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ITLOS Special Chamber Prescribes Provisional Measures with Respect to Oil and Gas Activities in Disputed Area in Case Involving Ghana and Côte d'Ivoire

By: Nigel Bankes

Decision Commented On: International Tribunal on the Law of the Sea (ITLOS), Special Chamber, Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, [Order](#) with respect to the prescription of provisional measures, April 25, 2015, ITLOS Case No. 23

By way of a Special Agreement concluded on 3 December 2014, Ghana and Côte d'Ivoire submitted a dispute concerning their maritime boundary to a Special Chamber (SC) of ITLOS. The SC was fully constituted on 12 January 2015 and on 27 February 2015 Côte d'Ivoire made a request for the prescription of provisional measures under Article 290(1) of the *Convention on the Law of the Sea* ([LOSC](#)) requiring Ghana to:

1. take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area;
2. refrain from granting any new permit for oil exploration and exploitation in the disputed area;
3. take all steps necessary to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area from being used in any way whatsoever to the detriment of Côte d'Ivoire;
4. and, generally, take all necessary steps to preserve the continental shelf, its superjacent waters and its subsoil; and
5. desist and refrain from any unilateral action entailing a risk of prejudice to the rights of Côte d'Ivoire and any unilateral action that might lead to aggravating the dispute.

In the circumstances of this case the first request was very far reaching given the extent of the development that had already occurred in and around what is now a disputed area.

Article 290(1) of LOSC allows the relevant tribunal to prescribe “any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute [hereafter referred to as head one] or to prevent serious harm to the marine environment [hereafter, head two], pending the final decision.”

This post provides the background to the dispute and then offers a summary of the Order issued by the Special Chamber and the supporting reasoning focusing on the preservation of the respective rights of the parties. The post concludes with some comments on the Order within the context of other relevant jurisprudence.

Background to the Dispute

In order to understand the full implications of the request for provisional measures in this case it is useful to have some background on the dispute. This appears most readily from Ghana's [written statement on](#) Côte d'Ivoire's request for the prescription of provisional measures. The Special Agreement between the Parties to submit the dispute to the SC actually originated with Ghana unilaterally instituting proceedings in September 2014. It is Ghana's position that, while there is no definitive written treaty between the parties delimiting the continental shelf or exclusive economic zone (and also the territorial sea) between them, both parties have followed a uniform practice since the 1960s of disposing of oil and gas rights in their adjacent offshore areas on the basis of an equidistance line. According to Ghana it was not until 2009 that Côte d'Ivoire unexpectedly changed its position and began to argue in favour of a different line which lies significantly to the east of the equidistance line.

Reproduced [here](#) is Figure 3 from Côte d'Ivoire's [Request for the Prescription of Provisional Measures](#). That Figure illustrates the implications of Côte d'Ivoire's proposed delimitation line. The red line shows the equidistance line which Ghana contends that both states have relied upon. The yellow line shows Côte d'Ivoire's claimed delimitation line, and the black dotted line shows an equidistance line re-plotted by Côte d'Ivoire as part of these proceedings. The map also shows the oil and gas developments that Ghana has licensed. While it shows that the Jubilee field (which commenced production in 2010) is still on the Ghanaian side of Côte d'Ivoire's new line, more recent developments including the so-called TEN fields (Tweneboah, Enyenra and Ntomme) are firmly within the disputed zone. Ghana takes the view that all of these developments occurred without any sign of protest from Côte d'Ivoire until 2009 (and no protest to the operator, Tullow, until 2011) and that that lack of protest should be a relevant matter in adjudicating on the merits but also in considering any request for provisional measures given the acknowledged importance of securing the rights of *both* parties (see Provisional Measures Order at paras 39 & 40).

In support of its request for provisional measures Côte d'Ivoire also alleged (Provisional Measures Order at para 50) that Ghana's oil and gas legislation "is out of step with international standards" and that Ghana's experience with production from the adjacent Jubilee field "has already evidenced many technical failings". This allegation was principally used to support Côte d'Ivoire's application in relation to the protection of the marine environment branch of Article 290(1).

In sum this was an unusual although not unprecedented fact pattern (see, for example, the North Sea Continental Shelf Cases, [1969] ICJ Rep 4 and the subsequent settlement treaties) insofar as significant exploration and investment had already occurred in what was now a disputed zone – well before the matter was submitted to formal dispute settlement.

