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## A Commentary on the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*

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### Abstract

In an era where hydrocarbon exploration and exploitation activities keep soaring, the law of maritime delimitation has a vital role to play. Even though the optimal result in a delimitation dispute would be the establishment of a definitive and permanent boundary, international law envisages rules for the regulation of offshore activities in undelimited/disputed maritime areas as well. In order to delimit their respective maritime areas and proceed with hydrocarbon operations, Ghana and Côte d'Ivoire submitted their maritime dispute to a Special Chamber of ITLOS. The Chamber had to address a series of issues, including the existence or not of a tacit delimitation agreement, the delimitation of the relevant maritime area both within and beyond 200M and the alleged international responsibility of Ghana. After resolving that there was no tacit delimitation agreement, the Chamber applied the three-stage method and designated a maritime boundary based on equidistance for the area both within and beyond 200M. Nonetheless, the Chamber's findings with respect to the 'constitutive nature' of a delimitation judgment, delimitation beyond 200M in the absence of recommendations issued by the CLCS and the performance of unilateral drillings in undelimited/disputed maritime areas appear to be controversial and precarious.

**Keywords:** tacit delimitation agreement, equidistance/relevant circumstances, three-stage method, delimitation beyond 200M, state responsibility, Article 83(3) UNCLOS

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### 1. Introduction

On 23 September 2017, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) handed down its judgment in the *Ghana/Côte d'Ivoire* maritime delimitation case. It should be noted that the Special Chamber had issued an Order (25 April 2015) prescribing provisional measures, which included, among others, prohibition of new drillings by Ghana in the undelimited/

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disputed area. As the Parties lodged the case to the Special Chamber by way of a Special Agreement (initially, Ghana had instituted proceedings under Annex VII of the 1982 United Nations Convention on the Law of the Sea - UNCLOS) no serious jurisdictional issues occurred apart from the question whether the Chamber was competent to address the matter of state responsibility regarding alleged violations of Article 83 UNCLOS by Ghana. The Special Chamber did not accept the Ghanaian argument on the existence of a tacit delimitation agreement and utilised the three-stage process in order to draw a single maritime boundary according to the equidistance/relevant circumstances method delimiting the territorial sea, the exclusive economic zone (EEZ) and the continental shelf both within and beyond 200M. However, one of the most interesting aspects of the judgment is that the Chamber did not consider the unilateral drillings performed by Ghana in an undelimited/disputed maritime area as constituting a violation of the obligations imposed on the authority of Article 83(3) UNCLOS.

## 2. The Provisional Measures Order

In the aftermath of the institution of the Special Chamber, Côte d'Ivoire filed a request for provisional measures asking the Chamber to order the suspension of the ongoing oil activities and to prohibit the granting of additional hydrocarbon licences by Ghana; to prevent information regarding hydrocarbons attained by Ghana from being used to the detriment of Côte d'Ivoire; to take measures to preserve the continental shelf, superjacent waters and the seabed; to order Ghana to refrain from any unilateral activities that might entail a risk of prejudice to Côte d'Ivoire's rights and might aggravate the dispute.<sup>1</sup>

In its Order, the Special Chamber highlighted the great importance ascribed to the preservation of the marine environment by the UNCLOS, customary international law and international jurisprudence.<sup>2</sup> Additionally, the Chamber accentuated the risks Ghana's exploration and exploitation activities, including exploratory drillings, might bring about for the environment and noted that damage on the seabed and subsoil would not be possible to be remedied by means of compensation.<sup>3</sup> In the end, the Chamber concluded that Ghana's activities might cause an irreparable harm to the environment and therefore ordered Ghana not to commence any new drillings.<sup>4</sup> The Chamber also reiterated an important point, which could allay the fears of many states involved in a dispute and could contribute to the easement of tensions. In particular, it stated: 'any action or abstention by either party in

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1 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, para 25.

2 *ibid* paras 68-73; Yoshifumi Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46(4) ODIL 315; Andrés Sarmiento Lamus and Rodrigo González Quintero, 'Request for Provisional Measures in the *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*' (2016) 31(1) IJMCL 160.

3 *Ghana/Côte d'Ivoire* (n 1) paras 88-91.

4 *ibid* para 102, Dispositif para 1(a).



order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute.<sup>5</sup>

Another noteworthy aspect of the Order is that the Chamber took into consideration any financial losses Ghana was likely to suffer in case its ongoing hydrocarbon activities were to be terminated. With a view to striking a balance as to the protection of the rights of both parties and although it prohibited any future activities, the Chamber did not order cessation of those activities already underway, distancing itself from previous case law.<sup>6</sup> However, as Tanaka notes, the fact that the oil and gas activities of Ghana took place on its side of the equidistance line may have played a role in the Chamber's decision in this respect.<sup>7</sup>

An additional crucial point is the finding of the Chamber that access to information about resources falls within the ambit of a state's exclusive rights.<sup>8</sup> This suggests that even exploration for the attainment of seismic data may constitute a violation of sovereign rights and should be prohibited. Besides, that is what exclusivity of the coastal state's sovereign rights in respect of exploration over its continental shelf stipulates. The particular conclusion signalled a departure from previous cases where international courts and tribunals seemed to condone unilateral exploration activities in un-delimited/disputed areas.<sup>9</sup>

