The Rights and Obligations of States in Disputed Maritime Areas: What Lessons can be Learned from the Maritime Boundary Dispute between Ghana and Côte d'Ivoire?

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Abstract

Unilateral acts undertaken in disputed maritime areas, particularly in relation to mineral resources, frequently lead to conflict between States. Appraisals of the scope that remains for unilateralism in disputed maritime areas under international law exist in both case law and literature, but the precise scope remains shrouded in doubt. The ruling of the Tribunal in Guyana v. Suriname *– building its argumentation extensively on that of the International Court of Justice (ICJ or Court) in the* Aegean Sea Continental Shelf (interim measures) *– is significant in this regard, clarifying, at least to a certain extent, the scope for unilateral conduct. Recently, in September 2017, in the maritime boundary dispute between Ghana and Côte d'Ivoire a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) addressed the lawfulness of unilateral conduct by Ghana in a disputed maritime area. The* Ghana/Côte d'Ivoire *judgment throws a completely different light on the matter, compared to this earlier case law, making revisiting the topic of what the rights and obligations of States are in disputed maritime areas highly necessary and topical.*

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1. Introduction

Frequently, acts are undertaken unilaterally in disputed maritime areas in relation to mineral resources. This might involve a broad spectrum of categories of acts that are different in nature and aim: i.e., acts paving the way for activities related to mineral resources to proceed through concessioning; activating these concessions; conducting seismic work to map out the mineral resource potential in a disputed maritime area; undertaking exploratory drilling to assess whether earlier located deposits are commercially viable; and appropriating mineral resources through exploitation.[1] Along this range of conduct, different measures of damage will be caused to the marine environment.[2] These unilateral acts when undertaken unilaterally regularly engender conflict between claimant States; however, the exact measure thereof varies with the specific situation and the type of conduct concerned.[3] It is not easy to answer the question what unilateral acts can be lawfully undertaken in disputed maritime areas in relation to mineral resources from the perspective of international law; perhaps inherently so due to that the circumstances surrounding a particular disputed maritime area are entwined with determining this scope.[4] Scholars also continue to puzzle over this issue.[5]

The most recent addition to the case law relevant to the issue of unilateralism in disputed maritime areas is the judgment on the merits in the dispute between Ghana and Côte d'Ivoire (*Ghana/Côte d'Ivoire*) that was handed down by a Special Chamber of ITLOS (Special Chamber or Chamber) on 23 September 2017.[6] Also relevant in this regard is the interim measures order that was delivered by ITLOS previous thereto, on 25 April 2015.[7]

More specifically, this article will seek to analyze to what extent *Ghana/Côte d'Ivoire* has

[1] Youri van Logchem, The Status of a Rule of Capture under International Law of the Sea with Regard to Offshore Oil and Gas Resource Related Activities, 26 Mich. St. Int'l L. Rev. 196-246 (2018).
[2] Corazon Morales Siddayao, Oil and Gas on the Continental Shelf: Potentials and Constraints in the Asia-Pacific Region, 9 Ocean Management 74 (1984).
[3] See, e.g., Jared Bissinger, The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications, 10 Asia Policy 109 (2010); Youri van Logchem, The Scope for Unilateralism in Disputed Maritime Areas, in THE LIMITS OF MARITIME JURISDICTION 175 (Clive H. Schofield, Seokwoo Lee & Moon-Sang Kwon eds., 2014).
[4] Van Logchem, *supra* note 3, at 196-197.
[5] See e.g., Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (British Institute of International and Comparative Law, 2016), available at 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, at 18.
[6] Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, 23 Sept., 2017, Case no. 23, p. 2 (Ghana/Côte d'Ivoire (Judgment)).
[7] Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/Côte D'Ivoire), Case No. 23, Provisional Measures, Order, April 25 2015 (Ghana/Côte d'Ivoire (Provisional Measures)).

made a positive contribution on two issues: first, the interpretation of paragraph 3 of Article 83 of the United Nations Convention on the Law of the Sea (LOSC, or Convention) as such, predominantly the obligation to not hamper or jeopardize continental shelf delimitation, given that it figured quite heavily in this case; and, second – which is, to a certain extent, intermingled with the first issue – the issue of what the rights and obligations of States are in relation to mineral resources within disputed maritime areas on the basis of *Ghana/Côte d'Ivoire*.

In addition, an alternative line of inquiry will be considered, i.e., the question whether, in relation to the remaining scope for unilateralism in disputed maritime areas, there has been a blurring of the distinction between lawful and unlawful unilateral acts because of how the Chamber in *Ghana/Côte d'Ivoire* framed its reasoning and the conclusions it reached in relation thereto. There is a general caveat in relation to the scope remaining for unilateralism in disputed waters concerning mineral resources under international law: it has never fully crystallized.[8] After analyzing the case law rendered before *Ghana/Côte d'Ivoire* it could be stated with greater certainty that, unilateral conduct causing irreparable prejudice to rights would be prohibited in a disputed maritime area.[9] However, the judgment of the Special Chamber in *Ghana/Côte d'Ivoire* (see section 5.2) raises some fundamental questions regarding the state of international law in relation to unilateral conduct in disputed maritime areas.

In terms of organization, this article is divided into two parts. The first part will offer a more general introduction to the topic at hand, unilateralism in disputed maritime areas (see section 2). Attention will be first directed towards disputed territorial sea, exclusive economic zone (EEZs) and continental shelf areas as a general phenomenon. This is necessary because the Special Chamber in *Ghana/Côte d'Ivoire* was called upon to effect a delimitation of these maritime zones conjointly. After shortly describing the reasons how disputed maritime areas came into being and can be dealt with, the international legal framework applicable to these areas in the period prior to delimitation will be laid out. Relevant in this regard are Articles

[8] Van Logchem, *supra* note 3, at 195-197; David H. Anderson & Youri van Logchem, Rights and Obligations in Areas of Overlapping Maritime Claims, in THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA 206 (S. Jayakumar, Tommy Koh & Robert Beckman eds., 2014).
[9] See e.g., Rainer Lagoni, Interim Measures Pending Maritime Delimitation Agreements, 78 Am. J. Int'l L. 366 (1984).

15, 74 and 83 LOSC.[10] Special emphasis will be placed on paragraph 3 of Article 83 LOSC, dealing with disputed continental shelf areas, fulfilling a central role in the argumentation of Côte d'Ivoire (see in particular sections 4.1 and 5.1); the modalities of this paragraph will be laid out in sections 3.2-3.5.

Two cases, respectively dealt with by the ICJ and an Arbitral Tribunal and delivering their decisions some three decades apart, respectively in 1976 in *Aegean Sea Continental Shelf (interim measures)* and in 2007 in *Guyana v. Suriname* (see section 3.5),[11] have contributed to a more advanced understanding of how to interpret the rules and obligations of international law that are relevant in pinpointing the existing scope for unilateralism in disputed EEZ and continental shelf areas. Both cases involved disputed maritime areas, in which acts in relation to mineral resources were undertaken unilaterally, and against which one of the parties to the dispute protested. *Guyana v. Suriname* will be looked at as to how paragraph 3 of Article 83 LOSC has been understood in this case. Also, the ICJ's decision in *Aegean Sea Continental Shelf (interim measures)* will be analyzed. The Tribunal in its award *Guyana v. Suriname* attributed a central role to what the ICJ held in the aforementioned interim measures procedure, in interpreting paragraph 3. *Guyana v. Suriname* has been argued, wrongly in the view of this author, to have resolved the conundrum of what scope is reserved for unilateralism in relation to mineral resources within disputed EEZ/continental shelf areas.[12] Although the decision in *Guyana v. Suriname*, heavily building on the ICJ's ruling in *Aegean Sea Continental Shelf (interim measures)*, can be applauded for clarifying, to a certain extent, the scope for unilateral acts relating to mineral resources, the award and the reasoning of the Tribunal, has tended to provoke questions of its own. One of these questions is the extent to which it is appropriate to apply, by analogy, the findings of this Tribunal to disputed maritime areas in a general sense; and thus considering it to be the final word on what scope remains for unilateralism in disputed maritime areas.[13]

Distinguishing *Ghana/Côte d'Ivoire* from the previously mentioned case law, was the extent

[10] United Nations Convention on the Law of the Sea, Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.
[11] Aegean Sea Continental Shelf case (Greece v. Turkey), Provisional Measures, Order, 1976 I.C.J. 3 (September 11); Guyana/Suriname, Award of the Arbitral Tribunal 17 Sept., 2007, ¶ 467, available at https://pcacases.com/web/sendAttach/902.
[12] See Stephen Fietta, Guyana/Suriname, 102 Am. J. Int'l L. 120 (2008); Shigeki Sakamoto, Japan-China Dispute Over Maritime Boundary Delimitation – From a Japanese Perspective, 51 Japanese Y.B of Int'l L 101 (2008).
[13] Van Logchem, *supra* note 3, at 183-192.

of unilateral acts undertaken by a party to a maritime boundary dispute, i.e., Ghana, in relation to mineral resources in a disputed maritime area. An important aspect to this dispute is that Ghana was on the verge of starting to produce oil from previously drilled wells. Questions about the lawfulness of the unilateral acts by Ghana already rose to the fore in the interim measures phase, in which Côte d'Ivoire contested their lawfulness. The primary measure of interim protection sought from the Special Chamber was that, Ghana would be ordered to put all mineral resource activity related within the disputed area on hold prior to delimitation.[14] An important motivation for Côte d'Ivoire to take this position was as follows: through the unilateral acts of Ghana, the exclusivity of its sovereign rights over the continental shelf was infringed upon to an extent that the resulting damage was irreparable (see section 5.1).[15] In formulating this argument, Côte d'Ivoire relied heavily on the obligation to not hamper or jeopardize the final delimitation of a disputed continental shelf area, which is contained in paragraph 3 of Article 83 LOSC.[16] During the merits phase, this line of argument was repeated by Côte d'Ivoire. As a result, the Chamber was called upon to interpret the wide and diversified range of unilateral conduct by Ghana in relation to the disputed continental shelf area, *inter alia*, through the lens of paragraph 3. New light is shone by the final judgment of the Special Chamber on the content of the obligation to not hamper or jeopardize. Standing in the way of a more elaborate analysis of this paragraph however, was the way in which Côte d'Ivoire committed its submissions on this point to paper (see section 5.3).

The second part of the article will closely analyze the specifics of the dispute between Ghana and Côte d'Ivoire. It will look at the following aspects: the arguments presented by the parties to the dispute, both in the phase of the interim measures (sections 4.1-4.2) and on the merits (section 5). In both phases, arguments were presented by both sides to the dispute about the (un)lawfulness of the unilateral conduct in the disputed maritime area. Yet, an important difference was that the States concerned approached this issue from very different angles. The conclusions arrived at by the Special Chamber in these respective stages in relation to the

[14] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 11, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire under Article 190, paragraph 1, of the United Nations Convention on the Law of the Sea, 27 February 2015 (Request for provisional measures submitted by Côte d'Ivoire), at 2.

[15] See e.g., Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 11, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, at 10-11.

[16] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 11, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, at 8.

(un)lawfulness of this unilateral conduct will also be discussed (see sections 4.3 and 5.3). Before delving into this issue, the maritime boundary dispute between Ghana and Côte d'Ivoire before the Special Chamber will be closely analyzed by first discussing the interim measures phase, to then move to the dispute on the merits. Following this, the aspect of how the Special Chamber has ruled on the arguments presented by the parties in these two phases will be at the center of analysis (see section 5.3).

After discussing the intricacies of this dispute, the findings of the Special Chamber will be placed in a broader context, by applying them to the questions that lie at the core of this contribution: that is, was a better understanding offered of the meaning of paragraph 3 of Article 83 LOSC, or more broadly, in relation to the issue of what the rights and obligations of States are concerning disputed maritime areas, specifically in relation to mineral resources?

2. Disputed maritime areas and unilateralism

Due to the proximity of certain coasts of States, combined with the expansion of entitlements to maritime zones up to at least 200 nautical miles (nm) in the form of the EEZ and continental shelf, and the extension of the breath of the territorial sea to 12 nm, disputed maritime areas were inevitably created.[17] Disputed maritime areas are those areas where neighboring States have advanced *overlapping* claims to maritime zones, be it e.g., the territorial sea, EEZ or (extended) continental shelf, or a combination thereof. Areas of this type are voluminous in the international landscape.[18] For instance, African States have completed a little over half of the amount of delimitation exercises they can go through in total; however, some of these concern boundaries that have been partially delimited, but leave the remainder undefined.[19]

Disputed maritime areas can create different levels of conflicts between coastal States having overlapping claims, ranging from no problems arising between them to that, disputes are frequent. Undertaking unilateral acts in connection with mineral resources in disputed maritime area is particularly prone to prompt a response from the other claimant State. Two

[17] ROBIN R. CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA 147-148 (3rd ed., 1999); Anderson & Van Logchem, *supra* note 8, at 192-195.
[18] H.M. Al Baharna, Legal Implications of Maritime Boundary Disputes (With Special Reference to the Gulf), 68 Y.B. of Islamic & Middle Eastern L. 70 (1994); Clive H. Schofield, Even More Lines in the Sea, in OCEAN LAW AND POLICY: TWENTY YEARS OF DEVELOPMENT UNDER THE UNCLOS REGIME 399 (Carlos Espósito et al. eds., 2016).
[19] Report on the Obligations of States under Articles 74(3) and 83(3), *supra* note 5, at 85.

ways can be identified as to how claimant States can respond to unilateral conduct:[20] protesting and taking physical action. Yet, there are fundamental differences between these types of responses: protesting is a lower intensity response than formulating a physical reaction, e.g., through sending navy vessels to the area concerned in an attempt to put a halt to unilateral conduct.[21] Giving a reaction to a unilateral act may be called for in certain circumstances, and might prevent a State from being confronted with the argument that by staying silent it has acquiesced in the lawfulness of that conduct; or, alternatively, in the claim of the other State over the area.[22] An example illustrating the importance of giving some response, is the dispute currently under consideration, with Ghana contending that through Côte d'Ivoire's silence in connection with the disputed area, and the related conduct set in motion therein, it had acquiesced in a equidistance boundary line (see e.g., section 5.2).[23]

Article 15 LOSC is the relevant provision in case overlapping territorial sea claims arise. It contains the following delimitation rule: the territorial sea boundary is the equidistance line, unless another line is justified by a special circumstance or historic title. This same solution applies in the shape of an interim rule to the period preceding delimitation of the disputed territorial sea area, with the same caveat: no historic title or special circumstance can be in play.[24] In their absence, the equidistance line would signify the outer point up to which a claimant can exercise sovereignty prior to delimitation.

Beyond the outer limit of the territorial sea, the EEZ and the continental shelf will enter into the picture. Disputed EEZ and continental shelf areas arise regularly in the international landscape: in fact, the majority of disputed areas remaining outstanding today involve one or a combination of these two maritime zones.[25] States can delimit their disputed EEZ or

[20] Van Logchem, *supra* note 3, at 175.

