



Ghana and Côte d'Ivoire ITLOS Judgment

The judgment of the Special Chamber of ITLOS will likely be of interest to States, international oil companies and international law practitioners in that it raises important questions as to what activities may or may not be permissible in a disputed maritime area pending a definitive agreement on maritime delimitation.

Introduction

On Saturday 23 September 2017, a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in Hamburg handed down its judgment in the maritime boundary dispute between Ghana and Côte d'Ivoire. As well as confirming the equidistance/relevant circumstances methodology when delimiting the boundary, the Special Chamber's judgment also raises important questions as to what activities may or may not be permissible under international law pending a delimitation. The judgment is therefore likely to be of interest both to States and international oil companies contemplating operations in disputed waters.

The origin of the dispute: the discovery of hydrocarbons in a disputed maritime area

Following several commercial hydrocarbon discoveries off the coasts of Ghana and Côte d'Ivoire in 2009, the two States have been engaged in a long-standing dispute concerning the delimitation of the maritime boundary between them, with each State claiming that the discoveries were made within areas to which it is entitled.

As has been widely reported, a particular source of tension was Ghanaian-authorized drilling by Ghana's licensed international oil companies in the so-called Tweneboa, Enyenra, Ntomme (TEN) fields.

The proceedings

In September 2014, Ghana launched arbitration proceedings against Côte d'Ivoire under Annex VII of the UN Convention on the Law of the Sea (UNCLOS). On 3 December 2014, the Parties concluded a Special Agreement transferring their dispute to a Special Chamber of ITLOS. The Chamber consisted of five judges, three being permanent judges of ITLOS (Vice-President Bouguetaia (Algeria), Judges Wolfrum (Germany) and Paik (Republic of Korea)) and two being judges *ad hoc*, one appointed by each of the two States (Thomas Mensah appointed by Ghana and Ronny Abraham appointed by Côte d'Ivoire).

In February 2015, Côte d'Ivoire filed a request for provisional measures with the Special Chamber, seeking an order directing Ghana to "take all steps to suspend all oil exploration and exploitation operations under way in the disputed area" pending delimitation of the maritime boundary.

ITLOS issued its order on provisional measures in April 2015. It ordered that no new drilling should take place in the disputed area pending the decision of the Special Chamber on the maritime boundary. However, it rejected Côte d'Ivoire's request that ongoing activities also be suspended, because it considered that such suspension would "entail the risk of considerable financial loss to Ghana and its concessionaires".

Following exchanges of written pleadings, an oral hearing was held in February 2017.

The Parties' positions

Ghana's case was founded on the alleged existence of a "customary equidistance boundary". Its primary case was that this was not "a maritime delimitation case, but rather a request to declare the existence of a boundary". In its submissions, Ghana asserted that both Parties had engaged in exploration and exploitation on each side of the customary equidistance line without protest for nearly half a century. While Ghana acknowledged that there had never been a formal delimitation of their common maritime boundary, it claimed that both Parties had "repeatedly, consistently and publicly accepted and respected a maritime boundary based on equidistance". In particular, Ghana asserted that, until 2009, the practice of both States with respect to petroleum concessions, legislation, correspondence, maps, public statements, representations to international organisations and oil companies, reflected the existence of a tacit agreement on the customary equidistance boundary.

Ghana argued, in the alternative, that if the Special Chamber proceeded to delimit the maritime boundary *de novo*, it should in any event apply the equidistance principle, given that the relevant coasts controlling the delimitation of the territorial sea are "unremarkable" and do not "render an equidistance-based boundary, such as the customary equidistance boundary the Parties have long observed in practice, inappropriate."