### 3. The Merits Phase

#### 3.1 Existence of a tacit delimitation agreement (paras 100-246)

One of the main arguments put forward by Ghana at the merits stage was that a tacit delimitation agreement existed as between the Parties and therefore asked the Chamber to endorse the purported 'customary equidistance boundary' instead of drawing another equidistant line. Ghana predicated its claim on 'consistent oil practice', namely the fact that both Parties carried out oil activities on their side of the alleged customary equidistance line and concessions granted by the Parties did not cross

5 *ibid* para 103; see also *M/V "SAIGA" (No 2) (Saint Vincent and the Grenadines v Guinea)*, Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 24, para 44; *M/V "Louisa" (Saint Vincent and the Grenadines v Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, para 79; "Arctic Sunrise" (*Kingdom of the Netherlands v Russian Federation*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, para 99; this point is significant and is connected to the obligation of states to abstain from any unilateral activities that might jeopardise or hamper the reaching of the final agreement on the authority of Articles 74(3) and 83(3) UNCLOS. See *infra* sections 3.3 and 4.

6 *Ghana/Côte d'Ivoire* (n 1) paras 98-100; these findings were criticised by Tanaka, who argues that any financial losses on the part of Ghana could be compensated, while there is a risk for other states to use the decision in order to justify drilling in a disputed area. Tanaka (n 2) 325, 327; that risk has been exacerbated by the judgment on the merits. See *infra*, section 4.

7 Tanaka (n 2) 325; this factor seems to have also influenced the Chamber's decision regarding the purported violation of Article 83(3) UNCLOS.

8 *Ghana/Côte d'Ivoire* (n 1) paras 94-95.

9 See *infra*, section 4.



that limit.<sup>10</sup> Nevertheless, the Chamber took into account that Côte d'Ivoire had in several instances objected to the Ghanaian activities in the undelimited/disputed area, hence it was not bound by estoppel in this regard.<sup>11</sup> Furthermore, the Special Chamber did not deem concession maps, domestic legislation and submissions to the Commission on the Limits of the Continental Shelf (CLCS) sufficient evidence supporting the existence of a tacit agreement.<sup>12</sup> It also emphasised that oil activities are being carried out on the seabed and thus do not have any bearing on a delimitation involving the superjacent water column.<sup>13</sup> In addition, the Chamber noted that the conduct of bilateral negotiations with respect to the appropriate delimitation method and the issuance of joint statements by the Presidents of Ghana and Côte d'Ivoire referring to a delimitation agreement to be reached in the future lead to the conclusion that there was no tacit agreement on the 'customary equidistance boundary'.<sup>14</sup>

### 3.2 Delimitation of the maritime boundary (paras 247-540)

The Special Chamber stressed from the outset that the delimitation methodology to be followed should be the same for the whole process, namely for the territorial sea, continental shelf (within and beyond 200M) and EEZ.<sup>15</sup> In the discussion on the preferred delimitation method, the Chamber rejected the position supported by Côte d'Ivoire in favour of the angle bisector method given that there were no peculiar circumstances justifying the use of the particular method. On the contrary, the Chamber underlined the overwhelming use of the equidistance/relevant circumstances method in delimitation cases over the last years and opted for the 'internationally established' three-stage procedure.<sup>16</sup>

Prior to drawing a provisional equidistance line, the Chamber had to identify the relevant coasts on which base points would be placed (relevant Ghanaian coast approximately 139 km and relevant

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10 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, to be published, paras 102, 104 <[www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.23\\_merits/C23\\_Judgment\\_23.09.2017\\_corr.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf)> last accessed 24 November 2017.

11 *ibid* paras 229-46.

12 *ibid* paras 146-68, 217, 224.

13 *ibid* paras 149, 226; the ICJ set forth that an agreed limit concerning a particular maritime zone cannot automatically be extended to another zone and thus a new agreement is necessary to this effect. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Judgment) [2001] ICJ Rep 97, para 240; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61, para 69; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing 2006) 296.

14 *Ghana/Côte d'Ivoire* (n 10) paras 191-92, 220-23, 228.

15 *ibid* paras 259-63; the same approach was taken in another two cases: *Barbados/Trinidad and Tobago Award* [2006] 27 RIAA 147; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4.

16 *Ghana/Côte d'Ivoire* (n 10) para 360; the three-stage approach was used for the first time by the ICJ in the 2009 *Black Sea* case and has ever since been used in most maritime delimitation cases. Before that, international courts and tribunals used to apply a two-stage method providing for the designation of a provisional boundary (based either on the median/equidistance line or equitable principles) and examining whether there were any special or relevant circumstances calling for a modification of the provisional line with a view to reaching an equitable result.



