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The Prompt Release of Vessels in Provisional Measures Procedures. New Trends and Challenges?¹

La liberación inmediata de buques en procedimientos de medidas provisionales. ¿Nuevas tendencias y desafíos?

Leopoldo M. A. Godio

leopoldogodio@derecho.uba.ar

Attorney and Magister in International Relations (University of Buenos Aires), is Adjunct Professor (i) of Public International Law, University of Buenos Aires Law School and Member of Institute of Public International Law, National Academy of Law and Social Sciences, Buenos Aires.

Julián M. Rosenthal

julian.rosenthal90@gmail.com

Attorney specialized in International Law (School of Law, Pontifical University of Buenos Aires). Member of the Argentine Council of International Relations.

Abstract: This article discusses the incidents and situations created when vessels are detained in foreign ports, and the measures that need to be undertaken to overcome these disputes, analyzing the United Nations Convention on the Law of the Sea; that not only provides a frame that all States (who have submitted) should constrain to, but also contributes to define the peaceful means for settlements intended to overcome such controversial situations.

Apart from the consideration of all these regulations, jurisprudence and real precedents are explored. In first place, to perceive the way parties react towards these situations, and also to understand how the settlement of disputes be operationalized through the International Tribunal for the Law of the Sea. For this purpose, contemporary cases such as the *Grand Prince*, the *ARA Libertad*, and the *Artic Sunrise* are deepened.

Keywords: Prompt Release Proceedings, Provisional Measures, Jurisdiction, Law of the Sea Convention, Vessels.

Resumen: En el presente artículo se ven plasmados los incidentes que pueden presentarse cuando los buques y sus tripulaciones son detenidos en puertos extranjeros, y las distintas medidas a tomar ante estas controversias, analizando la Convención de las Naciones Unidas sobre el Derecho del Mar, que no solo provee una regulación marco a la que todos los Estados signatarios deben adecuarse, sino que también contribuye con la enunciación de las distintas formas de solución pacífica creadas para superar estas situaciones.

¹ Artículo enviado el 13.04.2015 y aceptado el 04.06.2015.

Además de considerar estas regulaciones, es necesario analizar la jurisprudencia al respecto. En primer lugar, ya que ayuda a visualizar la forma en que los Estados actúan frente a estas situaciones y asimismo para comprender cómo el sistema de solución de controversias ha sido llevado a la práctica por el Tribunal de Hamburgo. Con esa finalidad profundizamos sobre algunos casos contemporáneos como el Grand Prince, el ARA Libertad y el Arctic Sunrise.

Palabras claves: *procedimientos de pronta liberación, medidas provisionales, jurisdicción, Convención de las Naciones Unidas sobre el Derecho del Mar y buques.*

1. Preliminary remarks

The release of foreign vessels detained in ports constitutes a classic topic of study for publicists of international law, especially after the *leading case Schooner Exchange*². The debate resurfaced in 2012 after the Frigate A.R.A. Libertad case, and later in 2013 thanks to The Arctic Sunrise case, both decided by the International Tribunal for the Law of the Sea.

Lately, incidents referring to boarding of foreign vessels by the authorities of a coastal state constitute one of the most sensitive issues for states in their international relations and for the international community as a whole, as it restricts one of the most elementary principles of the law of the sea: the freedom of navigation³.

In that sense, during 2013, the legal issue on jurisdiction of coastal states over freedom of the seas was again protagonist as a result of events linking activists of the Stichting Greenpeace Council Organization (hereinafter “Greenpeace”) to the eventual commission of international crimes in an oil platform of the Russian Federation, which led to the detention of the “Arctic Sunrise” vessel.

The above-mentioned cases showed a common characteristic: both states founded their claims as provisional measures (Article 290 UNCLOS), discarding the institute of early release (Article 292), although each one for different reasons.

² *The Exchange v. McFaddon*, 11 U. S. 116 (1812).

³ For example, the Permanent Court of International Justice analyzes the jurisdiction of the State in high sea and this exception. See *Lotus Case (France v. Turkey)*, PCIJ, Judgment of 7 September 1927.

2. Settlement of disputes in the Convention

2.1. *Preliminary considerations*

Due to the magnitude and importance of the issues addressed by the Convention, the need for a system for settling disputes became evident and after extensive meetings, global agreements and development of informal texts, the delegations agreed to the establishment of a system compatible with Articles 2.3 and 33.1 of the Charter of the United Nations.

Thus, the Convention provides in its Article 80 that parties may settle their disputes concerning the interpretation or application of the Convention by any peaceful means of their choice.

The first one of them, instituted in Section 1, Part XV, may be activated in the event of a dispute concerning the interpretation or application of the Convention through a general, regional, bilateral or other agreements including interchange of opinions, optional and mandatory conciliation⁴.

The second one constitutes the mandatory means and it is recognized in two parts of the Convention: Section 5, Part XI (referring to the settlement of disputes and advisory opinions applicable to exploration activities and exploitation of mineral resources in the area, whose proceedings are reserved to the Seabed Disputes Chamber) and Part XV, of interest for our study case, that in Article 287 provides a free choice regime known as the *Montreux Formula* which enables, thanks to its flexibility, that objections by State Parties to any peaceful settlement means be overcome.

Indeed, the Article mentioned above lists four options available to the parties: the International Tribunal for the Law of the Sea (or Hamburg Tribunal)⁵, the International Court of Justice, arbitration (Annex VII), and special arbitration (Annex VIII, applicable to disputes on fisheries, protection and preservation of the marine environment, marine scientific research and navigation). By signing or ratifying the Convention or adhering to it, states may make a statement choosing one or more of them. If they agree on the election of the Court, the Court has jurisdiction for dealing with disputes between said states, and in case of discrepancy or lack of agreement in particular, disputes must be settled by the arbitration in Annex VII which functions residually.

⁴ Article 281 to 284 of the Convention.

⁵ A special Court that works, since 1 October 1996, in Hamburg, Federal Republic of Germany.

The above enables us to ask some questions among which we can mention: What options does a flag state have under the Convention? Is it appropriate to request the prompt release of vessels and their crews in this case? Is it possible to opt for requesting provisional measures?

To answer these questions, we will briefly describe the jurisdiction and competence of the Hamburg Tribunal, in order to understand the procedure used by the Netherlands, and later analyze the decision of this Tribunal.

2.2. The jurisdiction of the Tribunal in Contentious disputes

2.2.1. Composition. Chambers of the Tribunal

The Tribunal is composed of 21 independent members who serve nine years in office (with possibility of renewal), judges are elected by secret ballot by state parties to the Convention, and this must take place among persons of recognized competence in the specialty, who enjoy the highest reputation for fairness and integrity, as well as represent the principal legal systems of the world, and in a geographically equitable way.