[21] For example, after Guyana allowed an oil rig to be placed within a disputed maritime area, to commence with exploratory drilling, Suriname put a halt to this conduct by sending its naval vessels. The Tribunal concluded that Suriname breached Article 2(4) United Nations Charter and general international law. It was particularly held against Suriname, that it issued an ultimatum: the rig would need to 'leave the area at once, or the consequences will be yours'. See, Guyana v. Suriname, *supra* note 11, ¶ 445, 476.

[22] M. Shah Alam & A. Al Faruque, The Problem of Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar: Prospects for a Solution, 25 Int'l J. Marine & Coastal L. 408-409 (2010).

[23] Another example is that silence on the part of Turkey was construed by Greece in *Aegean Continental Shelf (interim measures)* as coming to the former's detriment, in that it acquiesced in Greece's continental shelf claim. See e.g., Aegean Sea Continental Shelf, supra note 11, Dissenting opinion of Judge Stassinopoulos, at 36-37.

[24] SATYA N. NANDAN AND SHABTAI ROSENNE (EDS.), UNITED NATIONS CONVENTION OF THE LAW OF THE SEA 1982: A COMMENTARY, VOLUME II 135 (1993).

[25] Tim Martin, Energy and International Boundaries, in RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW 181 (Kim Talus ed., 2014); Anderson and Van Logchem, *supra* note 8, at 192, 198.

continental shelf area by way of a negotiated boundary agreement between the coastal States, or through a delimitation effected by an international court or tribunal. Paragraph 1 of Articles 74 and 83 LOSC contains the basic rules governing the delimitation of overlapping EEZ or continental shelf claims: the ultimate boundary has to be equitable.[26] These identical provisions have been regularly criticized for providing limited guidance to States having overlapping claims.[27] However, this has not prevented States from reaching delimitation agreements successfully; moreover, practice in this regard continues to expand.[28] Bringing a disputed EEZ or continental shelf area under the reach of a cooperative arrangement is another option for the States concerned, most of which can be considered provisional arrangements in the sense of paragraph 3 of Articles 74 and 83 LOSC.[29]

There are concurrent claims of coastal States to sovereignty (concerning the territorial sea), or sovereign rights (pertaining to the EEZ or continental shelf), with regard to the same maritime area prior to its delimitation.[30] The entitlements to maritime zones and related sovereignty, sovereign or jurisdictional rights of coastal States over a disputed maritime area already exist prior to delimitation, however.[31] In a way, the area of overlapping claims appertains to all of the claimants involved prior to delimitation. Or so it has been argued.[32] However that may be, there may be *uncertainty* over the extent to which States can *exercise* their rights in relation to disputed maritime areas.[33] But, there is an important difference between the EEZ and continental shelf.[34] The sovereign rights coastal States have over the continental shelf are inherent and exist *ab initio* and *de jure*.[35] This is not the case concerning

[26] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, 1982, I.C.J. 18, 59 (February 24).
[27] See e.g., Malcom D. Evans, Maritime Delimitation after Denmark v. Norway: Back to the Future?, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 156 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); VICTOR PRESCOTT AND CLIVE SCHOFIELD, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 246 (2005).
[28] Alex G. Oude Elferink, International Law and Negotiated and Adjudicated Maritime Boundaries: a Complex Relationship, 48 German Y.B. Int'l L. 231, 235-236 (2015).
[29] E.g., the preamble to a provisional arrangement concluded between Algeria and Tunisia, establishing a provisional maritime boundary between the coasts of the two States, explicitly refers to paragraph 3 of Arts. 74 and 83 LOSC. See Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People's Democratic Republic of Algeria, 2002, 2238 UNTS 197.
[30] Anderson & Van Logchem, *supra* note 8, at 198.
[31] Y.M. Yusuf, The Role of the 1982 UNCLOS in the Resolution of Maritime Boundary Disputes, 7 Int'l Energy L. Rev. 288-289 (2011).
[32] See e.g., Enrico Milano & Irini Papanicolopulu, State Responsibility in Disputed Areas on Land and at Sea, 71 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 590 (2011).
[33] VICTOR PRESCOTT, THE GULF OF THAILAND: MARITIME LIMITS TO CONFLICT AND COOPERATION 17 (1998).
[34] Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13, 24-25 (June 3).
[35] North Sea Continental Shelf cases (North Sea Continental Shelf (Federal Republic of Germany/Netherlands) and (North Sea Continental Shelf (Federal Republic of Germany/Denmark)), Merits, Judgment, 1969 I.C.J. 3-

the EEZ: one will need to be established by making an explicit claim.[36] Usually, the aspect of inherency of State's rights over the continental shelf has been argued to imply the following: sovereign rights automatically cover the mineral resources embedded therein.[37] Interestingly, the Special Chamber's reasoning in *Ghana/Côte d'Ivoire (judgment)* seems to be at odds herewith, raising the suggestion that delimitation is *constitutive* of rights (see section 6).

3. Disputed maritime areas: the international legal framework

The waters located off the adjacent coasts of Ghana and Côte d'Ivoire have been known, for some time, to contain significant deposits of mineral resources.[38] Tullow Oil, having its primary seat in London, was the petroleum company primarily concessioned by Ghana to conduct a variety of exploratory and exploitation work related to mineral resources in the disputed maritime area. Significant amounts of deposits were struck in several locations of the disputed area: fields showing particular promise were Jubilee field and Tweneboa, Enyenra and Ntomme (these are colloquially known as 'TEN').

It is difficult to pinpoint with precision when the dispute over the maritime boundary materialized between the two States; complicating this is Côte d'Ivoire being inactive in relation to the area concerned, at least, for some period of time.[39] Its silence spanned several decades according to Ghana,[40] which fed the latter's belief that Côte d'Ivoire had agreed that those parts located on Ghana's side of an equidistance boundary, including those rich in mineral resources, belonged to Ghana. At some point in time, according to Ghana in 2011,[41] Côte d'Ivoire actively started to claim areas beyond the equidistance boundary line in relation to which Ghana had begun extensive mineral resource activity.[42] These activities required making significant previous investments; e.g., in connection with enabling installations to move into position, and their operation coming at great cost. This made clear that the oil

56, ¶ 19 & 39; MALCOM D. EVANS, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION 55 (1989).

[36] Art. 57 LOSC.

[37] See e.g., Masahiro Miyoshi, The Basic Concept of Joint Development of Hydrocarbons on the Continental Shelf, 3 Int'l J. Estuarine & Coastal L. 7 (1988).

[38] *Ghana Told to Stop New Drilling in Disputed Waters*, BBC, 26 April 2015.

[39] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 130.

[40] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 102.

[41] *Oil: Nation Eager to Remain Master of its Own Destiny*, Financial Times, 14 December 2011: 'Officials say they first got wind of this when the Ivorian government wrote to oil companies requesting that they cease activities in waters long considered to be on Ghana's side.'

[42] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 130, 189.

companies were heavily invested in the area. So that the Chamber would determine that the areas concerned would be on Ghana's side of the boundary after delimitation, was seriously important for the latter.

According to Ghana, the observed silence by Côte d'Ivoire had by then come to amount to its acquiescence. This was due to Côte d'Ivoire's non-reaction in relation to Ghana's activities, which had been on-going for a significant period, providing Côte d'Ivoire with many opportunities to protest. The silence or inaction of a State in a situation where the converse, i.e., taking some action, was called upon, may amount to acquiescence, in that rights are established under international law coming to the detriment of the silent State.[43] By this same token, and in defining what was at the heart of the dispute, Ghana made it clear that it was not involved in a dispute about delimitation;[44] rather, the issue was the confirmation of a pre-existing boundary that was developed through acquiescence.

After learning Ghana had engaged in a wide range of unilateral activity in the disputed area, Côte d'Ivoire approached petroleum companies that had received concessions for nine blocks from Ghana. Côte d'Ivoire, in a letter,[45] ordered these companies to abandon operations and refrain from acting on further commitments there as well.[46] Discoveries of large quantities of mineral resources was argued by Ghana to have created this newfound interest on the part of Côte d'Ivoire in the area concerned.[47] Côte d'Ivoire denied this to be its motivation, producing a different version of events: Ghana knew, of the area having become a subject of dispute between them, certainly as early as 1992. Although fully aware of the area concerned not exclusively and uncontestably belonging to Ghana,[48] it did not alter its behavior accordingly by adopting restraint in relation to the disputed area, which would have been the appropriate response from the view of international law according to Côte d'Ivoire.

3.1 Establishing a single maritime boundary

In the maritime boundary dispute between Ghana and Côte d'Ivoire, the Special Chamber was requested to establish a single maritime boundary for the seabed and superjacent waters,

[43] Nuno Marques Antunes, 'Acquiescence', in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (Oxford University Press, 2008), 3, online edition, www.mpepil.com.
[44] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 69.
[45] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 134.
[46] *Oil: Nation Eager to Remain Master of its Own Destiny*, Financial Times, 14 December 2011.
[47] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 110-111, 131.
[48] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 585.

covering conjointly the territorial sea, EEZ and (extended) continental shelf.[49] Because the coasts of Ghana and Côte d'Ivoire are placed adjacent to each other,[50] their entitlements to all maritime zones, which are measured from the designated baselines, overlap where the land boundary terminates. The LOSC is silent on what the applicable legal rules are concerning a single maritime boundary – for instance, whether Articles 74 and 83 LOSC have any application in its determination, has not been explicated in the international case law. International courts and tribunals have simply assumed that these Articles are applicable whenever they were called upon to determine a single maritime boundary.[51] The Special Chamber in *Ghana/Côte d'Ivoire* considered that the maritime boundary for the territorial sea, EEZ, and the (extended) continental shelf could be delimited by using the same methodology.[52]

3.2 Paragraph 3 of Article 83 LOSC

Delimitation of the maritime boundary between the coasts of Ghana and Côte d'Ivoire was one aspect of their dispute on which the Special Chamber was asked to rule. In addition, the Chamber was faced with an ancillary issue: were the unilateral activities undertaken concerning mineral resources in the disputed maritime area lawful from the view of international law?[53]

Côte d'Ivoire took the following position, inspired in part by the obligation to not hamper or jeopardize contained in paragraph 3 of Article 83 LOSC: pending continental shelf delimitation, a moratorium was imposed on unilateral acts concerning mineral resources. Upon learning of the objections of Côte d'Ivoire, rather than that Ghana abandoned its unilateral conduct, it intensified its level of activity in the disputed area; this was construed by Côte d'Ivoire as posing a breach of paragraph 3 as well.[54]

Paragraph 3 will usually become relevant if States whose coasts lie *opposite* or *adjacent* to

[49] See e.g., Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 87.
[50] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 64.
[51] See e.g., Maritime Dispute (Peru v. Chile), Judgment, ICJ. Reports 2014, ¶ 179; Barbados v. Trinidad and Tobago, 11 April 2006, Award of the Tribunal, ¶ 234-235; Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Case No. 16, Judgment of 14 March 2012, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, ¶ 285-286 (Cameroon v. Nigeria).
[52] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 261-263, 409.
[53] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 542.
[54] Ghana/Côte d'Ivoire, *supra* note 6, Counter-memorial of Côte d'Ivoire, Volume I (4 April 2016), at 120.

each other, have been unsuccessful in delimiting their overlapping claims over the same continental shelf area.[55] The latter paragraph 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.

Paragraph 3 imposes two obligations tailored toward different aims on claimant States pending delimitation: seeking cooperative arrangements, in the form of the obligation to "make every effort to enter into provisional arrangements of a practical nature"; and observing restraint, so as "not to jeopardize or hamper the reaching of the final agreement".[56] Hence, in terms of overall aim, paragraph 3 of Article 83 LOSC seeks to steer between cooperation and abstention.[57]

At the Third United Nations Conference on the Law of the Sea (Third Conference), positions on the design of paragraph 3 fell effectively along two lines.[58] One group of States argued for using a unilateral equidistance boundary line as an interim rule. This boundary line would come to divide a disputed continental shelf area, and formed the outer point up to which a claimant could exercise jurisdiction pending delimitation.[59] Heavily opposed to this approach was another group of States, which encouraged the conclusion of provisional arrangements between claimants as an applicable interim rule.[60] The gist of their proposals was that, a failure to come to cooperative arrangements would activate the interim solution of a

[55] By combining this with that the LOSC operates on the assumption of there being no underpinning sovereignty disputes, meaning that clarity exists in the geographical extent of the coastal State's rights, it may be that disputed maritime areas where interweaving sovereign issues exist are beyond the reach of paragraph 3 of Article 83 LOSC. See, Youri van Logchem, Exploration and Exploitation of Oil and Gas Resources in Maritime Areas of Overlap: the Falklands (Malvinas), 28 Hague Y.B. Int'l L. 42 (2017).

[56] See e.g., R. Beckman, Legal Framework for Joint Development in the South China Sea, in UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA 254 (S. Wu, M. Valencia et al. eds., 2014).

[57] Kamal Hossain, United Nations Convention on the Law of the Sea and Provisional Arrangements Relating to Activities in Disputed Maritime Areas, in LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LIBER AMICORUM JUDGE HUGO CAMINOS 678 (Lilian del Castillo ed., 2015).

[58] STEPHEN FIETTA AND ROBIN CLEVERLY, A PRACTIONER'S GUIDE TO MARITIME BOUNDARY DELIMITATION 84-85 (2016); Lagoni, *supra* note 9, at 349.

[59] See e.g., A/CONF.62/C.2/L.14 (1974), Third Conference Official Records, Vol. III 190-191 (The Netherlands).

[60] See e.g., A/CONF.62/C.2/L.43 (1974) Third Conference Official Records, Vol. III 221 (Ireland).

moratorium on economic conduct in a disputed area.[61]

After agreement was reached on a text that was agreeable for the two doctrinally split groups,[62] and after paragraph 3 of Article 83 was included in the Convention, critical voices soon started to emerge, questioning the merits of this provision.[63] Opinions as to the usefulness of paragraph 3 of Article 83 LOSC can be seen to have undergone some change from the moment of its introduction into its framework. Primarily, the ruling in *Guyana v. Suriname* has brought about a change in thinking as to the importance of paragraph 3; although it has not been immune from criticism either. Since then, opinion can be seen to have shifted largely towards the paragraph not being empty, but, to the contrary, carrying actual weight.[64]

Despite this trend, the exact significance of this obligation remains subject of debate, varying from being of more minor importance to fulfilling a significant role in limiting acts of unilateralism.[65] The decision of the Special Chamber in *Ghana/Côte d'Ivoire* gives cause for revisiting this statement as to the usefulness of paragraph 3 of Article 83 LOSC, swinging the pendulum in favor of the view that paragraph 3 is mere rhetoric. By throwing a completely different light on the importance of paragraph 3, the Chamber, arguably, interpreted the obligation to not hamper or jeopardize in a way to render it almost meaningless.

