

Client Update

Special Chamber of the International Tribunal for the Law of the Sea Renders Important Decision on Hydrocarbon Activities Carried Out in a Disputed Area

On 23 September 2017, a Special Chamber of the International Tribunal for the Law of the Sea (Judges Bouguetaia, Wolfrum, Paik; Judges *ad hoc* Mensah, Abraham) rendered its Judgment in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*. The Judgment reaffirms the primacy of the equidistance/relevant circumstances methodology in maritime boundary delimitation, and provides important guidance for States and oil & gas companies engaged in exploration and exploitation activities in disputed maritime areas.

The Judgment brings some legal certainty to oil & gas concessionaires operating in disputed maritime areas. According to the Judgment, their activities will not retrospectively be found to contribute to the violation of the sovereign rights of a claiming State, as long as the activities “were carried out before the judgment was delivered” and “the area concerned was the subject of claims made in good faith by both States.” Further, the Judgment implies that hydrocarbon activities in disputed maritime areas do not *as such* “jeopardize or hamper” the reaching of a final agreement on the delimitation of the continental shelf. The Judgment highlights three fact-specific considerations—Ghana’s eventual suspension of its activities following a provisional measures Order, the distinction between “new drilling” and “ongoing activities,” and the fact that the area was eventually attributed to Ghana—suggesting that oil & gas concessionaires operating in disputed maritime areas will have to assess the legal risks they face on a case-by-case basis.

DETERMINATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE

By special agreement dated 3 December 2014, Ghana and Côte d'Ivoire agreed to submit the dispute concerning their maritime boundary in the Atlantic Ocean to a Special Chamber of the International Tribunal for the Law of the Sea. The disputed area included the TEN (Tweneboa, Enyenra, Ntomme) offshore oil field, where Ghana and its concessionaires conducted hydrocarbon activities.

Following a request for provisional measures by Côte d'Ivoire, the Special Chamber delivered an Order on 25 April 2015, prescribing that “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.”

Following a hearing in February 2017, the Special Chamber in its September 2017 Judgment (i) determined the maritime boundary between the two States with respect to the territorial sea, the exclusive economic zone, and the continental shelf, applying the equidistance/relevant circumstances methodology; and (ii) found that Ghana did not violate the sovereign rights of Côte d'Ivoire, article 83 of the United Nations Convention on the Law of the Sea (the “Convention”) or the provisional measures prescribed in the April 2015 Order in undertaking hydrocarbon exploration and exploitation activities in the disputed area.

DELIMITATION METHODOLOGY

The Special Chamber used the same delimitation methodology for the territorial sea, exclusive economic zone, and continental shelf.

Ghana contended that the equidistance/relevant circumstances method, as the “now-standard method,” should apply. Côte d'Ivoire advocated the use of another method, the angle bisector method, which it said would take into account the “macro-geography” of the relevant area.

The Special Chamber found that “the international jurisprudence concerning the delimitation of maritime spaces in principle favours the equidistance/relevant circumstances methodology” and that “in the absence of any compelling reasons that make it impossible or inappropriate to draw a provisional equidistance line, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation.”

After establishing a provisional equidistance line, the Special Chamber determined that no relevant circumstances required an adjustment of this line. In particular, in response to Côte d'Ivoire's invocation of the location and distribution of hydrocarbon resources as a relevant circumstance, the Special Chamber emphasized that “[m]aritime delimitation is not a means for distributing justice” and that it is “[o]nly in extreme situations” that considerations other than geographical ones become relevant. In a final step, the Special Chamber verified that the delimitation line “[did] not lead to an inequitable result owing to a marked disproportion

between the ratio of the respective coastal lengths and the ratio of the relevant maritime area allocated to each Party” and affirmed the equidistance line as the delimitation line.

GHANA'S HYDROCARBON ACTIVITIES IN THE DISPUTED AREA

The Special Chamber next considered Côte d'Ivoire's claim that Ghana breached Côte d'Ivoire's sovereign rights, article 83 of the Convention, and the April 2015 Order by undertaking hydrocarbon exploration and exploitation activities in the disputed area. The Special Chamber rejected the claim.

With respect to Côte d'Ivoire's sovereign rights, the Special Chamber held 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.”

With respect to article 83 of the Convention, the Special Chamber considered paragraphs 1 and 3 in turn. The Special Chamber found that paragraph 1—which provides that continental shelf delimitation “shall be effected by agreement”—imposes an obligation to negotiate in good faith, which is an obligation of conduct and not of result. Negotiations took place between Ghana and Côte d'Ivoire, and thus Ghana did not breach its obligation to negotiate in good faith.

Paragraph 3 of article 83 provides that, pending agreement, the States “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.” The Special Chamber stated that paragraph 3 “contains two interlinked obligations.” The first obligation—to “make every effort to enter into provisional arrangements of a practical nature”—does not impose an obligation to reach an agreement on provisional arrangements but merely constitutes an obligation of conduct. The Special Chamber noted that Côte d'Ivoire did not request that Ghana enter into provisional arrangements and therefore Côte d'Ivoire could not fault Ghana for failing to negotiate on such arrangements. According to the Special Chamber, the words “shall make every effort” also apply to the second obligation—“during this transitional period, not to jeopardize or hamper the reaching of the final agreement”—which too is an obligation of conduct. The Special Chamber found that Ghana did not breach this obligation for two reasons. First, Ghana “finally suspended its activities” by complying with the April 2015 Order, including by ensuring that no new drilling would take place in the disputed area, although it would have been “preferable” if Ghana had suspended its hydrocarbon activities before, at Côte d'Ivoire's request. The Special Chamber noted that drilling carried out in the disputed area was not “new drilling,” as the activities were “ongoing activities in respect of which drilling had already taken place,” whose purpose was, as explained by Ghana, to “ensure the proper production and maintenance of the oil deposits.” Second, “Ghana has undertaken hydrocarbon activities only in an area attributed to it.”

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The Judgment's fact-specific conclusions provide helpful guidance but do not eliminate all legal uncertainty. States and oil & gas concessionaires operating in disputed maritime areas must continue to assess the legal risks they face on a case-by-case basis. Please do not hesitate to contact us with any questions.

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