The Tribunal may not have two national members of the same state and any state party in a dispute may appoint a person of its choice for participating as judge *ad hoc* in case of not having a national member. If multiple parties have the same interest, they shall be considered a single party to that effect.

Likewise, the Tribunal has a President and a Vice President chosen by secret ballot by its own members. They serve three years in office and may be re-elected. The President presides and directs the judicial work of the Tribunal, supervises its administration, represents the Tribunal in relations with States and other entities, and decides its vote in case of tie. In the event of absence, vacancy or incapacity his duties are assumed by the Vice President.

Regardless of a specific case, the Tribunal fully understands and decides all disputes⁶. However, these may be referred to a chamber if both parties agree. We can mention the Seabed Disputes Chamber, the Chamber of Summary Procedure, and other special chambers periodically constituted by the Tribunal: Fisheries, Marine Environment and Marine Boundary. Likewise, at the request of the parties, the Tribunal may constitute chambers *ad hoc* to hear a particular dispute, determining their composition with approval of the parties⁷.

⁶ Article 13.3 Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea).

⁷ See *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern*

2.2.2. Jurisdiction of the Tribunal

Unlike the ICJ, the Hamburg Tribunal may also hear disputes where an international organization is one of the parties as provided by Articles 20.1 (access to the Tribunal by states), 20.2 (non-state entities in issues referred to exploitation of the Seabed) and 1.2 of the Convention (referred to other entities). Likewise, the Tribunal has developed its own regulations and the most outstanding are: the setting of a date for the initiation of oral proceedings after the written procedure has finished, without exceeding six months; terms not exceeding six months for filing pleadings; exiguous terms between hearings and judgments in issues of prompt release and proceedings before the Seabed Disputes Chamber.

The jurisdiction of this Tribunal comprises all disputes and applications submitted to it in accordance with the Convention, including all issues expressly foreseen in any other agreement conferring it jurisdiction for hearing them, either in its contentious jurisdiction or in its advisory function⁸.

Proceedings before the Tribunal are initiated by means of a written request or notification of a commitment, which is submitted under the basis of an agreement between the parties in dispute, in issues where the jurisdiction of the Tribunal is mandatory or pursuant to statements made by the parties (Article 287 of the Convention).

The procedure applicable to the proceedings of matters submitted to the Tribunal is established by the statute of the Tribunal (Annex VI of the Convention) and its regulations. The statute provides that the decisions of the Tribunal are made by majority vote; they must be grounded and must include separate or dissenting opinions. Judgments shall be final and binding on the parties (Articles 29 to 33 of Annex VI).

2.3. The competence in Provisional measures and Prompt release of vessels cases

The Tribunal has mandatory jurisdiction in two cases: requests of prompt release of vessels and their crews in accordance with Article 292 of the Convention, and requests of provisional measures under the terms provided by Article 290⁹.

Pacific Ocean (Chile v. European Union), initiated in December of 2000. On 25 November 2009, the parties jointly requested the Special Chamber to issue an Order for discontinuance of the case.

⁸ The Article 288.2 of the Convention, has been implementing in The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001), authorizing the ITLOS's intervention in conservation and fisheries management.

⁹ To date, twenty-two cases have been submitted to the Tribunal: nine prompt releases of vessels and crews'

2.3.1. *Prompt release of vessels and crews institute*

The procedure is provided for in Article 292 of the Convention, when it states that when the authorities of a State Party detain a foreign flag vessel belonging to another State Party, this must be promptly informed through appropriate channels, like diplomatic channels. Likewise, the rule adds that the issue may be submitted to a court or tribunal agreed upon or, after 10 days, the flag state of the vessel may request the prompt release to the tribunal that the detaining state has chosen pursuant to Article 287 of the Convention¹⁰, or to the Hamburg Tribunal that has residual and mandatory jurisdiction in this kind of procedures.

The above is founded on Article 73 of the Convention, referring to the “Enforcement of laws and regulations of a coastal state” in the exercise of its sovereign rights over the exploration, exploitation, preservation and administration of living resources of its EEZ, which enables it to legislate the necessary measures to ensure compliance with rules and regulations enacted in accordance with the Convention, including visits, inspections, boarding and, where appropriate, initiation of court proceedings¹¹.

In this regard, Hugo Caminos clarifies this issue by explaining that:

“Prompt release is provided for in cases of detention by a coastal State in order to guarantee compliance with its laws and regulations established in the exercise of its sovereign rights over the exploitation of the living resources in its exclusive economic zone. Another case is that of executory measures by coastal States of the rules and international standards for the prevention, reduction and control of pollution caused by ships in their territorial waters or exclusive economic zone”¹².

applications; and six requests for the prescription of provisional measures.

¹⁰ Yturriaga Barberán rightly observes that the Article 287 is a jurisdiction “a la carta”. See YTURRIAGA BARBERÁN, José Antonio. *Ámbitos de soberanía en la Convención de Naciones Unidas sobre Derecho del Mar. Una perspectiva española*. Madrid, Ediciones del Ministerio de Asuntos Exteriores, 1993, p. 493.

¹¹ Article 73 is part of a group of provisions of the Convention (Articles 61 to 73) which develop in detail the rule in Article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone are concerned. In the context of a violation concerning the bunkering of fishing vessels, a reference to Article 40 of the Guinean Maritime Code, in view of its textual correspondence with Article 56 of the Convention, must be read as dealing with the matters covered by Article 73 of the Convention. See *The M/V “SAIGA” Case (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, ITLOS, and Judgment of 4 December 1997, para. 66.

¹² CAMINOS, Hugo. “The international tribunal for the law of the sea: several considerations about its jurisdiction and procedures”. *First Meeting of International and Regional Courts of Justice of the World on the One-Hundredth Anniversary of the Central American Court of Justice*. Managua 4 and 5 October 2007.

On the other hand, the jurisdiction of a court or tribunal by virtue of Article 292 is extremely restrictive, as expressed in paragraph 3 of this provision:

“The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time”.

Likewise, a state may detain a foreign vessel and hold it in port under laws and regulations or applicable rules aimed at preventing, reducing or control contamination in its exclusive economic zone (hereinafter EEZ) or territorial sea, pursuant to Part XII of the Convention.

Indeed, Article 220 provides that if there is a clear basis for believing that a vessel, during its passage through the territorial sea of a State, violated environmental rules and regulations, the coastal State shall be able to inspect such vessel and initiate, in case of verifying said extreme behavior, the corresponding proceedings, including detention of the vessel.