For its part, Côte d'Ivoire claimed that there had never been a formal or tacit agreement on the delimitation of the maritime boundary. It referred to negotiations between the two States, during which it had consistently rejected Ghana's insistence on an equidistance boundary line. As for the delimitation of the maritime boundary, rather than employing the equidistance/relevant circumstances approach, Côte d'Ivoire instead put forward a bisector method, which it argued would allow "an equitable result to be attained given the particular geographical circumstances of the present case as it attenuates the concavity and convexity effects of the Ivorian and Ghanaian coastlines and more accurately reflects their general direction, thereby avoiding setting a precedent that is detrimental to the interests of the neighbouring States in the sub-region."

In addition, Côte d'Ivoire also asked the Special Chamber to declare that "activities undertaken unilaterally by Ghana in the Ivorian maritime area" constituted a violation of Côte d'Ivoire's sovereign rights, of UNCLOS, of customary international law and of the Special Chamber's previously ordered provisional measures.

Judgment

The Special Chamber handed down its unanimous judgment on 23 September 2017.

Having found that no tacit agreement on the maritime boundary between the Parties exists, and that the requirements of estoppel had not been met, the Special Chamber proceeded to delimit the maritime boundary of the territorial sea, the exclusive economic zone and the continental shelf between the two States.

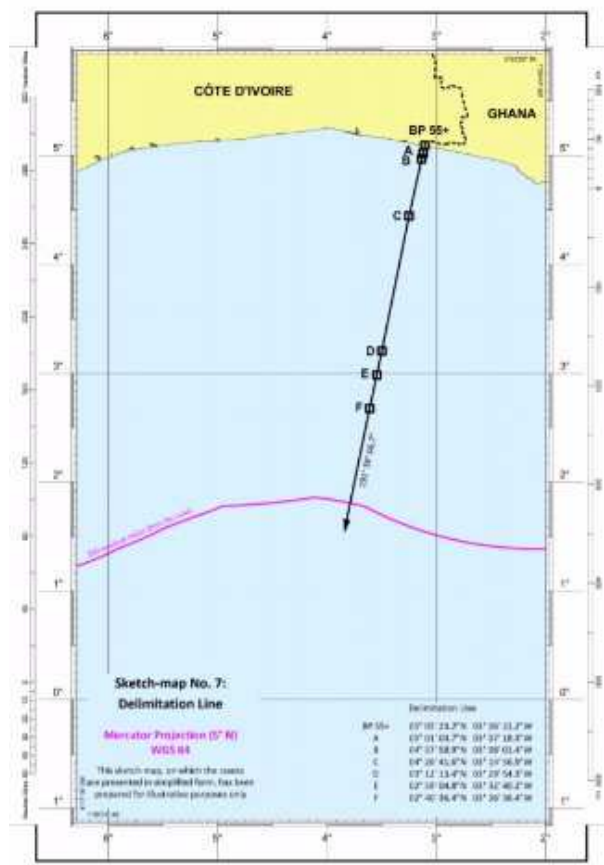
The Special Chamber ruled that, in the absence of any compelling reasons that would make it impossible or inappropriate to draw a provisional equidistance line, the equidistance/relevant circumstances methodology should be adopted for purposes of maritime delimitation.

Further, the Special Chamber ruled that, on the facts of the case, there was no convincing reason to adjust the provisional equidistance line. It noted that, although the configuration of the coasts, in particular the concavity of the coast of Côte d'Ivoire and the convexity of the coast of Ghana, did result in a cut-off effect to the detriment of Côte d'Ivoire, this effect was not so significant as to require adjustment of the provisional equidistance line. Similarly, the Special Chamber held that the conduct of the Parties (in particular oil concessions and oil activities) did not constitute a relevant circumstance justifying an adjustment. As for the continental shelf beyond 200 nautical miles, the Special Chamber considered that the same methodology should be applied, such that the delimitation line for the territorial sea, exclusive economic zone and continental shelf within 200 nautical miles should continue in the same direction until it reaches the outer limits of the continental shelf. A map of the final delimitation appears below.

