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Unilateral Hydrocarbon Activities in Undelimited Maritime Areas: The Only Certainty is Legal Uncertainty?

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UNILATERAL HYDROCARBON ACTIVITIES IN UNDELIMITED MARITIME AREAS

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Abstract

While the number of established maritime boundaries steadily increases, there are many situations where delimitation disputes between neighboring States remains unsettled. In the latter situations, States may face the existence of a hydrocarbon deposit that is located in an area where their maritime claims overlap. The presence of such a deposit inevitably creates a range of intricate legal (and political) issues. One of the issues is related to the question of whether States can unilaterally authorize hydrocarbon activities with respect to this deposit and, if so, what type of conduct is allowed in undelimited maritime areas. This article seeks to find an answer to the mentioned question.

Keywords: *undelimited maritime areas, hydrocarbon activities, unilateralism.*

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I. INTRODUCTION

States usually conduct hydrocarbon activities in undelimited maritime areas under two scenarios. Under the first scenario, States may conclude an interim arrangement that would make exploration and/or exploitation of petroleum resources possible.[1] Examples include provisional arrangements signed in the Gulf of Guinea between Nigeria and São Tomé and Príncipe,[2] in the Timor Sea between Australia and

[1] It is worth noting that States may also agree on a moratorium on all or some petroleum operations within an undelimited maritime area. For example, Israel and Lebanon appears to conduct no hydrocarbon activities in a clearly defined disputed area between them in the Levant Sea. Prior to a delimitation agreement concluded in 2010 between Norway and Russia, there was also a moratorium on all operations in an area of overlapping claims in the Barents Sea.

[2] Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States, Abuja, 21 February 2001, entered into force16 January 2003, reproduced in: *International Maritime Boundaries*, edited by Jonathan I. Charney, David A. Colson and Lewis M. Alexander,

Timor-Leste,[3] and in the Gulf of Thailand between Malaysia and Thailand.[4] The second scenario relates to the situation where States unilaterally authorize hydrocarbon activities to be carried out in undelimited maritime areas. This article addresses the second scenario because it can be observed in many geographical regions around the world. There are a number of examples where States, despite the existence of an area of overlapping maritime claims, have unilaterally permitted some exploration and/or exploitation activities in such area.[5] The *Somalia v. Kenya* case,[6] that is subject of ongoing litigation before the International Court of Justice (ICJ), exemplifies these types of situations.

The main legal issue is what, if any, hydrocarbon activities can be unilaterally conducted in a maritime area the legal status of which needs to be determined and that is not covered by a temporal arrangement. Articles 74 (3) and 83 (3) of the United Nations Convention on the

volume 5, 2005, pp. 3649-3682.

[3] Timor Sea Treaty between the Government of East Timor and the Government of Australia, 2258 UNTS 3, opened for signature 20 May 2002, entered into force 2 April 2003.. It is important to note that according to the latest Press Release issued by the Permanent Court of Arbitration on behalf of the Conciliation Commission between Timor-Leste and Australia on 15 October 2017, the Parties have reached a draft treaty that delimits the maritime boundary between them in the Timor Sea and addresses the legal implications for the joint management scheme. Nevertheless, the text of this draft treaty is not available at the time of the writing. See, the PCA's Press Release of 15 October 2017 at https://pca-cpa.org/wp-content/uploads/sites/175/2017/10/20171015-Press-Release-No-10-EN.pdf

[4] Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, Kuala Lumpur, 30 May 1990. The text is available at the Joint Authority webpage: https://www.mtja.org/rules.php Prior to the Agreement, the States signed a Memorandum of Understanding on the Establishment of the Joint Authority, Chang Mai, 21 February 1979. Available at the same webpage.

[5] It is also important to note that there are examples where neighboring States have abstained from/suspended hydrocarbon activities in disputed areas, following a mutual agreement or a protest from one of the States. Such examples can be found in paras. 9.46-9.48 (with the relevant footnotes) of the Côte d'Ivoire's Counter-Memorial, *Ghana v. Côte d'Ivoire* case. The Counter-Memorial is available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/pleadings/Counter_Memorial_final_Vol.I_Eng_TR.pdf

[6] International Court of Justice, "Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*)", The *Ghana v. Côte d'Ivoire* case can also be mentioned in this respect.

Law of the Sea (UNCLOS)[7] contain key rules applicable in areas of overlapping claims to the exclusive economic zone and the continental shelf. Paragraph 3 of these articles provides States with two obligations: first, to make every effort to arrive at a provisional arrangement of a practical nature and, second, to make every effort not to jeopardize or hamper the reaching of a future delimitation (the obligation is further referred as an obligation not to jeopardize or hamper).

This article examines the second obligation because when it is impossible to reach provisional arrangements as those mentioned above, this obligation becomes "the only reliable legal device that can regulate the conduct of States [in undelimited maritime areas]".[8] The relevance of this obligation has increased even more in light of the recent dictum of the Special Chamber (SC) in the *Ghana v. Côte d'Ivoire* case[9] that "maritime activities undertaken by a State in an area of the continental shelf which had been attributed to another State by an international judgement cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgement was delivered and if the area concerned as the subject of claims made in good faith by both States".[10] Thus, the obligation not to jeopardize or hamper seems to be the main tool to assess the legality of unilateral hydrocarbon operations in undelimited maritime area.

Although paragraph 3 imposes no moratorium on economic activities in undelimited areas, it is not altogether clear which types of petroleum activities can be regarded as having the effect of jeopardizing or hampering and, therefore, prohibited. To date, there is only one case, the *Guyana v. Suriname* case,[11] where the Arbitral Tribunal (Tribunal)

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[7] United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, opened for signature,10 December 1982, entered into force16 November 1994.

[8] International Tribunal on The Law of The Sea, *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)* Separate Opinion of Judge Paik, ITLOS Case number 23, para. 18.

[9] International Tribunal on The Law of The Sea, *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Judgement*, ITLOS Case No. 23, 23 September 2017.

[10] *Ibid.,* para. 592.

[11] Permanent Court of Arbitration, Arbitral Tribunal Constituted Pursuant to Article 287 and In Accordance With Annex VII of The United Nations Convention on The Law of The Sea (*Guyana v. Suriname)*, Award of the Arbitral Tribunal, 17 September

considered the meaning and scope of the obligation not to jeopardize or hamper in detail. The SC in the *Ghana v. Côte d'Ivoire* case fell short in this respect.[12] In the *Guyana v. Suriname* case, the Tribunal introduced a standard of "permanent physical change to the marine environment"[13] that, in general terms, implies that activities which satisfy this standard shall not be permitted in undelimited maritime areas and those which do not, are to be allowed. This article discusses whether the introduction of such a standard can provide a certain degree of certainty for coastal States and private petroleum companies wishing to undertake exploration and exploitation activities in undelimited maritime areas.

This article begins by determining the temporal scope of the obligation not to jeopardize or hamper. Hereafter, it addresses the obligation's substantive scope, including its judicial application in case law. The standard introduced by the Tribunal in the *Guyana v. Suriname* case is analyzed in detail. The article also examines the role of provisional measures in interpreting of the obligation not to jeopardize or hamper. Finally, the article concludes by providing some final observations.

II. THE TEMPORAL SCOPE OF THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER

Paragraph 3 begins with the phrase "pending agreement as provided for in paragraph 1". Hereinafter, it introduces a second phrase "during this transitional period". Logically, the first phrase relates to the obligation to enter into provisional arrangements, while the second phrase is directly linked to the obligation not to jeopardize or hamper.[14] However, the first phrase seems to govern the moment when both these obligations are triggered. This section considers the meaning of these two phrases

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2007.

[12] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire),* Judgement paras. 629-634.

