

State responsibility for unilateral hydrocarbon activities in disputed maritime areas: The case of Ghana and Côte d'Ivoire and its implications

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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.

Background to the dispute between Ghana and Côte d'Ivoire

For a long time, Ghana believed that there was a de facto maritime boundary line between Ghana and Côte d'Ivoire, and since the 1950s had conducted hydrocarbon activities based on its understanding of this 'customary boundary'. Côte d'Ivoire, for its part, was not particularly active in protesting Ghana's hydrocarbon activities. Only in 2009 did Côte d'Ivoire make a proposal as to its view of the maritime boundary thus forming a triangular area of overlapping maritime claims. The area claimed by Côte d'Ivoire covered significant oil and gas fields discovered by Tullow Oil plc operating under a license of Ghana. Ghana alleged that this was the main reason why Côte d'Ivoire raised its claims.

The ITLOS Special Chamber (SC) rejected Ghana's submission that there was a tacit agreement between Ghana and Côte d'Ivoire for the delimitation of their territorial sea, exclusive economic zone and continental shelf within and beyond 200 n.m. (chapter VII, especially paras. 211-228). At the same time, the SC also rejected Côte d'Ivoire's proposed boundary. The SC drew a single maritime boundary for the territorial sea, the exclusive economic zone and the continental shelf within and beyond 200 n.m. (chapter IX). The final boundary drawn by the SC almost coincides with the line argued by Ghana and does not affect Ghana's petroleum fields found in the Gulf of Guinea. Therefore, it is not surprising that in many news accounts the SC's decision is referred to as a victory of Ghana over Côte d'Ivoire.

This post comments on the issue of the international responsibility of Ghana for its hydrocarbon activities in the disputed maritime area. It also deals with the future implications of the SC's ruling for the conduct of hydrocarbon activities in undelimited areas. An overview of the Judgment in the *Ghana v. Côte d'Ivoire* case is provided in posts by [Nigel Bankes](#) and [Constantinos Yiallourides and Elizabeth Rose Donnelly](#).

The SC acknowledged that Ghana's hydrocarbon activities were carried out in an area disputed between Ghana and Côte d'Ivoire (para. 588) since they were within the triangular area formed by the line claimed by Ghana and the line proposed by Côte d'Ivoire in 2009 (para. 586; [Order of 25 April 2015](#), para. 60). However, the SC noted that Côte d'Ivoire's different methods of delimitation meant that the location and size of the disputed area differed over time (para. 586). This is significant when determining the area to which the two obligations set forth in Article 83 (3) of the [United Nations Convention on the Law of the Sea](#) (UNCLOS) apply, namely the obligation to make every effort to reach a provisional arrangement of a practical nature and the obligation to make every effort not to jeopardize or hamper the reaching of a final delimitation (hereafter the obligation not to jeopardize or hamper). Nevertheless, the SC did not elaborate on this observation. Arguably, it is preferable not to seek to define the precise geographical limits of an undelimited area (see, for example, [BIICL's Report on the Obligations of States in Undelimited Maritime Areas, 2016](#), paras. 100-107) for two main reasons. Firstly, Article 83 (3) of UNCLOS includes no geographical limitation as regards these two obligations. Secondly, the absence of such a limitation would help to avoid the difficulties associated with determining the geographical scope of the obligations and avoids shifting the focus of any inquiry from the substantive content of the obligations on to their geographical aspects.

Violation of sovereign rights

Côte d'Ivoire argued that the ongoing hydrocarbon activities of Ghana in the disputed area caused a grave and irreversible harm to Côte d'Ivoire's sovereign rights of exploration and exploitation of the natural resources of its continental shelf (Articles 56(1) and 77(1) of UNCLOS) ([Request of Côte d'Ivoire](#), para 19). Côte d'Ivoire also argued that the conduct of geophysical investigations by Ghana constituted an infringement of the exclusive right of Côte d'Ivoire to conduct maritime scientific research, pursuant to Article 246(5) of UNCLOS, and its associated right to access, possess and control all confidential information relating to the exploration of the continental shelf. This, according to Côte d'Ivoire, was an indispensable element of a coastal State's sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources as provided for in Article 77 of UNCLOS ([Request of Côte d'Ivoire](#), para 30). Overall, Côte d'Ivoire emphasized that the actions of Ghana irremediably deprived Côte d'Ivoire of its sovereign right to formulate and implement its national energy policy and its exclusive sovereign right to decide "when, how and under what conditions the exploitation of these resources will take place, and even whether it should take place." ([Request of Côte d'Ivoire](#), para 38). In its [final submission](#), Côte d'Ivoire requested the SC to declare and adjudge that the activities undertaken unilaterally by Ghana 'in the Ivorian maritime area' constituted a violation of a) Côte d'Ivoire's exclusive sovereign rights over its continental shelf; b) the obligation to negotiate in good faith, pursuant to Article 83(1) of UNCLOS and customary law; and (c) the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by Article 83(3) of UNCLOS.

