

Prospects for Joint Development in the South China Sea: Implications of Regional State Practice & Recent International Decisions

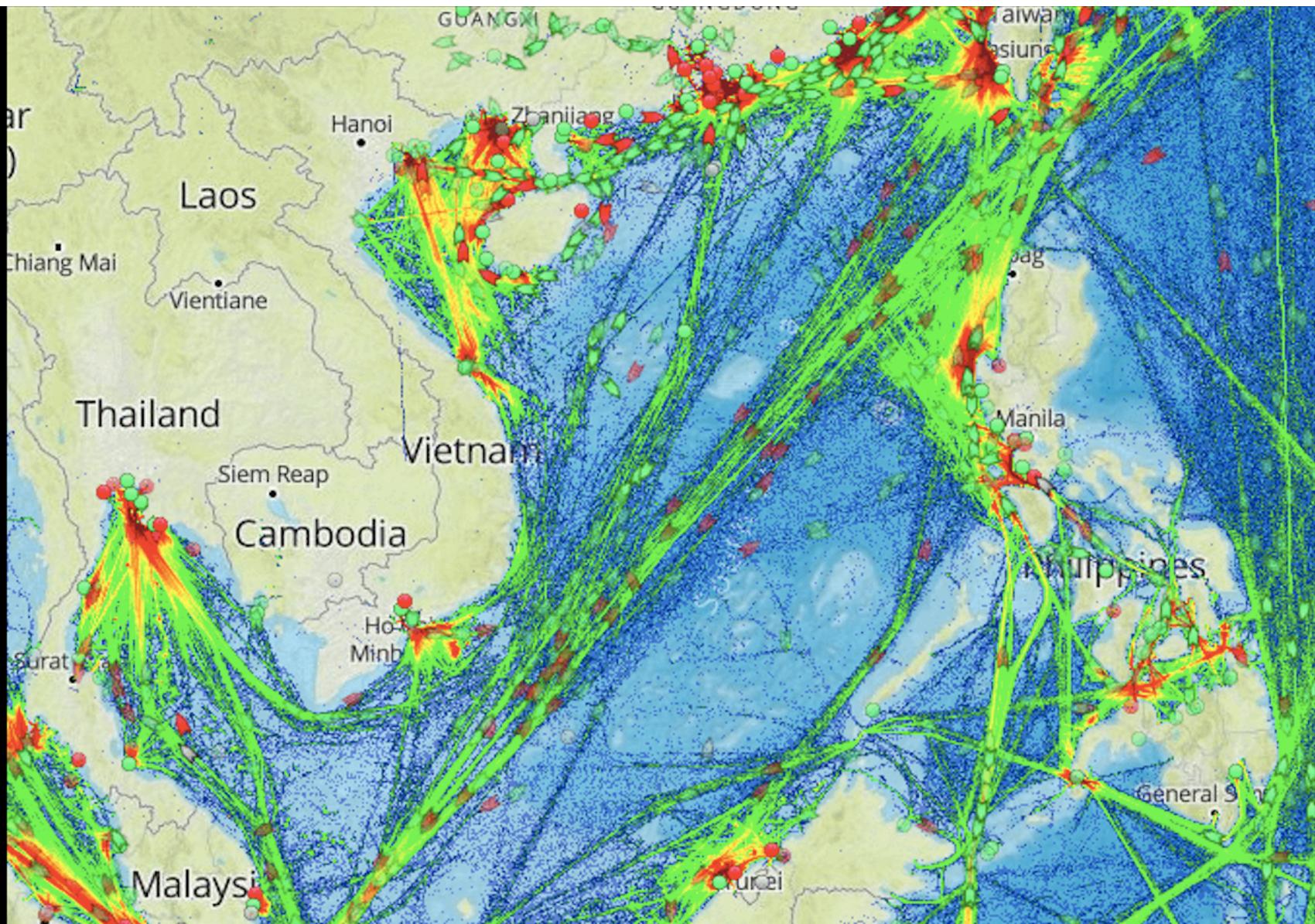
by

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Outline of Topics

- I. **South China Sea's Troubled Waters: Facts or Myths?**
- II. **Regional State Practice: Track One & Track Two Institutional Mechanisms**
- III. **Recent International Case Law:**
 - A. ***Ghana/Cote d'Ivoire*, Special Chamber of ITLOS;**
 - B. ***Timor Leste/Australia*, Conciliation Commission, established under UNCLOS Annex**



South China Sea: Facts or Myths?