[13] *Ibid.,* Chapter VIII (B) (2).

[14] David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims", in: *The South China Sea Disputes and Law of the Sea,* edited by S. Jayakumar, T. Koh, R. C. Beckman, 2014, p. 209.

A. "PENDING [A MARITIME BOUNDARY] AGREEMENT"

It is unclear when a future delimitation agreement is considered to be "pending". A number of legal commentators have emphasized that the existence of the obligations does not depend on whether or not delimitation negotiations have been initiated.[15] Indeed, the affirmation that the moment of the emergence is somehow associated with the negotiation process may detract from the significance of these obligations. It is likely there would be a considerable time difference between the moments when the negotiations start and when the maritime claims of neighboring states (potentially) overlap. Being dependent on whether negotiations have been initiated, the obligations would not be in force until the start of negotiations and would cease, if one of the parties would have refused to negotiate, or if the negotiations reached a deadlock or were discontinued.[16]

The point in time at which the obligations stemming from paragraph 3 emerge is generally tied to the situation where it is apparent that maritime claims to a particular area do, or might potentially, overlap.[17] It elicits the question of the circumstances in which the existence of overlapping claims becomes obvious. Unlike claims to an EEZ, states are not required to make an express claim to a continental shelf.[18] Undoubtedly, the obligations would arise when neighboring states, through diplomatic channels or by other means, have explicitly acknowledged that an area of overlapping maritime claims exists, giving rise to a need for delimitation.[19]

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[15] Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements", *The American Journal of International Law,* 1984, volume 78 (2), pp. 357 and 364; Satya N. Nandan and Shabtai Rosenne, *United Nations Convention of the Law of the Sea 1982: A Commentary, Volume II,* Leiden: Martinus Nijhoff Publishers, 2003, p. 815.

[16] Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements", *The American Journal of International Law,* 1984, volume 78 (2), p. 364.

[17] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, p. 178.

[18] UNCLOS, article 77 (3).

[19] David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims", in: *The South China Sea Disputes and Law of the Sea,* edited by S. Jayakumar, T. Koh, R. C. Beckman, 2014, p. 209.

However, there is less clarity in the event when State A has made its claims known or has even proceeded to exercise its (alleged) sovereign rights to explore and exploit, while State B has raised no objection to that.[20] It is reasonable to assume that the absence of reaction does not activate the obligations under paragraph 3 because it is unlikely that State A can unilaterally identify where exactly maritime claims of State A and State B overlap. The question arises as to whether the obligations are triggered when State B, after a certain period of time, starts to contest the position or activities of State A (for example, because State A has discovered a large-volume petroleum resource or State B due to different reasons has not been able to protest) on the basis that State B was not obligated to proclaim its rights over the continental shelf.

The *Ghana v. Côte d'Ivoire* case exemplifies the mentioned scenario. In this case, Ghana had authorized different petroleum operations in a maritime area for a long time before Côte d'Ivoire started to react (beginning with 2009). Ghana did so in the belief that a de facto maritime boundary was established and Côte d'Ivoire tacitly consented to Ghana's petroleum activities. Leaving aside the SC's conclusions that there was no tacit delimitation agreement between Ghana and Côte d'Ivoire and that Côte d'Ivoire was not estopped from objecting,[21] it is notable that the SC was of the view that Ghana's obligation not to jeopardize or hamper clearly arose in 2009 when the existence of a delimitation dispute and the location of the disputed area became, or should have become, obvious to Ghana.[22]

In other words, it means that in a similar situation when State B breaks its silence and starts to object, State A must pay due attention to the obligations set forth in paragraph 3, even if it believes that State B is estopped from objecting. State B may indeed have good reasons why it could not react earlier (e.g., internal conflicts that prevented State B from focusing on other issues). The subsequent issue relates to the legal consequences attached to the moment of triggering of paragraph 3: for example, whether State A would be compelled to halt its hydrocarbon activities in the contested maritime area or to share the benefits

[20] BIICL's Report, p. 32, para. 108.
[21] *Ghana v. Côte d'Ivoire* case, Parts VII and VIII.
[22] *Ghana v. Côte d'Ivoire* case, paras. 588, 630 and 631.

received prior to State B's objection. The *Ghana v. Côte d'Ivoire* case demonstrates how difficult it will be to suspend ongoing activities, but possible to freeze new petroleum activities.[23]

The opening phrase of paragraph 3 is also intended to determine the moment of termination of the obligation to seek provisional arrangements. The French and Russian texts of the UNCLOS clearly refer to the date of *conclusion* of a delimitation agreement.[24] However, it may be a time difference between the date of conclusion of a treaty and its date of entry into force.[25] Moreover, there is always a risk that the adopted delimitation treaty will never come into force. In this respect, the rules stemming from the law of the treaties are applicable.[26] A delimitation agreement may apply provisionally, pending its entry into force.[27] Article 18 of the Vienna Convention on the Law of Treaties (VCLT) imposes upon States an obligation to refrain from acts, which might defeat the object and purpose of a treaty prior to its entry into force. In other words, if a delimitation treaty is signed, but is not yet in force, the Parties to that treaty are nevertheless bound by their accord on where the delimitation line lies. Following this logic, the obligation to seek provisional arrangements ceases once a final delimitation agreement is reached (as long as neither contracting Party attempts to withdraw from the agreement), since there is no need for delimitation.

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[23] Section V (D).

[24] UNCLOS, arts. 74 (3) and 84 (3). French text: "En attendant la conclusion de l'accord visé au paragraphe l, …". Russian text: "До заключения соглашения, как предусматривается в пункте 1, …".

[25] Delimitation agreements may enter into force upon signature. However, they are usually subject to ratification or approval. See, *Handbook on the Delimitation of Maritime Boundaries*, DOALS, 2000, p. 82; David Anderson, "Negotiating Maritime Boundary Agreements: A Personal View", in: *Maritime Delimitation,* edited by R. Lagoni and D. Vignes, Martinus Nijhoff Publishers, 2006, p. 139.

[26] The governing law is Part II of the Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[27] VCLT, art. 25. For example, a delimitation agreement between the USA and the USSR concluded in 1990 (Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, 1 June 1990) is not in force, but the two governments agreed to abide by the terms of that delimitation agreement. See, Agreement between the United States of America and the Union of Soviet Socialist Republics to abide by the terms of the Maritime Boundary Agreement of 1 June 1990, pending entry into force, 2262 UNTS 407.

It is interesting to note that paragraph 4 explicitly mentions "an agreement *in force*".[28] Therefore, it could be argued that articles 74 and 83 of the UNCLOS on their entirety refer to delimitation agreements that are in force and while an agreement is not in force, the delimitation is not fully effected.[29] Consequently, the obligations provided by paragraph 3 would continue to apply until the date of entry into force of a delimitation treaty.[30]

Moreover, it is important to note that the term 'agreement' is employed in a broader context, covering not only the situation where states have agreed on a maritime boundary, but also where the delimitation dispute has been settled by a court or tribunal.[31] The question is whether, in the latter situation, the obligation would cease once some form of dispute settlement procedure has been invoked, or once the court or tribunal has decided that it has jurisdiction, or only when the court or tribunal has delivered its final judgement on the merits.[32] It seems reasonable to suggest that the obligation to seek provisional arrangements is terminated once the determination of a maritime boundary is made by a judicial body. However, there might be a situation where one of the Parties to a delimitation dispute does not accept the final decision.[33] In

[28] UNCLOS, arts. 74 and 84 (emphasis added). For example, the Russian text of the UNCLOS refers to "действующее соглашение" (this phrase is different from "заключенное соглашение" within the meaning of para. 3 - "an agreement concluded between States").

