

ITLOS Judgment in the Maritime Boundary Dispute between Ghana and Côte d'Ivoire

By: Nigel Bankes

PDF version: ITLOS Judgment in the Maritime Boundary Dispute between Ghana and Côte d'Ivoire

Case commented on: ITLOS Special Chamber, [Judgment in Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean](#), 23 September 2017.

A Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) handed down its judgment in the Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean on 23 September 2017. The litigation was originally commenced by Ghana as an application initiating arbitral proceedings under Annex VII of the United Nations Law of the Sea Convention ([LOSC](#)) but in December 2014, by Special Agreement, the two states agreed to submit the dispute to a Special Chamber of ITLOS comprised of Judge Boualem Bouguetaia as President, Judge Rüdiger Wolfrum, Judge Jin-Hyun Paik, Mr Thomas Mensah, Judge ad hoc (Ghana) and Judge Ronny Abraham, Judge ad hoc (Côte d'Ivoire). ITLOS acceded to that request. The Special Agreement and the attached Minutes of Consultations indicated that the two States were agreeing to transfer the arbitral proceedings instituted by Ghana with respect to the dispute “concerning the delimitation of their maritime boundary in the Atlantic Ocean.” Ghana’s earlier application had asked the Arbitral Tribunal to “delimit, in accordance with the principles and rules set forth in UNCLOS and international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Ghana and to Côte d'Ivoire in the Atlantic Ocean, including in the continental shelf beyond 200 M.”

Côte d'Ivoire submitted a request for the prescription of Provisional Measures on 27 February 2015 and on 25 April 2015 made an [Order prescribing Provisional Measures](#). The main operative provision stipulated as follows:

- (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.

A [previous post](#) provides a commentary on that Order.

The purpose of the present post is to provide an overview of the unanimous judgment of the Special Chamber (Judge ad hoc Mensah and Judge Paik appended short separate opinions). My colleagues at the Jebsen Centre may follow this post with additional posts on more specific elements of the judgment.

There were six main issues that the Special Chamber had to resolve: (1) the jurisdiction of the Special Chamber generally with respect to the dispute, (2) the alleged existence of a tacit agreement as between the Parties delimiting their single maritime boundary, (3) an alternative argument by Ghana to the effect that Côte d'Ivoire was estopped from denying the existence of an agreed boundary, (4) (in the alternative to arguments (2) & (3)) the actual delimitation of the maritime boundary out to 200 nautical miles (nm), (5) the delimitation of the maritime boundary beyond 200 nm, and (6) the responsibility of Ghana for authorizing oil and gas activities within the disputed area.

(1) The Jurisdiction of the Special Chamber

Given that the Parties had expressly agreed to submit the dispute with respect to the delimitation of the maritime boundary to the Special Chamber it was relatively easy for the Chamber to conclude (at para 88) that it had jurisdiction “to delimit the maritime boundary between the Parties in the territorial sea, in the exclusive economic zone and on the continental shelf, within 200 nautical miles (hereinafter “nm”).” For its part, the Chamber noted that Ghana had withdrawn an earlier declaration under Article 298(1) of LOSC (indicating that it did not accept compulsory and binding dispute resolution with respect to maritime delimitation) and confirmed as well that it had subject matter jurisdiction insofar as the dispute concerned the interpretation and application of provisions of the LOSC; namely Articles 15, 74, 76 and 83. It deferred until later in the Judgment any questions with respect to its jurisdiction over beyond the continental shelf beyond 200 nm as well as its jurisdiction with respect to issues of state responsibility.

(2) The alleged existence of a tacit agreement as between the Parties delimiting their single maritime boundary

Ghana's principal argument was that the Parties already had a tacit agreement, developed or confirmed as a result of the oil activities of both Parties over years, as to the course of their maritime boundary in the territorial sea, the exclusive economic zone and the continental shelf both within and beyond 200 nm; and all that remained was for the Special Chamber to declare the existence of that boundary which was based on the acceptance by the Parties of the principle of equidistance. In support of its argument Ghana referred to a consistent practice by both parties of respecting an equidistance line in granting oil concession; a similarly consistent practice with respect to licensing seismic activities and consenting to additional working space based on an equidistance line; a failure by either Party to protest the drilling activities of the other (at least in the case of Côte d'Ivoire until 2009); and oil concession maps issued by both Parties recognizing an equidistance line. While this evidence convinced the Tribunal that (at para 146) the equidistance line “was of relevance to both Parties when conducting their oil activities” it could not establish a tacit agreement between the Parties. There was evidence of objections by Côte d'Ivoire (at paras 147 and 213), the maps offered no convincing evidence of a clear understanding (at para 148) and the Special Chamber was doubtful (at para 149) as to whether the oil activities referenced “might be sufficient to establish a single maritime boundary for the territorial sea, the exclusive economic zone and the continental shelf within and beyond 200 nm.” Most of the oil activities took place (at para 149) “at a distance much less than 200 nm from the baseline” and the Special Chamber was therefore “doubtful how such