3.3 Interpreting the obligation to seek provisional arrangements

In the case between Ghana and Côte d'Ivoire, the latter did not allege in its formal submissions that Ghana had committed a breach of the obligation to seek provisional arrangements.[66] As a result, the obligation to seek provisional arrangements played a more marginal role in this case, with the Special Chamber laying out in more broad strokes what this obligation requires of the States concerned.[67] However, in its pleadings, Côte d'Ivoire did

[61] See e.g., NG7/15 (1978, mimeo), Article 83, para. 3 (Papua New Guinea). Reproduced in: RENATE PLATZODER, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA DOCUMENTS VOLUME IX 406 (1986).
[62] Fietta & Cleverly, *supra* note 58, at 25.
[63] Lucius Caflisch, The Delimitation of Marine Spaces between States with Opposite or Adjacent Coasts, in A HANDBOOK OF THE NEW LAW OF THE SEA, VOLUME 1 495 (Rene-Jean Dupuy and Daniel Vignes eds., 1991).
[64] See e.g., Van Logchem, *supra* note 3, at 191-192.
[65] See e.g., Hossain, supra note 57, at 674-676.
[66] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 628.
[67] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 626-627.

suggest that breaches of the obligation to seek provisional arrangements had occurred. This seems to be the reason that the Tribunal addressed the meaning of this obligation; albeit to a more minimal extent, as compared with the obligation to not hamper or jeopardize.[68]

In general terms, under the first obligation encountered in paragraph 3 of Article 83 LOSC, claimant States are required, in a spirit of understanding and cooperation, to make every effort to enter into provisional arrangements of a practical nature. An implication of this is that, when negotiations on provisional arrangements have begun, the States concerned must approach these with a spirit of understanding and cooperation. This implies that States have to be considerate of each other's rights and positions in relation to a disputed maritime area, combined with showing a cooperative attitude.[69] In *Guyana v. Suriname*, the Tribunal emphasized the importance of developing a disputed maritime area pursuant to agreed provisional arrangements.[70] This is a continuation of a line of argument, which international courts and tribunals have been advocating for a while now: the favored response to deal with difficulties that can emerge from having overlapping claims is seeking and agreeing on cooperative arrangements by the States involved.[71] The thrust of this approach is as follows: whenever it is feasible, provisional arrangements covering the disputed maritime area in the period that precedes delimitation should be created. This would enable the States concerned to mutually pluck fruits from developing a disputed area economically; otherwise, such development probably has to be deferred to until after delimitation.

Despite the measure of importance ascribed to cooperative arrangements, there is a caveat however. The Tribunal in its award in *Guyana v. Suriname* framed the extent of the positive obligation under paragraph 3 of Article 83 of the LOSC in the following way: States are under a duty to make good faith attempts to come to a provisional arrangement, constituting an obligation of conduct. A breach of this obligation would be avoided when earnest effort have been made by the States concerned at arriving at this result.

3.4 Interpreting the obligation to not hamper or jeopardize

In contrast, playing a prominent part in this case was the negative obligation in paragraph 3

[68] See e.g., Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 607.
[69] See e.g., See Anderson & Van Logchem, *supra* note 8, at 205-206.
[70] Guyana v. Suriname, *supra* note 11, ¶ 460.
[71] Van Logchem, *supra* note 3, at 191-192.

of Article 83 LOSC: the obligation to not hamper or jeopardize reaching a delimitation agreement. Côte d'Ivoire relied heavily on this obligation, and alleged that Ghana committed several breaches thereof (see section 5.1). Clearly, the idea of abstention or restraint underpins the obligation to not hamper or jeopardize delimitation.[72] More specifically, it embodies the general thought of discouraging certain unilateral acts from being undertaken in relation to a disputed continental shelf area.[73]

There are two sides to the obligation not to hamper or jeopardize, in that it relates to both actions and reactions of claimant States undertaken concerning a disputed continental shelf area.[74] The following rationale underlies this obligation: were claimant States to continue to act unilaterally in relation to their disputed continental shelf area, or if they were to react in a particular way to unilateral conduct, the difficulties in reaching the final delimitation would be enhanced as a result (be it through their own efforts in the shape of a delimitation agreement or submit the maritime boundary dispute to an international court or tribunal).[75] The converse side to the obligation to not hamper or jeopardize, in that a *reaction* to a unilateral act can have a detrimental effect on the chances of reaching the final delimitation, is illustrated in the reaction of Suriname to Guyana allowing an oil rig to move into a disputed maritime area, in order to initiate exploratory drilling.[76]

Although there is clarity in terms of spirit (i.e., to exercise restraint), the precise sphere of operation of the obligation is far less straightforwardly established, with the paragraph itself failing to single out specific acts surpassing the threshold of non-hampering or jeopardizing; therewith, leaving the material reach of this obligation unspecified. The two words "hamper" and "jeopardize" are central to developing an understanding of the meaning of this obligation and assist in ascertaining the types of unilateral conduct that are captured under its reach. These terms cannot be treated as synonyms however. The insertion of these two terms injects a distinction into paragraph 3 of Article 83 LOSC: acts having an effect of either hampering or jeopardizing must be abjured prior to delimitation of the disputed continental shelf area. Particularly illustrating that the words convey different meanings is the use of the disjunctive,

[72] Report on the Obligations of States under Articles 74(3) and 83(3), note 5, at 23-24; Xinjun Zhang, Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation, 42 Ocean Dev. & Int'l L. 57-58 (2011),
[73] See Anderson & Van Logchem, *supra* note 8, at 207; Van Logchem, *supra* note 3, at 179.
[74] Van Logchem, *supra* note 3, at 192, 195.
[75] Caflisch, *supra* note 63, at p. 495; Van Logchem, *supra* note 3, at 48-49.
[76] Guyana/Suriname, *supra* note 11, ¶ 445, 476.

"or", separating the two words of 'hampering' and 'jeopardizing.'[77]

Because of the inclusion of the words 'every effort' in the obligation to not hamper or jeopardize contained in paragraph 3 of Article 83 LOSC,[78] the obligation is transformed into an obligation of conduct.[79] The ordinary meaning of the phrase 'every effort' would suggest this indeed being the case. The effect this good faith component has on the content of the negative obligation in paragraph 3 of Article 83 LOSC is that, what is resultantly required is that genuine efforts must have been made by the States concerned to avoid engaging in acts having a subsequent effect of hampering or jeopardizing the final delimitation. An alternative reading of the language of paragraph 3 of Article 83 LOSC is that the requirement of every effort, solely operates in connection with the obligation to seek provisional arrangements; this would arguably better comport with the meaning of not hampering or jeopardizing delimitation, which is akin to a prohibition.[80] However, this interpretation is problematic: if the words "shall make every effort" are not linked to the second limb of the sentence contained in paragraph 3, it would be incomplete and grammatically incorrect. However, the addition of the words "shall make every effort" implies that the obligation could be violated if the result expected by one States (i.e., reaching delimitation) has not been achieved, or is regarded to have been complicated by one State, due to acts of unilateralism having been undertaken by another claimant.

The extent of the limitation imposed by the obligation to not hamper or jeopardize is dependent on an act having a hampering or jeopardizing effect on the successful completion of the final delimitation. However, whether a unilateral act hampers or jeopardizes varies with the specific circumstances of the case.[81] So, there is a variable in play: a unilateral act may have an effect of hampering or jeopardizing reaching a delimitation agreement between certain States, but may not have a similar effect between other States. Hence, categorizing acts caught under the obligation to not hamper or jeopardize cannot be defined *in abstracto*: the specifics of the disputed maritime area will be critical in this regard. This view is

[77] Report on the Obligations of States under Articles 74(3) and 83(3), *supra* note 5, at 24.
[78] Catherine Redgwell, International Regulation of Energy Activities, in ENERGY LAW IN EUROPE: NATIONAL, EU AND INTERNATIONAL REGULATION 61 (Martha Roggenkamp, Catherine Redgwell et al., eds., 2016).

[80] See e.g., SUN-PYO KIM, MARITIME DELIMITAION AND INTERIM ARRANGEMENTS IN NORTH EAST ASIA 76 (2004); Zhang, *supra* note 72, at 57-58.
[81] Anderson & Van Logchem, *supra* note 8, at 206; Van Logchem, *supra* note 3, at 185-186.

supported by Judge Paik's separate opinion in *Ghana/Côte d'Ivoire*,[82] also arguing against designing closed categories of 'lawful' and 'unlawful' activities in disputed continental shelf areas (see section 5.2.6).

3.5 Paragraph 3 of Article 83 LOSC: what can be learned from the case law rendered prior to Ghana/ Côte d'Ivoire?

There are two previous rulings (i.e., *Aegean Sea Continental Shelf (interim measures)* and *Guyana v. Suriname*) that have contributed to better understanding of the content of paragraph 3 of Article 83 LOSC; the latter in a direct manner and the former indirectly. Although the decision of the ICJ in *Aegean Continental Shelf (interim measures)* was rendered before the entry into force of the LOSC, and despite being an interim measures procedure, its decision remains important in interpreting paragraph 3 of Article 83 LOSC. The continued relevance of *Aegean Continental Shelf (interim measures)* is due to the fact that the final ruling the Tribunal delivered in *Guyana v. Suriname*, replicates largely, although with some minor variations, the reasoning of the ICJ from this earlier decision. In *Aegean Continental Shelf (interim measures*), the ICJ in its decision elevated the standard of unilateral acts having an effect of causing irreparability to a State's rights as the relevant rule of thumb to distinguish between lawful and unlawful uses of a disputed continental shelf area.[83]

However, whatever their merits may be, there are various reasons for these two decisions not pinning down the scope for unilateralism in relation to mineral resources in a definitive way. Importantly, *Aegean Continental Shelf (interim measures)* was an interim measures procedure that operates according to its own rules, *limiting* its usefulness in interpreting paragraph 3 of Article 83 LOSC.[84] Because a lower threshold than irreparability is perceived under hampering or jeopardizing, more acts than merely those surpassing the standard of irreparability would be captured thereunder however. But, more importantly, and this builds on the argument presented above, the aspect of that each disputed maritime areas has its own intricacies and surrounding dynamics renders speaking about what scope remains for

[82] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik.
[83] The ICJ's position seems to bear a close connection with the general rule of international law of causing no harm to rights of another State. See, Report on the Obligations of States under Articles 74(3) and 83(3), *supra* note 5, at 20.
[84] Van Logchem, *supra* note 3, at 186-191.

unilateralism in such areas in conclusive terms inapposite.[85]

3.5.1 *Aegean Sea Continental Shelf (interim measures)*

As regards those parts of the disputed continental shelf area of the Aegean Sea, where Turkey sought to map out the potential for mineral resources through seismic work and scientific research,[86] Greece claimed to have exclusive entitlements, which encompassed a sole right to collect information about the composition of the seabed.[87] Greece argued that through unilateral seismic work, its sovereign rights were breached and their exclusive character infringed upon. Such infringement was sufficient, according to Greece, for the ICJ to indicate measures of interim protection. However, beyond that the aspect of exclusivity was infringed upon, irreparability to Greece's sovereign rights was also caused through seismic work.[88]

In dealing with this argument, the ICJ acknowledged a risk of prejudice accompanying unilateral seismic work.[89] However, it concluded in general sense that unilateral conduct of a mere transitional character, which encompassed seismic work, did not have a risk of prejudicing the rights of another claimant State irremediably. So, there seems to have been a lack of the required urgency, not enabling the Court to indicate measures of interim protection. Particularly important in this regard is that the resultant prejudice was found to be of a nature that could be repaired *ex post facto*; i.e., after the ICJ would have handed down its ruling on the merits as to where the continental shelf boundary lies. Hence, the materialization of the prejudice connected to unilateral seismic work was made dependent on that the area in question would ultimately be on Greece's side of the established boundary.

However, the ICJ did not generalize this position, in that every unilateral act carrying the risk of prejudice when undertaken in a disputed maritime area was acceptable. Central to this determination was the following question: can the harm caused through unilateral conduct be financially compensated after delimiting the continental shelf boundary? One type of act threatening the rights of another State with irreparability was placing an installation in contact with the disputed continental shelf area. Therefore, according to the ICJ in *Aegean Continental Shelf (interim measures)* it could not commence *pendente litis*.[90] Furthermore,

[85] Anderson & Van Logchem, *supra* note 8, at 206; Van Logchem, *supra* note 3, at 186.
[86] Aegean Sea Continental Shelf, *supra* note 11, Oral Pleadings 1976, at 141.
[87] Y. ACER, THE AEGEAN MARITIME DISPUTES AND INTERNATIONIAL LAW 37 (2003).
[88] Aegean Sea Continental Shelf, *supra* note 11, ¶ 30.
[89] Aegean Sea Continental Shelf, *supra* note 11, ¶ 31.
[90] Aegean Sea Continental Shelf, *supra* note 11, ¶ 30.

exploratory drilling and the actual appropriation of mineral resources, or making attempts thereto, would likewise lead to irreparability. These acts thus fell in the category of unilateral acts concerning a disputed continental shelf area that would have merited the indication of interim measures of protection.[91] In the overall analysis of the ICJ, there being a physical component attached to a unilateral act was critical, in that the continental shelf would have been somehow modified.[92] A similar emphasis can be seen in the dispute between Guyana and Suriname;[93] on which more in the next section.

3.5.2 Guyana v. Suriname

Now, to turn to the maritime boundary dispute between Guyana and Suriname. The main emphasis in this section will be on retracing the steps of the Tribunal, which led it to ultimately attributing a central role to the ICJ's decision in *Aegean Continental Shelf (interim measures)* in its own interpretation of the content of paragraph 3 of Article 83 LOSC. Both parties to the dispute relied on paragraph 3 claiming that it had been breached by the other State. The primary event instigating the formulation of arguments on either side of the parties to this dispute based on paragraph 3 was a petroleum company, licensed only by Guyana, moving a drilling rig into a disputed area to begin exploratory drilling. Guyana argued that the positioned oil rig was allowed to unilaterally drill in the disputed area: no discernible differences exist between drilling and seismic work, both being lawful exploratory activities.[94] Suriname based itself on the opposite view, at the core of which was the dissimilar nature of the two acts. An appraisal of the lawfulness of drilling and seismic work had to be informed by different considerations, in the view of Suriname. Guyana having authorized exploratory drilling was construed by Suriname as to have altered *status quo*: that is, to a degree that the chances of effecting a delimitation were impeded upon.[95]

The Tribunal interpreted the two obligations included in paragraph 3 of Article 83 LOSC,[96] in a way that the imposition of a moratorium on economic activities pending delimitation needs to be avoided.[97] In distinguishing between permissible and impermissible unilateral conduct concerning disputed continental shelf areas, the Tribunal assessed whether "the risk of

[91] Aegean Sea Continental Shelf, *supra* note 11, ¶ 30.
[92] Aegean Sea Continental Shelf, *supra* note 11, ¶ 32.
[93] Guyana v. Suriname, *supra* note 11, ¶ 468-469.
[94] Guyana v. Suriname, *supra* note 11, Reply of the Republic of Guyana, Volume 1 (1 April 2006), at 141-143.
[95] See e.g., Guyana v. Suriname, *supra* note 11, Rejoinder of the Republic of Suriname, Volume 1 (1 September 2006), at 130.
[96] Guyana v. Suriname, *supra* note 11, ¶ 465.
[97] Guyana v. Suriname, *supra* note 11, ¶ 463.

physical damage to the seabed or subsoil" accompanies a unilateral act. Based on this criterion, unilateral exploratory drilling and the actual taking or the making attempts to take such resources were considered unlawful. To the contrary, however, activities of an exploratory nature, encompassing both prospecting and licensing for mineral resources, could generally be undertaken in relation to disputed continental shelf areas. An important component informing the analysis of the Tribunal on this point was that seismic work was designated to be of a transitory character by the ICJ in *Aegean Continental Shelf (interim measures)*.[98] However, exploratory drilling and exploitation needed to be treated legally different from unilateral seismic testing according to the Tribunal,[99] with the former two acts resulting in a 'perceived change to the status quo'.[100]

Despite being the most elaborate pronunciation on the meaning of paragraph 3 of Article 83 LOSC, considerations produced in *Guyana v. Suriname*, notwithstanding some assumptions to the contrary,[101] have proven not to be the definitive word on the matter of what scope is reserved for unilateralism in relation to mineral resources within disputed areas. The relevance of the specific circumstances surrounding a disputed maritime area in setting the scope for unilateralism is confirmed by the judgment of the Special Chamber in *Ghana/Côte d'Ivoire*, coming to very different conclusions compared to the Tribunal in its award in *Guyana v. Suriname* (see e.g., section 5.2).