[29] BIICL's Report, p. 32, para. 109.

[30] *Ibid.*

[31] UNCLOS, arts. 74 (2) and 84 (2).

[32] BIICL's Report, p. 32, para. 109.

[33] For example, Croatia issued a statement declaring that it does not accept the Final Award of 29 June 2017 in the *Croatia v. Slovenia* case (available at http://www.mvep.hr/en/info-servis/press-releases/,28223.html). The text of the Final Award is available at https://www.pcacases.com/web/sendAttach/2172 . In the *Cameroon v. Nigeria: Equatorial Guinea intervening* case, Nigeria initially did not accept the Judgement delivered by the ICJ in 2002 (available at http://www.icj-cij.org/files/case-related/94/094-20021010-JUD-01-00-EN.pdf). The process of the Judgement's implementation took more than 5 years. See in detail Hilary V. Lukong, *The Cameroon-Nigeria Border Dispute: Management and Resolution, 1981-2011*, 2011, chapter 5. In 2010, Cameroon and Nigeria signed an agreement on joint development of a number of cross-border petroleum deposits (the text of the agreement is not available). See, "Cameroon and Nigeria agree joint development along part of their maritime boundary", IBRU news, 15 March 2011. Available at https://www.dur.ac.uk/ibru/news/

this situation, it is logical to assume that the obligation continues to apply until the decision is fully implemented.

Thus, this subsection has considered the temporal scope of the obligation to arrive at provisional arrangements of a practical nature. The moment of triggering the obligation depends on the circumstances surrounding each delimitation case. While in some circumstances it is clear that the obligation has arisen, in other circumstances this moment is more difficult to establish. The obligation ceases upon the conclusion of a maritime boundary agreement or the determination of a boundary by a judicial body that is challenged by neither Party.

B. "DURING THIS TRANSITIONAL PERIOD"

As regards the obligation not to jeopardize or hamper, articles 74 (3) and 84 (3) of the UNCLOS stipulate that it lasts "during this transitional period". Nevertheless, the articles provide no explanation of what the phrase 'during this transitional period' implies. The previous section has discussed the circumstances under which the obligation to negotiate provisional arrangements arises. The same applies to the obligation not to jeopardize or hamper.

The subsequent question is when the transitional period ends.[34] The logical conclusion is that paragraph 3 refers to the period until a maritime boundary is agreed by the Parties or is determined by a court or tribunal. The SC in the *Ghana v. Côte d'Ivoire* case offered the similar reading of paragraph 3.[35] At the same time, the SC has drawn a distinction between two scenarios within the transitional period: the scenario where a provisional arrangement is reached and the scenario where no such provisional arrangement exists.[36] It is not very clear what the SC desired to show by this distinction: whether the obligation not to jeopardize or hamper is terminated once a provisional arrangement

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[34] The statement of the Conciliation Commission in the case between Timor-Leste and Australia is not very useful in this respect. In its decision on Australia's objection to competence, the Commission stated that the transitional period is a period "pending a final delimitation and the provisional arrangements of a practical nature", para. 97. Available at https://pcacases.com/web/sendAttach/1921

[35] *Ghana v. Côte d'Ivoire* case, para. 630.

[36] *Ibid.*

is concluded or whether the obligation not to jeopardize or hamper becomes supplementary where a provisional arrangement is in place. The latter interpretation is preferable for a number of reasons.

A provisional arrangement rarely regulates all activities in the disputed maritime area or do not always apply to the entire area of overlapping claims. Logically, if a provisional arrangement solely covers fisheries activities or a part of a disputed area, the obligation not to jeopardize or hamper would be applicable to other activities, such as hydrocarbon exploration and exploitation, or to other parts of the contested area. Against this backdrop, D. Anderson and Y. van Logchem assert that the obligation not to jeopardize or hamper applies while a provisional arrangement is in place, as well as before such an arrangement is concluded.[37] Their approach is most appropriate because no provisional arrangement can cover all acts which may amount to jeopardizing or hampering the reaching a final delimitation.

Thus, it appears reasonable that the duration of the obligation not to jeopardize or hamper is equated with the temporal scope of the obligation to seek provisional arrangements. In other words, the two obligations are triggered once State A has realized that a certain maritime area is also claimed by State B and cease when a delimitation agreement (between State A and State B) is concluded or when a maritime boundary is established by a judicial body. There is no reason to attach a different meaning to the phrase 'during this transitional period' only on the basis that the period it refers to is already covered by the paragraph 3's opening phrase.

III. THE CORE CONTENT OF THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER

It is important to note that the requirement to "make every effort" applies not only to the obligation to enter into provisional arrangements, but also to the obligation not to jeopardize or hamper the reaching of a

[37] David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims", in: *The South China Sea Disputes and Law of the Sea,* edited by S. Jayakumar, T. Koh, R. C. Beckman, 2014, p. 209.

final delimitation.[38] It would be a significant difference if the UNCLOS had stipulated an absolute obligation not to jeopardize or hamper. However, for the purpose of convenience, the considered obligation is further abbreviated in this article as 'the obligation not to jeopardize or hamper'. The obligation not to jeopardize or hamper is an obligation of conduct, not of result.[39]

Paragraph 3 does not define the terms 'jeopardize' and 'hamper'. According to the Concise Oxford Dictionary, the verb 'jeopardize' means "put (someone or something) into a situation in which there is a danger of loss, harm, or failure", while 'hamper' means "hinder or impede the movement or progress of".[40] Thus, the obligation not to jeopardize or hamper appears to mean that States, having overlapping claims regarding a certain maritime area, must make every effort not to engage in activities that might endanger the reaching of a final agreement on delimitation or impede the progress of negotiations to that end.[41]

It is clear that the obligation not to jeopardize or hamper does not necessarily exclude all activities unilaterally conducted within undelimited maritime areas, but rather those that would jeopardize or hamper the reaching of a final delimitation agreement.[42] However, it is completely unclear which types of activities are to be regarded as having the effect of jeopardizing or hampering. In this article, the main question is the conduct of what unilateral activities surrounding hydrocarbon exploration and exploitation is likely to breach the obligation not to jeopardize or hamper.[43]

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[38] *Guyana v. Suriname* case, para. 465; *Ghana v. Côte d'Ivoire* case, para. 629.

[39] *Ghana v. Côte d'Ivoire* case, para. 629. See also *Responsibilities and obligations of States with respect to activities in the Area,* Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para. 110.

[40] It is taken from the BIICL's Report, para. 75, p. 22. The Report refers to the Concise Oxford Dictionary (10th edition, OUP 1999), pp. 759 and 644, respectively.

[41] BIICL's Report, paras. 76-83. This conclusion of the BIICL was also reflected in the separate opinion of Judge Paik, para. 6, *Ghana v. Côte d'Ivoire* case.

[42] M. H. Nordquist, S. N. Nandan, and S. Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary,* volume II (Dordrecht: Nijhoff, 1993), p. 815. See also the *Guyana v. Suriname* Award, para. 465.

[43] Apart from hydrocarbon activities, the same question can be asked in the context of other unilateral activities undertaken in undelimited maritime areas such as fishing,

D. Anderson and Y. van Logchem, and Y. van Logchem writing separately, affirm that the question of what type of conduct jeopardizes or hampers can hardly be answered in the abstract. They argue that the assessment of whether a particular unilateral action amounts to jeopardizing or hampering is subjective.[44] This sounds reasonable. However, a court or tribunal, dealing with a (putative) breach of the obligation not to jeopardize or hamper, would probably apply an objective criterion, as the Tribunal in the *Guyana v. Suriname* case done (or attempted to do).[45] The existence of an objective standard as to what constitutes jeopardizing or hampering is also desirable for ensuring the stability of private petroleum companies' activities in undelimited maritime areas and the investment flow.