Ivorian coast 352 km) as well as the relevant maritime area to be delimited (198,723 km<sup>2</sup>) (**Maps 1 and 2**). Following the line of reasoning of the 2009 *Black Sea* and the 2012 *Bangladesh/Myanmar* judgments, the Chamber did not accept the base points identified by the Parties and selected its own on the low-water line.<sup>17</sup>

Having done that, the Chamber designated a provisional equidistance line (first stage) and examined whether there were any relevant circumstances requiring the modification of the provisional equidistance line (second stage). In dealing with the Côte d'Ivoire's argument that the use of an equidistance line would produce a cut-off effect due to the concavity of the Ivorian coast, the Special Chamber resolved that the cut-off is not so significant as to warrant adjustment of the provisional boundary.<sup>18</sup>

In line with the established international jurisprudence, the Chamber gave prominence to geographical factors and did not consider the location of mineral resources and the conduct of the parties -mostly relating to oil operations- as relevant circumstances calling for an amendment of the provisional line. It also proclaimed that the lack of recommendations by the CLCS did not pose a bar to the jurisdiction of the Chamber to draw a maritime boundary in the area beyond 200M. In light of the above, it was concluded that no relevant circumstances dictating alteration of the provisional equidistance line were present.<sup>19</sup>

At the final stage, the Chamber applied the disproportionality test with a view to ascertaining whether the result reached at the second stage was not disproportionate. Since the ratio of the relevant coastal lengths is 1:2.53 in favour of Côte d'Ivoire and the ratio of the allocated maritime areas is 1:2.02 in favour of Côte d'Ivoire, the Chamber found that there is no disproportionality (**Maps 3 and 4**).<sup>20</sup>

### 3.3 International responsibility of Ghana (paras 541-659)

Even though the Special Agreement did not cover the matter of jurisdiction to decide on the international responsibility of Ghana, the Chamber found itself competent to do so because of the conduct of the Parties during the proceedings and by virtue of Article 293 UNCLOS providing for recourse to general international law in cases adjudicated within the framework of Part XV UNCLOS.<sup>21</sup>

The Special Chamber propounded that a delimitation judgment gives 'one entitlement priority over the other' and thus has a 'constitutive nature' in the sense that it determines which part of the disputed area falls within the jurisdiction of each of the Parties. Therefore, the Chamber stressed the following:

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<sup>17</sup> *Ghana/Côte d'Ivoire* (n 10) paras 387-400.

<sup>18</sup> *ibid* paras 421-25.

<sup>19</sup> *ibid* paras 450-80, 493, 495, 517-19.

<sup>20</sup> *ibid* paras 536-38.

<sup>21</sup> *ibid* paras 545-59.



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.<sup>22</sup>

Further, the Chamber opined that Ghana did not violate the obligation (of conduct) to negotiate in good faith in compliance with Article 83(1) UNCLOS. It also held that Ghana's hydrocarbon activities in the undelimited/disputed area did not breach the obligation 'not to jeopardize or hamper the reaching of the final agreement' according to Article 83(3) UNCLOS given that Ghana had complied with the provisional measures Order and its activities were performed in an area ultimately allocated to it; consequently, Ghana was not found accountable for any violation of international law.<sup>23</sup>

#### 4. Commentary

One of the conclusions inferred from the judgment is that it remains necessary for a state to manifest its objections to another state's activities that might prejudice the former's rights in order not to find itself later in a position where it would be debarred from voicing its protest (estoppel and acquiescence).<sup>24</sup>

What is more, the judgment under concern affirms the pivotal role of the equidistance/relevant circumstances method in maritime delimitation as well as the prevalence of the three-stage process. It reiterates that there is a high threshold in determining whether a tacit delimitation agreement exists<sup>25</sup> and upholds the predominance of geographical over non-geographical factors when it comes to the examination of any relevant circumstances calling for modification of the provisional equidistance line, even though it maintained that a cut-off effect due to concavity does not always call for an adjustment of the median/equidistance line.<sup>26</sup>

<sup>22</sup> *ibid* paras 591-93.

<sup>23</sup> *ibid* paras 594, 629-34.

<sup>24</sup> *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 3, para 30; *Bangladesh/Myanmar* (n 15) para 124; *The Chagos Marine Protected Area Award (Mauritius v United Kingdom)* [2015] paras 435-38 <[www.pca-cpa.org/showpage.asp?pag\\_id=1429](http://www.pca-cpa.org/showpage.asp?pag_id=1429)> last accessed 24 November 2017; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, paras 130, 145; *The Philippines v China Award on Jurisdiction and Admissibility* [2015] para 250 <[www.pcacases.com/web/sendAttach/1506](http://www.pcacases.com/web/sendAttach/1506)> last accessed 24 November 2017; Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (CUP 2015) 489-90; Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 241.

<sup>25</sup> *Ghana/Côte d'Ivoire* (n 10) para 212; *Newfoundland and Labrador/Nova Scotia* (Awards of the Tribunal in the First and Second Phases of an Arbitration Concerning Portions of the Limits of the Parties' Respective Offshore Areas, 17 May 2001 and 26 March 2002 Respectively) 128 ILR 426; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, para 253; *Bangladesh/Myanmar* (n 15) paras 100-18; *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, para 91.

<sup>26</sup> *North Sea cases* (n 24) para 91; *Bangladesh/Myanmar* (n 15) para 292; *Bangladesh v India Award* [2014] para 402 <[www.pcacases.com/web/sendAttach/383](http://www.pcacases.com/web/sendAttach/383)> last accessed 24 November 2017.



