships").

²⁷⁵ See U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1,833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (listing the signatories to the convention, both Argentina and Ghana are parties).

²⁷⁶ See Burke, *supra* note 101 (explaining how ITLOS gained jurisdiction over the case).

²⁷⁷ U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1,833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

²⁷⁸ See Gelpert, *supra* note 145 (pointing to how ITLOS did not address a key issue of the dispute, the waiver of sovereign immunity).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See Stoll, *supra* note 98.

examine the dispute under than the UNCISI used by the Ghanaian court.²⁸²

Although both Ghana and Argentina are signatories to the UNCLOS,²⁸³ the UNCLOS does not address one of the key components of this dispute, the waiver of enforcement immunity in connection with a warship.²⁸⁴ This missing component in the UNCLOS makes it inadequate to address this dispute.²⁸⁵

2. ITLOS's Analysis Was Flawed

ITLOS examined the ARA Libertad dispute by looking at it through the lens of Article 32 of the UNCLOS, entitled Immunities of Warships and Other Government Ships Operated for Non-Governmental Purposes.²⁸⁶ Because there was no dispute as to whether the ARA Libertad was a "warship," ITLOS determined that this provision applied to this case.²⁸⁷ Although Ghana argued that the ARA Libertad was detained in Ghanaian waters, not the Territorial or Contiguous Zone, ITLOS determined that Article 32 was still the proper article to analyze the dispute.²⁸⁸

Where ITLOS' analysis is, ultimately, deficient is its failure to address whether the convention's language purported to create an absolute immunity from a waiver of enforcement immunity for warships.²⁸⁹ The failure to address this point is particularly odd given the strong debate in the Ghanaian court over whether the FAA agreement could be read to constitute a waiver of enforcement immunity for the warship. ITLOS's failure to fully analyze this issue is the result of procedural maneuvers on the part of Argentina,²⁹⁰ and, as a result, the tribunal's guidance on this issue will remain ambiguous.

²⁸² See *infra* Part II.A.2.

²⁸³ See U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (looking at signatories of the convention).

²⁸⁴ *Id.*

²⁸⁵ See Michael Risvas, *The Saga Continues: Argentina's Request for Provisional Measures v Ghana Before the ITLOS*, EJIL: TALK! (Nov. 20, 2012), <http://www.ejiltalk.org/the-saga-continues-argentinias-request-for-provisional-measures-v-ghana-before-the-itlos/> (questioning whether the Convention on the Law of the Sea is the applicable law in which to analyze this dispute under).

²⁸⁶ See *M/V Saiga (No. 2) (Argentina v. Ghana)*, Case No. 20, Order of Dec. 15, 2012, not yet reported (finding that Article 32 applies, not just to the Territorial Sea and Contiguous Zone).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See Gelpern, *supra* note 145 (pointing to how ITLOS did not address a key issue).

²⁹⁰ See Simpson, *supra* note 143 (analyzing the applicability of the request for provisional measures).

Although ITLOS's analysis was flawed, its ultimate decision that the ARA Libertad could not be seized was correct.²⁹¹ Regardless of which United Nations convention was the proper one to apply, the proper interpretation of both lead to the conclusion that the ARA Libertad could not be seized.²⁹²

C. THE CORRECT LEGAL ANALYSIS WAS UNDER CUSTOMARY INTERNATIONAL LAW BECAUSE THERE IS NO TREATY IN FORCE THAT ADEQUATELY ADDRESSES WAIVERS OF SOVEREIGN IMMUNITY

Because no single document currently in force and binding on both Argentina and Ghana directly addresses the issues presented by this unique case,²⁹³ the correct analysis would have been for a court or tribunal to examine several documents that have been accepted as "customary international law." Such a system would be the correct legal analysis because through examining numerous documents that all tangentially deal with issues related to this case,²⁹⁴ rather than attempting to pigeonhole this case under the auspices of a single document,²⁹⁵ a court or tribunal would likely be able to reach a decision that better respects international legal opinions on these important issues.

Sovereign Immunity is typically looked to on a nation-by-nation basis.²⁹⁶ A court or tribunal analyzing this case under customary international law would examine two components: 1) that a "custom" has been accepted as international practice and 2) that the

²⁹¹ See Risvas, *supra* note 156 (determining that it would likely be found that a more specific type of waiver would be needed for Argentina to waive its enforcement immunity).

²⁹² See *id.* ("... probably a more specific waiver of immunity from execution against warships will be deemed necessary, by analogy to the immunity of diplomatic missions and property"); see also JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 502 (8th ed. 2012) (explaining what is required for a waiver of enforcement immunity).