IV. THE APPLICATION OF THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER IN CASE LAW

The application of the obligation not to jeopardize or hamper is still limited to one case, the *Guyana v. Suriname* case. In the *Ghana v. Côte d'Ivoire* case, the SC touched upon some aspects of the obligation not to jeopardize or hamper without bringing more clarity to the issue of what unilateral activities are likely to jeopardize or hamper.[46] In the *Guyana v. Suriname* case, the Tribunal considered the obligation not to jeopardize or hamper in the context of the legality of exploratory drilling authorized by Guyana in an area where the maritime claims of Guyana and Suriname overlapped. The Tribunal adopted a standard of "(permanent) physical change to the marine environment" that in general terms implies that activities which satisfy this standard shall not be permitted in undelimited maritime areas and those which do not, are to be allowed. This section discusses the question of whether the

laying submarine cables or pipelines, marine scientific research or enforcing national legislation.

[44] David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims", in: *The South China Sea Disputes and Law of the Sea,* edited by S. Jayakumar, T. Koh, R. C. Beckman, 2014, p. 206; Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, p. 186.

[45] BIICL's Report, para. 85, p. 25.

[46] The Chamber explained the reasons in paras. 632 and 633 of the Judgment.

adoption of such a standard is reasonable with respect to the obligation not to jeopardize or hamper.

A. THE ADOPTION OF THE STANDARD OF "(PERMANENT) PHYSICAL CHANGE TO THE MARINE ENVIRONMENT"

Although the *Guyana v. Suriname* case concerned exploratory drilling in an area claimed by both parties, the Arbitral Tribunal made statements of a general character on the question of what types of unilateral conduct would breach the obligation not to jeopardize or hamper.

The Tribunal distinguished two categories of unilateral activities: those that "do not cause a physical change to the marine environment" and those that "do cause [such a] physical change".[47] The Tribunal further stated that the first category would "generally" not be considered as jeopardizing or hampering the reaching a final maritime boundary agreement, whereas the second category would have the effect of jeopardizing or hampering.[48] The Tribunal found support for this distinction in the international jurisprudence of prescribing provisional measures, in particular, in the *Aegean Sea* case.[49] The Tribunal' reliance on the *Aegean Sea* case elicits the questions of whether it was appropriate for the interpretation of the obligation not to jeopardize or hamper and whether it was in line with the current regime of provisional measures.

It is noteworthy that the Tribunal also introduced an additional element 'permanent' into the phrase 'physical change to the marine environment'.[50] Arguably, the latter phrase covers the range of activities wider than those that falls into the definition of 'permanent physical change to the marine environment'.[51] Thus, the word 'permanent' logically excludes activities that would have only a temporal physical

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[47] *Guyana v. Suriname* Award, paras. 467 and 480.

[48] *Ibid.*

[49] *Guyana v. Suriname* Award, paras. 468-469. Moreover, in para. 470, the Tribunal stated that such a distinction "is consistent with other aspects of the law of the sea and international law".

[50] *Guyana v. Suriname* Award, para. 467 and subsequently paras. 470 and 481.

[51] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, p. 184.

impact on the marine environment.[52]

Subsequently, the Tribunal gave four other definitions of activities that are likely to jeopardize or hamper the reaching a final delimitation agreement. They are: activities with a risk of "physical damage to the seabed or subsoil";[53] activities that "might affect the other party's rights in a permanent manner";[54] "activities having a permanent physical impact on the marine environment";[55] and activities that "might cause permanent damage to the marine environment".[56]

It is apparent that activities affecting the rights of the parties in a permanent way stands out from activities having a (permanent) physical change or damage to, or have a (permanent) physical impact on, the marine environment. While activities within the latter category are broadly similar, although they differ as to the degree of permanency or otherwise of their adverse effects, activities in the first category are conceptually quite different.[57] However, as discussed below, all definitions employed by the Tribunal relate to the provisional measures stage and are the necessary requirements for the prescription of provisional measures. Thus, contrary to what the Tribunal stated about the difference between the thresholds, it actually applied a standard higher than that applicable under articles 74 (3) and 83 (3) of the UNCLOS in relation to jeopardizing or hampering the reaching of a final agreement. Therefore, one can conclude that the standard adopted in the *Guyana v. Suriname* case is too strict in determining whether the obligation not to jeopardize or hamper has been violated.

Arguably, the question of whether a particular activity jeopardizes or hampers the reaching of a final delimitation agreement should be examined not on the basis of its physical effects on the seabed or subsoil, but on the basis of its potential adverse effects on the reaching of such agreement. Moreover, as further discussed in section V (D), the

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[52] *Ibid.*

[53] *Guyana v. Suriname* Award, para. 469.

[54] *Guyana v. Suriname* Award, para. 470.

[55] *Ibid.*

[56] *Guyana v. Suriname* Award, para. 481.

[57] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, pp. 184-185; BIICL's Report, para. 88, p. 25.

requirement of (permanent) physical damage does not seem to be the only applicable in assessing a request for provisional measures.

B. THE MEANING OF THE STANDARD OF "(PERMANENT) PHYSICAL CHANGE TO THE MARINE ENVIRONMENT"

Under the Tribunal's reasoning, the standard of "(permanent) physical change to the marine environment" appears to be decisive in identifying activities that may jeopardize or hamper the reaching of a final agreement on delimitation. The Tribunal did not clarify the meaning of this standard. However, it is reasonable to assume that the Tribunal meant unilateral activities that may result in a (permanent) modification of a physical character of the marine environment and its components, including the seabed and subsoil. It is notable that the Tribunal defined the marine environment as the object to which physical damage shall not be caused and has thereby broadened the scope of the criterion used by the ICJ in the *Aegean Sea* Order.[58] The *Aegean Sea* Order refers only to "the seabed or subsoil or to their natural resources".[59]

The Tribunal further explained the adoption of the standard by the fact that activities having a (permanent) physical change to the marine environment might alter the *status quo*[60] or prejudice the position of a party in a delimitation dispute.[61]

However, the Tribunal's explanation is not quite clear. For example, modern seismic exploration techniques can provide with an effective means of assessing the resource potential of the continental shelf and can reliably inform a state what parts of an undelimited maritime area are potentially rich in hydrocarbon resources.[62] In an analysis of the

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[58] See section V (C) in detail.

[59] *Aegean Sea* Order, para. 30.

[60] The Concise Oxford Dictionary defines 'the status quo' as "the existing state of affairs" (in Latin, the meaning is 'the state in which'). Therefore, changing the *status quo* means an act through which the situation, as it currently exists, may alter.

[61] *Guyana v. Suriname* Award, para. 480.

[62] Stephen Fietta, "Annex VII arbitration under UN Convention of the Law of the Sea – interstate dispute over territorial sea, exclusive economic zone, and continental shelf boundaries – primacy of equidistance line – circumstances justifying other methods – scope of duty to reach interim agreements and not to jeopardize or hinder final agreements – implications for hydrocarbon exploration", *American Journal of International Law*, volume 102, 1 January 2008, p. 127.

Guyana v. Suriname Award, Stephen Fietta has emphasized that:

Unilateral seismic exploration could, therefore, in some circumstances, significantly alter the status quo as regards the comparative levels of knowledge of two neighboring states about the value of all (or part) of a disputed maritime area. Such a disequilibrium in knowledge between two states could, in many cases, make a final delimitation agreement more difficult to obtain.[63]

Thus, while seismic exploration could somehow change the *status quo* or affect the outcome of delimitation negotiations, this activity is unlikely to cause any *permanent* physical change to the marine environment.