With respect to non-geographical -especially economic- factors, albeit international courts and tribunals have not explicitly taken them into consideration in delimitation cases, it is argued that they underpin most maritime delimitation judgments and awards and they should be given additional weight. This is inevitable owing to the fact that the continental shelf and EEZ concepts were coined so as to serve states' economic interests.<sup>27</sup> As the ICJ put it: '[t]he natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation.'<sup>28</sup> In other words, economic factors are the *raison d'être* of both the continental shelf and the EEZ, which prompt states to pen delimitation agreements for the establishment of definitive and permanent maritime boundaries,<sup>29</sup> hence they should not be disregarded.

In addition, the judgment follows the stance taken by the Arbitral Tribunal in the 2006 *Barbados/Trinidad and Tobago Award*, the ITLOS *en banc* in the 2012 *Bangladesh/Myanmar* and the ICJ in the 2016 *Nicaragua v Colombia* (Preliminary Objections) cases, namely that there is no distinction between the 'inner' and 'outer' continental shelf in terms of the delimitation methodology and that the CLCS recommendations are not a prerequisite for the lateral delimitation of the continental shelf. Nonetheless, this approach might engender complications in the event the recommendations issued by the CLCS in a given case indicate that the natural prolongation of a state's continental shelf beyond 200M transcends the maritime boundary judicially established beforehand. In such an eventuality, if no other agreement between the parties is reached, the affected state could apply for a revision of the delimitation judgment with all the complexities something like that would generate.<sup>30</sup>

Perhaps a way to avert this kind of predicament could be a differentiation in the approach of courts and tribunals when it comes to delimitation beyond 200M. As it has already been consolidated in international jurisprudence, the distance criterion is the sole factor to be taken into consideration as to the determination of the width of a maritime zone at the expense of any geological or geomor-

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27 *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (1992) 21 RIAA 302, Dissenting Opinion of Judge Weil, para 34; David Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 264-71; Derek W Bowett, 'The Economic Factor in Maritime Delimitation Cases' in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Giuffrè Editore 1987) 45-63; Prosper Weil, *Perspectives du Droit de la Delimitation Maritime* (Pedone 1988) 274-82; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (CUP 1989) 221-22; Barbara Kwiatkowska, 'Economic and Environmental Considerations in Maritime Boundary Delimitations' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries*, Vol I (Martinus Nijhoff 1993) 75, 78-81, 106; Masahiro Miyoshi, 'Some Thoughts on Maritime Boundary Delimitation' in Seung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009) 113; Malcolm D Evans, 'Maritime Boundary Delimitation' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 274-76.

28 *North Sea cases* (n 24) paras 97, 101(D)(2).

29 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, para 107; *Barbados/Trinidad and Tobago* (n 15) para 241; *Black Sea case* (n 13) para 198; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, para 223; Committee on Rights to the Sea-bed and its Subsoil, 'Rights to the Sea-bed and its Subsoil' in International Law Association Report of the Forty-fourth Conference (Copenhagen 1950) (International Law Association, Copenhagen 1950) 87, 135, sub-paragraph (3).

30 Statute of the International Court of Justice, art 61; ITLOS Rules of the Tribunal, arts 127-129.





phological arguments; therefore, according to both conventional and customary international law, all states are entitled to a continental shelf and EEZ up to 200M.<sup>31</sup> However, in order for a state to assert continental shelf rights beyond 200M it is indispensable to prove that the natural prolongation of its landmass actually exceeds the 200M limit. Bearing in mind that the geological/geomorphological aspect unavoidably comes into play in respect of the area beyond 200M, it is argued that courts and tribunals should attach greater importance to it when drawing a maritime boundary in that area. Consequently, despite the fact that this position has not found support in jurisprudence thus far, in the absence of recommendations by the CLCS and with a view to precluding a stalemate,<sup>32</sup> international courts and tribunals could, at the first stage of delimitation, draw a provisional median/equidistance line up to 200M and then establish a different provisional line in the area beyond 200M based on the course of the natural prolongation.<sup>33</sup>

Moving now to another aspect of the judgment, what is utterly striking is the endorsement of unilateral drilling operations exercised in an undelimited/disputed maritime area. Even though Ghana carried out oil drillings in an area ultimately allocated to it, hence the Chamber found that no violation of the Ivorian sovereign rights occurred, this should not be accepted as a general rule. Nonetheless, it is necessary to point out that this finding affirms that maritime claims based on the median/equidistance line and activities -except for drillings, which appears to be the most extreme unilateral activity- performed within that limit tend to evidence good faith.<sup>34</sup>

In the 1976 *Aegean Sea Continental Shelf* case (Interim Measures of Protection), the ICJ held the following: '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'.<sup>35</sup> In other words, the Court underscored that even seismic surveys in an undelimited/disputed area, which might later on be granted to Greece, might constitute a violation of Greece's exclusive sovereign rights to explore the natural resources of its continental shelf. In the case in hand, as seen above,

31 *Tunisia/Libya* (n 29) paras 42-43, 47, 70; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, paras 33-34, 39-40, 77; *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (1992) 21 RIAA 265, para 47; *Gulf of Maine* (n 24) paras 193-95; *Barbados/Trinidad and Tobago* (n 15) paras 224-26; *Bangladesh/Myanmar* (n 15) para 322.