Insofar as the first request of Côte d'Ivoire is concerned, the alleged violation of its exclusive sovereign rights, the SC considered that in the case of overlapping continental shelf claims 'both States concerned have an entitlement to the relevant continental shelf on the basis of their relevant coasts' and that "only a decision on delimitation establishes which part of the continental shelf appertains to which of the claiming States" (para 591). The relevant judgment determines which State's entitlement gets priority over the other. As a consequence, unilateral hydrocarbon activities carried out by a State in an area subject to overlapping claims, before the area in question has been delimited, do not give rise to the international responsibility of that State - even when it turns out that these activities were conducted in an area belonging to the other claiming State (para. 592).

As the SC explained:

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 the both States. (para. 592)

[T]he Special Chamber finds the argument advanced by Côte d'Ivoire that the hydrocarbon activities carried out by Ghana in the disputed area constitute a violation of the sovereign rights of Côte d'Ivoire is not sustainable, even assuming that some of those activities took place in areas attributed to Côte d'Ivoire by the present Judgment. (para. 594)

The practical implications of the SC's reasoning are far-reaching. The judgment demonstrates quite clearly that whenever a State acts unilaterally in the EEZ or continental shelf of another State (e.g. by authorising and carrying out hydrocarbon exploration and exploitation activities without the latter's permission), it will not have breached the latter's exclusive sovereign rights if the initiating State demonstrates that it has acted in those areas in good faith and with the

honest belief that those areas were on its respective side of the boundary line. Consequently, this will not lead to engagement of the initiating State's international responsibility or a duty to provide full reparation for any injury caused. The initiating State's international responsibility will not be engaged even when it turns out that these activities were conducted in an area belonging to the other claimant State.

This finding seems to contradict the SC's [Order of 25 April 2015](#) in which it clearly held that unilateral drilling activities by Ghana "may affect the rights of Côte d'Ivoire in an irreversible manner if the Special Chamber were to find in its decision on the merits that all or any part of the area in dispute belongs to Côte d'Ivoire" ([Order of 25 April 2015](#), para. 91). According to the SC's Order, drilling can "result in significant and permanent modification of the physical character of the area in dispute" which no form of compensation awarded would be able to restore (paras. 89-90). The SC also considered that "the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire should the Special Chamber, in its Judgment on the merits, find that Côte d'Ivoire has rights in all or any part of the disputed area" ([Order of 25 April 2015](#), para. 95). The SC's treatment also seems to be at odds with the [Aegean Sea](#) case in which the International Court of Justice (ICJ) stated expressly that "seismic exploration of the natural resources of the continental shelf without the consent of the coastal state might, no doubt, raise a question of infringement of the latter's exclusive right of exploration" ([Aegean Sea](#), para. 31). The ICJ explained that "in the event that the Court should uphold Greece's claims on the merits, Turkey's activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece" ([Aegean Sea](#), para. 31).

Violation of the obligation not to jeopardize or hamper

When considering the issue of whether Ghana's activities in the disputed area constituted a violation of the obligation not to jeopardize or hamper, the SC made some observations with respect to the temporal and substantial scope of this obligation (chapter X (D) (2)). These observations are discussed below.

The temporal scope of the obligation

Article 83 (3) of UNCLOS provides that the obligation not to jeopardize or hamper lasts "during this transitional period". Nevertheless, it is not clear what transitional period is referred to in paragraph 3. *Ghana v. Côte d'Ivoire* is the first case to address the duration of the transitional period. The SC defined the transitional period as a "period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved" (para. 630). The issue of the duration of the obligation not to jeopardize or hamper (as well as any other international obligation) is important. A State bears responsibility only for a breach of an obligation that is in force for that State at the time the breach occurs (Art. 13 of the [ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts](#)).