²⁹³ See U.N. Convention on the Law of the Sea, *supra* note 148 (providing immunity for warships in Article 32 but not addressing waiver of that immunity); see also Rep. of the Ad Hoc Comm. on Jurisdiction Immunities of the States and Their Property, 1-5 March 2004, UN Doc. A/69/22; GAOR 59th Sess., Supp. No. 22, Annex I (2004) (listing parties that have ratified the treaty; Argentina and Ghana are not on the list).

²⁹⁴ See Rep. of the Ad Hoc Comm. on Jurisdiction Immunities of the States and Their Property, 1-5 March 2004, UN Doc. A/69/22; GAOR 59th Sess., Supp. No. 22, Annex I (2004) (addressing only immunity of warships but remaining silent regarding waiver).

²⁹⁵ See "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS reports, to be published (holding that the ARA Libertad should be released); Michael Risvas, *The Saga Continues: Argentina's Request for Provisional Measures v Ghana Before the ITLOS*, EJIL: TALK! (Nov. 20, 2012), <http://www.ejiltalk.org/the-saga-continues-argentinas-request-for-provisional-measures-v-ghana-before-the-itlos/> (holding that the ARA Libertad should be released; limiting its ruling to immunity of warships without considering Argentina's waiver because the Convention does not have a clause pertaining to waiver of immunity).

²⁹⁶ See Stoll, *supra* note 98.

practice has been carried out in such a way that there is a cognizable consensus accepting it as obligatory.²⁹⁷ The international legal community generally accepts the concept of enforcement immunity as a “custom” under customary international law.²⁹⁸

Many sources of customary international law support the notion that warships, generally, enjoy immunity from seizure. For example, Section 392 of the Ghana Shipping Act mandates that “Non-Commercial Cargoes” retain sovereign immunity and are not subject to seizure without the express consent of the state owner of the cargo.²⁹⁹ Additionally, treaties such as the UNCLOS and the UNCSI provide further support for this position – that warships, such as the ARA Libertad are typically immune from enforcement measures.³⁰⁰

A court properly analyzing the case under customary international law would then address the more important question here, if and how the immunity accorded to warships can be waived.³⁰¹ Many countries have held that sovereign immunity may be waived in connection with enforcement measures, including the United States,³⁰² the United Kingdom, and France.³⁰³ Ghana also recognizes that enforcement immunity may be waived, and section 392 of Ghana’s shipping act requires “express consent” or waiver of the non-commercial ship’s sovereign

²⁹⁷ See JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24-26 (8th ed. 2012) (explaining the requirements of customary international law).

²⁹⁸ See *supra* Part I.B and accompanying text. (expanding on sovereign immunity and its requirements).

²⁹⁹ See Ghanaian Decision, *supra note 102, at 24* (stipulating that there is nothing similar to the United States’ Foreign Sovereign Immunities Act in Ghana, the closest thing is the Section 392 of the Ghana Shipping Act).

³⁰⁰ See Rep. of the Ad Hoc Comm. on Jurisdiction Immunities of the States and Their Property, *supra note 165* (providing in Article 21(1) that military property is immune from enforcement measures), see U.N. Convention On The Law Of The Sea, *supra note 148* (looking to Article 32, entitled Immunities of Warships and Other Government Ships Operated for Non-Commercial Purposes); see also Stoll, *supra note 98* (acknowledging that the immunity of warships has been recognized since the 1700s, but became part of a written instrument in the 1926 Brussels Convention and its 1934 Protocol).

³⁰¹ See Ghana Superior Court of Judicature, High Court of Justice Accra Commercial Division, 11/10/2012, “NML Capital Ltd. vrs Republic of Arg.,” (RPC/343/12), 24, [hereinafter Ghanaian Decision] (referencing Section 392 of the Ghanaian Shipping Act).

³⁰² 28 U.S.C. §§ 1602–1611 (2006).

³⁰³ See Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law*, STATE IMMUNITY, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL> (last visited Jan. 3, 2013) (looking at waivers of state immunity).

immunity.³⁰⁴ Additionally, the UNCSI, requires a separate and clear waiver of sovereign enforcement immunity.³⁰⁵ The requirement that a waiver of enforcement immunity be separate and explicit is, also, supported by both the Draft Convention on State Immunity prepared by the International Law Association and the 1991 Basel Resolution of the Institut de Droit International.³⁰⁶

In applying customary international law, a court ruling on this dispute would order the release of the ARA Libertad to Argentina because there was no explicit waiver of enforcement immunity. The language of the waiver in the FAA is neither clear in explicitly waiving immunity from execution measures, nor is it separate from Argentina's waiver of jurisdictional immunity.³⁰⁷ Lacking these two fundamental requirements, a court or tribunal would likely find that Argentina did not intend to waive its immunity in cases of execution for non-commercial items.³⁰⁸

IV. RECOMMENDATIONS

The global legal community must take actions to provide greater clarity and guidance on this issue moving forward in order to prevent recurrence or drastic effects on the international investment community.