32 Occurring from the refrainment of the CLCS to issue recommendations because of the existence of a dispute and courts' desistance to designate a maritime boundary without the CLCS having issued recommendations. 'Rules of Procedure of the Commission on the Limits of the Continental Shelf', Rule 46 and Annex I; *Bangladesh/Myanmar* (n 15) paras 390-94; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100, paras 105-14.

33 In his Dissenting Opinion in the *Libya/Malta* case, Judge Oda mentioned: 'the distance criterion has replaced that of geomorphology in all respects save in regard to the outer continental shelf between the 200-mile and 350-mile limits'. *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 123, Dissenting Opinion of Judge Oda, para 61; *Fietta and Cleverly* (n 24) 295, 362, 508, 530, 571, 616-18; it would be extremely helpful if a cooperative scheme between international courts/tribunals and the CLCS was carved out; Judge Ndiaye submitted a proposal to establish a referral process. *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 151, Separate Opinion of Judge Ndiaye, paras 87, 99, 107, 109-18.

34 Robert C Beckman and Clive H Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) *IJMCL* 193, 211-12.

35 *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection) Order of 11 September 1976, ICJ Rep 3, paras 30-33.



the Special Chamber had also taken into account the risk of damage occurring from data gathering in its 2015 Order. Therefore, it would be logical to infer, *a minore ad maius*, that activities causing a permanent change to the seabed, like oil drillings, would most likely be an infringement of the coastal state's sovereign rights.

Nevertheless, the breach of a state's sovereign rights should be distinguished from a violation of the obligation stipulated in Articles 74(3) and 83(3) UNCLOS, namely 'not to jeopardize or hamper the reaching of the final agreement'.<sup>36</sup> It is worth mentioning that in the 2007 *Guyana v Suriname* case, the Arbitral Tribunal underlined the distinction between provisional measures for the protection of sovereign rights from activities in breach of Articles 74(3) and 83(3) UNCLOS:

It should be noted that the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally. As the Court in the Aegean Sea case noted, the power to indicate interim measures is an exceptional one, and it applies only to activities that can cause irreparable prejudice [...] Activities that would meet the standard required for the indication of interim measures, in other words, activities that would justify the use of an exceptional power due to their potential to cause irreparable prejudice, would easily meet the lower threshold of hampering or jeopardising the reaching of a final agreement.<sup>37</sup>

Although the Tribunal did not consider unilateral seismic research as a breach of Articles 74(3) and 83(3) UNCLOS -because it did not entail an irreversible harm to the seabed- it resolved that unilateral drilling in an undelimited/disputed maritime area could be in contravention of the obligation envisaged in Articles 74(3) and 83(3) UNCLOS.<sup>38</sup> As a matter of fact, the Tribunal found that unilateral drilling activities undertaken by Guyana constituted a breach of the aforementioned obligations.<sup>39</sup>

Having said the above, it seems that the correct approach would have been to deem unilateral drilling activities in the undelimited/disputed area a breach of the obligation imposed by virtue of Article 83(3) UNCLOS, even if no violation of the sovereign rights of Côte d'Ivoire eventually materialised after the boundary was established. This is because the crux of the obligation is for states to show restraint and avoid unilateral activities that might trigger and/or exacerbate tensions. Of course, the

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36 Myron H Nordquist, Shabtai Rosenne, Satya N Nandan (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol II (Martinus Nijhoff 1993) 815, 984; Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78(2) AJIL 345, 362.

37 *Guyana v Suriname Award* [2007] 30 RIAA 1, para 469.

38 *ibid* paras 466-70, 480-81.

39 *ibid* para 477.



finding on the 'constitutive nature' of the judgment is also controversial and contradicts the concept of sovereign rights a coastal state enjoys *ipso facto* and *ab initio* over its continental shelf, as expounded in the 1969 *North Sea Continental Shelf* cases.<sup>40</sup>

The way Côte d'Ivoire formulated its claim on this point (asserting that the activities in breach of Article 83(3) UNCLOS were undertaken in the Ivorian maritime area) might have played a role in the Chamber's judgment. At any rate, as mentioned above, a violation of Article 83(3) UNCLOS is not contingent on whether the activities are being carried out in a state's maritime area, but it merely suffices to prove that they are performed in an undelimited maritime area.