C. HYDROCARBON ACTIVITIES THAT (ARE LIKELY TO) FALL UNDER THE SCOPE OF THE STANDARD

In the view of the Tribunal, seismic exploration is not a type of activity that might lead to a (permanent) physical change or damage to the marine environment and, therefore, "should be permissible in a disputed area".[64] It is important to emphasize here that the Tribunal made this statement against the background that neither state had raised an objection to seismic testing authorized by the other State in the area of overlapping claims.[65] The Tribunal thus arrived at the conclusion that "in the circumstances at hand", unilateral seismic testing conducted by a party in the disputed area is not inconsistent with its obligation not to jeopardize or hamper.[66] Following the logic of the Tribunal, it could be argued that in certain circumstances, unilateral seismic exploration can nonetheless constitute a breach of the obligation not to jeopardize or hamper. The main question is what these circumstances are. Even assuming that the legality of seismic exploration in an undelimited area is called into question, it is very unlikely that this activity would satisfy the standard of *permanent* physical change or damage to the

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[63] *Ibid.* Stephen Fietta has repeated his opinion during the Conference (22 July 2016) launched the BIICL's Report, Report of Conference, p. 30. David Anderson, however, did not agree that seismic surveys could constitute jeopardizing or hampering since seismic information is not very useful, *Ibid.*

[64] *Guyana v. Suriname* Award, paras. 467 and 481.

[65] *Guyana v. Suriname* Award, para. 481.

[66] *Guyana v. Suriname* Award, para. 481.

marine environment[67] and, thereby, would not amount to a breach of the obligation not to jeopardize or hamper. Therefore, it remains unclear why the Tribunal, instead of adopting a uniform standard that unilateral seismic activity by its very definition *is* allowed in disputed maritime areas, whatever the circumstances, used the phrase '*should be* permissible'.[68]

Saying that seismic testing does not involve any physical modification of the continental shelf and its natural resources, it could nevertheless be argued that this activity may have (although not permanent) physical effects on the marine environment (for example, sonic waves can negatively impact on the living marine resources, i.e., cause a change of fish migration routes).[69]

As regards exploratory drilling, the Tribunal declared that "*some* exploratory drilling might cause permanent damage to the marine environment".[70] However, the Tribunal did not clarify what kind of exploratory drilling is likely to fall into this category. It nevertheless appears reasonable to assume that *any* exploratory drilling could result in an irreversible physical change to the continental shelf and, hence, should not be permissible in the absence of either a delimitation agreement or a provisional arrangement of a practical nature.

The Tribunal abstained from concluding as to whether unilateral exploratory drilling authorized by Guyana in the disputed maritime area was consistent with that State's obligation not to jeopardize or hamper and merely alluded to remedies envisaged by Part XV and Annex VII of the UNCLOS.[71] However, it appears that the authorization of concession holders to carry out exploratory drilling in the disputed area was considered by the Tribunal as an act that jeopardized or hampered the reaching of a final delimitation treaty. Whereas the Tribunal held that

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[67] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, pp. 184-185.

[68] *Ibid.*

[69] See, for example, Constantinos Yiallourides, "Oil and Gas Development in Disputed Waters Under UNCLOS", *UCL Journal of Law and Jurisprudence,* volume 5 (1), 2016, p. 79.

[70] *Guyana v. Suriname* Award, para. 481 (emphasis added).

[71] *Guyana v. Suriname* Award, para. 482.

Suriname breached its obligation to make every effort not to jeopardize or hamper the reaching of a final agreement using a threat of force against Guyana's exploratory drilling, it also concluded that Guyana violated the obligation not to jeopardize or hamper.[72] It is logical to infer that unilateral exploratory drilling of Guyana was the reason for the latter statement. One possible explanation of the Tribunal's hesitation might be that the Tribunal decided to attribute the area where Guyana's drilling took place to Guyana.[73]

Unlike seismic exploration and some exploratory drilling, the Tribunal stated that unilateral exploitation of oil and gas resources in a disputed area would undoubtedly jeopardize or hamper the reaching of a final agreement.[74] Although neither Guyana nor Suriname had conducted exploitation of hydrocarbon reservoirs in the disputed area, the Tribunal found that such activities are to be prohibited, since they always lead to a permanent physical change to the marine environment.[75]

V. THE ROLE OF PROVISIONAL MEASURES IN CLARIFYING THE CONTENT OF THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER

This section addresses the role of provisional measures in the interpretation of the obligation not to jeopardize or hamper. Moreover, this section assists in understanding of what types of petroleum activities may justify the prescription of provisional measures.

A. THE RELATIONSHIP BETWEEN THE REGIME OF PROVISIONAL MEASURES AND THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER

The power to prescribe provisional measures is given, for example, to the ICJ and the ITLOS under provisions set forth in their constituent instruments.[76] There are also several requirements that must be met in order for these judicial bodies to exercise this power. The next section

[72] *Guyana v. Suriname* Award, paras. 486 and 488 (3).
[73] *Guyana v. Suriname* Award, para. 451.
[74] *Guyana v. Suriname* Award, para. 467.
[75] *Guyana v. Suriname* Award, para. 467.
[76] Article 41 of the ICJ Statute and article 25 of the ITLOS Statute.

of addresses these requirements. Although the regime of provisional measures is of a special nature, the legal requirements developed by international courts and tribunals for prescribing provisional measures may nevertheless provide some assistance in interpreting the obligation not to jeopardize or hamper. In the *Guyana v. Suriname* case, the Tribunal heavily relied on the *Aegean Sea* case's Order of provisional measures when applying articles 74 (3) and 83 (3) of the UNCLOS.[77]

The Tribunal underlined that the "exceptional" power to prescribe provisional measures is triggered only when activities carried out in disputed maritime areas might cause irreparable prejudice to the rights of the parties.[78] However, the Tribunal stated that cases dealing with the prescription of provisional measures are informative as to what type of activities "should be permissible" in disputed areas pending a delimitation agreement or a provisional arrangement.[79] It automatically means that the informative value of provisional measures is also contained in explaining of what activities are to be prohibited in disputed maritime areas. The Tribunal further held that activities in respect to which the prescription of provisional measures would be justified, "would easily meet the lower threshold of hampering or jeopardizing the reaching of a final agreement" on delimitation.[80] In other words, the Tribunal characterized the threshold for prescribing provisional measures as being higher than the threshold for identifying activities that jeopardize or hamper under the meaning of paragraph 3. Despite of this observation, the criteria that guided the Tribunal in its analysis of whether a breach of the obligation not to jeopardize or hamper had occurred were those "used by international courts and tribunals in assessing a request for [provisional] measures, notably the risk of physical damage to the seabed or subsoil".[81] Hence, it is difficult to understand the extent to which the obligation not to jeopardize or hamper actually diverges from the regime of provisional measures.[82]

[77] *Guyana v. Suriname* Award, paras. 468-469. A similar approach has been adopted by a number of legal scholars long before the Award, see Lagoni, pp. 365-366, Miyoshi, Ong, pp. 798-799.

[78] *Guyana v. Suriname* Award, para. 469.

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

[82] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas",

Moreover, it leaves open the question of whether activities that would *not* meet the standard for prescribing provisional measures, can nevertheless be regarded as jeopardizing or hampering the reaching of a final agreement.

While the Tribunal blurred the line between the obligation not to jeopardize or hamper and the regime of provisional measures, the practice of prescribing provisional measures seems to maintain this division watertight. It clearly follows from the *Ghana v. Côte d'Ivoire* case where the Special Chamber made no mention of articles 74 (3) and 84 (3) in its Order, although both parties did so in their submissions. One possible explanation might be that the Chamber considered these articles irrelevant in the context of provisional measures. Moreover, the circumstances surrounding the *Ghana v. Côte d'Ivoire* case differ significantly from those in the *Guyana v. Suriname* case.