activities could have a bearing upon the delimitation of the continental shelf within and beyond 200 nm” (and see also at paras 193 – 197 where the Special Chamber noted that there were no specific arrangements between the Parties dealing with fisheries or other none oil-related activities).

Neither did the Special Chamber find convincing Ghana’s efforts to rely on the national legislation of both Parties (at paras 163 and 226 - 227) nor the representations made by the two Parties to the Commission on the Limits of the Continental Shelf (CLCS) (at paras 168 & 220), or the bilateral exchanges and negotiations between the Parties. Indeed (at paras 191 & 221) the existence of these negotiations which dealt *inter alia* with substantive discussions (at para 191) as to the appropriate method to delimit their maritime zones was hardly consistent with Ghana’s argument that the bilateral negotiations were intended to formalize a maritime boundary tacitly agreed upon between the Parties. In sum, Ghana had failed to meet the demanding test for establishing of a tacit agreement set out in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] II ICJ Reports 659, at p. 735, para. 253 to the effect that: “Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed”. Furthermore, the Chamber, again consistently with earlier jurisprudence, was clearly of the view (at para 215) that oil concession practice was always equivocal without more.

The Special Chamber expanded further on the need for caution in light of the duty of states under Articles 74(3) and 83(3) not to jeopardize or hamper efforts to reach a delimitation agreement:

The Special Chamber observes that States often offer and award oil concessions in an area yet to be delimited. It is not unusual for States to align their concession blocks with those of their neighbouring States so that no areas of overlap arise. They obviously do so for different reasons, but not least out of caution and prudence to avoid any conflict and to maintain friendly relations with their neighbours. To equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence. It would be contrary to article 74, paragraph 3, and article 83, paragraph 3, of the Convention, which require States, pending agreement on delimitation, in a spirit of understanding and cooperation, not to jeopardize or hamper the reaching of the final agreement. It would also entail negative implications for the conduct of States in the area to be delimited elsewhere.

(3) Ghana’s alternative argument to the effect that Côte d’Ivoire was estopped from denying the existence of an agreed boundary

Recalling the decision of the ICJ in the *Gulf of Maine* case (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, [1984] ICJ Reports 246) that estoppel would only apply if there were “clear, sustained and consistent” conduct, the Special Chamber had little difficulty in concluding that Ghana had failed to establish its case. Somewhat curiously the Special Chamber actually framed this (at para 244) in terms which seemed to have placed the onus on Côte d’Ivoire –when it said that “Côte d’Ivoire has not demonstrated, by its words, conduct or silence, that it agreed to the maritime boundary based on equidistance.” Nevertheless, the Special Chamber’s reasons for this conclusion are surely convincing (at para 243):

The Special Chamber observes that Ghana’s argument of estoppel is essentially based on the same facts put forward by it to establish the existence of a tacit

agreement. The Special Chamber has already stated (in paras. 211 to 228) that various statements, conduct or silence of the Parties over the past five decades fall short of proving the existence of a tacit agreement between them on the maritime boundary. In particular, the fact that the bilateral exchanges and negotiations on the delimitation of a maritime boundary took place between the Parties indicates the absence, rather than the existence, of a maritime boundary.

(4) Delimitation of the maritime boundary

Since Ghana had failed to establish the existence of either a tacit agreement on the boundary or an estoppel to the same effect it was necessary to proceed (at para 247) “to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf.” While the Special Chamber acknowledged its understanding (at para 290) “that under the Convention different rules apply to the delimitation of territorial seas and the delimitation of exclusive economic zones and continental shelves” it nevertheless went on to conclude (at para 262) “that the Parties, in requesting the Special Chamber to delimit a single maritime boundary for their territorial seas, exclusive economic zones and continental shelves, have implicitly agreed that the same delimitation methodology be used for these maritime spaces.” See also to the same effect at paras 259 and 278. Similarly, while the Chamber acknowledged that both the continental shelf and EEZ delimitation concerned functional jurisdiction rather than sovereignty or territory (at para 262), “neither Ghana nor Côte d’Ivoire raised sovereignty-related considerations in respect of the delimitation of the territorial sea between them.”