4. The first part of the proceedings between Ghana and Côte d'Ivoire: interim measures stage

Earlier in this article, the positions of Ghana and Côte d'Ivoire, and the handling of the arguments by the Special Chamber in the phases on the merits and interim protection, have been laid out in broad strokes. In turn, both these phases will be analyzed with a special emphasis on those aspects bearing on the issue of acts of unilateralism undertaken in disputed maritime areas concerning mineral resources. Section 4 will start with looking at the phase of the interim measures, which was initiated by Côte d'Ivoire in February 2015 with its request for interim protection, to then direct attention in section 5 to the dispute on the merits, on which the Special Chamber delivered its final judgment in September 2017.

[98] Aegean Sea Continental Shelf, *supra* note 11, ¶ 30.
[99] Guyana v. Suriname, *supra* note 11, ¶ 479.
[100] Guyana v. Suriname, *supra* note 11, ¶ 480.
[101] Dominic Roughton, The Rights (and Wrongs) of Capture: International Law and the Implications of the Guyana/Suriname Arbitration, 26 J. Energy & Nat. Resources L. 374, 398 (2008); Sakamoto, *supra* note 12, at 101.

4.1 Côte d'Ivoire's position on interim measures

Côte d'Ivoire's stated reason for the request for interim protection was that the exclusivity existing for the coastal State to act concerning the continental shelf was infringed upon, predominantly basing its position on Articles 2(2), 56(1) and 77(1) LOSC. The exclusivity enjoyed by Côte d'Ivoire enabled it to engage in acts related to mineral resources that may be found in the continental shelf, to the exclusion of all other States. Under this logic, unilateral acts having an economic character had to be fully abjured prior a final delimitation. As a corollary thereto, Côte d'Ivoire's request was tailored to putting a halt to activities already set in motion in the disputed area. In addition, it sought measures of interim protection to the effect of future conduct not being allowed to be undertaken – e.g., that no new permits were awarded or activated by Ghana in relation to the disputed maritime area for the duration of the Chamber not having handed down its ruling on the merits.[102] If Ghana would be allowed to continue with unilateral conduct related to mineral resources, this would result in Côte d'Ivoire's sovereign rights becoming threatened with irreparability. Moreover, and this is aligned to the previous consideration, significant and irreparable harm to the marine environment was inevitable to ensue.[103] Effects of this magnitude were argued to occur from the following range of unilateral activities: conducting (marine scientific) research; the concluding of contracts with the petroleum industry; the approval of seismic work; starting (exploratory or exploitation) drilling operations; and bringing installations into position of.[104] Along these lines, Côte d'Ivoire, in its oral pleadings, sought to demonstrate that the effects done by drilling into the seabed for mineral resources are such that, the seabed can, by definition, not be returned to its original state;[105] rather, effects caused to the marine environment will be permanent. International law recognizes according to Côte d'Ivoire that the following elements are encompassed by a coastal State's sovereign rights: having information in relation to mineral resources in terms of their amount, place where they are located, and whether the *in situ* available quantities would be suitable for commercial

[102] These were two of Côte d'Ivoire's five submissions, that is (i) and (ii). See Ghana/Côte d'Ivoire (Provisional Measures), supra note 7, ¶ 25.
[103] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, at 15.
[104] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, at 8.
[105] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Public sitting held on Sunday, 29 March 2015, at 10 a.m., at 25.

exploitation.[106] If, in the final ruling the area in question would be established to be on Côte d'Ivoire's side of the boundary, the possession of this information by Ghana would cause irreparable prejudice to its rights.

Paragraph 3 of Article 83 LOSC was invoked by Côte d'Ivoire to further reinforce its position that its exclusiveness of rights over the continental shelf needs to be preserved prior to delimitation. Côte d'Ivoire took the position that the implication of paragraph 3 is that a moratorium on economic conduct was automatically introduced. Lifting this moratorium was tied to States having reached cooperative arrangements or a delimitation. Support for this position was provided, according to Côte d'Ivoire, by the debates at the Third Law of the Sea Conference. Here during negotiations, a number of States actively promoted the moratorium solution as the applicable rule prior to delimitation, and in the absence of agreement to the contrary between the States concerned. This interpretation is problematic, however: an interim rule based on a moratorium was a minority opinion at the Third Law of the Sea Conference, being held only by a smaller group of States (e.g., Ireland and Papua New Guinea).[107] The gist of these proposals was virtually identical to the argument of Côte d'Ivoire: if claimant States were unsuccessful in setting up cooperative arrangements, a moratorium on economic conduct would be introduced. Aside from being limited in number, proposals advocating a ban on all economic activities met with a great measure of skepticism from other States, because of their economic consequences.[108]

It is of note that Côte d'Ivoire's reasoning on the point of a moratorium being introduced as an interim rule, seems to have not been entirely consistent. In its oral pleadings, Côte d'Ivoire' argued that paragraph 3 of Article 83 LOSC does not imply that no room exists for economic conduct within a disputed maritime area; however, this position was turned on its head in the merits phase.[109] Overall, the *de facto* effect of the position of Côte d'Ivoire was seeking to return the disputed maritime area to a state where Ghana had not acted unilaterally and unlawfully in relation to mineral resources, which it deemed to be the relevant *status*

[106] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, at 17.
[107] See, e.g., NG7/15 (1978, mimeo), Article 83, para. 3 (Papua New Guinea). Reproduced in: RENATE PLATZODER, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA DOCUMENTS VOLUME IX 406 (1986).
[108] See, e.g., NG7/24 (1978, mimeo), Articles 74/83, para. 3 (Chairman, NG7). Reproduced in: RENATE PLATZODER, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA DOCUMENTS VOLUME IX 430 (1986).
[109] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Public sitting held on Sunday, 29 March 2015, at 10 a.m., at 16.

quo.[110]

4.2 Ghana's position on interim measures

Much of Ghana's argumentation, designed around justifying it moving to the phase of exploitation, was tied to Côte d'Ivoire having acquiesced in the conduct of Ghana, by never having protested. In its pleadings, Ghana invoked a range of examples in support of its contention of acquiescence: e.g., the alignment of concessions given by the two States concerned, and that drilling and seismic operations had only commenced on their respective sides of the equidistance boundary line. The evidence invoked by Ghana to strengthen its argument consisted *inter alia* of it allowing the petroleum industry to proceed with work, by using the equidistance boundary line as the appropriate rule of thumb for acceding or denying requests from the industry.[111] Further, and this functioned as the linchpin of Ghana's argument, all this happened without the protest of Côte d'Ivoire. Ghana continued by trying to demonstrate, by going into significant detail, that its own practice of respecting the equidistance boundary was mirrored by the licensing practice of Côte d'Ivoire: the latter was restrained similarly in that the reach of its concluded contracts with the petroleum industry never crossed this equidistance line.[112]

A second strand of argument presented by Ghana was that the request for the indication of measures of interim protection could not succeed, because Côte d'Ivoire did not intend to keep their disputed maritime area in pristine condition.[113] The discovery of oil and gas fields in 'the territory of Côte d'Ivoire' would result in the roles of the two States being reversed, in that Ghana would have found itself on the outside looking in:[114] Côte d'Ivoire with a similar zest, would have undertaken acts in connection with the mineral resources in the disputed area. Drawing a parallel with previous case law (i.e., *Guyana v. Suriname* or *Aegean Sea Continental Shelf (interim measures)*), in an attempt by Côte d'Ivoire to bolster its argument that Ghana's unilateral acts were unlawful, was misplaced, according to Ghana. This was because the facts existing between Ghana and Côte d'Ivoire stood in stark contrast to these two previously mentioned cases, where there had been no 'exploration or development' by

[110] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 25.
[111] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Written Statement of Ghana, 23 March 2015, at 6-7.
[112] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 8-19.
[113] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 47-48.
[114] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 47-48.

either State.[115] A fundamental difference was that, Suriname contested the lawfulness of all exploratory drilling within the disputed area, and Greece argued that no seismic work could be undertaken in relation to the disputed continental shelf area.[116] Rather, according to Ghana, what was at the core of its dispute with Côte d'Ivoire, and inspiring the tone of the latter's argumentation, was Côte d'Ivoire feeling entitled to enjoy the economic benefits that can be reaped from developing the mineral resources located in the disputed continental shelf area.[117]

Another ground invoked by Ghana against having to put all its exploration and exploitation efforts on hold for the duration of the dispute over the maritime boundary being settled, were the economic implications that would have followed therefrom. Ghana considered these implications to be close to catastrophic: investments that were made at the time already exceeded USD 3 billion.[118] To order Ghana to put a stop to the work would lead to investors withdrawing from their earlier commitments, dealing "a crippling blow"[119] to Ghana's economy – in fact, it would regress to a low point it had not been at for several decades.[120] Investors withdrawing were not the only negative consequence that followed from putting a stop to Ghana's activities: infrastructure already being moved into the disputed area, with the aim of starting with the production of mineral resources, would begin to deteriorate because of falling into disuse.[121] Ghana, in tailoring its argument to whether the requirement of urgency was fulfilled, being one of the requirements needing to be present in order for an international court or tribunal to offer interim protection, argued that the fact that it was able to progress to the stage of exploitation exemplified the lack thereof.[122] Besides a lack of urgency, the requirement of irreparability was neither met: damages claimed to be incurred by Côte d'Ivoire lacked the element of irreparability; being able to be remedied through awarding damages *ex post facto*.[123] Under its argument, Ghana did not distinguish between the different types of acts it undertook concerning mineral resources in terms of their reparability. No matter whether these acts were exploration or exploitation related, all of them could be compensated after delimitation with seemingly equal ease.

[115] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 48.
[116] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 47-48.
[117] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 48.
[118] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 7.
[119] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 25.
[120] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 25, 27-29.
[121] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 26-27.
[122] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 43-44.
[123] Ghana/Côte d'Ivoire, *supra* note 111, Written Statement of Ghana, at 45.

4.3 The order of the Special Chamber of ITLOS

On 25 April 2015, the Special Chamber delivered its ruling on the question of whether interim measures of protection could be indicated, per the request of Côte d'Ivoire.[124] Despite Côte d'Ivoire's reliance on paragraph 3 of Articles 83 LOSC in its request for interim protection, and in face of that Ghana paid some lip service to it, no mention of this provision can be found in the order of the Special Chamber.[125]

Two elementary requirements needed to be present according to the Chamber in order for it to be able to accede to a request for interim protection: a recognized urgency, and a real and imminent threat of irreparable prejudice to rights.[126] Here, the Chamber seems to have followed the line of argument that has been *inter alia* set out earlier by the ICJ in it is ruling the *Pulp Mills* case: indicating interim measures of protection is inexorably interwoven with the presence of an urgent necessity to prevent that irreparable prejudice is done to the rights in dispute, before the Court having been able to give its final ruling on the matter.[127] On the question whether in the case at hand, the thresholds of irreparability and urgency were surpassed, the Special Chamber gave a mixed answer. Gathering information and undertaking unilateral exploration and exploitation activities in connection with the disputed area was recognized by the Chamber to pose a threat of irreparability:[128] to paraphrase, this unilateral conduct caused a "risk of irreversible prejudice" to Côte d'Ivoire's rights.[129]

What is especially interesting about this part of the order is that, the Chamber established a relationship that was hitherto not explicitly recognized to exist in the international case law: gathering information on a disputed continental shelf area, and putting it to use – being an act that does not alter the geography of the continental shelf – may possibly lead to irreparability being caused to another State's rights. Among the rights a coastal State has over the continental shelf, and which might be irreparability infringed upon, is plausibly to obtain information and putting it to use exclusively and in a way of their own design:[130] i.e., a right to information was acknowledged to exist by the Chamber.

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[124] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 16.
[125] It has been suggested that the reason for this is that the members of the Special Chamber operated on the belief that paragraph 3 of Articles 74 and 83 LOSC carries no relevance in an interim measures procedure. See Report on the Obligations of States under Articles 74(3) and 83(3), *supra* note 5, at 26.
[126] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 42.
[127] Pulp Mills (Argentina v. Uruguay) case, (Provisional Measures), Order of 13 July 2006, ¶ 62.
[128] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 95-96.
[129] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 94-95.
[130] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 94.

Notwithstanding the Special Chamber's finding that a "risk" of irreparability was caused by the unilateral acts of Ghana, this did not automatically imply that the required urgency was present, constituting a second hurdle that must be overcome for an international court or tribunal to be able to indicate interim measures of protection. Subsequently, the Chamber addressed when this consideration would enter into play: manifestation of this risk was tied to that the area in which the unilateral seismic work took place was considered to be under the jurisdiction of Côte d'Ivoire. Hence, the Chamber identifies two respective stages, i.e., before and after delimitation, showing significant similarity with the way in which the ICJ construed its analysis in *Aegean Continental Shelf (interim measures)*. Exploration activities that were undertaken by Turkey in connection with a disputed continental shelf area, carried in the view of the ICJ the inherent possibility of causing prejudice.[131] However, this risk coming to fruition was entwined with the consideration of the area ultimately being considered to be under the exclusive jurisdiction of Greece after the delimitation was established by the ICJ. In terms of this risk arising, the Special Chamber in *Ghana/ Côte d'Ivoire* reached a rather similar conclusion. However, at variance with the ICJ in *Aegean Continental Shelf (interim measures)* – the Chamber stated that damages incurred from producing mineral resources could be compensated by financial means ex post facto. In this regard, the Chamber considered only the relative ease with which unilateral exploitation can be compensated, implying that in relation to exploration activities, e.g., exploratory drilling and seismic work, this exercise of calculating the extent of damages will be more complicated.[132] It does at face value indeed seem more difficult to calculate the damage caused through unlawful drilling and seismic work: e.g., how is one to compensate for obtaining an advantage by one claimant over another in terms of the information it possess through conducting seismic work or exploratory drilling? The Special Chamber did not further elaborate on how these relevant differences in connection with certain types of unilateral mineral resource activity interacted with calculating the height of compensation.