- 1) Freedom of Navigation (FON) for merchant & military shipping is a rising concern due to continuing disputes over South China Sea (SCS) insular features and the maritime jurisdiction claims surrounding them;**
- 2) The Chinese maritime jurisdiction claims in the SCS are no longer valid following the SCS Arbitral Tribunal Award in July, 2016;**
- 3) The main reason for SCS disputes over Territorial and Maritime Jurisdiction claims is *oil and/other hydrocarbon/mineral (non-living) resources*;**
- 4) No bilateral/multilateral negotiations, nor even dedicated international fora for SCS co-operation have been established, nor adopted.**

Regional State Practice

- Track One Initiatives, increasingly building upon already successful Track Two Initiatives include as follows:
- **DECLARATION FOR A DECADE OF COASTAL AND MARINE ENVIRONMENTAL PROTECTION IN THE SOUTH CHINA SEA (2017-2027)**
- ‘... Noting that pending a comprehensive and durable settlement of territorial and jurisdictional disputes, the parties concerned may explore or undertake relevant cooperative activities, in accordance with universally recognized principles of international law, including the UNCLOS 1982, without prejudice to the positions of the concerned parties to the dispute; ...’

Regional State Practice

**CHAIRMAN'S STATEMENT OF THE 31st ASEAN SUMMIT,
MANILA, PHILIPPINES, 13 NOVEMBER 2017**

“PARTNERING FOR CHANGE, ENGAGING THE WORLD”

ASEAN Community Vision 2025

7. We reaffirmed the shared commitment to maintaining and promoting peace, security and stability in the region, as well as to the peaceful resolution of disputes, including full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

Regional State Practice

CHAIRMAN'S STATEMENT OF THE 31st ASEAN SUMMIT, MANILA, PHILIPPINES, 13 NOVEMBER 2017 "PARTNERING FOR CHANGE, ENGAGING THE WORLD"

ASEAN Maritime Forum (AMF)/Expanded AMF

41. We welcomed cooperation and constructive dialogue on cross-cutting maritime issues of common interests and concerns including search and rescue, maritime capacity-building, freedom of navigation and overflight and other lawful uses of the sea, crimes at sea, maritime scientific research, maritime connectivity, protection of the marine environment, promotion of eco-tourism in East Asia and combating piracy and armed robbery against ships and illegal, unreported and unregulated (IUU) fishing. We encouraged better coordination of cross-sectoral ASEAN maritime-related cooperation between the AMF and the Expanded AMF (EAMF) and other relevant ASEAN mechanisms such as the ARF, ADMM-Plus and the East Asia Summit (EAS).

Bilateral State Practice

US-Vietnam Joint Statement, 12 Nov, 17, *inter alia*, full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC), and an early conclusion to an effective, legally binding Code of Conduct for the South China Sea (COC). They further called for all South China Sea claimants to clarify and comport their maritime claims in accordance with the international law of the sea as reflected in the 1982 UNCLOS and to implement their international legal obligations in good faith in managing or resolving these disputes;

China-Vietnam, Nov 17, *inter alia*, manage and control the differences concerning maritime issues and refrain from taking actions that will make the situation complicated and the disputes enlarged, as well as (using) a pact on the basic principles concerning guidance for solving maritime disputes between China and Vietnam, make good use of the border negotiation mechanism between the two governments and seek a fundamental and long-term solution accepted by the two nations;

Philippines-US Joint Statement, 13 Nov, 17, *inter alia*, both sides reiterated their commitment to uphold their principles including the freedom of navigation and overflight, and the exercise of self-restraint. They stressed the importance of peacefully resolving disputes in the South China Sea, in accordance with international law, as reflected in the Law of the Sea Convention.