The ultimate disposition of this warship matters because of the precedent it has set for future investor/ state disputes. While this dispute should have served as a test case that would clarify the proper law to apply in these types of scenarios. The proper venue and controlling treaty remain unclear given the transitory nature of the vessel and the complex international flavor of the dispute.³⁰⁹

³⁰⁴ See Ghanaian Decision *supra* note 172 (citing section 392 of the Ghana Shipping Act).

³⁰⁵ See Stoll, *supra* note 174 (explaining that Sovereign Immunity has its roots and is still primarily based on international customary law, but that the UN Convention on Jurisdictional Immunities of States and Their Property is a guiding document).

³⁰⁶ *Id.*

³⁰⁷ See Ghanaian Decision, *supra* note 172, at 23 (referencing the waiver language of the Fiscal Agency Agreement).

³⁰⁸ See Stoll, *supra* note 174 (listing the requirements of a waiver of enforcement immunity).

³⁰⁹ See Michael Risvas, *The Saga Continues: Argentina's Request for Provisional Measures v Ghana Before the ITLOS*, EJIL: TALK! (Nov. 20, 2012), <http://www.ejiltalk.org/the-saga-continues-argentinas-request-for-provisional-measures-v-ghana-before-the-itlos/> (analyzing the next steps of the ARA Libertad dispute); see also Naomi Burke, *Argentina v Ghana at ITLOS*, CJICL BLOG (Nov. 15, 2012), <http://www.cjicl.org.uk/index.php/component/easyblog/entry/argentina-v-ghana-at-itlos?Itemid=101> (enumerating the events that lead up to the

Given the current international economic climate, as governments around the world face difficulty repaying what they borrowed in capital markets,³¹⁰ the disposition of this case (and the subsequent reaction by the legal world) could have major ramifications for the global marketplace. The outcome could have a profound affect on the type of investments companies and people make, the way countries word their investment agreements,³¹¹ and ramifications of sovereign defaults on its bonds. If NML Capital is ultimately allowed to seize the ARA Libertad in connection with its civil litigation award, investors may become more likely to invest in these types of issuances because they might face less risk of loss if a sovereign should default.³¹² Conversely, since NML Capital was ultimately unable to seize the vessel and alternative seizable property is unavailable, foreign investment could be stifled as investors become less confident in their ability to enforce civil litigation remedies.³¹³

A. THE UNITED NATIONS SHOULD INSTITUTE GREATER REGULATION OVER SOVEREIGN BOND ISSUANCES

In order to avoid costly disputes such as the NML Capital-Argentina-Ghana dispute,³¹⁴ the United Nations should institute

Argentina – Ghana dispute), Susan Simpson, *Argentina's Sham Annex VII Arbitration and ITLOS' Provisional Measure Ruling on the Merits of the ARA Libertad Case*, THE VIEW FROM LL2 (Feb. 9, 2013), <http://viewfromll2.com/2013/02/09/argentinas-sham-annex-vii-arbitration-and-itlos-provisional-ruling-on-the-merits-of-the-ara-libertad-case/> (arguing that this dispute's has questionable jurisdiction in front of the International Tribunal of the Law of the Sea).

³¹⁰ See, e.g., Argentina's Debt Default Gauchos and Gadflies, *supra* note 2 (acknowledging that Greece verge of default); *Europe Debt Crisis*, *supra* note 22; Tully, *supra* note 22 (pointing to France as a danger because it has weathered the crisis no better than the PIIGS).

³¹¹ See Carol Searle & Tim Johnson, *Supreme Court Reviews Sovereign Immunity*, INCE & CO. (May 2012), <http://incelaw.com/ourknowledge/publications/supreme-court-reviews-sovereign-immunity> (providing that “if you are seeking to contract with a sovereign state, you should ensure that the wording of your agreement contains an express waiver of sovereign immunity, both for adjudication, and for enforcement”).