The Chamber's reading of the phrase "during this transitional period" means that the obligation not to jeopardize or hamper was clearly triggered in 2009 when Ghana realized, or should have realized, that it had a delimitation dispute with Côte d'Ivoire and as to the location of the area to which this dispute applied (para. 631). That finding has significant implications. For example, one can imagine a situation where State A has made known its claims to a certain maritime area and has proceeded to exercise its (alleged) sovereign rights to explore and exploit natural resources in that maritime area, while State B is silent. In this situation, the SC's finding would mean that once State B breaks its silence and starts to contest State A's hydrocarbon activities, State A is subject to the obligation not to jeopardize or hamper, but the obligation not

to jeopardize or hamper is not triggered until then, even though State B was not obligated to proclaim its rights over the continental shelf explicitly.

In accordance with the SC's reading of Article 83 (3) of UNCLOS, the transitional period ends when a maritime boundary is agreed by States or when it is determined by a court or tribunal (para. 630). Further, the SC draws a distinction between two scenarios within the transitional period: the scenario where a provisional arrangement is reached and the scenario where no such provisional arrangement exists (para. 630). It is not altogether clear what the SC desired to show by that distinction: whether the obligation not to jeopardize or hamper is terminated once a provisional arrangement is concluded or whether the obligation not to jeopardize or hamper becomes supplementary where a provisional arrangement is in place. The latter interpretation is preferable for a number of reasons.

A provisional arrangement rarely regulates all activities in the disputed maritime area and may not always apply to the entire area of overlapping claims. Logically, if a provisional arrangement only covers fisheries activities or a part of a disputed area, the obligation not to jeopardize or hamper would be applicable to other activities, such as hydrocarbon exploration and exploitation, or to other parts of the contested area. Against this backdrop, it could be argued that the obligation not to jeopardize or hamper does not cease once a provisional arrangement is reached, but continues to apply where such a provisional arrangement exists until there is a final delimitation of both the continental shelf and the exclusive economic zone (or a single maritime boundary).

The substantive scope of the obligation

Although Ghana was bound by the obligation not to jeopardize or hamper since 2009, the SC concluded that Ghana did not violate this obligation by undertaking its hydrocarbon activities in the disputed maritime area (para. 634). The SC arrived at that conclusion for two reasons (para. 631). First, the SC took into account that "Ghana finally suspended its activities by implementing its obligations in accordance with the Order of the Special Chamber of 25 April 2015 namely, *inter alia*, to ensure that no new drilling either by Ghana or under its control would take place in the disputed area. It would, however, have been preferable if Ghana had adhered to the request of Côte d'Ivoire earlier to suspend its petroleum activities in that area" (para. 632). Second, the SC stated that "Ghana has undertaken petroleum activities only in an area attributed to it. This is particularly relevant in this case in light of paragraph 2 (iii) of the final submissions of Côte d'Ivoire" (para. 633). In respect of the latter statement, it is worth noting that in its final submission 2 (iii), Côte d'Ivoire requested the SC 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" (para. 63, emphasis added).

This part of the post addresses these two reasons in detail.

As regards the latter reason, one wonders whether the SC would have reached the same conclusion if Côte d'Ivoire had referred instead to the 'disputed maritime area' as did Suriname in its final submissions in the *Guyana v. Suriname* case (para. 456 of the [Guyana v. Suriname Award](#)). As noted above, the Chamber considered Ghana's hydrocarbon activities as being conducted in the disputed maritime area. However, the SC in its Judgment allocated the area where these activities took place to Ghana. In this respect, it is interesting to recall the *Guyana v. Suriname* case where Guyana's international responsibility was engaged for drilling a well in a maritime area which was in dispute between Guyana and Suriname, but which the Tribunal ultimately declared to attribute to Guyana (para. 451 and chapter VIII (D) (E) of the *Guyana v. Suriname Award*). In other words, the *Guyana v. Suriname* case illustrates that the conduct of

hydrocarbon activities by State A in an area which is also claimed by State B, but which a judicial body, at the stage on the merits, decides to allocate to State A does not preclude the wrongfulness of such activities and the responsibility of State A. Therefore, it could be argued that the finding of the SC would have been different had Côte d'Ivoire referred to the 'disputed maritime area' rather than the 'Ivorian maritime area'.

Nevertheless, the SC cited another reason to support its conclusion that Ghana did not violate the obligation not to jeopardize or hamper set forth in Article 83 (3) of UNCLOS: "Ghana finally suspended its activities by implementing its obligations in accordance with the Order of the Special Chamber of 25 April 2015 ..." (para. 632). It is true that hydrocarbon activities requiring "new drilling" were suspended by Ghana in the disputed area, following the SC's Order of 25 April 2015.