In its Request, Côte d'Ivoire notes that the timetable established by the Special Chamber makes it such that a decision on the merits cannot be expected before the second half of 2017.

The Test for Provisional Measures: Preservation of the Respective Rights of the Parties

The jurisprudence of both ITLOS and the International Court of Justice establishes that provisional measures should not be prescribed unless the tribunal establishes prima facie jurisdiction (not an issue in this case given the Special Agreement, at paras 37-38) and unless the tribunal finds that there is “a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute” (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, at para 72) and before the issue on the merits can be resolved (*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 13 December 2013, ICJ Reports 2013, at para 25). Irreparable harm in this context refers to harm that cannot be compensated for by way of damages. The case law also establishes that the measures must be required as a matter of urgency, “that is to say” (Provisional Measures Order, at para 42) “the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered ...”.

Côte d’Ivoire based its claim for provisional measures under the preservation of rights head of Article 290(1) on the need to preserve (Provisional Measures Order, at para 46) *three* categories of “exclusive sovereign rights ... arising under UNCLOS”:

- the right to explore for and exploit the resources of Côte d’Ivoire’s seabed and the subsoil thereof by carrying out seismic studies and drilling, and installing major submarine infrastructures in the disputed area; (Articles 2(2), 56(1), 77(1), and 81)
- the right to exclusive access to confidential information about its natural resources in the disputed area; (Article 246(5))
- the right to select the oil companies to conduct exploration and exploitation operations and freely to determine the terms and conditions in its own best interest and in accordance with its own requirements with respect to oil and the environment”; (Articles 2(2), 56(1), 77(1))

Damage to Côte d’Ivoire as a result of allowing Ghana to continue its activities would, in the view of Côte d’Ivoire, be irreversible because it would deprive Côte d’Ivoire of its 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; drilling activities by their very nature are “irreversible”; the rock cannot be reconstituted; the well can be plugged with cement, but its lining remains; the subsoil cannot be restored to its prior state; and, the collection and circulation of information relating to the natural resources of the disputed area by Ghana and by private oil companies could not be reconstituted, possibly leading to an irreversible and deleterious change in Côte d’Ivoire’s bargaining power in dealing with potential investors (Côte d’Ivoire’s Request, at paras 34-35).

Ghana in reply took the view that Côte d’Ivoire had not met the test for obtaining an order of provisional measures principally on the ground that any harm such as that alleged could be met by an appropriate award of damages and by delivery of any information acquired by Ghana. In addition, Ghana considered that Côte d’Ivoire’s claims in respect of information were not supported by any particular provision of the Convention (Provisional Measures, at para 55). Ghana also considered that the SC should take some note of the weakness of Côte d’Ivoire’s case in light of its failure to object in a timely way to Ghana’s actions and those of its licensees.

Subject to two important qualifications, the SC largely sided with Côte d'Ivoire. While it agreed with Ghana (at para 88) that "the alleged loss of the revenues derived from oil production could be the subject of adequate compensation in the future" the on-going exploration and exploitation activities were different. These activities "will result in a modification of the physical characteristics of the continental shelf" and (at para 90) "any compensation awarded would never be able to restore the status quo ante in respect of the seabed and subsoil."

As for the question of confidential information about the natural resources of the continental shelf, the SC considered (at paras 92 & 93) that the matter had been dealt with in part by Ghana's observation that "information about petroleum recovered is recorded in detail, as part of standard practice in petroleum production and revenue accounting" and that "the information currently being gathered in the disputed area will be duly recorded, and Ghana will be in a position to provide that information to Côte d'Ivoire if ordered to do so at the conclusion of the case". The SC accepted this undertaking. However, the SC was also of the view that Côte d'Ivoire's interests required prospective protection insofar as "the rights of the coastal State over its continental shelf include all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf" and that "the exclusive right to access to information about the resources of the continental shelf is plausibly among those rights." Any loss of such an exclusive entitlement would (at para 96) "create a risk of irreversible prejudice to the rights of Côte d'Ivoire" should the SC rule in favour of Côte d'Ivoire on the merits with respect to any part of the disputed area.

The operative clauses of the Order provide as follows (at para 108):

... pending the final decision, the following provisional measures under article 290, paragraph 1, of the Convention:

- (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.