III. Recent International Case Law

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE IN THE ATLANTIC OCEAN (*GHANA/CÔTE D'IVOIRE*), SPECIAL CHAMBER OF ITLOS.

- **Provisional Measures Order, 25 April, 2015:**
- **Jurisdiction: Plausibility of Rights?**
- **Substantive Issues: Nature of Sovereign Rights?**
- **(Final) Judgment, 23 September, 2017:**
- **Jurisdiction &**
- **Substantive Issues: Articles 83(1) & 83(3)**

UNCLOS, Article 83

Delimitation of the continental shelf between States with opposite or adjacent coasts

Article

83

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

...

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Timor Leste/Australia Conciliation Commission

PRESS RELEASE, THE HAGUE, 23 NOVEMBER 2017:

- **Timor-Leste and Australia continue engagement with Greater Sunrise Joint Venture and progress towards signature of maritime boundary treaty;**
- This meeting was convened further to the Comprehensive Package Agreement reached between the Parties on 30 August 2017 regarding maritime boundaries in the Timor Sea, which includes an “Action Plan” for engagement regarding the development of the resource.
- In the course of the conciliation proceedings, the Parties have reached agreement on the text of a treaty which delimits the maritime boundary between them in the Timor Sea and addresses ***the legal status of the Greater Sunrise gas field, the establishment of a Special Regime for Greater Sunrise, a pathway to the development of the resource, and the sharing of the resulting revenue.***

Accessible at: <http://www.gfm.tl/wp-content/uploads/2017/11/Press-Release-No.-11-EN.pdf>

Ghana/Cote d'Ivoire: Provisional Measures

Jurisdiction: Plausibility of Rights?

58. *Considering* that, before prescribing provisional measures, the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are ***at least plausible***; (emphasis added) ...

62. *Considering* that, in the circumstances of this case, the Special Chamber finds that Côte d'Ivoire has presented enough material to show that the rights it seeks to protect in the disputed area ***are plausible***; (emphasis added)

63. *Considering* that the Special Chamber finds that ***there is a link between the rights Côte d'Ivoire claims and the provisional measures it seeks***. (emphasis added)

Ghana/Cote d'Ivoire: Provisional Measures

Substantive Issues: Nature of Sovereign Rights?

- 47. *Considering* that Côte d'Ivoire also claims ***“the right to exclusive access to confidential information about its natural resources”*** in the disputed area, and argues that this is one of the sovereign rights of the coastal State for the purpose of exploring the continental shelf and exploiting its natural resources as provided for in article 77 of the Convention, ...; (emphasis added) ...
- 55. *Considering* that Ghana submits that Côte d'Ivoire's alleged right referred to in paragraph 47 is not based on any specific provisions of the Convention, that “Côte d'Ivoire has failed to establish a basis for the legal existence of an alleged right to information newly claimed to be harmed”, and that “Côte d'Ivoire has cited no legal authority for any such right to information”; ...
- **94. *Considering* that the Special Chamber considers that the rights of the coastal State over its continental shelf include all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf and that the exclusive right to access to information about the resources of the continental shelf is plausibly among those rights;**

Ghana/Cote d'Ivoire: (Final) Judgment

X. International responsibility of Ghana

C. Violation of sovereign rights

- 562. In support of its claim, Côte d'Ivoire refers to the principle whereby ***“States should refrain from any unilateral economic activity in a disputed area pending a definitive delimitation”***. (emphasis added)

ITLOS Special Chamber deliberations on this pt.:

- 592. In the view of the Special Chamber, the consequence of the above is that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out ***before*** the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States. (emphasis added) ...