It is worth noting that in its final submissions, Côte d'Ivoire argued that Ghana breached the provisional measure (a) by performing new drilling after 25 April 2015 (paras. 635-646; [post by Natalia Ermolina](#) has discussed this issue). However, the SC concluded that no new drilling took place in the disputed area (para. 652).

At this point, it is important to emphasize that all the evidence suggests that Ghana suspended its activities because the SC imposed a specific interim obligation on Ghana and not because of Ghana's appreciation of its obligation not to jeopardize or hamper. The facts of the *Ghana v. Côte d'Ivoire* case clearly show that Ghana paid no attention to the obligation not to jeopardize or hamper in the period when Ghana realized that its hydrocarbon activities were conducted in the area which was also claimed by Côte d'Ivoire (obviously in 2009) until the prescription of provisional measures by the SC (in April 2015). Instead, Ghana undertook extensive exploration and exploitation activities in the disputed area while the two Parties held bilateral negotiations on delimitation of the maritime boundary (para. 587). Unfortunately, the SC took little note of this fact and only stated that "it would have been preferable if Ghana had adhered to the request of Côte d'Ivoire earlier to suspend its hydrocarbon activities [in the disputed area]" (para. 632). It is surprising that the SC did not formulate its statement in a more affirmative manner: that according to the obligation not to jeopardize or hamper, Ghana was required to comply with the request of Côte d'Ivoire to suspend its planned hydrocarbon activities in the disputed area.

Indeed, it is apparent from the foregoing that Ghana made no effort to exercise restraint in the disputed area from 2009 to April 2015. Contrary to the obligation to make every effort not to jeopardize or hamper, Ghana continued and increased its hydrocarbon activities in the disputed area. Therefore, one can argue that Ghana's hydrocarbon activities between 2009 and 2015 were not in conformity with its obligation under Article 83 (3) of UNCLOS to make every effort not to jeopardize or hamper the reaching of a final agreement.

Some general remarks

The SC considered whether and the extent to which unilateral hydrocarbon activities (including seismic testing, drilling and petroleum production) carried out by one party in a disputed maritime area which is also claimed by another party can be considered to be a violation of the sovereign rights of the latter. The SC concluded that Ghana did nothing wrongful through its unilateral conduct in the disputed area. Importantly, it also held that Ghana would have done nothing wrong even if it turned out that its activities were conducted in Ivorian waters.

It is to be regretted that the SC failed to take a harder stance on Ghana's unilateral activities, thus establishing much clearer rules for similar maritime delimitation cases underway, not least in the oil-rich West African region. As it stands, the reasoning of the SC may trigger

unilateralism in disputed areas. Given that the initiating State bears no international responsibility for alleged violations of the other claiming party's sovereign rights, States involved in disputes over maritime boundaries and seabed resources may seek to move faster to oilfield development and production in the disputed areas with a view to creating a *fait accompli* that could have the effect of rendering nugatory the final decision to be handed down by the court or tribunal.

Further, the SC missed an important opportunity to bring more clarity to the meaning of the obligation not to jeopardize or hamper. It is still unclear whether the standard of "permanent physical change to the marine environment" adopted in the *Guyana v. Suriname* case is the main test for determining which hydrocarbon activities might jeopardize or hamper the reaching of a final delimitation. Only Judge Paik in his [Separate Opinion](#) addressed this issue in detail and pointed to the risks which the SC's mistreatment of the obligation not to jeopardize or hamper might have in other geographical regions of the world.

The *Ghana v. Côte d'Ivoire* case shows how hydrocarbon activities may affect the reaching of a final delimitation agreement. As Judge Paik noted, Ghana's extensive hydrocarbon activities had left Ghana little room for maneuvering in the negotiation process (para. 15 of the Separate Opinion). Ghana had constantly repeated that the Parties had already agreed on a maritime boundary in practice. Although the SC dismissed the claim of Côte d'Ivoire that Ghana had breached the obligation to negotiate a delimitation agreement in good faith (paras. 604 and 605), it is clear that hydrocarbon activities with significant commercial investments made it difficult for Ghana to modify its position.

Another lesson that can be learned from the *Ghana v. Côte d'Ivoire* case is that State A should immediately and explicitly react to State B's petroleum activities conducted in a maritime area in respect of which State A also has, or believes in good faith that it has, entitlements. If it fails to do so the SC's decision suggests that State B may reasonably conclude that the duty not to jeopardize or hamper has yet to be triggered.

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