³¹² See Marcelo Ballvé, *Who Pays When Countries Go Broke?: the Implications of NML Capital Ltd., v. Argentina*, MARCELO BALLVÉ (Jun. 27, 2012), <http://marceloballve.wordpress.com/2012/06/27/who-pays-when-countries-go-broke-the-implications-of-nml-capital-ltd-vs-republic-of-argentina/> (expounding on the ramifications on investment from potential rulings if judges rule either way on various parts of the NML-Argentina dispute).

³¹³ *Id.*

³¹⁴ See Ghana Reporters, *Argentine Vessel Brouhaha: Ghana Loses \$7.6 Million*, GHANA REPORTERS CITIZEN REPORTERS OF GHANA (Dec. 20, 2012), <http://ghanareporters.com/2012/12/20/argentine-vessel-brouhaha-ghana-loses-76-million/> (reporting how Ghana was the real loser in this dispute, spending more than \$7.6 million in this dispute that it really was not involved in).

greater regulation over sovereign bond issuances such as these. The United Nations could regulate these bond issuances by agreeing to expand the UNCSI to include a section on sovereign issuances and what property, if any, can be claimed upon default.³¹⁵ Furthermore, the United Nations would be well served by better promoting this convention and seeking additional signatories in order to allow it to be put into force.³¹⁶

Greater regulation of sovereign bond issuances would be beneficial for both the international legal and financial communities because it would lead to greater clarity and reliability in the interpretation of such issuances.³¹⁷ The combination of the increase in sovereign investment and the increase of volatility in the market following recent economic crises both at home and abroad would help promote international investment by providing potential investors with clearer guidance on the ramifications of sovereign default.³¹⁸ And, with countries like Spain and Greece teetering on the edge of major financial turmoil, the specter of such defaults looms large over the international investment community.³¹⁹

Additionally, greater regulation would help provide a clearer analytical framework for legal bodies tasked with resolving these complex cross-border disputes.³²⁰ As NML's ongoing dispute with Argentina has shown, the precise legal standards to apply in cases

³¹⁵ See Rep. of the Ad Hoc Comm. on Jurisdiction Immunities of the States and Their Property, *supra* note 45 (lacking a section on Sovereign Debt Issuances).

³¹⁶ See *id.* (requiring two signatories and seventeen ratifications to be in force).

³¹⁷ See generally Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law*, STATE IMMUNITY, <http://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL> (last visited Jan. 3, 2013) (advocating for clarity in the role of state immunity as a whole).

³¹⁸ See Paul J. Lim, *Searching for Calm Markets*, N.Y. TIMES (Jun. 30, 2012) (explaining how investors are looking for a "calmer" market to invest in and how not all parts of the market appear as "risky" as Treasuries and foreign debt).

³¹⁹ See e.g., *Argentina's Debt Default Gauchos and Gadflies Credit's Decade-long Battle with Argentina Shows just how Tangled Sovereign Defaults Can Be*, ECONOMIST (Oct. 22, 2011) (acknowledging that Greece is on the verge of default); *Europe Debt Crisis*, CNN MONEY (Jan. 10, 2013), http://money.cnn.com/news/international/europe_debt_crisis/index.html; Sean Tully, *The Euro Crisis No One is talking about: France is in Free Fall*, CNN MONEY (Jan. 9, 2013, 9:26 AM), <http://finance.fortune.cnn.com/tag/eurozone/> (pointing to France as a danger because it has weathered the crisis no better than the PIIGS).

³²⁰ See e.g., *Ghana Decision*, *supra* note 172, at 18-25 (looking to customary international law but erroneously finding that the waiver was sufficient to allow seizure of a warship), *M/V Saiga (No. 2) (Argentina v. Ghana)*, Case No. 20, Order of Dec. 15, 2012, not yet reported (holding that the ARA Libertad should be released but failing to look to the waiver of sovereign immunity).

involving the potential seizure of a sovereign's assets are murky, at best.³²¹ Differing bodies can, and likely will continue to, reach entirely different results based on factors such as disagreeing over which documents provide the proper source of customary international law and incorrectly applying treaties that were not designed to deal with these types of disputes.³²² By amending the UNCSI, the U.N. could help better the disposition of these types of sovereign investment disputes in the future.³²³

B. THE UNITED NATIONS SHOULD AMEND TREATIES ALREADY IN USE TO PROVIDE GUIDANCE ON THIS MATTER

Rather than amending a treaty that is not yet in force,³²⁴ the United Nations could focus its energy on amending one that already is in use.³²⁵ By amending the UNCLOS the UN could add clarification on the requirements for a waiver of sovereign immunity in these types of situations.³²⁶ Clarifying the issue of whether military vessels should have an absolute immunity from seizure in connection with civil litigation would be a good place to start.³²⁷

While amending the UNCLOS would have many of the benefits discussed above, it is a less preferable course of action because of the more limited scope of the Convention.³²⁸ For example, it is doubtful that the UNCLOS could be reasonably amended in such a way that it would be helpful in resolving this dispute if the dispute was about military automobiles as opposed to military vessels.³²⁹ Ultimately, it seems likely that advocating for more signatories and more ratifications of the UNCSI would be preferable to amending UNCLOS as that Convention could more easily apply to a broader range of situations.³³⁰

³²¹ See Burke, *supra* note 180 (providing the complicated context of the NML-Argentina-Ghana dispute).