However, away from the question of compensation, the Chamber recognized there being another side to Ghana's exploration and exploitation activities undertaken in the disputed area: that is, the continental shelf was invariably modified as a result. Some of these physical modifications to the continental shelf cannot be remedied through financial compensation *ex*

[131] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 96.
[132] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 88.

post facto according to the Special Chamber.[133] What was clear, however, is that compensation does not enable restoring the physical characteristics of the continental shelf to its original form; i.e., to the state prior to the unilateral act being undertaken.[134]

It was not decisive for the Chamber that a particular unilateral act carried the potential for causing damage of an irremediable nature, as indicated earlier. Rather, the unlawfulness of a unilateral act was tied to the areas concerned being considered to be under the exclusive jurisdiction of Côte d'Ivoire after delimitation. After emphasizing that it can give individual measures of interim protection different, in whole or in part, from those requested by the parties to a dispute, the Chamber addressed the ramifications of if Ghana were ordered to put a halt to its previously initiated conduct in relation to mineral resources in the disputed area.[135] According to the Chamber, ordering Ghana to abort work had two consequences that predominantly argued against this, one of which was underlain by perceived financial ramifications; and the other concerned the marine environment being detrimentally affected.[136] More specifically, what formed a serious threat to the marine environment was putting the infrastructure out of commission, which would invariably set in motion the deterioration process.

However, the Special Chamber did not elaborate on why in the balance of things this particular environmental concern trumps the other environmental impacts caused by Ghana's exploration and exploitation activities in the disputed area. Furthermore, the financial losses suffered by Ghana, and those being concessioned by it, would impose an "undue burden" on them.[137] In balancing the aforementioned two considerations with the aspect of preserving the rights claimed by Côte d'Ivoire, particularly their exclusive character, the Chamber drew the line at drilling new wells, allowing previous drilling operations to continue unaffected.[138] Ghana, in addition, had to make sure that information being previously gathered, or that would be collected on future occasions from drilling, would not be used in a way that could come "to the detriment of Côte d'Ivoire", if the areas were conclusively considered to be under its jurisdiction after delimitation.[139]

[133] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 89.
[134] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 90.
[135] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 97-98.
[136] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 99.
[137] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 100.
[138] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 102.
[139] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶108 (b).

5. The second part of the proceedings between Ghana and Côte d'Ivoire: merits stage

During the merits phase, Ghana repeated much of its earlier presented arguments focusing on the silence observed by Côte d'Ivoire for over four decades, resulting in acquiescence.[140] Côte d'Ivoire disputed that there was acquiescence on its part, as evinced by its various protests. Two main reasons were invoked by Côte d'Ivoire to argue that the unilateral acts of Ghana were unlawful: the exclusivity the sovereign rights Côte d'Ivoire claimed to have was infringed upon; and, Ghana's unilateral conduct exerted a separate effect of hampering and jeopardizing delimitation.

5.1 Côte d'Ivoire's contentions

According Côte d'Ivoire, it became clear in the 20th Century that there was a maritime boundary dispute between Ghana and itself. Particularly relevant in this regard were two events occurring in 1988 and 1992, during which Côte d'Ivoire sought that Ghana postponed its unilateral activities.[141] This made it abundantly clear, according to Côte d'Ivoire, that it never recognized the outer point of earlier given concessions of Ghana (i.e. not crossing the equidistance line) as being the location where the maritime boundary lies.[142]

After reviewing the relevant case law, Côte d'Ivoire concluded that the standard as to when tacit agreement can be assumed to exist to be set very high by international courts and tribunals, whenever they were faced with such claims. A mere alignment in the scope of awarded concessions, would be insufficient of meeting this threshold.[143] Contrary to the picture sketched by Ghana, claiming that its activities had been continuously on-going over decades, reality according to Côte d'Ivoire was different. Two aspects illustrated this. First, the majority of Ghana's drilling operations were concentrated in the period between 2009 and 2014; and, second, Ghana speeding up its unilateral activities was tied to receiving promising results as to the commercial viability of certain oil and gas fields located in the disputed area.[144] The protests made by Côte d'Ivoire did not deter Ghana from increasing its level of activity however.

In support of its contention of Ghana having breached paragraphs 1 and 3 of Article 83

[140] See e.g., Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Reply of Ghana, Volume 1 (25 July 2016), at 4, 137-138.
[141] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 174.
[142] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 103, 105,
[143] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 122.
[144] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 134.

LOSC, Côte d'Ivoire invoked three considerations. First, the unilateral acts undertaken by Ghana in the disputed area exerted an effect of hampering or jeopardizing; second, Ghana's uncompromising stance in negotiations was contrary to both paragraphs 1 and 3 of Article 83 LOSC; and, third, that for some time Ghana was unwilling to have the matter adjudicated by an international court or tribunal, breached these two paragraphs.[145]

In its counter-memorial, Côte d'Ivoire analyzed the meaning of Article 83 LOSC in a wider sense. It began by pointing out that Ghana's unilateral conduct resulted in a breach of an obligation flowing from paragraph 1 of Article 83 LOSC: through undertaking acts unilaterally, Ghana had abandoned all willingness to negotiate in good faith on settling the maritime boundary dispute.[146] In elaborating further on how paragraph 1 of Article 83 LOSC was breached, Côte d'Ivoire pointed to Ghana's behavior being synonymous with the latter seeking to effect a maritime boundary through creating a "fait accompli", rather than through agreement as paragraph 1 explicitly requires.[147] The importance of the obligation to hold good faith negotiations was argued by Côte d'Ivoire to have been enhanced in light of that, the oil and gas field located in the disputed area could be considered a "shared deposit".[148]

Côte d'Ivoire built the majority of its argumentation on the point of the unlawfulness of the unilateral activities around paragraph 3, predominantly the obligation to not hamper or jeopardize delimitation of the continental shelf. The origins of the obligation to negotiate towards a provisional arrangement, and it becoming a constituent part of paragraph 3, was traced back to the division that pervaded during the Third Law of the Sea Conference over the extent to which limitations had to be imposed on the scope for unilateral economic conduct within a disputed area.[149] Determining where the continental shelf boundary lies between the coasts of Ghana and Côte d'Ivoire, was according to the latter complicated by the unilateral mineral resource activity of Ghana.[150] One of the aspects that enhanced the difficulties encountered in this regard was the scale on which Ghana undertook unilateral acts in relation to the disputed continental shelf area. The chosen strategy of Côte d'Ivoire revolved around an attempt to show that refraining from unilateral economic conduct in a disputed maritime area is mandated pursuant to international law – "*les activités économiques*

[145] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 599.
[146] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 235.
[147] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 600.
[148] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 600.
[149] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 236. Referring to Van Logchem, *supra* note 3, at 193.
[150] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 241-242.

unilatérales sont prohibées dans une zone litigieuse".[151] Its argumentation on this point, falling effectively along two lines, will be explored in turn over the next two paragraphs.

Combining the gist of paragraph 3 of Articles 83 LOSC, particularly its negotiating history, with the exclusivity of sovereign rights of the coastal States the following could be concluded according to Côte d'Ivoire: unilateral economic conduct had to be completely eschewed prior to continental shelf delimitation.[152] In an attempt to reinforce its argument, Côte d'Ivoire relied heavily on one particular holding set out in *Guyana v. Suriname,* in which the Tribunal held that activities brought under the reach of a provisional arrangement could be undertaken pending delimitation.[153] Isolated from its context, this holding can perhaps be interpreted as to mean that concluding a provisional arrangement precedes the possibility to undertake unilateral conduct within a disputed maritime area. However, when read in conjunction with other holdings of the Tribunal, the force of this presented argument ebbs away quickly. This is because in these other holdings, the Tribunal rather emphasized that some room must be reserved for unilateral conduct in connection with mineral resources.[154] Furthermore, it went on to draw a divisional line between different categories of unilateral activity, placing some economic activities in the permissible category, whereas others in the impermissible one, undercutting Côte d'Ivoire's reading of *Guyana v. Suriname* further.

In addition, Côte d'Ivoire carefully detailed its argument that the principle of exclusivity would entail that no economic activities can commence prior to delimitation. Under international law, the coastal State (i.e., Côte d'Ivoire) enjoys exclusive use over the adjacent continental shelf because of it having sovereignty over territory, which encompasses the mineral resources in the continental shelf, as is reaffirmed in Articles 77 and 81 of the LOSC.[155] Breaches were made on this exclusivity of the sovereign rights of Côte d'Ivoire, through the full range of unilateral activities concerning mineral resources undertaken by Ghana. Two detrimental effects are exerted by unilateral seismic work according to Côte d'Ivoire, making it unlawful: first, it is a "source of serious tension" between the States concerned; and, second, vital information on the resources of the seabed will be provided and be placed at the exclusive disposal of that State, offering it considerable advantages in e.g., negotiations with the petroleum industry, or in (delimitation) negotiations with the other

[151] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 237.
[152] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 237.
[153] Guyana v. Suriname, *supra* note 11, ¶ 465.
[154] Guyana v. Suriname, *supra* note 11, ¶ 465.
[155] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 221-222.

claimant State that has not acquired the same piece of information.[156] The history of effected maritime boundary delimitations laid bare a recurrent pattern in the view of Côte d'Ivoire:[157] once "invasive activities" were undertaken unilaterally within the disputed maritime area and prompted a protest form the other claimant, subsequently, acts of this nature were eschewed pending delimitation.[158] Despite Côte d'Ivoire's protests, and it requesting Ghana to put all its unilateral conduct on hold on account of paragraph 3 of Article 83 LOSC, Ghana acted at variance with this detected pattern. This is seen in that instead of abandoning its practice of acting unilaterally concerning the disputed maritime area, as would have been the required response from the view of international law, Ghana decided to amplify the intensity with which it started to act unilaterally.

5.2 Ghana's contentions

One of the main contentions presented by Ghana was that there was silence on the part of Côte d'Ivoire, amounting to a *de facto* maritime boundary lying between their coasts. Evidence of this came particularly in the shape of its "oil practice", the provenance of which goes back to 1956.[159] The range of acts undertaken by Ghana in connection with the disputed area, and which consistently failed to produce any kind of response from Côte d'Ivoire consisted of the following: auctioning concessions, entertaining applications from the petroleum industry, giving concessions, seismic surveying[160] and exploratory drilling.[161]

According to Ghana, acceptance of the equidistance boundary line started in 1957, with Côte d'Ivoire awarding a concession by using this same line as the outer limit; had more extensive areas been covered within its reach, an overlap would have formed with a concession given a year earlier by Ghana.[162] To avoid such an overlap was according to Ghana the driving force behind Côte d'Ivoire restricting the reach of its given concessions to the equidistance line. Since then and despite broader areas becoming covered under awarded concessions, albeit that their precise area of application underwent some changes, a consistent pattern was argued by Ghana to have emerged: both parties to the dispute observed the equidistance

[156] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 237.
[157] Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 238-239.
[158] See also: Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, Public sitting held on Sunday, 29 March 2015, at 10 a.m., at 17-18.
[159] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 116.
[160] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 124-129.
[161] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 104-105, 113, 130-136.
[162] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 116.

boundary line in their licensing policies.[163] Drilling by Côte d'Ivoire on its own side of the equidistance line had in fact been extensive, with no less than 212 wells being drilled; but these never extended west of the equidistance line, thus crossing into areas which Ghana regarded to be under its exclusive jurisdiction.[164] The accusations being directed by Côte d'Ivoire at Ghana for encroaching on the dispute area, were underlain according to the latter by a fundamental misconception: Ghana had not undertaken unilateral acts in relation to mineral resources located in a 'disputed area'. Because of Côte d'Ivoire's acquiescence,[165] Ghana's unilateral conduct on its own side of the equidistance boundary line constituted an area under its exclusive jurisdiction. This made Côte d'Ivoire's portrayal of these activities as being "unilateral" in nature, and occurring in a disputed maritime area, a misnomer.[166]

At the center of Ghana's argumentation was that a *de facto* boundary had evolved, but despite this main emphasis, Ghana did put forward an alternative line of argument based on paragraph 3 of Article 83 LOSC. The quite heavy reliance of Côte d'Ivoire on this paragraph made it seemingly necessary for Ghana to address the meaning of paragraph 3. Côte d'Ivoire's reading of paragraph 3, coming down to introducing a moratorium on economic conduct in a disputed area, had, in the view of Ghana, no basis in the case law, literature or negotiating history; in fact, these uniformly laid out a view opposite to the one sketched by Côte d'Ivoire.[167] When paragraph 3 of Article 83 LOSC is analyzed in its entirety, this argument is reinforced further: not only is there an obligation mandating States to abstain from undertaking certain types of acts unilaterally, but in addition, there is an obligation imported on States to seek provisional arrangements; however, the latter does not imply an actual obligation to successfully set up cooperative arrangements.[168] Another strong presumption against the solution of the moratorium can be derived from the dispute between Guyana and Suriname. In *Guyana v. Suriname*, the Tribunal placed great emphasis on avoiding the introduction of a moratorium:[169] the economic implications that follow from bringing a disputed maritime area under the reach of a moratorium argued against this. And, as was pointed out by Ghana, Côte d'Ivoire conveniently ignored that the Tribunal drew a

[163] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 117.
[164] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 132.
[165] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 137.
[166] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 137.
[167] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 150. Referring to Van Logchem, *supra* note 3, at 180-181.
[168] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 150.
[169] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 151.

dividing line between permissible and impermissible unilateral economic uses of a disputed maritime area.[170]

5.3 The Special Chamber's pronouncement on the merits

The primary contention of Ghana was that a *de facto* maritime boundary had developed through acquiescence.[171] Whether this contention was supported by the Chamber, will be addressed in the next section. Besides delimitation, there were several other "subsidiary" aspects to the judgment of the Special Chamber that merit further consideration, Two of these aspects were: had, as Ghana argued, Côte d'Ivoire's silence amounted to acquiescence; and, were paragraphs 1 and 3 of Article 83 LOSC breached by Ghana through it undertaking a wide range of unilateral acts concerning mineral resources? Whether paragraph 3 of Article 83 LOSC or Côte d'Ivoire's sovereign rights, were infringed upon through Ghana's acts of unilateralism, and whether international responsibility could be incurred for this, were matters of a more subsidiary nature. This was illustrated by that the Special Chamber's handling of these issues formed a more minor part of the judgment.

5.3.1 Acquiescence in the maritime boundary?

Starting its analysis on the point of whether there was acquiescence in the maritime boundary, as alleged by Ghana,[172] the Special Chamber recognized that concessions awarded by the two States aligned. Connected to this, operations undertaken in connection with mineral resources, being seismic surveying and drilling, similarly did not cross this boundary. After acknowledging that there was no crossing by either party to the dispute into areas lying on the other side of the equidistance boundary, the Special Chamber however rejected the argument of Ghana centering on the existence of a *de facto* maritime boundary.[173] The Chamber in *Ghana/Côte d'Ivoire*, falling back on *Nicaragua v. Honduras*, in which the ICJ in its decision indicated that because of their gravity maritime boundaries cannot be easily assumed to exist through acquiescence, indicated that evidence thereof must be "compelling".[174]

Next, the Chamber addressed why the threshold of compelling evidence was not met by

[170] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 151.
[171] *Ghana/Côte d'Ivoire* (Judgment), *supra* note 6, ¶. 104-105, 113, 116, 124-129, 130-136.
[172] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 100, 102.
[173] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 228.
[174] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 199, 212.