While Côte d’Ivoire was of the view that this was a case in which the Special Chamber should adopt the angle-bisector method of delimitation, the Special Chamber quickly rejected that view. It emphasized (at para 284, but see also at para 269) that “the majority of delimitation cases, in particular the ones decided in recent years, have used the equidistance/relevant circumstances methodology.” Furthermore the Special Chamber was entirely unconvinced by Côte d’Ivoire’s arguments (at paras 283 – 322) (location of appropriate base points, location of base points on Jomoro, the alleged instability of the coastline and the interests of neighbouring states) as to why this was an exceptional case.

A provisional equidistance line

Given that conclusion the Special Chamber proceeded to construct a provisional equidistance line in accordance with the prevailing jurisprudence (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, [2009] ICJ Reports 61 and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, [2012] ITLOS Reports 4. In order to do that it had to rule on two preliminary matters: (1) the nautical charts that it would use for the purpose, and (2) the location of the starting point for the maritime boundary.

The Charts

As to the first, the Special Chamber ruled that it would use a combination of an old British Admiralty (BA) Chart and a virtually identical chart prepared by Service hydrographique de la marine française (SHOM) rather than some combination of the BA Chart and a more recently prepared chart of the coast of Côte d’Ivoire. The Special Chamber acknowledged that a more recently prepared set of charts would be preferable but took the view (at para 341) “that it is essential that the same methodology be used for the two coasts in question.” It supported this conclusion with the

observation (at para 342) that the older charts “were used by both Parties until at least 2014. This common use of the charts may not have amounted to an agreement that those charts alone had to be used, as is claimed by Ghana. However, this practice is indicative of the Parties’ common confidence in the reliability of these charts, a factor which the Special Chamber cannot ignore.”

The starting point of the maritime boundary

The parties agreed as to the last land boundary terminus (BP 55) but they disagreed as to how to move from that point to the low-water line of the coast. Ghana proposed the shortest distance; Côte d’Ivoire proposed continuing the direction of the agreed line to the low-water line. The Special Chamber agreed with the position advanced by Côte d’Ivoire on the basis that (at para 354) it was a more accurate reflection of the intentions of the Parties as reflected in the treaty dealing with the land boundary.

Relevant coasts, Relevant area, Base points, and Construction of the Provisional Equidistance Line

As the Special Chamber noted (at para 361) “The first step in the construction of the provisional equidistance line is to identify the Parties’ coasts of which the seaward projection overlaps”. For a coast to be relevant (at para 372) “it must generate projections which overlap with those of the coast of another party”. Since there is only one continental shelf the relevant coast is the same both within and beyond 200 nm. The relevant area is (at para 381) “the area in which the projections of the coasts of the two Parties overlap, extending to the outer limits of the area to be delimited.”

The Special Chamber (at paras 383 – 400) selected a small number of base points for the construction of the preliminary equidistance line observing (at para 396) that all such points must be situated at the low-water line.

Relevant circumstances

The Special Chamber considered a number of arguments for possible adjustments to the provisional equidistance line. The first such consideration advanced by Côte d’Ivoire was that of the concavity of the coastline. While admitting that Côte d’Ivoire’s coast was indeed concave the Special Chamber considered the concavity not to be as pronounced as in some of the decided cases and noted that it did not result in any cut-off effect until 163 nm. This was not sufficiently significant (at para 425) as to require an adjustment. Neither could there be a legitimate concern with respect to access to the port of Abijan given that freedom of navigation in the EEZ is guaranteed by Article 58(1) of the LOSC (at para 426). Neither did the Special Chamber consider (at para 434) that the geography of Jomoro required any adjustment. As for the location and distribution of resources this too was unconvincing to the Special Chamber as a reason for adjusting the line. Following established jurisprudence (citing *inter alia* *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ. Reports 246, at para 237), *Territorial and Maritime Dispute (Nicaragua v. Columbia)* (Judgment), [2012] ICJ. Reports 624 at para 223) *Award in the Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them* (Decision of 11 April 2006, XXVII RIAA 147 at para. 241) and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment), [2009] ICJ Reports 61 at para 198) the Special Chamber concluded that resource related considerations may be taken into account in delimitation only if such delimitation was “likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned”. Côte d’Ivoire

had not met that threshold, nor had it advanced arguments that might lead the Special Chamber to deviate from that jurisprudence.

