required.[46] Mutual trust is totally dependent on respect for the rule of law by member states.[47] The Spanish Constitutional Court was right in pointing to these contradictions between the impugned Law and the values enshrined in TEU Article 2.[48] What it did not mention, however, is that federalism is also dependent on permanent negotiation and the search for common solutions. Unfortunately, it seems that the Court will have more opportunities in the future to recall these principles.

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International Tribunal for the Law of the Sea—maritime delimitation—tacit agreement and estoppel—delimitation method for seabed and water column—single maritime boundary—Article 83.3 obligation not to hamper the reaching of a final agreement

GHANA v. IVORY COAST. Case No. 23. *At* https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf.
Special Chamber of the International Tribunal for the Law of the Sea, September 23, 2017.

The charm of maritime delimitation and its enigmatic lessons hardly surprise us, yet the reasoning behind them sometimes seems seductively elusive. On September 23, 2017, a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) issued its decision in *Ghana v. Ivory Coast*.[1] The glamour of maritime delimitation is reason enough to note the judgment, but the case also addresses the equidistance principle for maritime delimitation, the standard for the acceptance of a tacit agreement, and international responsibility under Article 83 of the United Nations Convention on the Law of the Sea (UNCLOS).[2]

Ghana instituted an arbitral proceeding against Ivory Coast in 2014, pursuant to Annex VII of the UNCLOS. The proceeding arises out of a maritime boundary dispute. The parties agreed to submit the dispute to a special chamber constituted under Article 15(2) of Annex VI of the UNCLOS; Annex VI is called the Statute of the ITLOS. The ITLOS constituted a Special Chamber (Chamber) with the following five judges: Bouguetia (president), Wolfrum, Paik,

[46] TEU, *supra* note 43, Art. 4(3).

[47] Commission Reasoned Proposal, *supra* note 43, para. 2.

[48] A similar point has been made in a manifesto drafted by seven Spanish professors of public international law and signed by over four hundred international lawyers. *See* Statement on the Lack of Foundation on International Law of the Independence Referendum that Has Been Convened in Catalonia, Sept. 27, 2017, *available at* https://voicesfromspain.com/2017/09/27/statement-on-the-lack-of-foundation-on-international-law-of-the-independence-referendum-been-convened-in-catalonia.

* The opinions set out in this work are exclusively those of the author and do not engage the International Court of Justice.

[1] Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Judgment of Sept. 23 2017.

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 396 (*entered into force* Nov. 16, 1994) [hereinafter UNCLOS].

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and *ad hoc* judges, Mensah and Abraham. Once the Chamber was constituted, but before the main proceedings began, Ivory Coast requested provisional measures against Ghana in accordance with Article 290(1) of the UNCLOS (paras. 14, 63). The Chamber, having heard both parties, held that it had prima facie jurisdiction over the dispute and ordered Ghana to take all necessary steps both to ensure that no new drilling takes place in the disputed maritime areas and to prevent information on seabed activities in the disputed area that is not already in the public domain from being used in any way detrimental to the interests of Ivory Coast.[3]

The main proceedings followed. Ghana argued for an equidistance-based single maritime boundary in the territorial sea, in the Exclusive Economic Zone (EEZ), and in the continental shelf within two hundred nautical miles. The boundary beyond two hundred nautical miles should, according the Ghana, extend on the same azimuth as the boundary within two hundred nautical miles, up to the limit of national jurisdiction (para. 63). Ghana maintains that the equidistance-based single maritime boundary has been recognized and applied by Ivory Coast, that there is a tacit agreement between parties which estops the Ivory Coast from objecting to the boundary, which Ghana called a "customary equidistance boundary," and that the "customary equidistance boundary" starts from a land boundary terminus that Ghana named Boundary Pillar 55 (BP 55) (*id.*).

Ivory Coast, on the other hand, claimed that the basis for delimitation should be the angle bisector method (para. 254). This angle bisector method, Ivory Coast contended, should be applied to all maritime areas and must form a single maritime boundary starting at BP 55 and extending to the outer limit of the Ivorian continental shelf (para. 63). Ivory Coast also claimed that the unilateral activities by Ghana in the Ivorian maritime area violated Ivory Coast's sovereign rights over its continental shelf, Ghana's obligation to negotiate in good faith as per Article 83(1) of UNCLOS and customary law, and Ghana's "obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by Article 83, paragraph 3, of UNCLOS" (*id.*).

The judgment was unanimous. Judges Paik and Mensah filed separate opinions. The Chamber rejected Ghana's "tacit agreement" (or the so-called "customary equidistance boundary") and estoppel arguments. The Chamber cited the International Court of Justice's (ICJ) decision in *Nicaragua v. Honduras*,[4] which held that "compelling evidence" is necessary to establish a permanent maritime boundary based on a tacit agreement, and that oil exploration and practice cannot by itself establish a tacit agreement regarding a maritime boundary (para. 215). Even the mutual and longstanding oil practice—like adjoining oil concession limits—cannot create a permanent boundary. At best, it may create a provisional line, as it did in the case of *Indonesia v. Malaysia*.[5] After examining the conduct of the parties, oil concession maps, and submissions to the CLC, the Chamber held that the high standard for establishing a maritime boundary was not satisfied. The Chamber cited the ICJ's decision in *Peru v. Chile* (para. 226)[6] for the proposition that evidence of oil exploration practice in the seabed and the subsoil alone is of limited value for an all-purpose boundary that delimits not only the seabed and subsoil

[3] Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Order of Apr. 25, 2016.