In prescribing these measures the SC emphasised that it was not concerned with the relative merits of the Parties' claims, it was enough that the SC could conclude (at para 62) that Côte d'Ivoire had "presented enough material to show that the rights it seeks to protect in the disputed area *are plausible*" (emphasis supplied) and that there was (at para 63) a link between the rights Côte d'Ivoire claims and the provisional measures it seeks.

While the SC generally sided with Côte d'Ivoire, there were, as noted above, two important qualifications. The first relates to the crucial distinction between ongoing activities and new activities. In its "Written Statement" Ghana made much of the fact that billions of dollars of investments had already been made within the area which was now disputed without any complaint from Côte d'Ivoire and that any shut down of these activities would have dire and irreversible consequences for Ghana and its people as well as its licensees.

The SC drew a clear distinction between ongoing activities already authorised by Ghana and in respect of which drilling has already taken place and new drilling activities. With respect to the former the SC denied the requested relief on the twin grounds (at paras 100-102) that any prohibition in relation to existing activities "would cause prejudice to the rights claimed by Ghana and create an undue burden on it" and "could also cause harm to the marine environment." With respect to new activities the SC was of the view that it was necessary to order Ghana to take all the necessary steps to ensure no new *drilling* activity in the disputed area in order to preserve the rights of Côte d'Ivoire. The scope of this obligation is examined in more detail below.

The second qualification relates to Côte d'Ivoire's efforts to maintain that the SC should also impose provisional measures in order to prevent "serious harm to the marine environment", largely on the basis of what it alleged to be Ghana's sub-standard record with respect to offshore oil and gas activities. The SC was wholly unpersuaded of this (Provisional Measures Order, at para 68), but did choose to affirm more generally its concern for "the risk of serious harm to the marine environment" and reiterated that Article 192 of LOSC imposes an obligation on States to protect and preserve the marine environment and that Article 193 of LOSC provides that States have the sovereign right to exploit their natural resources pursuant to their environmental policies, but that this right is to be exercised "in accordance with their duty to protect and preserve the marine environment". The SC also chose to refer to previous decisions which emphasised the duty of states to cooperate in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and crucially "that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention" ([*MOX Plant \(Ireland v. United Kingdom\)*](#), Provisional Measures, Order of 3 December 2001, at para 82; [*Land Reclamation in and around the Straits of Johor \(Malaysia v. Singapore\)*](#), Order of 10 September 2003, at para 92; and [*Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*](#), Advisory Opinion of 2 April 2015, at para 140).

The decision was unanimous. Judge ad hoc Mensah (appointed by Ghana) appended a separate opinion to the Order. Judge Mensah's principal point was that the SC needed to be sensitive to the interests of both parties, particularly in the circumstances of this case in which Ghana had proceeded prudently on the basis of an equidistance line accepted at least in the practice between the two states. In the end he concluded that the SC had protected the interests of both by confining the application of the measures to prevent new drilling activities and refusing to extend them to work in relation to projects that had already been approved and drilled.

Comments

The comments that follow explore the scope of the Order and then the relationship between this decision and the Tribunal's Award in *Guyana v Suriname* and the ICJ's provisional measures decision in the *Aegean Sea Continental Shelf Case*, Order of 11 September 1976 (*Greece v*

Turkey). The SC does not refer to either decision although both were referred to by the parties in this case.

Scope of the Order

The operative clauses of the Order are quoted above in their entirety. It is evident that paragraph (a) deals with “new drilling”. It therefore applies to both exploratory drilling and drilling designed to delineate the geography of an existing discovery. Thus if a licensee in the disputed area has already drilled one well and wants to drill a second step-out well to delineate the geographical extent of the discovery, Ghana’s duty under the Order is a duty not to permit the new well and if the permit has already been issued it is a duty to exercise due diligence to ensure that its licensee does not drill that second well unless operations had been commenced before the Order was issued. Thus Ghana will need to refrain from authorizing further development activities within the disputed area to the extent that such developments require new wells. This will have serious implications for the plans of any operator to proceed to production and will certainly significantly delay an investor’s recovery of sunk investments.