Finally, the Special Chamber rejected Ghana's arguments with respect to the conduct of the parties as a relevant circumstance. In making this claim Ghana was relying on essentially the same evidence that it had adduced in favour of its earlier tacit agreement and estoppel arguments. In the view of the Special Chamber this had (at para 478) the appearance of "an attempt to revive a tacit maritime boundary that was rejected by the Special Chamber by circumventing the high standard of proof required for the existence of a tacit agreement. The Special Chamber considers that accepting such argument would, in effect, undermine its earlier finding on the existence of a tacit agreement."

In sum, the Special Chamber found that there were no relevant circumstances in the present case which would justify an adjustment of the provisional equidistance line.

Disproportionality test

Both the ratio of the relevant coastlines (1: 2.53) and the ratio of the allocated areas (1:2.02) favoured Côte d'Ivoire, but, not surprisingly, the Special Chamber concluded (at para. 538) "taking into account all the circumstances of the present case, the result achieved by the application of the delimitation line adopted [by the Special Chamber] ... does not entail such disproportionality as to create an unequitable result."

(5) Jurisdiction to delimit the continental shelf beyond 200 nm

While the Parties agreed that the Special Chamber had the jurisdiction to delimit the continental shelf beyond 200 nm (at para 489) the Special Chamber noted that it needed to decide for itself on both jurisdiction and admissibility. The Special Chamber readily resolved the issue of jurisdiction: there is one continental shelf (not an inner and a separate outer shelf). While the Special Chamber can only delimit a shelf beyond 200 nm if such a shelf exists (at para 491) "[t]here is no doubt about this in the case before the Special Chamber. Ghana has already completed the procedure before the CLCS. Côte d'Ivoire has made its submission to the CLCS and, although as yet the latter has not issued any recommendation, the Special Chamber has no doubt that a continental shelf beyond 200 nm exists for Côte d'Ivoire since its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist."

As for admissibility (given that the CLCS had yet to provide its recommendations to Côte d'Ivoire), the Special Chamber, following the Judgment of the Tribunal in *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* emphasised that the distinction between the delineation of the outer limits of the shelf and the question of delimitation of maritime boundaries and the fact that the CLCS had already made recommendations with respect to Ghana meant that (at para 494) "there is no risk that the Judgment of the Special Chamber might interfere with the functions of the CLCS." Accordingly, the Special Chamber concluded that the request that it decide on delimitation beyond 200 nm was admissible.

Having so decided all that remained was for the Special Chamber to rule that the same delimitation methodology should be applied both within and beyond 200 nm (there being only one shelf) and that accordingly (at para. 527) "the delimitation line for the territorial sea, the exclusive economic zone and the continental shelf within 200 nm as referred to in paragraph 481 continues in the same direction until it reaches the outer limits of the continental shelf."

(6) The international responsibility of Ghana

Côte d'Ivoire submitted that Ghana's conduct in the disputed part of the continental shelf violated international law, the Convention, and the Order for the prescription of provisional measures. Ghana did not dispute the jurisdiction of the Special Chamber to consider these matters.

The Special Chamber considered (at para 546) that it clearly had jurisdiction to rule on the alleged violation of the order of provisional measures as part of "the inherent competence of the Tribunal." Côte d'Ivoire's further submissions required more deliberation. Côte d'Ivoire's final submission (at para. 63) was a request that the Special Chamber:

(2) ... declare and adjudge that the activities undertaken unilaterally by Ghana *in the Ivorian maritime area* constitute a violation of:

(i) the exclusive sovereign rights of Côte d'Ivoire over its continental shelf, *as delimited by this Chamber*;

(ii) the obligation to negotiate in good faith, pursuant to article 83, paragraph 1, of UNCLOS and customary law;

(iii) the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by article 83, paragraph 3, of UNCLOS; (emphasis added)

The starting point for the Special Chamber's analysis was the Special Agreement of the Parties to submit their dispute to the Special Chamber. The dispute so submitted was "the dispute concerning the delimitation of their maritime boundary in the Atlantic Ocean". Read together with the narrow compass of the dispute as submitted to the Annex VII Tribunal and subsequently transferred to the Special Chamber, (at paras 548 – 550) the Tribunal concluded that the Special Agreement did not permit it to consider a claim dealing with Ghana's alleged international responsibility. That was not the end of the matter since the Special Chamber went on to conclude (at paras 551 – 554) that the Parties, by their conduct in the pleadings on the merits, had accepted the Special Chamber's jurisdiction to deal with issues of international responsibility.