³²² Compare Ghanaian Decision, *supra* note 172, with *M/V Saiga* (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, not yet reported (coming to conflicting outcomes regarding what should happen to the *ARA Libertad*).

³²³ See UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (not yet in force) (lacking a section regarding sovereign immunity in connection with sovereign debt disputes).

³²⁴ *Id.*

³²⁵ See *e.g.*, U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (missing a section on waiver of immunity on warships).

³²⁶ See *id.* (referring to Article 32 which needs a section regarding waiver of immunity of warships).

³²⁷ See *id.* (looking at Article 32 which provides immunity of warships, but is silent as to whether this immunity is absolute).

³²⁸ See *id.* (providing immunity of warships or government ships but nothing more).

³²⁹ See *id.* (reviewing the law of the sea, not the law of other situations of sovereign immunity).

³³⁰ See Stoll, *supra* note 188 (advocating for more ratifications of the Convention to better handle these types of disputes).

C. INVESTORS SHOULD DEMAND THAT SOVEREIGNS LIST THE TYPES OF PROPERTY THAT MAY BE SEIZED IN CONNECTION WITH CIVIL LITIGATION AWARDS STEMMING FROM DEFAULT ON BOND PAYMENTS

Lastly, nations should begin to and investors should demand that sovereigns make clear the types of property that may be seized in connection with civil litigation awards stemming from a default on bond payments. This type of action is referred to as “earmarking” under Article 19 of the UNCSI.³³¹ Such provisions could make clear whether, as a last resort, an investor could seize military assets.³³² These provisions could also provide consent measures of constraint that are afforded by way of allocation or earmarking of specific property for the satisfaction of a claim.³³³

It is likely that even absent direct action on this issue from the U.N. and other international legal bodies, this type of “earmarking” will grow more common.³³⁴ As the lessons learned from this dispute crystalize, investors will likely grow more astute at recognizing and compensating for the unique risks presented by sovereign default.³³⁵

V. CONCLUSION

The World may never gain any greater closure on the proper

³³¹ See UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement> (referring to Article 19, entitled State Immunity from post judgment measures of constraint).

³³² See August Reinisch, *European Court Practice Concerning State Immunity and Enforcement Measures*, 17 EUR. J. INT'L LAW at 820(2006) (providing an explanation of the option of earmarking property in connection to civil litigation awards).

³³³ See Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law*, STATE IMMUNITY, <http://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e1106?rskey=W0Momt&result=1&q=state%20immunity&prd=EPIL> (last visited Jan. 3, 2013) (providing alternatives to a waiver of a contractual waiver of enforcement immunity).

³³⁴ Earmarking might become more popular because treaties already account for this and it has become a generally accepted practice. See August Reinisch, *European Court Practice Concerning State Immunity and Enforcement Measures*, 17 EUR. J. INT'L LAW at 820 (explaining that treaties accept this as a practice and it is further by being generally accepted by court cases).

³³⁵ See Carol Searle & Tim Johnson, *Supreme Court Reviews Sovereign Immunity*, INCE & Co. (May 2012), <http://incelaw.com/ourknowledge/publications/supreme-court-reviews-sovereign-immunity> (providing that “if you are seeking to contract with a sovereign state, you should ensure that the wording of your agreement contains an express waiver of sovereign immunity, both for adjudication, and for enforcement”).

legal disposition of the ARA Libertad. With Argentina having withdrawn the ship back into its own waters, many of the questions raised by the dispute between Argentina and NML Capital will be left open, including the extent to which a private debt holder may attempt to seize a sovereign's military property and if and how a sovereign may waive its immunity in connection with said property. However, these issues will continue to be an important part of the international legal landscape as the global economy continues to flounder and the risk of sovereign default throughout the world remains. Despite the current calm caused by the resolution of this case, international legal bodies should continue to push for reform now, lest they be faced with a storm of even greater magnitude later.