Finally, Article 226.1 (a) of the Convention refers to the visit of foreign vessels and provides that states shall not retain a foreign vessel for longer than necessary for carrying out the investigations provided for in Articles 216, 218 and 220. If from the physical inspection (examination of certificates, records and other documents that vessels are required to carry according to international rules and standards generally accepted) there arises a violation of rules relating to protection and preservation of the marine environment, a release through a bond or reasonable financial security is applicable. This latter situation becomes relevant for the prompt release institute as in case that a vessel represents a threat to the marine environment, it is possible to deny it or subject it by ordering that the vessel be directed to the nearest shipyard for repairs.

2.3.2. Provisional Measures

Understood as preliminary procedure, the Tribunal has mandatory jurisdiction regarding provisional measures according to Article 290.1 of the Convention, as it acknowledges the need of urgent pronouncements in situations that require not only preservation of the respective rights of the parties, but also prevention of serious damage to the marine environment while waiting for a final decision¹³.

¹³ Article 290 (1) of the Convention, expresses: “If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve

The Tribunal has a wide selection criterion to prescribe the provisional measures it deems pertinent, to the point that it may set the actions requested by one of the parties or not apply those requested and modify them in order to preserve the rights of the parties in the most effective way. After the provisional measures are granted they may be modified or revoked if circumstances, which deserved their adoption, change. Indeed, the Convention provides in Article 290.3 that provisional measures “(...) may be prescribed, modified or revoked at request of one of the parties in dispute and after giving the parties an opportunity of being heard”.

According to the Convention, provisional measures may be prescribed in accordance with two assumptions: the assumption of Article 290.1 already mentioned; and the hypothesis of Article 290.5, pending the constitution of a court or tribunal appointed by agreement between the parties for examining the issue. This way the jurisdiction of the Hamburg Tribunal is justified for prescribing the necessary preservation measures in view of the risks that the time required in these cases might entail. Likewise, the last paragraph mentioned above enables the prescription of these measures if the tribunal deems *prima facie* that the court or tribunal to be constituted to examine the merits of the dispute shall have competence and if the urgency of the situation so requires it¹⁴.

Caminos explains that both paragraphs (1st and 5th) provide for two different situations: in the first situation “(...) the Tribunal shall have the power to prescribe provisional measures if it deems *prima facie* that it will be competent to deal with the merits of the issue”; while in the second situation “(...) the Tribunal shall have the power to prescribe provisional measures if it deems *prima facie* that the arbitration court to be constituted shall be competent”¹⁵.

the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision”.

¹⁴ The Statute of the ITLOS, Article 25 expresses: “1. In accordance with Article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures. 2. If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, *the provisional measures shall be prescribed by the chamber* of summary procedure formed under Article 15, paragraph 3, of this Annex. Notwithstanding Article 15, paragraph 4, of this Annex, *such provisional measures may be adopted at the request of any party to the dispute. They shall be subject to review and revision by the Tribunal*” (emphasis added). In own opinion, this Article must connect to Article 91 of Rules of the ITLOS (amended on 17 March 2009): “1. *If the President of the Tribunal ascertains that at the date fixed for the hearing referred to in Article 90, paragraph 2, a sufficient number of Members will not be available to constitute a quorum, the Chamber of Summary Procedure shall be convened to carry out the functions of the Tribunal with respect to the prescription of provisional measures. 2. The Tribunal shall review or revise provisional measures prescribed by the Chamber of Summary Procedure at the written request of a party within 15 days of the prescription of the measures. The Tribunal may also at any time decide *proprio motu* to review or revise the measures*”.

¹⁵ CAMINOS, “The international tribunal...”, *op.cit.*, p. 5.

Article 290.5 of the Convention has been an important source of application in the jurisprudence of the Tribunal and it is established in each case that provisional measures are binding on the parties, as it happened in the Bluefin Tuna case, in which the Hamburg Tribunal for grounding its competence on the jurisdictional basis of an arbitration court to be constituted under the Convention, ordered to limit the experimental fishing programs of Japan and at the same time to resume negotiations aiming at preserving the resource. Likewise, the institute has been recently used by the Tribunal in the Frigate A.R.A. Libertad issue, when it ordered the immediate supply and unconditional release of the vessel¹⁶.

The provisional measures provided for in the Convention have interesting similarities, but even more interesting differences compared to the Statute of the ICJ.

In effect, the first element in which the Hamburg Tribunal differs from the ICJ is that the latter has the power of indicating provisional measures *ex officio* –notwithstanding the fact that their filing may be requested by the parties in dispute–, and it must immediately communicate the provisional measures to the parties and to the Security Council of the United Nations.

It has also been correctly claimed that the Convention uses the term “decretar” (official text in Spanish) or “prescribe” (official text in English and French) and not the verb “indicate”, used in the Statute of the ICJ, which certainly expresses greater conviction on the mandatory nature of the provisional measures ordered by the Hamburg Tribunal. In this regard, González Napolitano explains that the wording of Article 290 shows their obligatoriness as the verbs “decree” and “prescribe” are stronger than the verb “indicate” used in the Statute of the ICJ for establishing provisional measures¹⁷.

Lastly, in our opinion, both tribunals have a third difference: the *locus standi* in the Hamburg Tribunal is broader than that established for the ICJ. It is not a matter relating to the establishment of provisional measures *motu proprio*, but to the scope granted by Article 290 of the Convention when it sets the formula “to prevent that serious damages be caused to the marine environment”.

¹⁶ See *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS, Provisional Measures, Order of 27 August 1999; *The MOX Plant Case (Ireland v. United Kingdom)*, ITLOS, Provisional Measures, Order of 3 December 2001; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, ITLOS, Provisional Measures, Order of 8 October 2003; *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS, Provisional Measures, Order of 15 December 2012.

¹⁷ GONZÁLEZ NAPOLITANO, Silvina S. “La importancia de las medidas provisionales en las controversias relativas a la pesca”, in DEL VECCHIO, Angela (ed.). *La gestión de los recursos marinos y la cooperación internacional: Actas del seminario, Santiago de Chile, 22-23 de marzo de 2004*. Roma, Instituto Ítalo-Latino Americano, 2006, p. 172. In a similar vein, see JUSTE RUIZ, José, “La Solución de Controversias en el Convenio de las Naciones Unidas sobre el Derecho del Mar”, in BOU FRANCH, Valentín (Coord.). *Nuevas controversias internacionales y nuevos mecanismos de solución*. Valencia, Tirant lo Blanch, 2005, p. 356.