The Special Chamber however also had to satisfy itself that the claims with respect to state responsibility fell within its remit (as a court of special rather than general jurisdiction) for determining questions relating to the interpretation and application of the Convention (LOSC Articles 286 & 288). It did so by referencing both the applicable law clause of the LOSC (Article 293), the LOSC provision on responsibility and liability (Article 304) as well as the relevant passages from *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4 and *M/V "SAIGA" (No. 2) Case*. These authorities certainly establish that a Part XV tribunal can go on to consider issues of responsibility if it has jurisdiction under the relevant primary rules. But they are less convincing in establishing the Chamber's jurisdiction at large with respect to primary rules that are not located in or otherwise referenced in the LOSC. This is clearly not an issue with respect to the Chamber's jurisdiction with respect to the provisional measures order (see above), or with respect to Côte d'Ivoire's allegations under Article 83 of the LOSC but it was potentially an issue with respect to what both Côte d'Ivoire and the Special Chamber characterize as a breach of general international law, the violation of sovereign rights. The Special Chamber fails to address the question of how it can assume jurisdiction with respect to primary norms outside the LOSC. That said, I think that it is puzzling that the alleged violations of Côte d'Ivoire's sovereign rights are characterized as a breach of general international law; surely they can equally (and more obviously)

be characterized as breaches of the LOSC. Ghana seems to accept this characterization since it refers in this context (as quoted by the Special Chamber at para 579) to Articles 77, 81 and 193 of the LOSC.

General international law: sovereign rights

The Tribunal began its discussion of the merits of Côte d'Ivoire's claims with the alleged violation by Ghana of Côte d'Ivoire's sovereign rights "over its continental shelf as delimited by this Chamber." At its core this is a claim that the coastal state's rights are exclusive and thus that for Ghana to licence any activity on the shelf is a violation of that exclusivity. However, this claim to exclusivity must be understood in the context of competing entitlements to exclusivity based on a relevant coast which are only ultimately resolved by agreement or by a competent tribunal's delimitation.

The Chamber acknowledged (at para 586) that while Ghana may have been in some doubt as to when the delimitation dispute arose and as to the size of the contested area (especially since Côte d'Ivoire formulated its claims differently over time) Ghana, at the very least should have known that the hydrocarbon activities within the TEN field between 2009 and 2014 were conducted in an area that Côte d'Ivoire considered to be disputed. These activities included drilling wells and actual production. Armed with this factual conclusion the Special Chamber then framed the issue as follows (at para 589):

... the Special Chamber must now establish whether *hydrocarbon activities carried out by a State in a disputed area before the area in question has been delimited by adjudication* may give rise to international responsibility when these activities are carried out *in a part of the area attributed by the judgment to the other State*. (emphasis added, both italics and underlining)

In framing the issue this way the Special Chamber appears to have been making a counter-factual assumption in favour of Côte d'Ivoire since the result of the Special Chamber's delimitation was that all of Ghana's activities (at least in relation to the TEN field) occurred in the area attributed to Ghana by the judgment (not the 'other' State) (see for confirmation of this conclusion, para 633).

In any event, even with the benefit of this counter-factual assumption in favour of Côte d'Ivoire, the Special Chamber declined to find that Ghana's responsibility had been engaged, largely on the basis that each State had an entitlement based upon its relevant coast. "Only a decision on delimitation establishes which part of the continental shelf under dispute appertains to which of the claiming States" at which point one State no longer has any entitlement or, as the Special Chamber puts it (at para 591) "the relevant judgment gives one entitlement priority over the other". In that sense, a judgment on delimitation is constitutive and not just declaratory.

In the end then the Special Chamber decided something it did not need to decide (i.e. the question of state responsibility where Ghana had engaged in drilling activity in an area ultimately awarded to Côte d'Ivoire). It is not clear why the Special Chamber found it necessary to do so; and it did so (at para 592 and see also at para 584) in surprisingly broad terms:

the consequence of the above [i.e. authorizing the TED development knowing that the area was disputed by Côte d'Ivoire] is that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign

rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.

I am also not sure that this is consistent with the Chamber's own observations in its Provisional Measures Order with respect to the sovereign rights claimed by Côte d'Ivoire: see the Order at paras 88 – 90.