The Special Chamber next considered Côte d'Ivoire's arguments that Ghana's conducting of hydrocarbon activities violated Côte d'Ivoire's sovereign rights and Article 83 of UNCLOS, as well as the provisional measures previously ordered. The Special Chamber dismissed all these claims. As a threshold matter, it ruled 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”. It further confirmed that, pending a definitive maritime delimitation agreement, the obligation embodied in UNCLOS to conduct negotiations in good faith is one of conduct, not result. Thus, so long as discussions are held, the fact that one State may wish to preserve the status quo is not necessarily a violation of an obligation to negotiate in good faith, nor is the failure ultimately to reach agreement. Significantly, the Special Chamber also found that Ghana’s unilateral activities had not violated the second obligation of UNCLOS Article 83(3),¹ namely “not to jeopardize or hamper the reaching of the final agreement”; this was, in the Special Chamber’s view, (i) because Ghana had previously suspended all new drilling activities in 2015 when so required by way of provisional measures ordered by the Special Chamber; and (ii) because Ghana’s drilling activities were undertaken in an area ultimately attributed to it.

The Special Chamber’s judgment is accompanied by two separate opinions (by Judge *ad hoc* Mensah and Judge Paik).



Conclusions

The judgment of the Special Chamber will likely be of interest to States, international oil companies and international law practitioners for two primary reasons.

First, the judgment re-confirms the equidistance/relevant circumstances methodology as the standard approach in maritime delimitation cases. It also offers useful guidance as to the kinds of factors that may be relevant in assessing whether or not a provisional equidistance line should be adjusted in order to ensure an equitable result. In particular, the Special Chamber ruled that the existence of a *de facto* line or *modus vivendi* related to oil practice cannot, in and of itself, be a relevant circumstance in the delimitation of an all-purpose maritime boundary, with respect to the superjacent water as well as the seabed and subsoil. As for the location of hydrocarbon resources, the Special Chamber held that the provisional equidistance line would need to be shown to entail “catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned” to justify deviating from the equidistance line.

¹ Article 83(3) of UNCLOS reads in full as follows: “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

Second, the Special Chamber's findings on the absence of violation by Ghana of Ivorian sovereign rights and Article 83 of UNCLOS are likely to be the source of some scrutiny. They may give rise to further questions as to what precise obligations States carry as regards unilateral conduct in a disputed maritime area pending a definitive agreement on maritime delimitation. In his Separate Opinion, Judge Paik noted that, as a result of the Special Chamber's finding that Ghana had not violated Ivorian sovereign rights, now "States may see less reason to exercise restraint in the disputed maritime area". By extension, he stated that it has therefore become paramount that Article 83(3) of UNCLOS operates effectively, being "the only reliable legal device that can regulate the conduct of States in the area yet to be delimited". In its judgment, the Special Chamber confined itself to dismissing Côte d'Ivoire's allegation of a violation on the basis that Ghana's drilling activities were undertaken in an area ultimately attributed to Ghana, whereas the Ivorian allegation of a violation was specifically framed in relation to unilateral Ghanaian activity "in the Ivorian maritime area"; however, it is noteworthy that the Special Chamber elected not to clarify the meaning of Article 83(3) of UNCLOS. In his Separate Opinion, Judge Paik observed that "the Special Chamber's response fell short in this respect".

To date, this ITLOS judgment, and the 2007 UNCLOS Annex VII arbitral award in the maritime boundary dispute between Guyana and Suriname, constitute the only judicial decisions that have considered UNCLOS Article 83(3) in any detail. In view of the importance both to States and oil companies of knowing precisely what obligations they carry if operating in disputed waters, it seems certain that further clarity in this regard, whether from international courts or *ad hoc* arbitral tribunals, will be welcome.

Given the uncertainties presently faced both by States and international oil companies, the International Boundaries Research Unit (IBRU) and Freshfields will together be running a training workshop on transboundary resources in New York, from 18 to 20 October 2017.

Details can be found at <https://www.dur.ac.uk/ibru/workshops/2017/transboundary/>.

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