Some comments on Ghana's alleged violation of provisional measure (a) as prescribed by the ITLOS Special Chamber in its Order of 25 April 2015.

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Proceedings commented on: Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, ITLOS Case No. 23.

Background of the dispute and the current post

The dispute between Ghana and Côte d'Ivoire over the delimitation of their maritime boundary was submitted by way of a special agreement to a special chamber of the ITLOS. On 27 February 2015, Côte d'Ivoire submitted a request for the prescription of provisional measures under article 290 (1) of the United Nations Convention on the Law of the Sea (LOSC). The Chamber delivered its Order on 25 April 2015 (Order). The Chamber unanimously prescribed the following provisional measures (para. 108 (1)):

> (a) Ghana shall take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area as defined in paragraph 60;
>
> (b) Ghana shall take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire;
>
> (c) Ghana shall carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area with a view to ensuring the prevention of serious harm to the marine environment;
>
> (d) The Parties shall take all necessary steps to prevent serious harm to the marine environment, including the continental shelf and its superjacent waters, in the disputed area and shall cooperate to that end;
>
> (e) The Parties shall pursue cooperation and refrain from any unilateral action that might lead to aggravating the dispute.

Professor Nigel Bankes, in his post of 12 May 2015, summarized the conditions to be met in order to trigger the power of courts and tribunals to prescribe provisional measures and commented on the scope of the provisional measures prescribed by the Order of 25 April 2015. This post addresses the subsequent developments in the dispute between Ghana and Côte d'Ivoire.

In its written pleadings and during the oral proceedings, Côte d'Ivoire claimed that Ghana had violated a number of provisional measures prescribed by the Chamber (paras. 9.58 – 9.74 of Côte d'Ivoire's Counter-Memorial, paras. 6.41 – 6.65 of Côte d'Ivoire's Rejoinder and its Final Submission). Ghana denied that charge and asked the Chamber to reject Côte d'Ivoire's claims (paras. 5.44 – 5.62 of Ghana's Reply and the Final Submission).

This post focuses on the alleged breach of provisional measure (a).

There is no doubt that the failure of a state to comply with provisional measures imposing specific interim obligations in the course of dispute resolution proceedings engages the international responsibility of that state. Provisional measures prescribed by the ITLOS, as well as those indicated by the International Court of Justice are binding (LOSC, article 290(6) and the LaGrand case).

The main arguments of the Parties with respect to breach of provisional measures

In its Counter-Memorial, Côte d'Ivoire accused Ghana of violating the provisional measures (a), (c) and (e) (para. 9.61 of Côte d'Ivoire's Counter-Memorial). Subsequently, Côte d'Ivoire argued that Ghana has breached "at least" two provisional measures, namely (a) and (e) (paras. 6.41 and 6.63 of Côte d'Ivoire's Rejoinder). As regards provisional measure (a), Côte d'Ivoire took the view that Ghana is in breach by authorizing continuing drilling in the disputed area.

Ghana however argues that it has fully complied with the Order. Ghana stated that "since the date of the Order, there has been no new drilling in the disputed area" and that "[t]he only activity undertaken by the operators has been work on the wells already drilled that is necessary to ready those wells for production" (para. 5.49 of Ghana's Reply). "Ghana's operators have carried out completion work on wells already drilled, but have drilled no new wells" (para. 5.50 of Ghana's Reply). Ghana explained that 11 wells drilled in the disputed area prior to the Order have been completed. Ten "were to be used for first oil production", while the eleventh well, Nt07, "was, and is, intended to be used as a water injector well for improving production" (para. 5.52 of Ghana's Reply).

Côte d'Ivoire replied that Ghana has assimilated two different notions: new drilling and drilling of new wells (paras. 6.42 and 6.43 of Côte d'Ivoire's Rejoinder). In the view of Côte d'Ivoire, the provisional measure (a) imposes on Ghana the obligation to abstain from any activity requiring the subsoil to be drilled again, not only from drilling new wells (paras. 6.49 and 6.50 of Côte d'Ivoire's Rejoinder).