Paragraph (b) of the Order deals with the *use* (not the *collection*) of geological information “resulting from” “exploration activities”. It requires Ghana to exercise due diligence to prevent any such information which is not already in the public domain “from being used in any way whatsoever to the detriment of Côte d’Ivoire.” Given the reasoning behind the terms of the Order it is perhaps surprising that this paragraph was not framed in somewhat wider terms. The SC’s reasoning seemed to accept that the generation of new information in the hands of third party licensees may pose some downside risk to the ultimate holder of the sovereign rights to the resource and yet it is clear that the Order does not prevent the *generation* of information from *future* exploration activities, so long as such activities do not include the drilling of a new well or wells. Thus, (and subject to the terms of paragraph (e)) the Order will not preclude Ghana from continuing to authorise seismic activities. In other respects the obligation is broad. Thus, Ghana’s obligation under this paragraph is not confined to information in relation to the disputed area that arises *after* the date of the Order but also applies to any information generated with respect to past and ongoing exploration activities. By its terms the paragraph is confined to information arising from *exploration* activities. It is not clear why this obligation does not also extend to information generated by ongoing production activities.

Paragraph (c) requires Ghana to monitor all authorised activities within the disputed area with the goal of ensuring the prevention of serious harm to the environment, while paragraph (d) is addressed to *both* parties and requires them to take the necessary steps to protect the marine environment and to cooperate to that end.

Paragraph (e) of the Order is also directed at *both* Parties. In addition to emphasizing the need for cooperation between them it also requires each of them to refrain from unilateral action that might aggravate the dispute between the Parties. While such a provision might be thought to have some connection to the duty of states under Articles 83(3) and 74(3) of LOSC (discussed further below) not to take measures to hamper or prejudice efforts to reach agreement on delimitation, my review of other ITLOS provisional measures orders suggests that it is a rather standard part of such orders or at least the narrative of the decisions (see for example, [Arctic Sunrise](#) at para 98 (not the operative clauses of the formal Order); and *Land Reclamation*, at para 102 (equally not the operative clauses of the Order)).

The next two sections of this post review the “pending agreement” provisions of LOSC and the Award in *Guyana v Suriname* (2007) and then the ICJ’s *Aegean Sea* provisional measures Order with a view to assessing whether the ITLOS SC decision in this case is consistent with this earlier jurisprudence.

The “Pending Agreement” Provisions of LOSC

As is well known, the Exclusive Economic Zone (EEZ) and continental shelf delimitation provisions of LOSC (Articles 74 and 83) both contemplate delimitation by agreement “in order to achieve an equitable solution.” Failing agreement, States shall resort to the procedures contemplated by Part XV of LOSC as occurred in this case. Pending agreement States shall consider provisional arrangements and shall do nothing to “jeopardise or hamper the reaching of the final agreement” (the duty not to jeopardise). It is perhaps this second element of the obligation which seems most relevant to the proceedings here.

The Arbitral Tribunal in *Guyana v Suriname* offered an extended commentary on the duty not to jeopardise obligation. The Tribunal noted (at paras 465 *et seq*) that the obligation:

... is an important aspect of the Convention’s objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area. ...

In the context of activities surrounding hydrocarbon exploration and exploitation, two classes of activities in disputed waters are therefore permissible. The first comprises activities undertaken by the parties pursuant to provisional arrangements of a practical nature. The second class is composed of acts which, although unilateral, would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary.

The Tribunal is of the view that unilateral acts which do not cause a physical change to the marine environment would generally fall into the second class. However, acts that do cause physical change would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation. A distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

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. The cases dealing with such measures are nevertheless informative as to the type of activities that should be permissible in disputed waters in the absence of a provisional arrangement. 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. The criteria used by international courts and tribunals in

assessing a request for interim measures, notably the risk of physical damage to the seabed or subsoil, therefore appropriately guide this Tribunal's analysis of an alleged violation of a party's obligations under Articles 74(3) and 83(3) of the Convention.

It is important to emphasise at this point that the Tribunal is distinguishing between the general treaty duty (arising under LOSC) not to jeopardise the opportunity for reaching agreement and the more specific and more onerous duties that might arise from the exercise of the "exceptional" power to prescribe provisional remedies. The Tribunal however went on to note that the duty not to jeopardise should not be given so robust an interpretation that it should stifle all opportunities for development:

470. It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner. However, international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process. This Tribunal's interpretation of the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement must reflect this delicate balance. It is the Tribunal's opinion that drawing a distinction between activities having a permanent physical impact on the marine environment and those that do not, accomplishes this and is consistent with other aspects of the law of the sea and international law.