Ghana. One problematic aspect with Ghana's position was that most of the evidence centered on the existence of a consistent oil practice.[175] In finding that the evidence presented by Ghana relating to this oil practice did not bear out the existence of a pre-existing boundary, failing short of being compelling, there were three aspects to the Special Chamber's denial on this point. First, although the record was patchy, in that Côte d'Ivoire protested irregularly and with varying intensity, it did protest on more than one occasion against Ghana's unilateral conduct concerning mineral resources, so much was clear.[176] Second, the Special Chamber entertained significant doubts whether a *de facto* maritime boundary, which was argued to encompass more than the seabed alone, could be shown to exist by relying solely on evidence pertaining to activities conducted in connection with the latter.[177] Third, and which is aligned to the previous consideration, in terms of geographical reach, the activities of Ghana were restricted to areas falling within the 200 nm limit, putting into question what evidential weight such acts carry in proving the *de facto* existence of a maritime boundary also extending beyond 200 nm.[178]

5.3.2 The maritime boundary established by the Chamber

As regards the primary issue in dispute, that of where the boundary lies between the two States, the Special Chamber plotted a maritime boundary for the territorial sea, EEZ and continental shelf, also beyond 200 nm, following largely a line that is equidistant from the adjacent coasts of the States concerned. The boundary, beginning at the point where the land boundary terminates, from that point onwards it is more or less a straight boundary line (i.e., an unaltered equidistance line) extending up to a point beyond the 200 nm limit.[179]

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[175] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 146, 226.
[176] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 214.
[177] Earlier in *Peru v. Chile*, the ICJ stated that in determining the extent of a single maritime boundary, a consistent practice concerning fisheries was not deemed decisive either.[177] See Peru v. Chile, *supra* note 51, ¶ 111. Furthermore, another difficulty arises from interpreting an oil practice that is seemingly consistent: having the reach of concessions not extend beyond a certain line may be borne out by reasons different from recognition of a maritime boundary by a State. Restraint, or caution being exercised, by the parties to the dispute can be alternative motivations for having a concession not extend beyond a geographical point. Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 215, 226.
[178] Ghana's proclaimed legislation carried according to the Chamber little weight in assessing whether there was acquiescence on the part of Côte d'Ivoire; Ghana's legislation, in fact, did not make it clear that there was such pre-existing agreement. The submissions made by the two States to the Commission on the Limits of the Continental Shelf to assess the extent of their extended continental shelf entitlements held no value either in regard of the acquiescence contention. These submissions, containing an explicit disclaimer, in which they were excluded from affecting the underlying issue of maritime boundary delimitation, was for the Chamber sufficient reason to deny them any relevance in relation to assessing whether a *de facto* boundary existed. Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 109. 163, 168, 219, 224.
[179] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 540.

Those parts of the disputed area where Ghana had given concessions pursuant to which Tullow Oil was on the verge of exploitation were all considered to be under Ghana's exclusive jurisdiction. After the final ruling was delivered, Tullow Oil, by publishing a statement on its website, applauded the result,[180] indicating that work would be resumed shortly. A consequence of the judgment of the Special Chamber is that the reach of certain previously issued concessions by both parties to the dispute would have to be revisited, as some of the blocks issued by them straddle the newly established maritime boundary.[181] But, importantly, this did not concern areas in relation to which Ghana had begun exploration and exploitation activities.

5.3.3 A judgment on delimitation: constitutive or declarative of rights?

It is of note that on the issue of "the meaning of a judgment on the delimitation of the continental shelf",[182] the Chamber took a position at variance with those of the States involved. Where the parties to the dispute agreed that delimitation is of a *declarative* nature, although their views differed in relation to the consequences that followed from delimitation being declarative, the Chamber defined the nature of delimitation as consisting of both declarative and constitutive elements. Not only was this at variance with the positions of the States concerned, this is also at odds with previously rendered international case law. Looking at e.g., the *North Sea Continental Shelf* cases, the ICJ stated that delimitation is of a declarative nature: the undelimited continental shelf already belongs to the coastal State; meaning delimitation is not concerned "with the determination *de novo* of such an area".[183] Closely connected to this finding of the ICJ was the consideration that the sovereign rights the coastal State has over the continental shelf are inherent and flow automatically from the State having sovereignty over territory.[184] Following on these lines set out by the ICJ, Côte d'Ivoire took the position that the aspect exclusivity of sovereign rights is not dependent on

[180] *ITLOS Judgment*, 23 September 2017, available at http://www.tullowoil.com/media/press-releases/itlos-judgment.
[181] See Pieter Bekker and Robert van de Poll, Ghana and Côte d'Ivoire Receive a Strict-Equidistance Boundary**,** ASIL Insights, 13 October 2017, available at https://www.asil.org/insights/volume/21/issue/11/ghana-and-cote-divoire-receive-strict-equidistance-boundary.
[182] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 590.
[183] North Sea Continental Shelf cases, *supra* note 35, ¶ 18.
[184] North Sea Continental Shelf cases, *supra* note 35, ¶ 19.

when the maritime boundary is established.[185]

Rights of the coastal State to the continental shelf, being inherent and *ab initio*, would inevitably require a judgement of the Chamber to be declarative of these rights, in the view of Côte d'Ivoire. Under this logic, the rights a coastal State has over the continental shelf already exist, and so does their exclusiveness, also in relation to the disputed parts of a continental shelf. Through delimitation the geographical extent of these rights is determined conclusively, subsequently opening up the possibility for States to act exclusively on these rights in relation to mineral resources in areas on its own side of the boundary. Inevitably, however, by allowing acts to proceed unilaterally in relation to the disputed continental shelf area, the aspect of exclusivity of a State's rights would be breached (see previous section 5.1).

Against the backdrop of Côte d'Ivoire's contention that there is a general requirement of not conducting unilateral activities in a disputed maritime area,[186] because the sovereign rights it enjoyed were exclusive in nature, Ghana contested the understanding that a delimitation is declarative in the way suggested by Côte d'Ivoire.[187] In general, Ghana agreed with that delimitation is necessarily declarative in nature; otherwise, the disputed area would be a "terra nullius".[188] Although the States concerned were in agreement on delimitation being declarative of rights, this did not imply that Côte d'Ivoire was correct in arguing that its sovereign rights had been violated: "Ghana's operations over many decades in the now-disputed area" could not be considered breaches of these rights, according to Ghana.[189] Neither did the consequence of the *ab initio* and *ipso facto* character of sovereign rights over a continental shelf change this: "belatedly declaring" having claimed rights over the disputed area did not have a consequential effect of that previous lawfully undertaken conduct would now breach the sovereign rights of Côte d'Ivoire, even after the latter altered the extent of its claim to maritime zones.[190] So, Ghana placed great emphasis on that the acts it undertook related to an area that was not in dispute, tying in to its acquiescence accusation (see section 5.2). Importantly, however, it did not dispute the aspect of exclusivity already attaching to a State's sovereign rights. Rather, Ghana argued that Côte d'Ivoire could not claim having such

[185] Ghana/Côte d'Ivoire, supra note 54, Counter-memorial of Côte d'Ivoire, at 222.
[186] See sections 4.1 & 5.1.
[187] Ghana/Côte d'Ivoire, supra note 140, Reply of Ghana, at 139-140.
[188] Ghana/Côte d'Ivoire, supra note 140, Reply of Ghana, at 140.
[189] Ghana/Côte d'Ivoire, supra note 140, Reply of Ghana, at 140.
[190] Ghana/Côte d'Ivoire, supra note 140, Reply of Ghana, at 140-141.

exclusivity, having forfeited its sovereign rights to areas falling on Ghana's side of the equidistance boundary due to acquiescence.

The Chamber began its analysis with indicating where its view converged with those of the parties to the dispute, that is: the sovereign rights coastal States have over the continental shelf are exclusive and exist *ab initio*.[191] The Chamber went on to recognize that the States concerned held similar views over the nature of delimitation being declarative in nature. However, characterizing delimitation as inherently declarative is false according to the Chamber, stating that delimitation "cannot be qualified as merely declarative",[192] but rather also possesses constitutive elements. Usually, these rights are considered to have an existence independent of delimitation, in that these rights also apply to a disputed part of the continental shelf.[193] In this light, if another claimant holding a similar entitlement decides to act on related rights unilaterally prior to delimitation, the pre-existing rights of the other coastal State might be breached. However, the Chamber did not go along these lines of argument, stating that international law will only be breached by a State acting unilaterally in a disputed maritime area that lacks a good faith claim to the area concerned (see the next section).

Following the Chamber's finding that the continental shelf rights of coastal States are exclusive, and that the entitlement to a continental shelf is automatic, the Chamber discussed the issue of the nature of the judgment on delimitation it was called upon to effect. A delimitation determines conclusively which parts of a disputed continental shelf area belong to which State, coming down to it giving prevalence to one State's entitlement over another.

Then, in light of assigning to delimitation both declarative and constitutive aspects, the Special Chamber assessed whether a claimant acting unilaterally in a disputed continental shelf area can incur international responsibility (see the next section for more).

So, the reasoning of the Special Chamber challenges what seems to have been a widely held overall assumption: delimitation is *declarative* of pre-existing rights. In fact, the roots of the rather unconvincing reasoning of the Chamber that e.g., unfolds on the issue of international responsibility, as will be discussed next, can be retraced to this characterization of the nature of delimitation.

[191] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 590.
[192] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 591.
[193] See e.g., North Sea Continental Shelf cases, *supra* note 35, ¶ 19

5.3.4 Were paragraphs 1 and 3 of Article 83 LOSC breached by Ghana?

In substantiating its argument that Ghana through its unilateral actions violated international law, Côte d'Ivoire invoked both paragraph 1 and paragraph 3 of Article 83 LOSC.[194] The Special Chamber in its analysis addressed whether any breaches of these paragraphs had occurred.

It started with answering the question whether the claimed violation by Côte d'Ivoire of the obligation to negotiate in good faith, as was argued to be enshrined in paragraph 1 of Article 83 LOSC, could be upheld. The Chamber began by recognizing that there is a close tie between negotiations and delimitation, in that the first necessarily precedes the latter. Negotiating was found to be a particularly appropriate vehicle when "States conduct maritime activities in close proximity" to each other.[195] As the obligation to negotiate is an obligation of conduct, a breach of paragraph 1 of Article 83 LOSC could according to the Chamber not be assumed if the "result expected" by one of the claimants is not met. Important in this regard was that Côte d'Ivoire failed to produce any evidence of several rounds of held negotiations spanning a 6-year period, not being conducted in a meaningful manner; i.e., they did not show there being a lack of good faith on the part of Ghana. Neither could the initial unwillingness of Ghana to bring the dispute to international adjudication be seen as breaching the obligation to negotiate in good faith.[196] One reason for this is that Article 298 LOSC explicitly permits States to place certain types of disputes beyond the reach of binding dispute settlement.[197] Therefore, Côte d'Ivoire seeking to maintain the existing *status quo* as it deemed to exist (i.e., that no unilateral economic conduct was taking place in the disputed area), and the unwillingness of Ghana to accede thereto, could not be seen as a breach of the obligation to negotiate in good faith.

The Chamber made it clear that two separate obligations are set out in paragraph 3 of Article 83 LOSC, which are interrelated.[198] A further link was recognized to exist between the two obligations in the sense of the nature of obligation they lay down: either of these stipulated an obligation of conduct. The point at which paragraph 3 would become relevant according to

[194] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 596.
[195] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 604.
[196] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 604.
[197] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 604.
[198] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 626.

the Special Chamber in *Ghana/Côte d'Ivoire* is when "the maritime delimitation dispute has been established".[199] This paragraph ceases to exert its relevance when States have effected "a final delimitation", through the conclusion of a delimitation agreement, or when an international court or tribunal has delimited the maritime boundary.[200]

The Special Chamber abstained from engaging in an in-depth analysis of the meaning of the positive obligation included to this aim in paragraph 3 of Article 83 LOSC. This was because Côte d'Ivoire did not frame any of its submissions along the lines of the obligation to seek provisional arrangements being breached, although it made some reference to the obligation and breaches thereof in its pleadings.[201] However, the Chamber did elaborate on the content of this obligation in a broader sense by stating that it connotes an "obligation of result": the States concerned have to make good faith efforts to conclude provisional arrangements.[202] The addition of the phrase "in a spirit of understanding and cooperation" was considered to "enhance" this obligation.[203] However, it is not entirely clear how this obligation is "enhanced", with the defining standard remaining that States have to make good faith efforts in setting up provisional arrangements successfully.

5.3.5 The Special Chamber's interpretation of the obligation to not hamper or jeopardize[204]

Due to the strong emphasis placed by Côte d'Ivoire on the obligation to not hamper or jeopardize, the Special Chamber began by addressing the issue of how to define its underlying nature. As to determine whether the obligation to not hamper or jeopardize is an obligation of conduct (i.e., *pactum de contrahendo*) or result (i.e., *pactum de negotiando*), forming an understanding of the words of "shall make every effort" was regarded critical by the Special Chamber. It interpreted this phrase as being applicable to both obligations in paragraph 3 of Article 83 LOSC. This was confirmed by the use of the word "and" linking the second limb of the sentence to its first part.[205] By reaching the conclusion that there is a good faith component attached to the obligation to not hamper or jeopardize, the Special Chamber followed the line that the Tribunal in its award *Guyana v. Suriname* set out

[199] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 630.
[200] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 630.
[201] See e.g., Ghana/Côte d'Ivoire, *supra* note 54, Counter-memorial of Côte d'Ivoire, at 236.
[202] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 627.
[203] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 627.
[204] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 629.
[205] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 629

earlier.[206] Reinforcing this position is the literature, where the view regularly emerges that the obligation to not hamper or jeopardize is an obligation of conduct.[207]

Following the determination as to its nature, the Chamber acknowledged that the parties to the dispute vocalized different views in relation to two aspects connected to paragraph 3 and the obligation to not hamper or jeopardize as collected thereunder: first, whether it was breached; and, second, whether paragraph 3 would be applicable. After concluding earlier that the acquiescence claim could not succeed, the Chamber made it clear that a breach of paragraph 3 of Article 83 LOSC required there being a disputed continental shelf area in relation to which a unilateral act was undertaken.[208]

The Special Chamber observed *obiter dictum* that although Ghana suspended new drilling in the disputed area, as it was ordered to do in the interim measures phase, "preferably" it would have done this earlier when Côte d'Ivoire previously requested this.[209] This statement has to be probably read as being in the nature of *lege ferenda*, rather than grounding in a legal obligation; the Chamber did not even order a stop to initiated drilling operations in the interim measures phase despite Côte d'Ivoire's request to this aim (see section 4.3).

The circumstance that the areas where the unilateral conduct was undertaken were considered to be under the exclusive jurisdiction of Ghana, as they fell on its own side of the established boundary, had to inevitably carry great weight according to the Chamber. As a result, Côte d'Ivoire's submission building on the view that the unilateral acts were undertaken "in the Ivorian maritime areas"[210] became meaningless according to the Chamber. Falling back on a formalist reasoning, by pointing to that the areas were located on Ghana's own side of the boundary, the Special Chamber made it clear that these areas could not be considered Ivorian; hence, its submission could not succeed.[211] Judge Mensah, in his separate opinion, and in assessing whether paragraph 3 of Article 83 LOSC was breached, adopted a similar argumentation: given that the areas in question were in the final judgment attributed to

[206] In this latter case, in pinpointing the nature of the negative obligation in paragraph 3 of Article 83 LOSC, the Tribunal construed it as to make "every effort … not to jeopardise or hamper the reaching of the final agreement". See Guyana v. Suriname, *supra* note 11, ¶ 465.
[207] See e.g., Peter D. Cameron, *The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and the Caribbean*, 55 Int'l & Comp. L. Q. 563 (2005); Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS, *supra* note 5, at 21-22.
[208] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 589.
[209] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 632.
[210] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 62, 561, 598, 606, 633.
[211] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Ad Hoc Mensah, ¶ 1.