Observations

Provisional measure (a) prohibits "new drilling". Côte d'Ivoire referred to the definition of drilling as an activity that crushes the rock by abrasive rotation of a drill bit at the tip of a drill string (para. 6.44-6.45 of Côte d'Ivoire's Rejoinder with important footnotes). While the accuracy of this definition is unlikely to raise a disagreement between the Parties, the meaning of the word 'new' will require examination by the Chamber. By including the word 'new' in the Order, the Chamber drew a clear distinction between activities in respect of which drilling had already taken place by the date of the Order and activities that entailed new drilling. But in using the phrase 'new drilling', did the Chamber intend to prohibit the drilling/deepening of partially drilled wells *or* solely the drilling of new wells? Undoubtedly, if Ghana has drilled new wells in the disputed area (meaning that the subsoil was penetrated for the first time after 25 April 2015), that would constitute a breach of provisional measure (a). Nevertheless, to date, there is no evidence that Ghana has done so.

The main issue before the Chamber is whether Ghana's completion operations, including additional drilling, on wells already drilled before 25 April 2015 are captured by the notion of new drilling. Côte d'Ivoire cited one particular example of the Nt07 well located in the disputed area in the Ntomme field, one of the fields in the TEN project (para. 6.57 of Côte d'Ivoire's Rejoinder). It is worth recalling that the Nt07 well is a water injector well (that assists hydrocarbons in a reservoir with low pressure to flow out towards a production well) for the production well Nt01. The latter well had been completely drilled before 25 April 2015. The Nt07 well was dug in two drilling operations. The first was completed to a depth of 2740 metres during the proceedings on the prescription of provisional measures (*i.e.*, before 25 April 2015). The second operation occurred between 13 July and 5 August 2015, after the Order had been delivered, in order to reach the Nt07's final depth of 4136 metres. In para. 6.55 of its Rejoinder, Côte d'Ivoire also argues that in addition to the drilling in regards to the Nt07 well, Ghana has conducted drilling activities on other wells after 25 April 2015.

The phrase 'new drilling' was introduced by the Chamber in para. 102 of the Order (and subsequently repeated in the operative part of the Order) as a counterbalance to paras. 99 and 100.

Para. 99 appears to mean that if Ghana, by the date of the Order, had undertaken activities involving drilling ("… ongoing activities conducted by Ghana in respect of which drilling has

already taken place …"), it was not required to cease these "ongoing" activities. Côte d'Ivoire stated that the only activities within the meaning of para. 99 were "the completion operations being performed by the West Leo platform on well Nt02-GI, which started on 22 March 2015 and finished on 23 June 2015" (para. 6.55 of Côte d'Ivoire's Rejoinder). In other words, Côte d'Ivoire suggests that para. 99 contemplates that once drilling equipment is detached from the seabed and withdrawn from the disputed area, follow-up drilling of the same well is not (as in the case of the Nt07 well) an ongoing activity. However, the phrase used by the Chamber in para. 99 seems to imply that Ghana's activities with respect to drilling that was underway (taking into account the necessary breaks) prior to the Order should not be affected.

Moreover, the subsequent paragraph, para. 100, has a broader scope than para. 99. Para. 100 does not mention the word 'ongoing' and provides that "an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities in respect of which drilling has already taken place, would therefore cause prejudice to the rights claimed by Ghana and create an undue burden on it". This paragraph makes clear that Ghana was not required to suspend *all* exploration or exploitation activities, *including* activities in respect of which drilling has already taken place.

Thus, it could be argued that the Chamber is likely to adopt a narrower interpretation of 'new drilling' than that suggested by Côte d'Ivoire. The Order seems to offer protection to any drilling started before 25 April 2015, but which was not fully completed as of 25 April 2015. In other words, re-drilling operations in the same borehole would not be contrary to provisional measure (a).

Map.