[4] Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 ICJ Rep. 659 (Oct. 8).

[5] *See* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 ICJ Rep. 625 (Dec. 17).

[6] *Quoting* Maritime Dispute (Peru v. Chile), Judgment, 2014 ICJ Rep. 3, 45, para. 111 (Jan. 27).

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but also superjacent water columns (*id.*). Rejecting the estoppel argument, the Chamber observed that the conduct of Ivory Coast does not to amount to the "clear, sustained and consistent" representation required for the recognition of estoppel (para. 244).

Turning to delimitation, the Chamber first decided whether to use the equidistance/relevant circumstances or the angle-bisector methodology. The Chamber observed that a single maritime boundary is appropriate for *all* the maritime spaces, including the extended continental shelf (ECS), because the parties "implicitly agreed" upon this approach in their pleadings (para. 262). The Chamber thus avoided constructing multiple boundary lines for the seabed and water column. It then settled on the equidistance/relevant circumstances method as the generally adopted method of maritime delimitation, rejecting the arguments of Ivory Coast in favor of the angle-bisector method (paras. 284, 289). Those arguments included special "geographical considerations," like the "location of base points, location of base points on Jomoro, [and] instability of the coastline," as well as special non-geographical considerations like "the interests of neighboring States" (para. 291).

The Chamber then constructed a provisional equidistance line (PEL). To construct the PEL, the Chamber decided first on the relevant coasts that face the area to be delimited (para. 361). Second, the Chamber calculated the relevant area extending to the outer limits of the area to be delimited (para. 381). The Chamber held that relevant coasts are, "on Ghana's side, from BP 55 + to Cape Three Points and, on Côte d'Ivoire's side, from BP 55 + to Sassandra" (para. 379). "The length of the relevant Ghanaian coast is approximately 139 kilometres and that of Côte d'Ivoire is 352 kilometres" (approximate ratio of 1:2.5) (*id.*); the relevant area covers approximately 198,723 square kilometers (para. 386). Finally, the Chamber constructed base points for PEL by digital process (para. 399) and constructed a "simplified provisional equidistance line" (para. 401).

The Chamber next considered whether to adjust the PEL. It examined the concavity of the Ivorian coast, the convexity of the Ghana coast, the geography of Jomoro and its effect as analogous to an island situated on the wrong side of the equidistance line, the location of resources, and the conduct of the parties as potentially justifying an adjustment, but found that none were sufficient to do so (para. 480). Matters relating to geography of Jomoro were advanced by Ivory Coast in favor of adopting the angle-bisector methodology; the location of oil resources and the conduct of parties were advanced by Ghana in favor of a customary boundary. Interestingly, none of these aspects were even evidentially sufficient to be considered as part of a low threshold, relevant-circumstances subtest, to adjust PEL.

As for delimitation of the ECS, the Chamber held that because the delimitation involved one single continental shelf, the PEL should continue in the same direction until it reaches the outer limits of the continental shelf (paras. 526–27). The third stage of the delimitation procedure, the disproportionality test, did not provide the basis for adjusting the line.

Overall, neither the low-threshold relevant circumstances test nor the high-threshold disproportionality test led to an adjustment of the PEL. The construction is remarkable because the PEL is ostensibly based solely on coastal geography, yet none of the oil exploration areas indicated in the maps submitted by Ghana were compromised or divided in the PEL. The final boundary, which is an equidistant line, deviates little from Ghana's original claim. The

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Chamber rejected the Ivory Coast's arguments that Ghana had violated Ivorian sovereignty over its continental shelf and that Ghana had violated UNCLOS Article 83(1) and (3).

* * * *

It is important to revisit some of the Chamber's reasoning, especially the decision to use single maritime delimitation and the spillover effects of that methodology on the other aspects of the judgment. The decision on Article 83 is also significant because it has implications for future judgments on maritime delimitation.

What is the evidential value of the oil activities in the seabed if those activities are not relevant to the construction of a "single all-purpose maritime boundary based on a tacit agreement"? The Chamber addressed the arguments on "tacit agreement" in paragraph 226:

> The Special Chamber has another reason not to accept Ghana's argument for the existence of a tacit agreement on a maritime boundary. The boundary the Special Chamber has to delimit is a *single maritime boundary* delimiting the territorial sea, exclusive economic zone and the continental shelf. In the Special Chamber's view, evidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of *limited value* in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns. (Para. 226 (emphasis added))

The Chamber's language suggests that the evidence on oil activities tended to support the development of two boundaries—one for the seabed and the other for the water column. If so, the evidence on oil activities also provides a reason to reject the all-purpose single delimitation methodology. But the Chamber selected an all-purpose delimitation methodology:

> The Special Chamber notes that the Parties, in requesting the Special Chamber to *delimit a single maritime boundary* for their territorial seas, exclusive economic zones and continental shelves, have *implicitly agreed* that the same delimitation methodology be used for these maritime spaces. (Para. 262, emphasis and additions are mine)

If the evidence on oil activities was disregarded so that there was no "tacit agreement" regarding a maritime boundary, why did the Chamber later develop a single all-purpose maritime delimitation methodology for both the seabed and water column—is it only based on the pleadings? What is the difference between a centripetal approach that led to the adoption of a "single boundary" maritime delimitation methodology for all maritime zones, and a centrifugal approach, in the same case, which led to the rejection of a "single customary maritime boundary based on State practice"? A better approach may have been to reject the argument that there should be a single customary boundary based upon oil practices (as the Chamber did), but nevertheless, to use oil practice for the second issue—that is in selecting a delimitation methodology—to create two separate maritime boundaries.

As to the tacit agreement on the pleadings, the Chamber may have taken Ghana's argument out of context. Ghana argued that "'this is not a maritime delimitation case, but rather a request to declare the existence of a boundary'. . . [and] that '[i]t is only in the alternative . . . that Ghana requests the Chamber to proceed to the delimitation of the maritime boundary'" (para. 69) Ghana's argument on the tacit agreement was perhaps offered only as evidential consideration under the "relevant circumstances" test—as "State practice." Had the

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Chamber interpreted Ghana's submission in this way, it may have prevented the Chamber from taking the internally contradictory approach described above—a centripetal and a centrifugal approach.

The foregoing considerations may call into question the overall structure and reasoning of the judgment. It is unclear, for example, what exactly was meant by the heading "maritime delimitation methodology" in the judgment. Why did the Chamber not consider the proposals of both parties—namely, the equidistance/special circumstances method and the angle bisector method—under the heading of "maritime delimitation methodology"? The heading of the judgment may have meant the "basis for a selection of different maritime boundaries" which is only one part of the "overall maritime delimitation methodology." Generally, the judgment left a jurisprudential vacuum on the scope of maritime delimitation methodology and its application, and the threshold limits for the determination of a customary boundary.

The Chamber's reasoning suggests that all of the UNCLOS Annex VII arbitrations and ITLOS decisions may prefer a single boundary delimitation methodology for cases involving the delimitation of the ECS. If, on the other hand, two boundaries are selected, one for the water column and the other for the seabed, it seems that the seabed-line is more likely to be used for the ECS. But the single boundary selected for both the water column and seabed is entirely based on coastal configurations and alignments, which is of less assistance for the delimitation of the seabed and subsoil. Another possibility is that two separate boundaries may also increase the possibility of grey zones—zones where an EEZ overlaps with another state's seabed.

The existence the ECS is based on geological evidence; but all of the case law holds that the maritime delimitation is based on coastal configurations. The Chamber's delimitation of the ECS would have been a more effective contribution to the jurisprudence in this developing area of law if the seabed delimitation methodology were not conflated with the water column delimitation, and if the opinion had accordingly avoided the superficial appeal of using the single maritime delimitation methodology. Had the Chamber found separate reasons for the use of a maritime delimitation methodology for both the water column and seabed, and then came to the conclusion that a single maritime delimitation methodology was appropriate, it may have provided a firmer jurisprudential foundation for future decisions.

Turning to Article 83, it was an evasive but a wise approach to hold that Ghana was not in breach. Had the Special Chamber held otherwise, it would have prejudged the existence and the extent of the disputed maritime territory, which can only be ascertained after a final judgment from a court or tribunal of law. In this case, determining the existence and extent of the "disputed" maritime territory may have opened another around of controversies, because such territory would have included the areas of oil exploration that the Chamber ultimately held were in Ghanaian territory. Although the judgment and Judge Paik's separate opinion failed to elaborate on these aspects adequately, the threshold test for determining the "disputed maritime territory" becomes very intricate when one country has asserted its rights in the seabed through oil practice while the other country has asserted rights to the water column, and there may ultimately be one single maritime boundary based on coastal configurations. Therefore, ascertaining the disputed maritime territory itself may produce disputed gray zones. Hence, the twofold-threshold test to determine the *existence* and the *extent* of a "disputed maritime territory" for Articles 74(1), 74(3), 83(1), and 83(3) should be so

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compelling, obvious, and convincing that it should not be lightly presumed, and the finally agreed or adjudicated boundary line should not become a criterion for the twofold test. This approach is preferable because it may avoid political tensions around existing maritime disputes.

Overall, the judgment reflects the traditional approach to maritime delimitation: the selection of a single maritime boundary based on coastal configurations. But the judgment struggles to justify the adoption of the single maritime delimitation methodology and to avoid confusion with other arguments like "tacit agreement." In this sense, the judgment reflects a growing tendency to favor the simplicity of a single maritime boundary for both water column and seabed, including the ECS. This simplicity created a remarkable coincidence, and a charming brilliance, because of the careful selection of coastal configurations that did not compromise ongoing seabed exploration undertaken by Ghana.

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