3. The *Grand Prince* Case (Belize v. France)

This major case of jurisprudence settled an invaluable precedent regarding the relation between the prompt release proceedings, and the merits in municipal or local courts. Arrested on December 20th, 2000, the Belize flying flag *Grand Prince* vessel was captured by a French surveillance frigate for unlawful fishing in the exclusive economic zone of the Kerguelen Islands¹⁸.

Immediately, the owners' attorney submitted an application for a prompt release on bond to the International Tribunal for the Law of the Sea. Towards this, surprisingly, the Tribunal addressed a lack of jurisdiction since the applicant failed to establish the vessel's flag state.

After its arrest and followed confiscation, the *Grand Prince*, was conducted to the island of Reunion; the captain crew was guilty of all charges, among them we can name fishing without authorization in the French EEZ and also omitting giving notice of the vessel's entrance into that zone.

On January 2001, the Tribunal of Saint-Paul confirmed the binding and the arrest of the vessel conditioning the release under a bond payment of FF 11.400.000. Taking into account the masters cooperation with French Authorities, the court only sentenced him with FF 200.000 fine, and FF 20.000 in damages to each of several civil claimants¹⁹.

Regarding the relation between proceedings of the Tribunal and of domestic courts, Article 293 of the Law of the Seas Convention, stipulates that the international court or tribunal shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. In this regard, two questions may arise: the first one relates to the applicability of the exhaustion of local remedies rules; the second question concerns the relation between the Tribunal's proceedings and decisions which have already been rendered by domestic courts of the detaining state²⁰.

Upon the submitted payment of a bank guarantee of FF 11.400.000, the ship-owner correctly filed a request to the chief judge of the tribunal d'instance of Saint Paul to order the prompt release of the vessel, as provided in the Article 73-2 of the convention²¹.

¹⁸ OXMAN, Bernard H., and BLANTZ, Vincent. "Law of the Sea Convention- Prompt Release". *American Journal of International Law*, January 2002.

¹⁹ OXMAN and BLANTZ, "Law of the Sea...", *op.cit.*

²⁰ TANAKA, Yoshifumi. "Prompt Release in the United Nations Convention on the Law of the Sea: Some reflections on the ITLOS jurisprudence". *Netherlands International Law Review*, v. LI, 2004, pp. 237-271.

²¹ Article 73(2) of the Convention "Arrested vessels and their crews shall be promptly released upon the

Unexpectedly, the chief judge rejected the request in light of the confiscation of the vessel, its equipment and gear, as well as fishing products seized; decided on the merits by the French courts beyond the scope of a prompt release proceedings, failing to comply with the law frame that regulates these disputes.

What is true is that France had a right under Convention Article 73 to impose penalties for violation of its fisheries laws in its sea, or more deeply, in their EEZ. Exegetically, the article does not exclude a confiscation, just mentions the imprisonment and corporal punishment. But, and this fact should be highlighted, France had the obligation of releasing the vessel promptly on reasonable bond, and this was overlooked. Eventually, this created an important question with respect to the relations between prompt release proceedings and decisions by domestic courts regarding merits of the dispute²².

Furthermore we shall examine both parties' arguments and the Courts decision on this matter. Primarily, the French criminal court points out that the application of prompt release became moot since they had already ordered the confiscation of the vessel some time before. The Belizean Mr. Peneles Alvares, responded that according to this French argument, every state could perfectly avoid the requirement of prompt release of vessels and crews since it could invoke a decision very quickly and then argue that if the decision is provisionally executed, it does not have to release the ship²³. Here the Article 300 plays an important role as it reads: "Good faith and abuse of rights: States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".

Finally, and despite this disagreement, the tribunal set itself aside and did not examine the controversy. This can resume to the strict acceptance of the Article 293 which states "(...) shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". It seems by the facts that once a domestic court has rendered a decision on the merits, the Tribunal has no longer de power nor the jurisdiction to render a judgment on a prompt release conflict.

posting of reasonable bond or other security".

²² TANAKA, "Prompt Release...", *op.cit.*, pp. 237-271.

²³ TANAKA, "Prompt Release...", *op.cit.*, pp. 237-271.

4. The “ARA Libertad” Case (Argentina v. Ghana)

Two hundred years after the *Schooner Exchange* issue the immunity of vessels was again in the center of specialized debate, to the extent that the legal situation of the Frigate A.R.A. Libertad at Ghanaian courts acquired a major impact on media and on the international community, especially after the second week of November 2012, due to a request of provisional measures filed by the Argentine Republic at the Hamburg Tribunal.

In this case, the dispute concerns the situation in port of the school-ship of the Argentine Navy, A.R.A. Libertad, detained in Ghana during its stopover at port Tema on occasion of an official visit.

The issue had been submitted by the Argentine Republic to an arbitration court according to Annex VII of the United Nations Convention on the Law of the Sea, and pending the constitution of said court, the Argentine Republic requested the Hamburg Tribunal the adoption of provisional measures that were finally granted by the Tribunal when it ordered on December 15, 2012 the immediate release of the vessel and its crew. The foundation for the unanimous decision was based on the probable aggravation of the dispute, due to attempts by Ghanaian authorities to board the vessel, take control, and lead it to a different location, an issue that was repelled by the Argentine crew.

4.1. *Synthesis of facts and positions alleged by the parties*

The case context is relatively simple: a speculative investment fund established in the Cayman Islands (NML Capital Limited) acquired bonds issued by the Argentine Republic between 2001 and 2003, under a financial services agreement signed on October 19, 1994 with the Bankers Trust Company for issuance of bonds together with two bond contracts signed in year 2000. Then, unable to pay for these values, Argentina went into default and offered to its various creditors swapping titles, offer that was rejected twice by NML Capital Limited, in 2005 and in 2010, while it had initiated legal actions against Argentina at the Court of First Instance of the District of New York, under a jurisdiction clause provided for in the Annex to the 1994 Agreement referred to and included in the contracts signed in 2000, obtaining a final judgment which convicted Argentina to pay the amount of U\$S 284,184,632.30 plus interest.

Later, NML sought to execute the judgment by searching Argentina’s property and assets in different countries like France, United States, Belgium and Switzerland among others, without success until the moment of arrival at Port Tema (Ghana) of the Frigate A.R.A. Libertad, on October 1, 2012, on an official visit agreed by both governments, as part of its instruction itinerary.