Ghana/Cote d'Ivoire: (Final) Judgment

594. On the basis of the foregoing, the Special Chamber finds the argument advanced by Côte d'Ivoire that the hydrocarbon activities carried out by Ghana in the disputed area constitute a violation of the sovereign rights of Côte d'Ivoire is *not sustainable*, even assuming that some of those activities took place in areas attributed to Côte d'Ivoire by the present Judgment. Therefore, the Special Chamber finds that Ghana *did not violate* the sovereign rights of Côte d'Ivoire.

Ghana/Cote d'Ivoire: (Final) Judgment

(1) Violation of UNCLOS article 83, paragraph 1, and the customary law obligation to negotiate in good faith:

Para.604. The Special Chamber emphasizes that the obligation to negotiate in good faith occupies a prominent place in the Convention, as well as in general international law, and that this obligation is particularly relevant where neighbouring States conduct maritime activities in close proximity. The Special Chamber notes, however, that the obligation to negotiate in good faith is an obligation of conduct and not one of result. Therefore, a violation of this obligation cannot be based only upon the result expected by one side not being achieved.

605. In conclusion, the Special Chamber takes the view that Côte d'Ivoire has not convincingly substantiated that Ghana did not negotiate in good faith and accordingly dismisses its claim for international responsibility on the basis of a violation of article 83, paragraph 1, of the Convention.

Ghana/Cote d'Ivoire: (Final) Judgment

(2) Violation of UNCLOS article 83, paragraph 3:

626. The Special Chamber notes that article 83, paragraph 3, of the Convention contains two interlinked obligations for the States concerned, namely to “make every effort to enter into provisional arrangements of a practical nature” and “during this transitional period, not to jeopardize or hamper the reaching of the final agreement”.

627. The Special Chamber would like to point out that the first of the two obligations under article 83, paragraph 3, of the Convention constitutes an obligation of conduct, as evidenced by the words “shall make every effort”. The obligation is designed to promote interim regimes of a practical nature pending final delimitation. The wording of this obligation, in the view of the Special Chamber, clearly indicates that it does not amount to an obligation to reach an agreement on provisional arrangements. The Special Chamber notes, however, that the language in which the obligation is couched indicates that the parties concerned are under a duty to act in good faith. This obligation is enhanced by the phrase that such acts have to be undertaken “in a spirit of understanding and cooperation”.

Ghana/Cote d'Ivoire: (Final) Judgment

(2) Violation of UNCLOS article 83, paragraph 3:

633. Finally, the Special Chamber takes into account that Ghana has undertaken hydrocarbon activities only in an area attributed to it. This is particularly relevant in this case in the light of paragraph 2 (iii) of the final submissions of Côte d'Ivoire which reads: “to declare and adjudge that the activities undertaken unilaterally by Ghana ***in the Ivorian maritime area*** constitute a violation of ... the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by article 83, paragraph 3, of UNCLOS”. Hence the activities of Ghana do not meet the qualification of the relevant submission of Côte d'Ivoire since ***they did not take place in the Ivorian maritime area***. It is therefore impossible to state that Ghana has undertaken activities which have jeopardized or hampered the conclusion of an agreement as envisaged by article 83, paragraph 3, of the Convention.

634. On the basis of the foregoing, the Special Chamber finds that Ghana has not violated article 83, paragraphs 1 and 3, of the Convention, and accordingly it dismisses final submission no. 2 (ii) and (iii) of Côte d'Ivoire.

Separate Opinion of Judge Paik

6. What actions would jeopardize or hamper the reaching of the final agreement? Article 83, paragraph 3, of the Convention does not elaborate on them. In my view, a key criterion is whether the actions in question would have the effect of endangering the process of reaching a final agreement or impeding the progress of negotiations to that end. In other words, it is a result-oriented notion. As such, the answer to the above question depends much on the particular circumstances of each case.