It is evident that the *Guyana v Suriname* Tribunal was at pains to distinguish between the duty not to jeopardise and the circumstances under which it would be appropriate to prescribe provisional measures that are more demanding than the behavior required by the duty not to jeopardise; but it also suggests that there is some common ground between the two situations insofar as in each case the Tribunal must be careful not to unnecessarily stifle the ability of the parties to pursue economic development. The Award also serves to emphasise that activities that might not be tolerated if carried out unilaterally may of course be sanctioned by agreement between the Parties, either as a provisional arrangement or otherwise.

The ICJ's Provisional Measures Decision in the *Aegean Sea Continental Shelf* Case

The SC did not mention the *Guyana v Suriname* Award but neither did it mention the ICJ's Order with respect to Greece's application for the indication of provisional measures in the *Aegean Sea* case. In that case Greece sought provisional measures that would require both parties to refrain from all exploration activity and scientific research within the disputed area in order to protect the sovereign rights of Greece to research, explore and exploit the continental shelf appertaining to Greece and its islands, "which rights" Greece asserted, are (at para 15) "exclusive in the sense that if Greece does not undertake research on the continental shelf or explore it or exploit its natural resources, no-one may undertake these activities, or make a claim to the said continental shelf, without the express consent of Greece." Greece further contended (in language that is clearly echoed in the pleadings in this case) that (at para 26):

... Turkey's seismic exploration threatens in particular to destroy the exclusivity of the rights claimed by Greece to acquire information concerning the availability, extent and location of the natural resources of the areas; that the acquisition and dissemination of such information without the consent of Greece prejudices its

negotiating position in relation to potential purchasers of exploitation licences, thereby permanently impairing its sovereign rights with respect to the formulation of its national energy policy.

The Court however was not persuaded that seismic activities were sufficiently intrusive or likely to result in irreparable injury such as to justify the indication of provisional measures. There was, said the Court (at para 30), no evidence of “any risk of physical damage to the seabed or subsoil or to their natural resources” nor “the establishment of installations on or above the seabed of the continental shelf” and nor was there “the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute”. In short (at para 33), there was no risk of irreparable prejudice and accordingly the Court declined to indicate any provisional measures.

Final Observations

On the face of it, the Order of the Special Chamber seems consistent with the *Aegean Sea* decision and the Award in *Guyana v Suriname*. After all both of these decisions generally support a distinction between seismic activities and activities that actually disturb the seabed (see especially *Guyana v Suriname* at paras 479 and 481, perhaps the latter hinting that in some circumstances even unilateral seismic testing may not be permissible if it may jeopardise or hamper the reaching of an agreement between the parties). The two decisions suggest that activities that disturb the seabed are inconsistent with a duty not to jeopardise reaching agreement *and* fully justify an award of provisional measures. However, one must be careful to ensure that provisional measures are appropriately responsive to the particular facts and circumstances of each case. There is some evidence of that here insofar as the SC evidently rejected Côte d’Ivoire’s application to suspend all ongoing activities in the disputed area. But is this sufficiently responsive? Consider the situation in which a licensee has already drilled a discovery well which justifies additional activity (including drilling activities) to determine if and how the licensee should proceed to production. Harm has already been done to the seabed; if the results are such that any prudent operator would proceed to the next stage it is hard to see how the authorization of further drilling on the same geological structure results in irreparable harm. Furthermore by taking this position the SC has likely significantly increased Côte d’Ivoire’s bargaining power. I say this because Ghana will come under tremendous pressure from any licensee in the position described above to create the circumstances in which that licensee will be able to proceed to map out the scope of its discovery and actually proceed to production (subject to any accounting which may subsequently be required). True, Ghana may well have protected itself from any legal recourse under the terms of its licences, but both the licensee and Ghana will have a shared economic interest in seeing any discovery proved up in an orderly way.

Under the terms prescribed by the SC, Ghana will need to secure (as suggested by the tribunal in *Guyana v Suriname*) the agreement of Côte d’Ivoire to any further development of this discovery which entails additional drilling. It is an open question whether in doing so the Order has simply preserved the rights of Côte d’Ivoire pending a decision on the merits, a decision which we cannot expect for at least two years. This is a long time for any licensee to sit on a discovery

made only on the basis of a significant capital investment, and one wonders whether the SC has achieved a fair balance between the rights and interests of the two parties.

This comment has been cross posted on the blog of the [KG Jebsen Centre of the Law of the Sea](#) of the University of Tromsø, the Arctic University of Norway, and on [ABlawg](#), the blog of the Faculty of Law, the University of Calgary. Thanks to Alex Oude Elferink for his comments on an earlier draft of this post.

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