Article 83 of the LOSC

Côte d'Ivoire's arguments with respect to the LOSC Article 83 engaged both paragraph 1 and paragraph 3. The argument with respect to paragraph 1 was that Ghana was in breach of its (implied) obligation to negotiate in good faith by reason of its alleged inflexibility. The Special Chamber agreed (at para 604) that the obligation to reach an agreement on delimitation "necessarily entails negotiations to that effect." However the obligation is an obligation of conduct not an obligation of result and there was no convincing evidence that Ghana did not negotiate in good faith. It was not (at para 604) itself a breach of that obligation for Ghana to try and maintain the status quo; nor was it a violation for Ghana to have precluded for a period any access to compulsory dispute resolution – Article 298 of the LOSC expressly permits this.

Côte d'Ivoire's arguments with respect to Article 83(3) build on the *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, XXX UNRIAA 1 and the two pronged duty to make every effort to enter into provisional arrangements and the duty not to jeopardize or hamper the reaching of a final agreement. For the Special Chamber these were (at para 626) "two interlinked obligations" and both were obligations of conduct (at paras 626 & 629).

The Special Chamber rejected both of Côte d'Ivoire's submissions. It ruled that it was not open to Côte d'Ivoire to claim a breach of the good faith obligation to negotiate a provisional arrangement since there was no evidence that Côte d'Ivoire had requested such negotiations. The Special Chamber rejected Côte d'Ivoire's arguments with respect to the breach of the duty not to jeopardize or hamper for two reasons. The first was simply that Ghana did finally suspend new drilling operations in the disputed area when ordered to do so by the Special Chamber in its provisional measures Order. This is not convincing and the Tribunal itself seems to doubt its own conclusion for it immediately observes (at para 632) that "It would, however, have been preferable if Ghana had adhered to the request of Côte d'Ivoire earlier to suspend its hydrocarbon activities in that area." The Special Chamber's reasoning is not convincing because Ghana's obligation not to jeopardize or hamper pre-dated the provisional measures Order and is not based on that Order. It may well be the case that by the time it gave effect to the Order, Ghana was no longer in breach of its continuing duty not to jeopardize or hamper, but it hardly follows from that that there was no proven breach before that time.

The Tribunal's second argument relieving Ghana of responsibility was a technical argument to the effect that Côte d'Ivoire had framed its request for relief narrowly insofar as it was a request "to declare and adjudge that the activities undertaken unilaterally by Ghana in the Ivorian maritime area constitute a violation of ... the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by article 83, paragraph 3, of UNCLOS" (emphasis added). Since (at para 633) Ghana had "undertaken hydrocarbon activities only in an area attributed to it" "the activities of Ghana do not meet the qualification of the relevant submission of Côte d'Ivoire since they did not

take place in the Ivorian maritime area.” But for this drafting slip in its request for relief, Côte d'Ivoire surely had a good case for it seems reasonable to infer that continuing drilling and production activities in a disputed area always jeopardize or hamper the prospects of reaching an agreement because they (at para 609 quoting from the submissions of Côte d'Ivoire) “create an atmosphere of animosity between the Parties” and “tend to create a *fait accompli* on which the wrongdoing State may subsequently attempt to rely”. That said, a decision in favour of Côte d'Ivoire on this point given the state of the pleadings would likely have been open to the objection that it was *ultra petita*.

The Separate Opinion of Judge Paik is much more convincing with respect to the Article 83(3) issues insofar as he recognizes that but for the “formalistic reason” for rejecting the submission, Côte d'Ivoire had a good case on the merits. Judge Paik acknowledged that any inquiry with respect to the duty not to jeopardize or hamper must always be contextual and that (at para 10) there is “no single test or criterion that must be applied in all situations”. In the present case (at para 11) Ghana’s activities in the disputed area between 2010 and 2014 were extensive and amounted to a breach of its duty. The fact that Ghana ceased most of its activities in the disputed area after the Order was issued (at para 17) “cannot exonerate Ghana from its responsibility”; neither does the fact that in the end these activities occurred within areas allocated to Ghana.

The Special Chamber also rejected the claim that Ghana was in breach of the Order for Provisional Measures by authorizing additional drilling (and see here [earlier post by Natalia Ermolina](#)). The Chamber did so partly on the basis of its interpretation of its Order and partly on the basis of its understanding of the facts. Thus, there was evidence that Ghana had authorized additional deepening of an existing well for injection purposes but the Chamber concluded (at para 652) that this did not amount to “new drilling” within the meaning of the Order. Likewise, the Chamber concluded that Côte d'Ivoire had not convinced it that Ghana was in breach of its obligation to cooperate under the terms of the Order.

My thanks to Alex Oude Elferink for his review and comments on an earlier draft of this post.