Separate Opinion of Judge Paik

7. Therefore I do not consider that it would serve the purpose of article 83, paragraph 3, of the Convention to attempt to identify in general and in the abstract what are permissible activities and what are not. While activities that cause a permanent physical change to the marine environment would likely prejudice the reaching of the final agreement, as the Annex VII Arbitral Tribunal suggested in *Guyana v. Suriname*, less invasive activities carried out unilaterally could also be the source of serious tension between States, thus jeopardizing the prospects of agreement. A permanent physical change to the marine environment thus may be considered one of several relevant factors but should not be applied as a hard and fast threshold of jeopardizing or hampering the reaching of the final agreement.

Separate Opinion of Judge Paik

10. In assessing whether the conduct of States would have the effect of jeopardizing or hampering the reaching of the final agreement, several factors may be considered. In particular, the type, nature, location, and time of acts as well as the manner in which they are carried out may be relevant. There is no single test or criterion that must be applied in all situations. A judicial body faced with the alleged violation of article 83, paragraph 3, of the Convention should take all those relevant factors into account and balance them in the framework of relations between the States concerned before making its decision.

Separate Opinion of Judge Paik

16. Thus I find that the highly invasive activities carried out unilaterally by Ghana in the disputed area close to the “customary equidistance boundary” since 2009, if not earlier, appear to be quite troublesome. By carrying out and even stepping up those activities despite Côte d’Ivoire’s repeated protests, I believe that Ghana violated its obligation under article 83, paragraph 3, of the Convention to make every effort, in a spirit of understanding and co-operation, not to jeopardize or hamper the reaching of the final agreement.

Separate Opinion of Judge Paik

17. The fact that Ghana suspended much of its activities in compliance with the Order of the Special Chamber of 25 April 2015 (see paragraph 632 of the Judgment) cannot exonerate Ghana from its responsibility. Nor does the fact that Ghana's unilateral activities took place in the maritime area which the Special Chamber decides to allocate to Ghana preclude the wrongfulness of its activities. The obligation not to jeopardize or hamper under article 83, paragraph 3, of the Convention is applicable to the States concerned during the transitional period. It is an obligation to exercise caution and restraint in the area the legal status of which has yet to be decided. Therefore this obligation is breached as long as a State fails to exercise the required caution and restraint pending agreement, regardless of to which State the disputed area is allocated. To exonerate acts that could jeopardize or hamper the reaching of the final agreement for the reason that the area is ultimately attributed to a State undertaking such acts would significantly diminish the value of this obligation.

Separate Opinion of Judge Paik

19. ... the Special Chamber observed, quite rightly in my mind, that “[t]o equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising ... caution and prudence” and that “[i]t would be contrary to ... article 83, paragraph 3, of the Convention”. The Special Chamber went further to warn that “[i]t would also entail negative implications for the conduct of States in the area to be delimited elsewhere”. ...

to condone the unilateral activities of such a scale in the circumstances of the present case would certainly send a wrong signal to States pondering over their next move in a disputed maritime area elsewhere.

Conclusions

The specific duties of States under UNCLOS Articles 83(1) and 83(3) when dealing with a situation of overlapping continental shelf claims in a disputed maritime area have arguably been rendered more uncertain following the final Judgment of the ITLOS Sp Chamber in the *Ghana/Cote d'Ivoire* case.

It would appear that a State can unilaterally initiate and conduct activities within such a disputed area of overlapping continental shelf claims in advance (or absence) of any negotiated maritime delimitation agreement or definitive international court/tribunal judgment rendering such delimitation.

Moreover, a State opposing such unilateral activities by the initiating State must not only argue for mutual restraint by all parties to the disputed area but also couple this claim with a proposal to enter into provisional arrangements in advance/absence of a negotiated boundary or definitive international court/tribunal decision on the final maritime boundary between the States concerned.

Otherwise, the opposing State runs the risk of losing the opportunity to claim that the initiating State is acting in breach of Article 83(3) by thereby jeopardizing/hampering the final agreement.