Judge Paik addressed the matter in his Separate Opinion noting that although the Ghanaian activities took place in an area finally allocated to Ghana, this does not preclude wrongfulness arising from the breach of the obligation provided for in Article 83(3) UNCLOS. As Judge Paik rightly remarked: 'to condone the unilateral activities of such a scale in the circumstances of the present case would certainly send a wrong signal to States pondering over their next move in a disputed area elsewhere'.<sup>41</sup>

A similar approach was taken by Judge Evensen in his Dissenting Opinion in the *Tunisia/Libya* case:

Any acceptance by the Court that the drilling of oil-wells, in an area which was disputed, should have any relevance for the delimitation, would really be an invitation to Parties to violate certain basic trends laid down in the Fourth Geneva Convention of 1958 and the draft convention of 1981, and might invite aggressive attitudes, through the staking out of claims, instead of conciliatory approaches.<sup>42</sup>

By way of conclusion, it should be pointed out that as disputes in undelimited maritime areas will

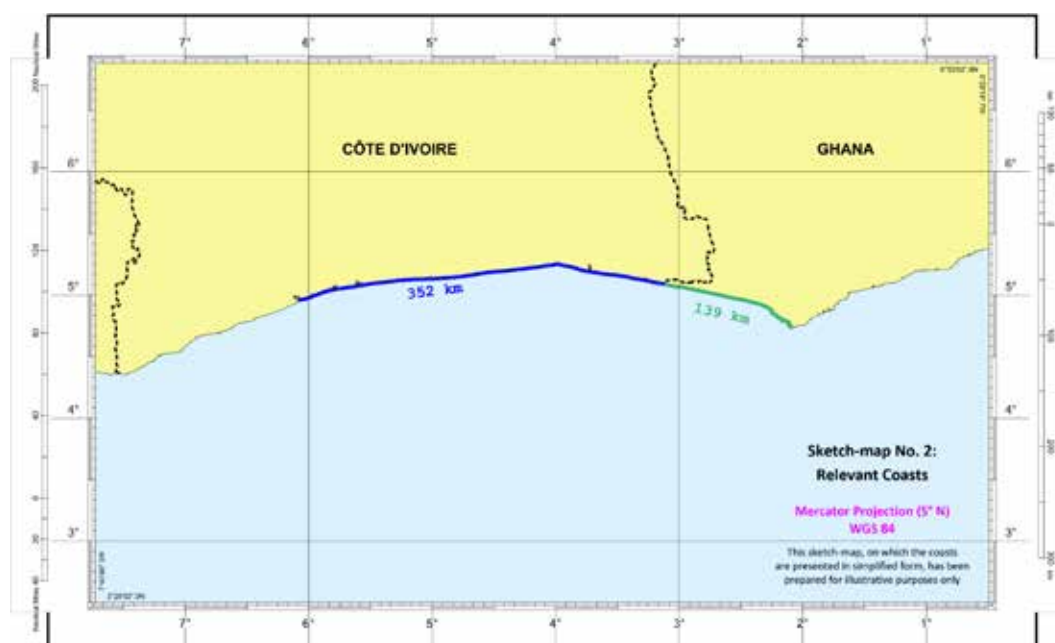
40 United States, Proclamation 2667, 'Policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf' (28 September 1945); Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311, art 2(2)(3); *North Sea cases* (n 24) paras 18-20, 63; *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 85; United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 77(2)(3); *Bangladesh/Myanmar* (n 15) paras 408-09; *Nicaragua v Colombia* (n 29) para 115; 'boundaries are found, not made'. M D Blecher, 'Equitable Delimitation of Continental Shelf' (1979) 73(1) AJIL 60, 63; 'It must be kept in mind that judges find entitlements; under no circumstances may they grant them.' Ndiaye (n 33) para 88; on the apportionment of the seabed see *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 171, Dissenting Opinion of Judge Tanaka; *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 197, Dissenting Opinion of Judge Morelli; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 157, Dissenting Opinion of Judge Oda, paras 153-154; Oda (n 33) para 64; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 130, Separate Opinion of Judge Shahabuddeen, pp. 159-61; *Anglo-French Continental Shelf Case (United Kingdom of Great Britain and Northern Ireland/France)* [1977] 18 RIAA 3, paras 78, 101; conversely, it can be accepted that without a delimitation agreement a coastal state's EEZ sovereign rights over the water column above the seabed should not be deemed duly established. BIICL, 'Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas' (2016) 20 <[www.biicl.org/documents/1192\\_report\\_on\\_the\\_obligations\\_of\\_states\\_under\\_articles\\_743\\_and\\_833\\_of\\_unclos\\_in\\_respect\\_of\\_undelimited\\_maritime\\_areas.pdf?showdocument=1](http://www.biicl.org/documents/1192_report_on_the_obligations_of_states_under_articles_743_and_833_of_unclos_in_respect_of_undelimited_maritime_areas.pdf?showdocument=1)> last accessed 24 November 2017.

41 *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, to be published, Separate Opinion of Judge Paik, para 19.

42 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 278, Dissenting Opinion of Judge Evensen, para 26.