Thus, the conditions for prescribing provisional measures could contribute to the clarification of the content of the obligation not to jeopardize or hamper. The subsequent section examines the question of which requirements of provisional measures might be applicable to the obligation not to jeopardize or hamper.

B. THE APPLICABILITY OF THE REQUIREMENTS OF PROVISIONAL MEASURES TO THE OBLIGATION NOT TO JEOPARDIZE OR HAMPER

The jurisprudence of international courts and tribunals establishes that several legal conditions must be met in order to prescribe provisional measures. The first prerequisite for prescribing provisional measures is that the relevant court or tribunal must satisfy itself that it has *prima facie* jurisdiction over the dispute.[83] Once *prima facie* jurisdiction is established, the objectives pursued by a requested party shall be considered.

The next two legal conditions under which a court or tribunal can

in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S. Kwon, 2014, p. 187-188.

[83] See, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Provisional Measures, Order of 19 April 2017, para. 17.

exercise its power to prescribe provisional measures are intimately intertwined. One is the requirement of urgency and the other is the requirement of a risk that irreparable prejudice might be caused to the rights of the parties to the dispute before a final decision on the merits is delivered. Both the ICJ and the ITLOS are of the view that provisional measures may be prescribed only if there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties to the dispute".[84] Interestingly, neither the ICJ Statute nor article 290 of the UNCLOS refers to the concept of irreparable prejudice. Nevertheless, under the regime of provisional measures, this concept is generally understood as a harm that cannot be fully compensated by way of financial reparations. The standard of urgency implies that there is "the need to avert a real and imminent risk that irreparable prejudice may be caused to [the] rights at issue before the final decision is delivered".[85]

The next legal requirement, which shall be fulfilled for the prescription of provisional measures, is that the provisional measures requested by a party must be linked to the rights it claims.[86] Apart from the already mentioned requirements, recently both the ICJ and the ITLOS have started to apply a new standard: the standard of plausibility.[87] The

[84] See, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Provisional Measures, Order of 19 April 2017, para. 89.

[85] International Court of Justice, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica);* International Court of Justice *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua, Provisional Measures, Order of 13 December 2013, ICJ Reports 2013, para. 25 and* International Tribunal on The Law of The Sea, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, Order of 25 April 2015, para. 42.*

[86] International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, para. 54*; International Tribunal on The Law of The Sea *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Order of 25 April 2015, para. 63.*

[87] For the first time, this requirement was included in the case between Belgium v. Senegal, Questions relating to the Obligation to Prosecute or Extradite, Order of 28 May 2009, para. 57. Subsequently, in other Orders indicated by the ICJ. At the ITLOS, the requirement of plausibility was for the first time applied in the *Ghana v. Côte d'Ivoire* case and subsequently in the *Enrica Lexie* case.

application of the plausibility test means that prior to the prescription of provisional measures, a court or tribunal has to satisfy itself that the rights which a party claims on the merits and seeks to preserve are at least plausible.[88]

The regime of provisional measures has been established and [and constantly develops] in order to preserve the potential rights of the parties to a dispute, pending a final decision on the merits. Similarly, the obligation not to jeopardize or hamper is intended to confine activities for the purpose of protecting the putative rights of each party, pending a final delimitation.[89] Therefore, it could be argued that some requirements existing in the context of provisional measures may apply by analogy to the obligation not to jeopardize or hamper. There are two requirements that directly aim at protecting the rights: the requirement of irreparable prejudice and the requirement of plausibility. The first requirement seems to be the most applicable to the obligation not to jeopardize or hamper.

Against this background, the statement of the Tribunal in the *Guyana v. Suriname* case can be recalled. The Tribunal held that activities that would satisfy the condition of irreparable prejudice, would automatically constitute a violation of the obligation not to jeopardize or hamper.[90] The following section considers the question of what kinds of hydrocarbon activities are likely to result in irreversible prejudice to the rights of parties to a delimitation dispute. Nevertheless, as noted above, it is important to bear in mind that even if the activities do not involve a risk of irreparable prejudice, they might have the effect of jeopardizing or hampering the reaching of a delimitation agreement.

As regards the second requirement, its incorporation into the obligation not to jeopardize or hamper would significantly limit

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[88] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, Order of 25 April 2015, para. 58,* International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 64.

[89] Virginia Commentary, Volume II (Martinus Nijhoff), 1993, p. 984. This has been repeated in the BIICL's Report, para. 124, p. 36.

[90] *Guyana v. Suriname,* para. 469.

the scope this obligation. In addition to the fact that the plausibility requirement is very controversial and vague, it seems to be impractical to link the application of the obligation to the degree of plausibility of the potential rights claimed by States over a maritime area.[91]

The content of the requirement of irreparable prejudice is examined by the example of two provisional measures orders: in the *Aegean Sea* case and in the *Ghana v. Côte d'Ivoire* case. Similar to the *Guyana v. Suriname* case, these Orders deal with the issue of certain hydrocarbon activities undertaken unilaterally in areas of overlapping maritime claims.

C. THE ORDER IN THE AEGEAN SEA CASE

In the course of litigation on the *Aegean Sea Continental Shelf Case*, Greece requested the ICJ to indicate provisional measures in respect to unilateral seismic exploration authorized by Turkey in areas of the continental shelf claimed by both countries. In particular, Greece sought provisional measures requiring Turkey to refrain from all exploration activity or any scientific research within the disputed areas in order to preserve the sovereign rights of Greece to research, explore and exploit the continental shelf appertaining to it.[92]

The ICJ declined to indicate the provisional measures requested by Greece, citing three reasons. First, Greece made no claim that seismic exploration undertaken by Turkey – although it required small explosions underwater for the purpose of sending sound waves through the seabed to obtain relevant information concerning its geophysical structure – involved "any risk of physical damage to the seabed or subsoil or to their natural resources".[93] Second, Turkish seismic exploration was of a transitory character and did not involve "the establishment of installations on or above the seabed of the continental shelf".[94] Third, Turkey did not embark upon operations involving "actual appropriation or other use of the natural resources" located in the disputed areas of the continental shelf.[95]

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[91] The counter-argument is presented in the BIICL's Report, paras. 131-133, p. 39.
[92] *Aegean Sea* Order, paras. 2 and 15.
[93] *Aegean Sea* Order, para. 30
[94] *Ibid.*
[95] *Ibid.*

The ICJ reaffirmed that its power to indicate provisional measures is triggered only when the circumstances of a case reveal that there is a risk of an irreparable prejudice to the rights of the parties in a dispute.[96] However, the Court found that Turkish seismic exploration in the disputed areas constituted no risk of irreparable prejudice to the rights claimed by Greece.[97] The ICJ held that the damage caused by the acquisition of information on the natural resources of the disputed areas was compensable, even if the Court, in its judgement on the merits, would find that these areas belonged to Greece.[98] Judge Stassinopoulos, in his dissenting opinion, argued that the gathering of information regarding the resource potential of the disputed areas and its possible disclosure created a risk of irreparable harm to the rights of Greece.[99] His argument sounds reasonable, particularly in light of the Order in the *Ghana v. Côte d'Ivoire* case. Although the Order is subject to scrutiny in the next section, it is worth noting that the Special Chamber of the ITLOS has applied an approach slightly different from that of the ICJ in the *Aegean Sea* case.[100]

The ICJ's reasoning raises the question of whether the Court would have reached a different conclusion, had Greece made a claim concerning the harmful nature of Turkish seismic exploration. The wording of paragraph 30 seems to imply that if Greece would have provided sufficient material to show that Turkish activity had entailed a risk of physical harm to the marine environment, it would, arguably, have warranted the indication of provisional measures under article 41 of the ICJ Statute.[101] Against this background, it is important to emphasize that the Court by no means focused on the environmental component of seismic exploration. At the time when the ICJ considered the request of Greece, the UNCLOS was not yet adopted. Hereby, the Court was guided solely by the content of article 41 of the ICJ Statute,

[96] *Aegean Sea* Order, paras. 25 and 32.

