The ARA Libertat Case (Argentina v. Ghana) — ITLOS Orders Release of Argentine Warship “ARA Libertat”

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In December 2012, the International Tribunal for the Law of the Sea (ITLOS) issued an order for the immediate release of the Argentinian warship “ARA Libertat” in The “ARA Libertat” Case (Argentina v. Ghana) (ITLOS Case No. 20). The historic Argentinian frigate had been detained by Ghanaian port authorities in October 2012, pursuant to a court order of the High Court of Accra. This court order had been obtained by US investment company NML Capital in an attempt to enforce a judgment rendered against Argentina in relation to sovereign bonds in the US District Court for the Southern District of New York in 2006.

Pending the constitution of an arbitral tribunal in accordance with Annex VII of the Convention on the Law of the Sea (UNCLOS) to ultimately decide on the lawfulness of the arrest, Argentina requested ITLOS to prescribe as a provisional measure under Article 290(5) of the Convention the immediate release of the ship. In its decision, ITLOS had to address two main issues: first, whether the Annex VII tribunal would prima facie have jurisdiction and, second, whether the ARA Libertat’s detention violated its immunity as a warship.

With regard to the first question, Ghana had submitted that Article 32 UNCLOS, which reiterates that the Convention does not affect the immunity of warships, does not refer to any such immunity in internal waters. Consequently the question of whether warships enjoyed immunity in internal waters lay outside the Convention and offered no basis for the Annex VII Tribunal’s or ITLOS’ jurisdiction.

ITLOS rejected Ghana’s arguments and held that although Article 32 UNCLOS was “included in Part II of the Convention entitled ‘Territorial Sea and Contiguous Zone’, and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas.” In this regard, a dispute between the parties existed in relation to the interpretation or application of the Convention, thereby providing a basis on which prima facie jurisdiction may be founded.

In relation to the second question, Ghana had submitted that a waiver of sovereign immunity declared in the bonds applied and that its interpretation and application was not an issue under the UNCLOS. Instead, Ghana argued, this issue was for the Ghanaian courts to decide, where judicial proceedings were still ongoing. ITLOS rejected this second argument, too, and held that “in accordance with general international law, a warship enjoys immunity, including in internal waters, and that this is not disputed by Ghana” and that “any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States.”