Ghana, the issue of infringement was a *non-sequitur*.[212]

What is problematic with these findings is that both seem to operate on a misunderstanding of paragraph 3 of Article 83 LOSC: this paragraph is concerned with whether a unilateral act undertaken in a disputed continental shelf area, *during* the time that it was disputed had an effect of hampering or jeopardizing reaching a delimitation agreement. And not whether this unilateral act in hindsight, i.e., *ex post facto*, with the newly acquired knowledge at one's disposal of who has exclusive jurisdiction over the area because it lies on a State's own side of the boundary, breached the obligation to not hamper or jeopardize. The way in which the Special Chamber interpreted paragraph 3 renders it effectively meaningless; this is further enhanced by combining the reasoning in regard to whether international responsibility could be incurred with the Chamber's interpretation of paragraph 3 of Article 83 LOSC.

5.3.6 Acting unilaterally in areas brought under the exclusive jurisdiction of the other claimant: can there be international responsibility?

After considering the areas where the unilateral mineral resource activity had taken place were on Ghana's side of the boundary, the Special Chamber made it clear that the issue it needed to analyze was as follows: can international responsibility be engaged when unilateral acts have been "carried out in a part of the area attributed by the judgment to the other State".[213] Framed differently, the question was, can international responsibility be incurred by Ghana for unilateral conduct in relation to the disputed continental shelf area that, was argued by Côte d'Ivoire to have resulted in a breach of its sovereign rights, particularly infringing on their exclusivity, even though in the final apportionment the areas were not located on the latter's side of the boundary?

In an earlier consideration, the Special Chamber acknowledged that Ghana's unilateral activities were however undertaken in what at the time could be considered the maritime area of dispute.[214] Judge Paik also emphasized this aspect in his separate opinion. However, the importance attributed thereto, and the conclusion Judge Paik draws therefrom are very different from the one of the Special Chamber.[215]

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[212] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate opinion of Judge Ad Hoc Mensah, ¶ 14.
[213] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 589.
[214] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 588.
[215] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik. On how the view of Judge Paik differed from the majority view, more in section 5.3.7.

According to the Special Chamber, determining which parts of the disputed area belonged to either Ghana or Côte d'Ivoire through delimitation, involves a prioritization of one coastal State's entitlement to a continental shelf over the entitlement of the other coastal State; i.e., there is a constitutive component to a delimitation (see the previous section). In the following finding, the Special Chamber made it clear when international responsibility would be incurred because of there being a breach of a rule of international law, in case a State acts unilaterally in relation to a disputed continental shelf area:

> In the view of the Special Chamber, the consequence of the above is 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.

One implication of this finding is that if a State has acted unilaterally in a part of a disputed continental shelf area prior to delimitation, and that area is ultimately considered to be under the exclusive jurisdiction of the acting State, there can be no violation of the sovereign rights of the other coastal State, which claimed entitlements over the same area prior to delimitation but to whom the area was not attributed after a delimitation judgment.[216]

The same holding also implies the possibility for incurring international responsibility by a State acting unilaterally prior to delimitation being extremely limited. As long as the area where the act occurred was claimed in good faith by the State acting unilaterally it will avoid responsibility; this is even if the area falls on the side of the boundary of the other State after delimitation.

The Special Chamber found judicial authority for this view in the ICJ's ruling in *Territorial and Maritime Dispute (Nicaragua v. Colombia).*[217] This latter case involved Nicaragua requesting the ICJ for a declaration containing that "Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian".[218] Colombia contested this assertion. One of the grounds it invoked was that, States do not claim reparation for acts that were conducted previously (i.e., prior to final settlement) in a

[216] Ghana/Côte d'Ivoire (Judgment), supra note 6, ¶ 592.
[217] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 2012 I.C.J, 624, ¶ 16, 17 (19 November).
[218] Territorial and Maritime Dispute (Nicaragua v. Colombia), supra note 217, ¶ 16, 17.

disputed area, if the area involved is ultimately established to be located on the side of the boundary of the State that acted unilaterally.[219] Ghana also relied on this holding, in the context of its argument that international responsibility cannot be incurred from carrying out activities to which Côte d'Ivoire had acquiesced.[220]

The ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* was unwilling to provide the declaration requested by Nicaragua, to the effect that Colombia's acts undertaken in a disputed maritime area were declared unlawful from the view of international law. In its analysis, the ICJ placed special emphasis on that different parts of the area in dispute were considered to be under the jurisdiction of the different States involved.[221]

By way of contrast, in the maritime boundary dispute between Ghana and Côte d'Ivoire, the areas where exploitation activities in the disputed maritime area were undertaken were in the final apportionment all considered to be under the exclusive jurisdiction of Ghana. The following consequence followed from applying the finding of the ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* by analogy to the dispute between Ghana and Côte d'Ivoire: even if the areas in relation to which Ghana was on the verge of producing mineral resources would have been considered to be under the jurisdiction of Côte d'Ivoire, there would have been no violation of its sovereign rights.[222]

To use the Chamber's own words, this would be no different "even assuming that some of those activities took place in areas attributed to Côte d'Ivoire by the present judgment".[223] In light of that the areas did not fall on Côte d'Ivoire side of the established boundary, it is not entirely clear why the Special Chamber *obiter dictum* stated that this would have not been different if the area would have been considered to be under Côte d'Ivoire's exclusive jurisdiction after delimitation; in fact, this seems to have been a largely unnecessary statement of the Chamber.

And the ruling on this point constitutes a clear break with what the Special Chamber itself held in the interim measures phase, where a risk of irreparability was tied to the area where Ghana undertook the unilateral acts in relation to mineral resources being placed under Côte d'Ivoire's exclusive jurisdiction; this earlier recognized risk now did no longer exist. Perhaps

[219] Territorial and Maritime Dispute (Nicaragua v. Colombia), supra note 217, ¶ 249.
[220] Ghana/Côte d'Ivoire, supra note 140, Reply of Ghana, at 142-143.
[221] Territorial and Maritime Dispute (Nicaragua v. Colombia), supra note 217, ¶ 250.
[222] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 593, 594.
[223] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 594.

this is more easily explained by the fact that there now is an established maritime boundary.

But there is another difficulty with how the Special Chamber framed its reasoning, particularly in light of it recognizing that the coastal State has *ab initio* rights to the continental shelf.[224] However, it then subsequently assume that there will be no breach of these rights prior to delimitation in the following case: if a part of the continental shelf is in dispute and claimed in good faith by a claimant acting unilaterally, there will not be a breach of another claimant's rights before or after delimitation. The logic laid out here by the Chamber seemingly can only really stand up to scrutiny if the States concerned *not* have pre-existing rights to the disputed area, due to delimitation being constitutive of these rights for States; this is a view that was prior to this judgment highly uncommon.

5.3.7 The separate opinion of Judge Paik: the neglected importance of the obligation to not hamper or jeopardize

The separate opinion of Judge Paik contributes to a better understanding of what the content of the obligation to not hamper or jeopardize delimitation consists of. In this separate opinion, he discussed the modalities of paragraph 3 of Article 83 LOSC in some detail. What motivated Judge Paik writing this opinion was that, the Chamber neglected the relevance and practical importance of this obligation in framing its decision.

Nonetheless, Judge Paik did not vote in favor of Côte d'Ivoire's submission that paragraph 3 of Article 83 LOSC was breached. The formulation of Côte d'Ivoire's submission on this point, referring to the disputed area as exclusively belonging to Côte d'Ivoire, enabled him to follow the unanimous decision that Ghana had not breached paragraph 3 of Article 83 LOSC.[225] With the benefit of hindsight, the unilateral conduct occurred in an area that could not be considered Ivorian.[226] Judge Paik made it clear that he would not have followed the majority's view, had Côte d'Ivoire's submission been worded differently.[227] However, Judge Paik expressed his reservations in relation to how the Chamber treated paragraph 3 of Article 83 LOSC in a more general sense.

First, the Chamber, through how it framed its judgment brushed over the general importance and practical relevance of the obligation to not hamper or jeopardize delimitation, according

[224] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 590.
[225] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 1.
[226] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 1.
[227] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 1.

to Judge Paik.[228] And, second, he was not convinced of "the lawfulness of Ghana's activities in the disputed area in terms of article 83, paragraph 3, of the Convention".[229] After acknowledging there are two separate obligations in paragraph 3, geared respectively towards cooperation and abstention, Judge Paik's exclusively directed his attention at the obligation to not hamper or jeopardize. The importance of this obligation was signified by that it embodies "a fundamental duty of restraint",[230] carrying significant "weight as a fundamental norm".[231] Further, the obligation to not hamper or jeopardize serves a significant practical purpose in light of disputed continental shelves being regular features in the international landscape.[232] Judge Paik, despite acknowledging that the obligation is "scant in substance", thought it to have been deserving of further clarification in this judgment.[233] However, the Special Chamber passed on the chance of offering welcome guidance on the content of this obligation.

In analyzing the meaning of the obligation to not hamper or jeopardize, Judge Paik started with indicating where a point of agreement with the judgment of the Special Chamber lies: the nature of the obligation to not hamper or jeopardize is not one of result, but rather an obligation of conduct.[234] In an attempt to circumscribe the nature of an obligation of conduct, Judge Paik adopted the line of approach set out in the *Responsibilities and Obligations of States with respect to Activities in the Area*: States must do their utmost to achieve the aim sought after by a provision.[235] On the issue of the extent of the limitation imposed by the obligation to not hamper or jeopardize on the possibility to act unilaterally, it was abundantly clear in the view of Judge Paik that a moratorium was not meant to be introduced.[236] This aspect was borne out by both the language of paragraph 3 of Article 83 LOSC and its negotiating history.[237] As a result, the contention of Côte d'Ivoire that "activities by the States concerned" in a disputed maritime area must be abjured in a comprehensive sense could not

[228] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 3.
[229] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 1.
[230] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 3.
[231] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 3.
[232] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 3.
[233] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 3.
[234] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 4.
[235] Responsibilities and Obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, ¶ 110. See Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 4.
[236] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 5.
[237] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 5.

succeed.[238] As regards to how the obligation to not hamper or jeopardize delimitation interacts with the obligation to seek provisional arrangement, both being collected under the same paragraph 3, Judge Paik held that the obligation to not hamper or jeopardize would "be particularly relevant" where there are no provisional arrangements into effect, or when the arrangement in question is not comprehensive in nature.[239] Most provisional arrangements are not comprehensive in scope, however, keeping alive the possibility of conflict arising concerning those types of acts that are unregulated by these arrangements.

The question of what acts are captured under this obligation's reach, takes on a particular urgency in light of there being no elaboration on what unilateral acts exert an effect of hampering or jeopardizing. According to Judge Paik, deciding on what unilateral conduct is (un)lawful in the disputed maritime area involved, had to be measured by the impact made on the chances of successfully reaching a delimitation, or on negotiations if they are being, or have been, pursued to that end. Construed thus, a breach of the obligation to not hamper or jeopardize becomes entwined to the circumstances at hand.[240] This aspect of the specific situation present in a disputed area is what rendered the distinguishing between lawful and unlawful acts *in abstracto* a futile exercise, in the view of Judge Paik.

Despite acknowledging the dependency of this assessment on the specific circumstances of a disputed maritime area, some measure of approximation of this scope is possible: but the caveat is that an act is *likely* to be lawful or unlawful, but no absolute determinations can be made. With regard to acts resulting in "a permanent physical change to the marine environment",[241] chances are that they have an effect of prejudicing the final agreement. However, activities effecting change falling short thereof, can just as well have an effect of hampering or jeopardizing.[242] Therefore, seeing causing permanent physical change to be the defining standard against which to measure the lawfulness of a unilateral act is misplaced. Rather, this criterion forms one "relevant factor" among "several" influencing the scope for unilateralism in relation to a disputed continental shelf area. And there is also no hierarchical ordering between these factors. So, the threshold of "a permanent physical change to the marine environment" does not necessarily prevail over any other factors that can be

[238] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 5.
[239] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 5.
[240] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 6. See also: Van Logchem, *supra* note 3, at 185-186.
[241] Guyana v. Suriname, *supra* note 11, ¶ 467.
[242] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 7. See also: Van Logchem, *supra* note 3, at 185-186.

identified.[243] Judge Paik, who focused mainly on the unilateral act as such, and the effects it exerts on a particular maritime boundary dispute, subsequently adduced a list of relevant factors: "type, nature, location, and time" combined with the "manner in which they are carried out" are all relevant in ascertaining whether a unilateral act is reconcilable with the obligation to not hamper or jeopardize.[244]

Ghana must have become fully aware of that there was a dispute with Côte d'Ivoire at some moment in time, certainly no later than in 2009.[245] Rather than subsequently adopting a posture of restraint, which seemed necessary, Ghana stepped up the frequency with which it undertook activities within the disputed maritime area; this intensification was in the view of Judge Paik not reconcilable with the obligation to not hamper or jeopardize delimitation.[246]

Ghana's unilateral activities were undertaken in areas that were *ex post facto* considered to be under its exclusive jurisdiction (i.e., they fell on Ghana's side of the boundary line); however, this aspect should according to judge Paik not factor into the determination of the obligation to not hamper or jeopardize having being breached. Lying behind this argument was the assumption that paragraph 3 of Article 83 LOSC applies exclusively to the period *preceding* continental shelf delimitation; therefore, assessing whether a unilateral act breaches the paragraph must be fully set in the moment of it being undertaken.[247]

Taking the opposite view, that a unilateral act undertaken in a disputed maritime area loses its unlawful character depending on whether that part of the area is placed under that State's jurisdiction after delimitation, would deprive the obligation to not hamper or jeopardize delimitation of the continental shelf of the main aim that it is meant to serve:[248] ensuring that unilateral acts undertaken pending delimitation do not hamper or jeopardize that the claimant States concerned are successful in reaching the final delimitation.

6. The implications of *Ghana/Côte d'Ivoire* for the rights and obligations of States in disputed maritime areas: a muddying of the waters?

A key determinant for the relevance of the judgment of the Special Chamber in relation to the issue of the scope that remains for unilateralism in disputed maritime areas concerning

[243] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 7.
[244] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 10.
[245] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 11.
[246] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 11.
[247] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 17.
[248] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, Separate Opinion of Judge Paik, ¶ 17.

mineral resources, was the acquiescence claim of Ghana being successful. This line of argument did not convince the Special Chamber, however: the evidence adduced fell short of meeting the required threshold of being compelling.[249]

As a result, the judgment can be analyzed through the lens of the added value for determining the rights and obligations States have in relation to a disputed continental shelf area. Now, to revert to the main question this article sought to answer: what lessons can be learned from the maritime boundary dispute between Ghana and Côte d'Ivoire in relation to the issue of what the rights and obligations are of States in disputed continental shelf areas, and in relation to what scope is reserved for unilateral conduct to access the mineral resources located therein?