Pursuant to legal actions initiated by the investment fund on October 2, 2012, an official of the Judicial Power appeared to notify an injunction from the Commercial Judge of Accra, Adjei Frimpong, ordering a precautionary measure (specifically an embargo) on the vessel, without having heard the other party. At that time, Argentina invoked immunity before Ghanaian courts without success. Argentina held that entry of the Frigate A.R.A. Libertad into Ghana's territorial waters was authorized by Ghana through an agreement reached by interchange of diplomatic notes between May and June 2012.

Argentina argued that this judicial measure affected the immunity of the vessel pursuant to Article 32 of the Convention (it must be remembered that both states are state parties) and that likewise, the detention of the Frigate A.R.A. Libertad, as carried out by Ghana, violated rights recognized by other provisions of the Convention in addition to Article 32 already referred to, in particular, Articles 18.1 (b), 87.1 (a) and 90. Argentina indicated that the behavior of Ghana prevented the Frigate A.R.A. Libertad from exercising its right of leaving port Tema and Ghana's jurisdictional waters, in accordance with the right of innocent passage; it prevented this flagship of the Argentine State from exercising its rights of navigation in various sea areas; it prevented the Frigate A.R.A. Libertad from completing its itinerary established by agreements with third party States; and finally, it prevented the Frigate A.R.A. Libertad from carrying out its regular maintenance program as training vessel. In addition, Argentina argued that Article 32 of the Convention confirms a firm rule of general international law, and that under customary international law recognized and enshrined by the Convention, the immunity of warships is a special and autonomous type of immunity, which grants these ships complete immunity. Likewise, it interpreted that Article 32 is applicable to all the geographic scope of the Convention and that the immunity of warships is identical in territorial seas and in internal waters²⁴.

After a little more than a month of diplomatic negotiations –this included a High-Level Mission to Accra by Vice-Chancellor Zuain and the Secretary of International Affairs of the Ministry of Defense, Lic. Alfredo Forti, and the repatriation of most of the crew, on October 24, 2012, leaving only the Captain together with 44 members-, and unsuccessful claims before Ghana's local courts, the Argentine Republic considered all political means of dispute settlement were exhausted pursuant to Article 295 of the Convention, and initiated an arbitral procedure in accordance with Annex VII of the Convention²⁵.

²⁴ *The "ARA Libertad" Case (Argentina v. Ghana)*, ITLOS, Request for Provisional Measures submitted by Argentina. [on line] <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf> [reviewed: June 10, 2015].

²⁵ It should be noted that Ghana is a party to the Convention but did not choose the Hamburg Tribunal as dispute settlement option, or any other of the alternatives included in Article 287. Meanwhile, Argentina opted in the first place for the Hamburg Tribunal and in the second place for the arbitration in Annex VIII.

On November 7, 2012, the authorities of Ghana attempted to board the Frigate A.R.A. Libertad by force for moving it to another sector of the port, without authorization from its Commander.

Later on, on November 14, 2012, pending the constitution of the Arbitration Court, Argentina filed before the Hamburg Tribunal an application for provisional measures under Article 290.5²⁶, requesting Ghana's unconditional consent for the departure of the Frigate A.R.A. Libertad from port Tema and the jurisdictional waters of that State, enabling its replenishment for that purpose, based on foreseeable irreparable damages to the rights in dispute²⁷.

Meanwhile, Ghana requested the Tribunal that: 1) the application for provisional measures petitioned by Argentina at the public hearing of November 14, 2012 be rejected; and 2) Argentina be ordered to pay all costs related to the application.

Ghana considered that the Arbitration Court to be constituted under Annex VII lacked jurisdiction *prima facie*, as none of the rules invoked by Argentina referring to immunity was applicable to acts that occurred in internal waters. Specifically, internal waters do not involve an interpretation or application of the Convention and if that rule existed, it could be found only outside the Convention, either under other customary rules or under conventional international law²⁸.

4.2. The role and ordinance of the Hamburg Tribunal. Further end of the dispute

4.2.1. The Hamburg Tribunal order for provisional measures in the Frigate A.R.A. Libertad issue

On December 15, 2012 the Tribunal pronounced judgment regarding the application for provisional measures filed by the Argentine Republic.

[on line] <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm> [reviewed: June 10, 2015].

²⁶ By means of a note dated October 29, 2012 addressed to the Minister of Foreign Affairs and Regional Integration of the Republic of Ghana, the Argentine Republic initiated an arbitration procedure under Annex VII of the Convention, requesting the adoption of provisional measures. The Tribunal has recognized to date 22 issues, 9 of which were applications for prompt release of vessels and their crew on one side, and 6 applications for provisional measures on the other. It should be remembered that the Seabed Disputes Chamber has mandatory jurisdiction on disputes relating to activities developed in the Area, as well as advisory jurisdiction on legal issues arising within the scope of the activities of the Authority.

²⁷ In this regard, it is not a minor detail that there are also points of discussion like the possible existence of a "waiver" thereof, issue that we will discuss later.

²⁸ *The "ARA Libertad" Case (Argentina v. Ghana)*, ITLOS, Written Statement of the Republic of Ghana.

To begin its analysis of this case, the Tribunal had to verify the existence of a dispute between the parties, if the arbitration court constituted under Annex VII would have jurisdiction *prima facie*, and if the situation was in fact so urgent, in order to justify the adoption of provisional measures. Indeed, the Hamburg Tribunal verified the existence of difference of opinion between the parties regarding the application of Article 32 of the Convention and thereby the existence of a dispute concerning its interpretation or application, thus enabling the jurisdiction *prima facie* of the arbitration court and therefore also of the Hamburg Tribunal itself. Likewise, it also determined that the interchange of opinions and negotiations between the parties had concluded²⁹.

Regarding the risk of delay alleged by Argentina and rejected by Ghana, the Tribunal considered a context where the dispute was aggravated by the fact that it involved a warship and this could put at risk, in this specific case, the friendly relations between the states, pointing out the boarding attempt by Ghanaian authorities occurred on November 7, 2012 and the possibility that such action be repeated. That demonstrated at the discretion of the Tribunal the severity of a situation that required the urgent need of adopting provisional measures pending the constitution of the arbitration court, in order to preserve the rights of the parties³⁰.

Consequently, the Hamburg Tribunal stated before issuing its ordinance that both parties had to undertake not to adopt any action that might aggravate or widen the dispute submitted to the arbitration court³¹; that it was authorized to prescribe various measures requested by the parties³²; that each party should submit a report on compliance with the measures ordered³³; and that the decision taken in no way prejudged the merits of the case to be decided by the arbitration court³⁴.