[97] *Aegean Sea* Order, para. 33.

[98] *Aegean Sea* Order, para. 33. However, the case was not decided on the merits, as the ICJ found that it lacked jurisdiction.

[99] Dissenting Opinion of Judge Stassinopoulos, p. 38.

[100] *Ghana v. Côte d'Ivoire* Order, paras. 95 and 108 (b).

[101] *Aegean Sea* Order, para. 30: "no complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources".

which does not include the protection of the marine environment as its object.

The other conclusion that follows from the wording of paragraph 30 is that activities involving the establishment of installations or the actual exploitation of natural resources of a disputed maritime area are likely to be viewed as prejudicing in an irreparable manner. Although Turkey conducted no such activities in the disputed areas, it could nevertheless be assumed that if it had been the case, the Court would have been able to exercise its power to indicate provisional measures.

Thus, Turkish seismic activities did not meet the condition of irreparable prejudice for the granting of provisional measures. Nevertheless, it is interesting to note that, in paragraph 32, the Court clearly acknowledged that seismic exploration conducted by Turkey without the consent of Greece could possibly cause a prejudice (although not irreparable) to the exclusive exploration rights of the latter, should the ICJ uphold the claims of Greece on the merits. This suggests that even if such a prejudice would not count as 'irreparable', it could be argued that unilateral seismic exploration in a disputed maritime area can nevertheless be categorized as jeopardizing or hampering. As noted above, in respect of the obligation not to jeopardize or hamper, the threshold should be lower than the threshold justifying the prescription of provisional measures.

D. THE ORDER IN THE GHANA V. CÔTE D'IVOIRE CASE

1. Background to the Case

In accordance with a Special Agreement concluded on 3 December 2014, Ghana and Côte d'Ivoire agreed to submit a dispute concerning delimitation of their maritime boundary to a Special Chamber of the ITLOS.[102] In the course of the litigation, Côte d'Ivoire filed a request for the prescription of provisional measures under article 290 (1) of the UNCLOS with the Special Chamber.[103]

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[102] Special Agreement and Notification, available https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/X001_special_agreement.pdf

[103] Côte d'Ivoire's request for the prescription of provisional measures under article 290 (1) of the UNCLOS, 27 February 2015, available https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/C23_Request_prov_measures_trans-

In its request, Côte d'Ivoire raised the issue of unilateral exploration and exploitation activities undertaken by Ghana in an area of overlapping claims.[104] As indicated in the request, activities authorized by Ghana had already gone beyond simple seismic survey of the disputed area.[105] Ghana permitted a number of drilling operations and even moved to the exploitation phase.[106] Therefore, Côte d'Ivoire requested that Ghana be ordered, *inter alia,* to cease all ongoing oil exploration and exploitation activities in the disputed area and abstain from issuing any new permits for oil exploration and exploitation in this area.[107]

In sum, the *Ghana v. Côte d'Ivoire* case appears to be unusual, although not unprecedented, in terms of the significant exploration and investment had occurred in the disputed area before the dispute was submitted to the Tribunal.[108] The reason for this is that according to Ghana, it has acted in the belief that the Parties have mutually accepted and applied a boundary line between them, and that for more than 40 years (until 2009), Côte d'Ivoire did not object hydrocarbon activities of Ghana and did not inform Ghana of the existence of a different position concerning the delimitation issue.[109]

According to article 290 (1) of the UNCLOS, pending a final decision on the merits, the Special Chamber has the power to prescribe provisional measures in order to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. Therefore, a request for the prescription of provisional measures shall at least be based on one of the legal grounds mentioned in

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[104] This area is defined in paras. 60 of the *Ghana v. Côte d'Ivoire* Order.

[105] Côte d'Ivoire's request, paras. 10, 23-27.

[106] *Ibid.*

[107] Côte d'Ivoire's request, para. 54.

[108] Nigel Bankes, "ITLOS Special Chamber Prescribes Provisional Measures with Respect to Oil and Gas Activities in the Disputed Area in Case Involving Ghana and Côte d'Ivoire", The JCLOS Blog, 12 May 2015. Available at https://site.uit.no/jclos/2015/05/12/itlos-special-chamber-prescribes-provisional-measures-with-respect-to-oil-and-gas-activities-in-disputed-area-in-case-involving-ghana-and-cote-divoire/

[109] Written Statement of Ghana, 25 March 2015, Section I, subsection B https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/Vol._I_-_Written_Statement_of_Ghana_FINAL.pdf

article 290 (1) of the UNCLOS. Côte d'Ivoire in its request argued that provisional measures had to be prescribed since there was the need both to preserve the respective rights and to protect the marine environment. Côte d'Ivoire claimed that provisional measures were required in order to preserve three categories of its "exclusive sovereign rights … arising under the UNCLOS", namely:

1) "the right to explore for and exploit the resources of Côte d'Ivoire's seabed and the subsoil thereof by carrying out seismic studies and drilling, and installing major submarine infrastructures" in the disputed area;
2) "the right to exclusive access to confidential information" about Côte d'Ivoire's natural resources in the disputed area;
3) *"the right to select the oil companies to conduct exploration and exploitation operations and freely to determine the terms and conditions in its own best interest and in accordance with its own requirements with respect to oil and the environment"*.[110]

Moreover, Côte d'Ivoire also alleged that oil exploration and exploitation activities authorized by Ghana in the disputed area were causing serious harm to the marine environment.[111] This allegation was used in support of Côte d'Ivoire's claim under the protection of the marine environment vein of article 290 (1) of the UNCLOS.

2. Changes Introduced by the Chamber Into the Irreparability Requirement

When prescribing provisional measures, the Chamber stated that all legal conditions necessary for granting of provisional measures[112] had been met. This subsection examines the changes, which the Chamber made with respect to the requirement of irreparable prejudice.

In its Order, the Chamber has confirmed that it prescribes provisional measures only when there is a real and imminent risk of causing irreparable prejudice to the rights of the parties to a dispute before a

[110] Côte d'Ivoire's request for the prescription of provisional measures under article 290 (1) of the UNCLOS, 27 February 2015, para. 53; Ghana/Côte d'Ivoire Order, paras. 44-49.

[111] Côte d'Ivoire's request for the prescription of provisional measures under article 290 (1) of the UNCLOS, 27 February 2015, paras. 39-53; Ghana/Côte d'Ivoire Order, para. 50.