Ghana's moving to the advanced stage of being on the verge of taking wells in a disputed area into production, makes this case the first in its kind: an international court and tribunal was asked to rule on the lawfulness of a State being close to exploiting mineral resources from a disputed maritime area, as well as on the lawfulness of the preliminary acts undertaken enabling Ghana to progress to this stage. Based on the previous case law, the following answer was likely to be given to the question about how to view the unilateral acts of Ghana from the perspective of international law: these activities are unlawful, given that exploratory and exploitation drilling result in causing irreparable damage to the rights of the other claimant, combined with that it would significantly risk damaging the marine environment, modifying the characteristics of the seabed to a degree that the resultant damage would be irreparable.

In the interim measures phase, signs of a break with previous case law started to first emerge. The Chamber, falling short of suspending all drilling, [250] ordered Ghana to abstain only from new drilling in the disputed maritime area. Leaving those operations already set in motion unaffected, was motivated by other environmental considerations and financial repercussions being simultaneously in play, which argued both against this, according to the Chamber. In its interim measures order, the Chamber recognized that "exploration and exploitation activities" raised the threat of irreparability to rights; a right to information existing for the coastal State in relation to the composition of the continental shelf similarly was considered

[249] See section 5.3.1.

[250] Two of the several requests made by Côte d'Ivoire were: first, ordering Ghana to abort operations in the disputed area completely; and, second, ordering Ghana not to award any new permits to the petroleum industry that intruded upon the disputed area for the duration of the Chamber not having handed down its ruling on the merits. See e.g., Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 25.

to be under threat (see section 4.3). By recognizing a risk of irreparability to flow from the unilateral collection of information, in this regard, the order of the Special Chamber went beyond what was earlier held in case law. This risk of irreparability coming to fruition was in the interim measures phase tied to the area being considered as to ultimately be under Côte d'Ivoire's exclusive jurisdiction. At first glance, the view espoused here by the Chamber shows some resemblance to *Aegean Continental Shelf (interim measures)*, where the ICJ in its decision held that a risk of irreparable prejudice being engendered by unilateral seismic work was dependent on that the area where the work took place was considered to be under the exclusive jurisdiction of Greece.[251] However, and importantly, the ICJ thought this line of reasoning could only be applied to seismic work, not to exploratory drilling and exploitation activities, including bringing installations into position. In the view of the ICJ, had one of these latter categories of unilateral activity been undertaken, it would have offered interim protection to the end of prohibiting these types of acts from being undertaken *pendente litis*.

These deviations from the previous case law have become more pronounced in the judgment on the merits. Parts of the judgment on the merits are (similarly) largely irreconcilable with what was held in the interim measures phase. While earlier recognizing a danger of causing irreparable prejudice to rights,[252] the materialization of this risk would result from the following unilateral activities: gathering information, and conducting exploration and exploitation activities.[253] Although none of the areas in dispute fell on Côte d'Ivoire's side of the established boundary, the Special Chamber addressed *obiter dictum* as to when a breach of the sovereign rights of Côte d'Ivoire, possibly incurring international responsibility, would have occurred: this would be limited to if a claimant lacking a good faith claim over the disputed area, would act in connection therewith unilaterally.

Ghana contended that acts in relation to mineral resources formed part of the *status quo* existing between itself and Côte d'Ivoire; being a constituent part thereof, they could not be assumed to have an effect of hampering or jeopardizing delimitation.[254] The main element having shaped the current and relevant *status quo* was, in the view of Ghana, Côte d'Ivoire's acquiescence, with the result that the undertaken acts had become an integral part of this status quo; hence, there could be no breach of paragraph 3 of Article 83 LOSC.

[251] Aegean Sea Continental Shelf, *supra* note 11, ¶ 31.
[252] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 94-95.
[253] Ghana/Côte d'Ivoire (Provisional Measures), *supra* note 7, ¶ 95-96.
[254] Ghana/Côte d'Ivoire, *supra* note 140, Reply of Ghana, at 137.

The treatment the Special Chamber gave to paragraph 3 was minimal; dismissing the paragraph's relevance based on a highly formalistic reasoning. After pronouncing itself on the nature of the obligation (i.e., forming an obligation of conduct) and stating that it is predominantly relevant in the absence of agreed provisional arrangements, the analysis of the Chamber in terms of paragraph 3 of Article 83 LOSC does not progress much beyond this point; this was due to the way in which Côte d'Ivoire committed its submission to paper.[255] Given that the paragraph applies in areas of disputed continental shelf, framing its submission in terms of that these acts occurred with the maritime zones of Côte d'Ivoire could be easily brushed aside as anticipating events which would have yet to come to pass, or perhaps not at all if the area was attributed to Ghana, as it ultimately was. Hence, this framing by Côte d'Ivoire of its submission that Ghana's unilateral acts occurred in the "Ivorian maritime area" can be regarded to have been unfortunate. Yet the submission of Côte d'Ivoire was concerned with a larger area than the area up to the equidistance boundary line as determined by the Chamber. Therefore, dismissing Côte d'Ivoire's submission on the ground that it was mainly concerned with the area up to the equidistance line cannot completely convince.[256]

To dismiss the relevance of this paragraph on the ground of the area in question not being ultimately considered to be on Côte d'Ivoire's side of the established boundary, roots in a misunderstanding of paragraph 3 of Article 83 LOSC by the Chamber. This is because the paragraph is not meant to function as a tool to determine *ex post facto* (i.e., after delimitation) the lawfulness of a unilateral acts undertaken prior thereto, by setting this determination in the time of it becoming clear where the boundary lies. Rather, paragraph 3 is meant to exert its relevance prior to delimitation: pursuant to which acts undertaken unilaterally *prior* to delimitation, and which have an effect of hampering or jeopardizing the final delimitation can be considered unlawful. The unconvincing interpretation of the Special Chamber of paragraph 3 seems to be entwined with another unconvincing set of considerations with regard to whether international responsibility could be incurred (see section 5.3.6). In turn, both the elements – that there was no breach of the obligation to not hamper or jeopardize nor international responsibility was incurred for violations alleged by Côte d'Ivoire on its sovereign rights through Ghana's unilateral acts – can be considered to be connected with the

[255] Ghana/Côte d'Ivoire (Judgment), *supra* note 6, ¶ 62, 561, 598, 606, 633.

[256] See more generally on this issue, Atsuko Kanehara, A Legal and Practical Arrangement of Disputes Concerning Maritime Boundaries Pending their Final Solution and Law Enforcement: a Japanese Perspective, in SERVING THE RULE OF INTERNATIONAL MARITIME LAW: ESSAY IN HONOUR OF PROFESSOR DAVID JOSEPH ATTARD 100 (Norman. A. Martínez Gutiérrez eds., 2010).

Special Chamber's finding of delimitation not being exclusively declarative (see section 5.3.3).

Had Côte d'Ivoire's submission of been framed differently, Judge Paik indicated he would have voted in favor of that paragraph 3 of Article 83 LOSC was breached. Yet a broader question is, how likely would it have been that the ultimate outcome of the majority's decision would have been similarly different, had the submission been worded differently? The Chamber's analysis on the point of incurring international responsibility provides for a bleak forecast that this would have been the case. Although, from the perspective of logic, it would have made more sense to discuss the aspect of whether paragraph 3 of Article 83 LOSC was breached before the Special Chamber addressed the issue of international responsibility, its analysis of paragraph 3 was reserved to a later point in the judgment. By placing this analysis *after* dealing with the issue of international responsibility, the Chamber seems to suggest that international responsibility could not have been incurred by breaching this paragraph.

The obligation to not hamper or jeopardize imposes a *de facto*, not *de jure* limitation on when claimed rights may be put to actual use by coastal States in a disputed area. Yet the practical possibility for claimant States to undertake unilateral acts in relation to disputed EEZ or continental shelf areas is reduced to those acts conforming to the obligation to not hamper or jeopardize.[257] The existence of pre-existing rights to the disputed maritime area of coastal States, which can be breached, is the precondition on which paragraph 3 of Article 83 LOSC operates. What the Special Chamber seemingly failed to recognize however is that, the extent to which claimants can exercise sovereign rights over the disputed continental shelf area prior to delimitation, is largely governed by paragraph 3. So, construed thus, the argument can be made that it would have been essential for the Special Chamber to address the meaning of paragraph 3 in light of Côte d'Ivoire's contention that its sovereign rights were infringed upon, because of the unilateral acts undertaken by Ghana; irrespective of that Côte d'Ivoire did not directly contend that paragraph 3 was breached in this particular way.

The Special Chamber seems to employ a different definition of delimitation being constitutive than used in earlier case law. Departing from the view that delimitation is merely declarative of rights, it assigns to delimitation a dual nature in that it carries both constitutive

[257] Van Logchem, *supra* note 3, at 195.

and declarative aspects. A difficulty with this view would be to disentangle those parts of delimitation that are declarative in nature from those that are constitutive; e.g., is delimitation constitutive of the rights coastal States have over the continental shelf, rendering, as Ghana suggested in its pleadings, a disputed maritime area essentially *terrae nullius* prior thereto; or, rather, is perhaps the feature of the exclusive character of rights entwined with completing a delimitation?

Looking at the reasoning that unfolded after the Special Chamber construed the nature of delimitation as being composed of both declarative and constitutive components, particularly concerning international responsibility and whether paragraph 3 of Article 83 LOSC was breached, strongly suggests that the Special Chamber considers delimitation to be mainly constitutive of rights. This is because the outcome of the Chamber's decision on these two points, is difficult to reconcile with delimitation indeed being declarative of pre-existing rights; in other words, sovereign rights for coastal States do not seem to exist, or alternatively cannot be breached, which seems to undercut the essence of possessing rights.

Perhaps, however, an alternative explanation might be that the Special Chamber construed the relation between having an entitlement to a continental shelf and the Chamber's delimitation judgment, as that related rights will become exclusive in nature once the maritime boundary has been established by the Chamber. Under that view, prior to delimitation there is a coexistence of rights with none of the States concerned being able to fall back on their exclusive nature; in a way there would be a cancelling out of this aspect of exclusiveness due to these co-existing sets of rights. The final judgment will clarify the exact extent of a State's sovereign rights over the continental shelf, whereby the coastal State's exercise of these related rights will become complete. On this interpretation, the constitutive aspect of the judgment would lie in that the exercise of a coastal State's sovereign rights is no longer qualified due to another coastal State claiming similar rights, but that after delimitation it can fully exercise these rights in areas considered to be under the exclusive jurisdiction of one coastal State.

However that may be, what remains highly unsatisfactory with the judgment of the Chamber is when international responsibility can be engaged for unilateral acts undertaken in relation to a disputed continental shelf area: the sovereign rights the coastal State has over the continental shelf, which are *ab initio* and *ipso facto*, cannot be breached by another claimant State unless it lacks a good faith claim over a disputed maritime area, putting into question

how inherent and exclusive these rights really are.

By assigning delimitation at least partly a constitutive effect, the Special Chamber does not render the disputed area "no one's waters"; this is because having an entitlement to the continental shelf area precedes the possibility to act in relation thereto. But, rather as waters in relation to which claimants holding a good faith claim can act freely and without the threat of incurring responsibility *ex post facto*, for acting during the time that the area is disputed. According to the Chamber, if a State has a good faith claim, no international responsibility will be incurred, even if *ex post facto* the area is located on the side of the boundary of the other, non-acting, coastal State.

Because of delimitation being in part of a constitutive nature, as the reasoning of the Chamber implies, paragraph 3 of Article 83 LOSC, is seemingly also deprived of much significance: breaching the obligation to not hamper or jeopardize is tied to when a State, lacking a good faith claim, would act unilaterally in relation to a disputed maritime area. This can function as an incentive for a claimant State having a good faith claim to start acting unilaterally in relation to a disputed maritime area, leading to the question whether the direction established by the Special Chamber is commendable in dealing with such areas, which will be explored next.

7. Concluding remarks on broader implications for disputed maritime areas: does the judgment provide cause for alarm?

Broader (adverse) consequences may flow from the judgment of the Special Chamber. A source for concern is that, the Special Chamber has provided a State that wants to undertake acts unilaterally within a disputed continental shelf area with the judicial authority to do so. By setting the threshold as to whether undertaking a unilateral act is allowed at when that part of the disputed maritime area is claimed in good faith by the State, this means a unilateral act can practically always proceed in relation to a disputed continental shelf area, seemingly without incurring international responsibility; this is even if the area after delimitation is part of the other claimant's maritime zone.

Other effects that might follow from a claimant undertaking acts unilaterally, including the bilateral relations between States being detrimentally affected are e.g., excluded from consideration by following this new 'path' of the Chamber. By focusing exclusively on the validity of the claim of a coastal State implies that, all other arguments arguing in favor of

adopting more restraint in such areas – including, that unilateral acts concerning mineral resources are regularly highly controversial, prompting protests and may breed new acts of unilateralism in response – are excluded by the Chamber as relevant considerations. The aspect of preserving the exclusivity that is attached to States' sovereign rights over the continental shelf, and the resources contained therein, was neither deemed a relevant consideration by the Chamber. [258]

Merely requiring that the area is claimed in good faith is not a very demanding requirement. It significantly lowers the bar for States seeking to act unilaterally in relation to a disputed continental shelf area. Following this argument, in a more general sense and by applying it by analogy to other disputed maritime areas, particularly those that regularly create conflict and where unilateral acts are recurrent sources of tension between claimant States, the reasoning of the Special Chamber cannot but have negative effects. This is especially because it effectively offers the claimant States concerned a *carte blanche* to act unilaterally in relation to their disputed continental shelf area.

Whether the judgment of the Special Chamber is a sign of a significant shift, in the wrong direction, remains to be seen, however. Or, rather, an alternative argument would be that the specifics of the dispute between Ghana and Côte d'Ivoire were of such central importance in shaping the outcome of the judgment of the Chamber, that drawing more general conclusions as to the state of international law in relation to disputed maritime areas from it, is inappropriate. Particularly, the aspect that Ghana was already in a very advanced stage of development of the disputed maritime area, being close to production, can be seen as relevant under this view. Had the Chamber ruled differently, serious financial consequences might have followed for Ghana and its concessionaires. Investors would inevitably pull out from earlier taken on commitments, which would lead to the abandonment of all development of mineral resources in the near future, and also leaving the equipment already moved into place to deteriorate up to a point where it could no longer properly function.

The next judgment that can add to the discussion as to the issue of what the rights and obligations are of States in disputed maritime areas, and which might offer a better indication in which direction judicial opinion is moving, is perhaps the maritime boundary dispute between Kenya and Somalia, where the latter complained of the unlawfulness of unilateral

[258] Arts. 55 & 56 LOSC.

acts undertaken by Kenya.[259] A return to the line set out previously in *Guyana v. Suriname*, although also flawed on certain points, is very much preferable to following the Chamber's judgment in *Ghana/Côte d'Ivoire*.

[259] *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), currently pending before the ICJ, see, www.icj-cij.org (*Somalia v. Kenya*).