By the above, the Tribunal prescribed unanimously provisional measures under Article 290.5 of the Convention, while the constitution of the arbitration court from Annex VII was pending. These measures were that Ghana permitted the necessary replenishment for the release of the Frigate A.R.A. Libertad, its Commander and crew, immediately and unconditionally, ensuring likewise the departure from port Tema and the marine areas under its jurisdiction. In addition, it requested that each State Party sent an initial report on compliance with the measures, and decided legal costs by order.

²⁹ *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS, Provisional Measures, Order of 15 December 2012, para. 60-72.

³⁰ *The “ARA Libertad” Case...* Provisional Measures, para. 93-100.

³¹ *The “ARA Libertad” Case...* Provisional Measures, para. 101.

³² *The “ARA Libertad” Case...* Provisional Measures, para. 102.

³³ *The “ARA Libertad” Case...* Provisional Measures, para. 103.

³⁴ *The “ARA Libertad” Case...* Provisional Measures, para. 106.

Without prejudice to the above, some separate statements and opinions of the members of the Tribunal deserve to be highlighted.

For example, Judge Paik focused his attention on procedural aspects aiming at considering the urgency condition and the eventual irreparable damage in the light of the Argentine request. Likewise, it pointed out that according to Ghana, the Executive Power of the State recognized the immunity of warships, but due to the division of powers they could not force the Judicial Power to change its position. Essentially, Paik declared that Ghana could not invoke provisions of its national law for violating an international commitment³⁵.

Judge Lucky, in his separate opinion, considered that the interpretation of the scope of the immunity is a question that falls within the purview of the Convention and therefore, the arbitration court has jurisdiction *prima facie*. In this sense, he interpreted that the vessels had immunity according to international law and also as a consequence of Ghana's invitation, but that the analysis of its exact scope corresponded to the arbitration court on occasion of considering the merits of the case³⁶.

Judge Rao, on its part, highlighted that Ghana's attempt to move the Frigate had enough character for establishing the risk entailed by the delay invoked by Argentina. Specifically, he remarked the important implications of such an attempt, when it comes to a warship, in the light of peacekeeping and international security. He also considered that Ghana had tried to invoke the division of powers in its national law to evade its international obligations. In this sense, he considered the application of the *estoppel* doctrine, as the vessel entered into Ghanaian waters by invitation of that same government, and he referred to the *Schooner Exchange* case. Lastly, he considered that any attempt to violate the immunity of a warship implies a violation of the principle of non-use of force between states³⁷.

Finally, Judges Wolfrum and Cot, the most interesting opinion for the purpose of this paper, stated that the rule of immunity of warships in internal waters of a state is not a subject covered by the Convention but by customary international law and according to the Convention itself, the arbitration court can resolve only issues derived from the application or interpretation of the Convention, but not derived from custom. For this reason, they inferred that the arbitration court would not have jurisdiction *prima facie*, however they considered that by application of the *estoppel* principle Ghana was prevented from opposing to the prescription of provisional measures requested by Argentina, considering the numerous contradictions of the African country in this case.

³⁵ *The "ARA Libertad" Case...* Provisional Measures, Declaration of Judge Paik.

³⁶ *The "ARA Libertad" Case...* Provisional Measures, Separate opinion of Judge Lucky.

³⁷ *The "ARA Libertad" Case...* Provisional Measures, Separate opinion of Judge Rao, specially, para. 16ss.

On this basis, their opinion is that the arbitration court would have jurisdiction *prima facie* and that the Tribunal was authorized to prescribe provisional measures. Particularly, considering that the government of Ghana recognized the immunity of warships in the territorial waters of a state. Therefore, as both parties agree on this point, these members emphasized the role of the Tribunal in helping the parties to implement this coincidence in compliance with international law³⁸.

In short, it is worth noting that the Hamburg Tribunal reaffirmed warships as an expression of the sovereignty of the state whose flag they carry, and that according to general international law, warships enjoy immunity for carrying out their mission and fulfill their functions, also in internal waters, concepts that had not been objected by Ghana³⁹.

Likewise, the Tribunal added that any act preventing the fulfillment of the mission and obligations of a warship by force constitutes a dispute that may put the friendly relations between states at risk and, in this case, the actions adopted by Ghanaian authorities for preventing the Frigate A.R.A. Libertad from completing its mission had affected the immunity enjoyed by this vessel, pursuant to general international law. In effect, the boarding attempt by Ghanaian authorities occurred on November 7, 2012 and the possibility that such an action be repeated, showed the seriousness of the situation and emphasized the urgent need of adopting measures pending the constitution of the arbitration court, in order to preserve the rights of the parties⁴⁰.

4.2.2. The culmination of the dispute between Argentina and Ghana

On September 27, 2013, the parties concluded the dispute by means of an agreement negotiated by their main agents: the Ambassador of the Argentine Republic, Susana Ruiz Cerutti and the Minister of Justice and Prosecutor General of the Republic of Ghana, Mrs. Marietta Brew Appiah-Oponq.

The agreement, signed in The Hague, considered the Judgment issued by the Supreme Court of Ghana on June 20, 2013 revoking the embargo ordered in first instance on the Frigate A.R.A., on October 2, 2012, as it considered the immunity from execution enjoyed by the vessel, property of a sovereign state assigned to military purposes, was applicable in this case.

Likewise, the Supreme Court of Ghana itself recognized also that the embargo measure could endanger the peace and security of the forum state, and likewise ensured the guarantees of non-repetition demanded by Argentina in the arbitration process, by forcing

³⁸ *The "ARA Libertad" Case...* Provisional Measures, Separate opinion of Judge Wolfrum and Judge Cot.

³⁹ *The "ARA Libertad" Case...* Provisional Measures, para. 93-98.

⁴⁰ *The "ARA Libertad" Case...* Provisional Measures, para. 93-100.

all lower courts of that country to refrain from ordering new embargos on military property of foreign states, as well as to spread that Judgment in the international community, in the field of multiple international organizations, including all the members of the United Nations, of the African Union, all the State parties to the Convention and the Hamburg Tribunal itself, among others⁴¹.

5. The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)

The dispute between the Netherlands and the Russian Federation regarding the vessel *Arctic Sunrise* and its crew constituted issue Nr. 22 submitted to the consideration of the Hamburg Tribunal. Following, we will point out the main facts and points of interest in the decision of the Tribunal.