[112] Section V (B) considers the conditions for the prescription of provisional measures.

final decision on the merits is handed down.[113] The Chamber held that a risk of irreparable prejudice exists where, in particular, "activities result in significant and permanent modification of the physical character" of the disputed area, and where "such modification cannot be fully compensated by financial reparations".[114]

Côte d'Ivoire claimed that the continuation of Ghana's unilateral activities in the contested area would cause irreversible damage to its sovereign rights.[115] Ghana in its reply stated that the harm claimed by Côte d'Ivoire cannot be regarded as "irreparable" because it might be addressed through an appropriate award of damages and by delivery of information acquired by Ghana.[116]

The Chamber agreed with Ghana that "the alleged loss of the revenues derived from oil production could be the subject of adequate compensation in the future".[117] However, the Chamber took the view that the ongoing exploration and exploitation activities conducted by Ghana in the disputed area were of a distinctive character. Such activities were likely to "result in a modification of the physical characteristics of the continental shelf"[118] and "any compensation awarded would never be able to restore the *status quo ante* in respect of the seabed and subsoil."[119]

As regards the exclusive right to access to confidential information about the natural resources of the continental shelf, the Special Chamber took into account Ghana's statement that the gathered information on the natural resources of the disputed area will be duly recorded and that Ghana will be able to provide this information to Côte d'Ivoire, if it will be required to do so at the conclusion of the dispute.[120] Although the Chamber accepted the undertaking given by Ghana, it also held that the right claimed by Côte d'Ivoire required protection.[121]

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113 *Ghana v. Côte d'Ivoire* Order, para. 74.
114 *Ibid.*, para. 89.
115 *Ibid.*, paras. 76-81.
116 *Ibid.*, paras. 82-87.
117 *Ibid.*, para. 80.
118 *Ibid.*, para. 88.
119 *Ibid.*, para. 90.
120 *Ibid.*, paras. 92 and 93.
121 *Ibid.*, para. 94.

The Chamber stated that "the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire", if the Chamber, in its judgement on the merits, will rule that all or any part of the disputed area pertains to Côte d'Ivoire.[122] Therefore, dealing with a matter similar to what was raised in the *Aegean Sea* case, the Chamber arrived at the opposite conclusion.[123] The Chamber's finding seems to imply that the condition of irreparable prejudice can be met even if there is no risk of physical change to the seabed and subsoil. The support for this can also be found in the formulation of paragraph 89, which by the inclusion of the adverb 'in particular', indicates that the requirement of physical change is not the only one to satisfy the condition of irreparable prejudice.

In sum, the Chamber accepted that the imminent risk of irreparable prejudice to the sovereign and exclusive rights of Côte d'Ivoire existed.[124] In other words, it concluded that the exploration and exploitation activities planned by Ghana in the disputed area required prescribing provisional measures. At the same time, the Chamber prescribed provisional measures different from those requested by Côte d'Ivoire. In doing so, the Chamber relied upon two main aspects: the preservation of Ghana's rights and the protection of the marine environment. The Chamber stated that in the event that Ghana would be ordered to suspend its activities, especially in respect of which drilling had already taken place, it would "cause prejudice to the rights claimed by Ghana and create an undue burden on it" and it could also result in a "harm to the marine environment."[125]

Such a two-pronged approach can be explained by the wording of article 290 of the UNCLOS. Article 290 aims at preserving the respective rights of both parties to a dispute, not only the rights of

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[122] *Ibid.*, para. 95.

[123] Section V (C).

[124] *Ghana v. Côte d'Ivoire* Order, para. 96.

[125] *Ghana v. Côte d'Ivoire* Order, paras. 99-101. It is interesting to note that the Chamber, when referring to a risk of prejudice to Ghana's rights, did not consider it as "irreparable". As regards the second argument against the suspension of Ghana's activities in the disputed area, one can wonder why the Chamber regarded environmental harm resulting from the suspension of ongoing activities as more serious than that from the continuation of these activities.

the requesting party. Hence, the Special Chamber attempted to reach a delicate balance between the competing rights of the parties under the regime of provisional measures.[126] The special circumstances of the *Ghana v. Côte d'Ivoire* case should also be borne in mind. It seems that the Chamber took into account the fact that Côte d'Ivoire was not particularly active to contest Ghana's petroleum activities in the disputed area before 2009.

VI. FINAL REMARKS

The *Ghana v. Côte d'Ivoire* case is the second case, following the *Guyana v. Suriname* case, in which an international judicial body has dealt with the obligation not to jeopardize or hamper in the context of unilateral hydrocarbon activities in disputed maritime areas. Unfortunately, the Chamber did not address the reasonableness of the standard of "(permanent) physical change to the marine environment" developed by the Tribunal in the *Guyana v. Suriname* case. Thereby, this standard is still the only applicable in identifying what hydrocarbon activities would have the effect of jeopardizing or hampering. When adopting the standard of "(permanent) physical change to the marine environment", the Tribunal heavily relied on the criterion laid down by the ICJ in the *Aegean Sea* case. In the view of the ICJ, activities that pose a risk of physical damage to the seabed or subsoil, or to their natural resources might cause irreparable prejudice to the rights, which are the subject of a dispute.

The Tribunal modified the ICJ's criterion by including such additional elements as 'permanent' and 'the marine environment'. Nevertheless, one can agree with a number of legal scholars that the benchmark used by the Tribunal was not fully justified with respect to the obligation not to jeopardize or hamper.[127] The Tribunal should have applied a less

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[126] Yoshifumi Tanaka, "Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the *Ghana/Côte d'Ivoire* Order of 25 April 2015 before the Special Chamber of ITLOS", *Ocean Development & International Law,* 46, 2015, p. 326; Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation,* Oxford University Press, 2016, p. 136.

[127] Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas", in: *The Limits of Maritime Jurisdiction,* edited by C. Schofield, S. Lee and M.-S.

strict threshold for finding a violation of the obligation not to jeopardize or hamper, rather than the one that is sufficient for triggering the power to prescribe provisional measures.

Moreover, as discussed above, the Chamber in the *Ghana v. Côte d'Ivoire* case seems to have changed the content of the irreparability requirement. In the context of the right to information about resources of the disputed maritime area, it appears that the Chamber did not consider the standard of permanent physical change to the marine environment as a necessary condition to meet the irreparable prejudice requirement.[128] Thus, the formula provided by the Tribunal in the *Guyana v. Suriname* case should be revisited in light of the Order in the *Ghana v. Côte d'Ivoire* case.

If one assumes that the standard of permanent physical damage is indeed a rule of international law defining what hydrocarbon activities are or are not consistent with the obligation not to jeopardize or hamper, the question is what phases (or techniques used in conducting) of the exploration and exploitation are most likely to come under the scope of this standard. The standard would definitely apply to activities involving the placement of permanent installations and structures on the seabed, or activities aimed at extracting of petroleum resources located in areas of overlapping maritime claims. As follows from the discussions in section IV, any drilling operation entails a risk of permanent physical damage to the seabed and subsoil and, therefore, would likely to be contrary to the duty not to jeopardize or hamper the reaching a final delimitation. The answer to the question of the applicability of the mentioned standard to seismic testing is less certain. Seismic exploration would hardly meet such a (unreasonably) high threshold for finding a breach of the obligation not to jeopardize or hamper.

It is important to bear in mind that this article concludes that for finding a violation of the obligation not to jeopardize or hamper, the application of the standard of "(permanent) physical change to the marine environment" is unjustified. The article argues that even if that standard

Kwon, 2014, p. 191; Stephen Fietta, his comments on the BIICL's Report, pp. 21-22, available at https://www.biicl.org/documents/1296_obligations_of_states_in_undelimited_maritime_areas_final_event_report.pdf?showdocument=1

[128] *Ghana v. Côte d'Ivoire* Order, para. 95.

cannot be met in the context of a particular hydrocarbon activity, it does not mean that this activity is in line with the obligation not to jeopardize or hamper. As noted above, the emphasis should be placed *not* on the physical effects of a hydrocarbon activity on the marine environment and its components, but on its effects on the process of reaching a final delimitation agreement between neighboring states. Thus, it could be argued that even seismic surveys might constitute jeopardizing or hampering. The seismic information may advantage the Party having access to it in delimitation negotiations. In each case, a State claiming that its neighbor's hydrocarbon operations in an undelimited maritime area are contrary to the obligation not to jeopardize or hamper would need to substantiate the effects of these operations upon the delimitation of the maritime boundary between them.

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