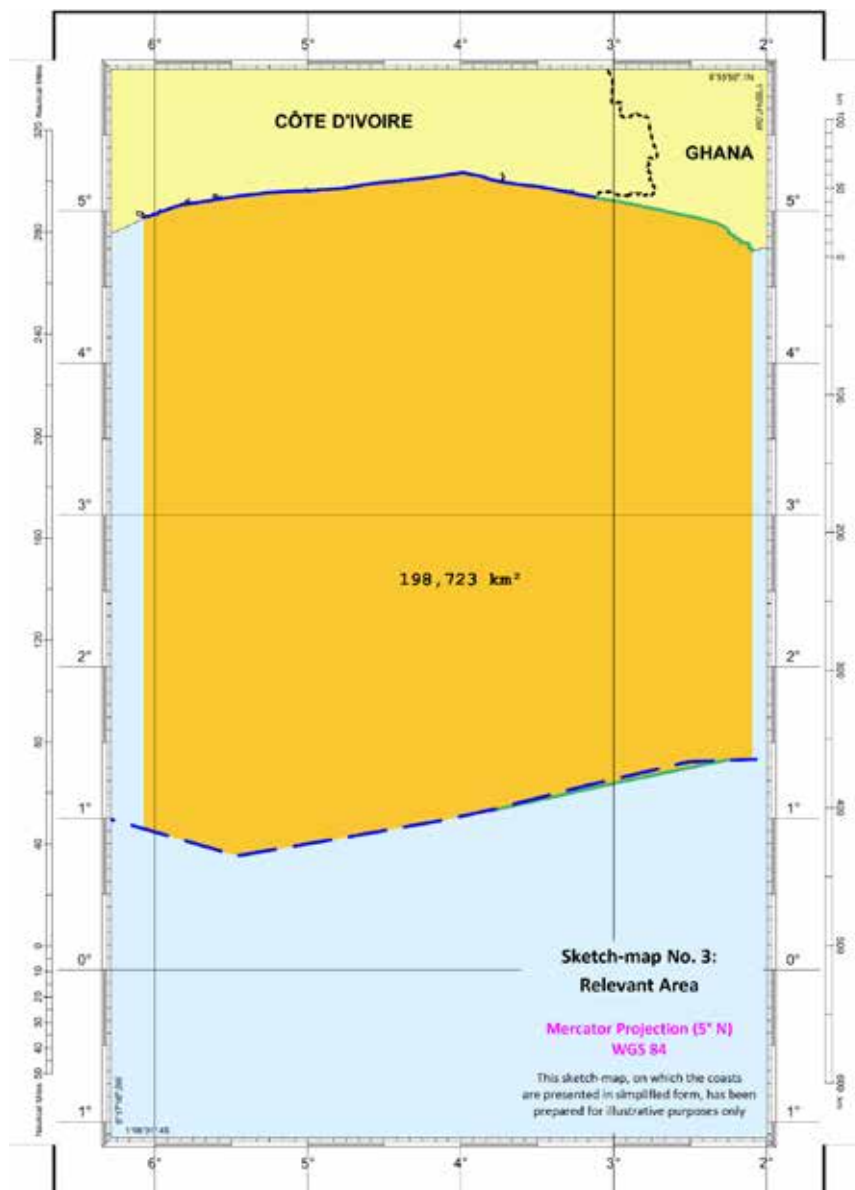
continue to emerge in the future, mainly owing to the performance of oil and gas activities, it remains to be seen whether the Special Chamber's interpretation of Article 83(3) UNCLOS will be upheld by international jurisprudence. As a similar case is in the ICJ's docket,<sup>43</sup> it will be interesting to see if the ICJ President, Ronny Abraham, who was a member of the Chamber, will play a role in instilling the Chamber's views in the Court's judgment.

On any account, the Chamber's views on the 'constitutive nature' of delimitation judgments and on non-violation of Article 83(3) UNCLOS by unilateral drillings are quite problematic. International jurisprudence should, for the sake of peace and stability, revisit these findings and follow the track designated by previous case law on the basis of both conventional and customary law of the sea.