5.1. The facts and the right invoked by the parties in this case

5.1.1. Synthesis of the facts and beginning of the dispute

The *Arctic Sunrise* was a vessel crewed by 28 national activists from different states (Argentina, Brazil, Canada, Denmark, the United States, Finland, France, Holland, Italy, New Zealand, Poland, United Kingdom, Czech Republic, Russia, Sweden, Turkey and Ukraine), and counted also with the presence of a cameraman and a freelance photographer.

The vessel and its crew were detained by Russian authorities by mid September 2013, in the proximity of a security zone belonging to the oil platform Pirazlomnaya, located in the EEZ of the Russian Federation, and carried them to the port city Murmansk.

The facts which derived in the detention of the vessel are disputed by the parties. It is argued that two activists had been able to reach an oil platform belonging to the Russian consortium Gazprom with the purpose of denouncing the damage that the extraction of crude oil would cause in the Arctic.

The basic argument of the Netherlands is that the Russian Federation lacked the right to board and detain the *Arctic Sunrise*, and that the boarding, as well as the detention of the vessel, constituted a continuous and serious violation of its rights as flag state

⁴¹ CANCELLERÍA ARGENTINA, Dirección de Prensa, Información para la prensa N° 243/13.

recognized in the Convention, in particular, its duties of exercising in an effective way jurisdiction and control over the vessels carrying its flag. In this sense, the Netherlands alleged that the Russian authorities did not comply with Article 94.6 of the Convention that provides the following:

“A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation”.

In other words, the Netherlands affirmed that the Russian Federation should not have boarded the *Arctic Sunrise*, and should have reported the situation, so that the flag state itself investigated, taking the necessary measures in this regard.

Likewise, as pointed out by the requesting state, the Russian Federation gave contradictory explanations of its actions, including suspicion of terrorism, risk to the environment, piracy and dangerous maneuvers.

Meanwhile, the Russian Federation interpreted that it is not necessary to ask for consent from the flag state of a foreign vessel for making an inspection visit to it, and that consequently, its actions regarding the *Arctic Sunrise* and its crew have been (and so will be) based on its criminal jurisdiction, in order to secure compliance with its laws and regulations as coastal state in accordance with the Convention.

Both states interchanged points of view, as reflected by the interchange of diplomatic notes and the official correspondence between them, from September 19, 2013, including the note dated October 3, 2013 from the Ministry of Foreign Affairs of the Netherlands to the Embassy of the Russian Federation.

Among other communications, it should be remarked that the Netherlands requested from the Russian Federation the immediate release of the vessel and its crew in its note from September 26, 2013, and also consulted if said release would be facilitated by a previous deposit of a bond or other reasonable financial guarantee fixed by the Russian Federation. The detaining state did not answer this question.

As we said before, although both states are state parties to the Convention, they did not accept the same procedure for settling their disputes according to Article 287, and consequently, the corresponding procedure for settlement of the merits of this dispute was the Arbitration provided for in Annex VII of the Convention.

Thereby, on October 4, 2013, the Netherlands instituted the procedure provided for in Annex VII of the Convention against the Russian Federation, so that it be decided and declared that:

1.
 - a. The Russian Federation boarded, investigated, inspected and detained the vessel *Arctic Sunrise*, without notifying the flag state so that it could exercise its right of protecting the vessel, particularly as regards freedom of navigation according to Articles 58.1 and 87.1 (a) of the Convention and to customary international law;
 - b. The behavior of the Russian authorities prevented the Netherlands from applying its jurisdiction regarding the vessel *Arctic Sunrise*, in accordance with Article 58 and Part VII of the Convention, and pursuant to customary international law;
 - c. By boarding the *Arctic Sunrise* as indicated above, and initiating later on judicial proceedings against the crew, the Russian Federation prevented the Netherlands from exercising its right of diplomatic protection, regardless of their nationality, and its right of obtaining reparation, as well as its freedom to leave the territory and the marine zones under jurisdiction of the Russian Federation, as provided for by Articles 9 and 12.2 of the International Pact on Civil and Political Rights of 1966, and in accordance with customary international law;
2. The violations referred to constitute internationally illicit acts which make the Russian Federation internationally responsible:
3. Those acts imply legal consequences, requiring from the Russian Federation that:
 - a. The internationally illicit acts cease immediately;
 - b. It provides the Netherlands assurances and guarantees of non-repetition;
 - c. It fully repairs damages caused.

Later on, on October 21, 2013, after expiration of the two-week term provided for in Article 290.5, and pending the constitution of the arbitration court, the Netherlands submitted to the Hamburg Tribunal an application for provisional measures.

Regarding competence and jurisdiction of the Hamburg Tribunal, it is of interest to point out that the Russian Federation, after ratifying the Convention on March 12, 1997, declared that among other things, it did not accept the procedures provided for in Section 2, Part XV of the Convention, as to decisions adopted in relation to application of its rules, based on the exercise or jurisdiction of its sovereign rights. In the words of the declaration itself:

“The Russian Federation declares that, in accordance with Article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of Articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations”.

In other words, Russia intended to exclude itself from the arbitral procedure in Annex VII of the Convention, initiated by the Netherlands in the case under analysis, and consequently, question the jurisdiction of the Hamburg Tribunal in the provisional measures procedure⁴².

5.1.2. The request of provisional measures by the Netherlands and the position of the Russian Federation

The requesting state pointed out that as a result of the continuous detention of the *Arctic Sunrise* in KolaBay, MurmanskOblast, its general condition was deteriorating and the lack of a planned intensive maintenance of its systems threatened the safety and seaworthiness of the vessel itself, thus creating a risk to the marine environment, which might be aggravated by the harsh weather of the region.

The Netherlands stated in addition that the jurisdiction of coastal states on the establishment and use of installations and structures is limited to the rules contained in Article 56.1 of the Convention, and is subject to the duties provided for in Articles 56.2, 58 and 60 of the Convention.

On the other hand, the Netherlands added that the prohibition to board foreign vessels offshore provided for in Article 110 of the Convention is also applicable to the EEZ under Article 58.2. In effect, they alleged that the right of visit and inspection in these cases constitutes an exception to the freedom of navigation and the jurisdiction of the flag state, justification that does not appear in this case.

⁴² *The Arctic Sunrise Case (Netherlands v. Russian Federation)*, ITLOS, Order of 22 November 2013, para. 9.

In the application submitted on October 21, 2013, the Netherlands requested the Hamburg Tribunal to prescribe the following provisional measures⁴³:

1. Immediate replenishment of the *Arctic Sunrise*, with the purpose of departing from the location where it is detained, exercising its freedom of navigation in the marine areas under jurisdiction of the Russian Federation;
2. Immediate release of the members of the crew of the *Arctic Sunrise*, allowing their departure from the territorial sea and jurisdiction of the Russian Federation;
3. Suspension of all legal and administrative proceedings and abstention by the Russian Federation from initiating any further proceedings relating to the incidents of arrest and detention of the *Arctic Sunrise* either against the vessel, the members of the crew, its owners or its operators: and,
4. To prevent that any other action aggravates or prolongs the dispute.

In the foundation of their claim, the Netherlands requested the Tribunal that it seriously considered the “irreversible” damage of maintaining the vessel detained and the crew deprived of their freedom, especially, in view of the lack of guarantees from the Russian Federation regarding maintenance of the *Arctic Sunrise*, with the consequent risk for its seaworthiness and for the marine environment considering the danger of a fuel spill.

It should be remembered that the position of the Russian Federation throughout the process was to refuse to participate in it by interpreting that the arbitration court to be constituted as well as the Hamburg Tribunal lacked competence and jurisdiction in this issue.

5.2. The Order of 22 November 2013

The Hamburg Tribunal issued its decision regarding the application for provisional measures filed by the Netherlands, after considering it in the light of Article 290.5 of the Convention and Articles 21, 25 and 27 of the Statute of the Tribunal.

To start its analysis of this case, the Tribunal had to: 1) verify the existence of a dispute between the parties; 2) determine if the arbitration court to be constituted under Annex VII would have jurisdiction *prima facie*; and 3) verify if the situation appeared urgent in order to justify the adoption of provisional measures.

⁴³ *The Arctic Sunrise Case (Netherlands v. Russian Federation)*, ITLOS, Request for Provisional Measures submitted by the Netherlands, p. 10, para. 47.

In this sense, in the light of the positions adopted by the parties, the Hamburg Tribunal determined the framework of the dispute (and the basis for the jurisdiction of the arbitration court to be constituted for analyzing de merits of the case) in the difference of opinions regarding the interpretation and application of the provisions of the Convention referring to rights and obligations of the flag state and the coastal state, in particular its Articles 56,58, 60, 87 and 110.

After determining the dispute and the facts of the case we have pointed out, the Tribunal had to consider the situation of urgency and danger alleged by the requesting state, particularly the detention of the crew that was in prison, considering the possibility of a long detention pending the constitution of the arbitration court and the resolution of the dispute.

Likewise, the Hamburg Tribunal took into account the note submitted on September 26, 2013 by the Minister of Foreign Affairs of the Netherlands to the Russian Federation which had not been answered⁴⁴, as well as the absence of the Russian Federation in the process, recalling that this was not an obstacle to the process itself and did not prevent the Tribunal from prescribing provisional measures, provided that the parties had had an opportunity to submit their observations, opportunity that the Russian Federation had and chose not to use.

The application process had also an element of interest that should be mentioned: the request of October 30, 2013 from Greenpeace for introducing itself as *amicuscuriae* and provide information to the process. After the opinions of the parties, the Tribunal rejected this participation mainly due to Russian objections⁴⁵.

The Tribunal sustained that under Article 290 of the Convention, it could establish a bond or other financial guarantee, as provisional measure for the release of the vessel and the persons detained and that, in accordance with Article 89.5 of the Rules of the Tribunal (which allows prescribing provisional measures equal or partially different to those requested) and with Article 290.5 of the Convention, it corresponds to order that the vessel *Arctic Sunrise* and its crew be released through the constitution of a bond or other financial guarantee, allowing its departure from the territorial and marine areas under jurisdiction of the Russian Federation.

The Tribunal determined that a bond or financial guarantee of 3.6 million Euros was convenient for the release of the vessel and the crew, taking into account the rights claimed and the circumstances of the case⁴⁶.

⁴⁴ *The Arctic Sunrise Case...* Provisional Measures, para. 92-93.

⁴⁵ *The Arctic Sunrise Case...* Provisional Measures, para. 15-20.

⁴⁶ *The Arctic Sunrise Case...* Provisional Measures, para. 93-95.

Finally, the Hamburg Tribunal decided that each state submitted a report on the evolution of compliance with the provisional measure prescribed.

6. Compliance and conclusions

The above considerations show how popular, but controversial the prompt release of vessels *dilemma* is. One of the major principles of the law of the sea is diminished when another flag's vessel is detained in a foreign port.

It is a fact that the individuals who create the regulations regarding these controversies expect to avoid the usage of violence or corporal means. Since the imminence absence of a central power in the international law, it is compulsory to design a set of statutes and normatives able to overcome such situations.

Luckily, there is a complex regulation system that tries to put up together and foresee the situations that could flourish in the future. The jurisdiction of the ITLOS in contentious disputes, its competence in provisional measures and the prompt release of vessels is a perfect construction that prevents controversies from becoming serious.

History of international law regarding the prompt release of vessels show how imperative is an immediate solution when the capture of a foreign vessel takes place. Many are the central principles lessened when the organizations in charge take a long time ruling. The international status quo, security and peace are in risk of losing their stability for avoiding a serious controversy and the production of irreversible damages.

For instance, and with specific focus in the "ARA Libertad" Case, various principles described in the UN Charter were diminished when the official of the Judicial Power appeared to notify an injunction from the Commercial Judge of Accra, Adjei Frimpong, ordering an embargo on the vessel, without having heard the other party. Another example to be mentioned can be when the authorities of Ghana attempted to board the Frigate A.R.A. Libertad by force for moving it to another sector of the port, without authorization from its Commander among others.

Moreover, counting with a wide spectrum of diplomatic channels is essential. We have mentioned in depth the jurisdiction and competence of the tribunal and the different ways a dispute can be handled, but also, there must exist other mechanisms of negotiation among the parties that could help in the arrival of a successful solution. Furthermore, it is valuable how the international organizations attempt to guide the parties into a pacific negotiation minding the peaceful means of settlement disputes with the creation of the different provisional measures and mechanisms developed in this piece, show how stable international affairs turn out to be.

Despite this exceptional creation, we portrayed how the parties can move away from the settled processes, and the dissimilar ways the Hamburg tribunal and the local courts can interact. Sometimes the local courts establish what it is appropriate for concluding such controversy, and others the tribunal takes over and applies its own jurisdiction. In particular, can mention how the court set itself aside in “The Grand Prince” Case, or how the “ARA Libertad” Case started with a misinterpretation of a judge when deciding the precautionary measure.

Finally many can be the reasons of a vessel’s detention in a foreign port; illegal fisheries, debts or supposed oil extractions. But the important matter to acknowledge is how the international mechanisms and courts are settled to overcome easily and peacefully the different controversies that can show up.