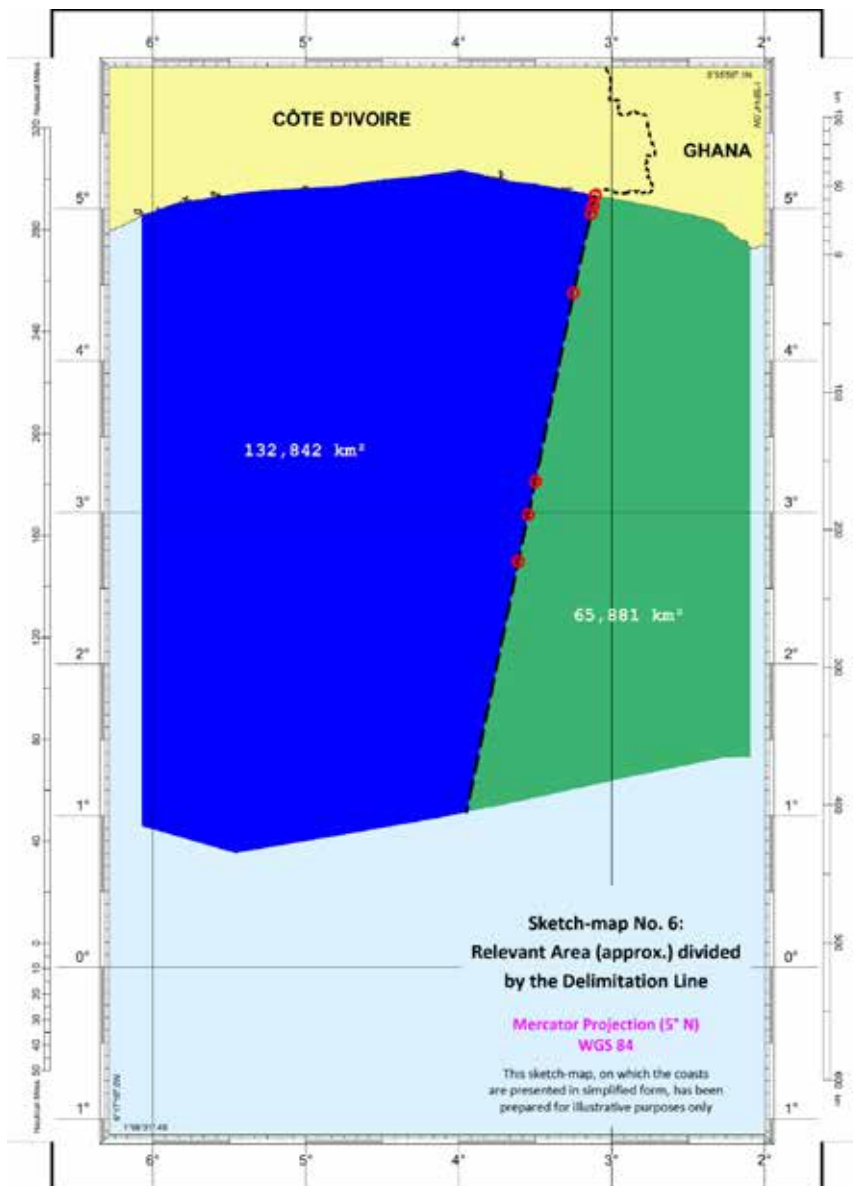


**Map 1 – Relevant coasts (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017)**

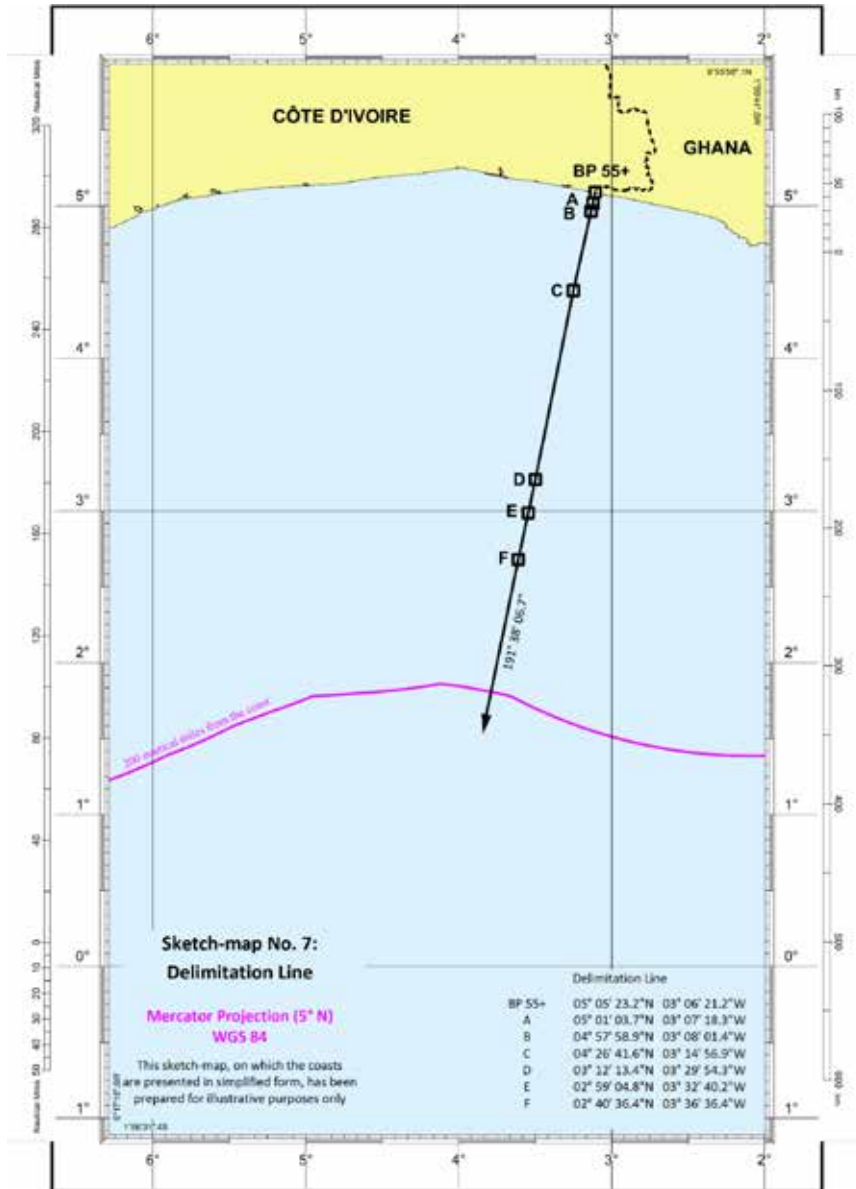
<sup>43</sup> *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* <[www.icj-cij.org/en/case/161](http://www.icj-cij.org/en/case/161)> last accessed 24 November 2017.



Map 2 – Relevant area (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017)



Map 3 – The delimited relevant area (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017)



Map 4 – The final delimitation line (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017)