Separate Opinion of Judge Paik

1. I voted in favour of the conclusion contained in operative paragraph (6) that "Ghana did not violate article 83, paragraphs 1 and 3, of the Convention", but my vote requires some explanation, especially with respect to the question as to whether Ghana violated article 83, paragraph 3, of the Convention. Operative paragraph (6) is a reply to final submission no. 2(iii) of Côte d'Ivoire, in which Côte d'Ivoire requested the Special Chamber 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" [emphasis added]. I had to reject this submission and vote in favour of the above operative paragraph, strictly because the activities undertaken by Ghana did not take place in the Ivorian maritime area but in an area attributed to Ghana, as the Special Chamber indicated in paragraph 633 of the Judgment. Leaving this formalistic reason aside, however, I have a serious reservation about the lawfulness of Ghana's activities in the disputed area in terms of article 83, paragraph 3, of the Convention. I also find the reasons given by the Special Chamber in support of its conclusion insufficient and unconvincing. I would have voted differently, had there been no reference to the "Ivorian maritime area" in final submission no. 2(iii) of Côte d'Ivoire. Thus I feel obliged to clarify my view on this question.

2. Article 83, paragraph 3, of the Convention provides:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, 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.

This provision sets forth "the procedure applicable where there is no agreement under paragraph 1" (see Myron H. Nordquist (ed.), *UNCLOS 1982: A Commentary, Vol. II*, p. 952). It imposes two obligations upon the States concerned: obligations to make every effort to enter into provisional arrangements

of a practical nature and not to jeopardize or hamper the reaching of the final agreement.

3. The obligation "not to jeopardize or hamper" embodies a fundamental duty of restraint in the disputed area pending agreement. As the Annex VII Arbitral Tribunal stated in *Delimitation of the Maritime Boundary between Guyana and Suriname*, this obligation is "an important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully" (*Reports of International Arbitral Awards*, Vol. XXX, para. 465). It also has a significant practical dimension, given the fact that there are a large number of maritime areas in which continental shelf entitlements of neighbouring States overlap and that the reaching of the agreement on a maritime boundary usually takes a considerable amount of time. (For the survey of State practice in undelimited maritime areas, see British Institute of International and Comparative Law, *Report on the Obligations of States under Article 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas*, 2016). The obligation under article 83, paragraph 3, of the Convention, though scant in substance, gives States in various parts of the world a guideline as to their conduct in the disputed maritime area during a lengthy transitional period. The present dispute provided the Special Chamber with an opportunity to clarify the meaning of this obligation. In light of its weight as a fundamental norm as well as its practical utility, the question as to how the obligation not to jeopardize or hamper should be interpreted and applied deserved scrutiny, but the Special Chamber's response fell short in this respect.

4. I agree with the Special Chamber's finding in paragraphs 627 and 629 of the Judgment that both obligations under article 83, paragraph 3, of the Convention are an obligation of conduct. They are obligations, in the words of the Seabed Disputes Chamber of the Tribunal, "to deploy adequate means, to exercise best possible efforts, to do the utmost", to obtain the result envisaged in the provision (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 110).

5. It is clear that the obligation not to jeopardize or hamper the reaching of a final agreement does not completely preclude activities by the States concerned in the disputed maritime area. This view is supported by both the text and the *travaux préparatoires* of the provision. Where a provisional arrangement exists, it is expected that activities would be conducted in accordance with that arrangement. However, in the absence of such an arrangement or where a provisional arrangement covers only a limited category of activities, the obligation not to jeopardize or hamper would be particularly relevant to regulating the conduct of States in the area to be delimited.

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.

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* (see *Reports of International Arbitral Awards*, Vol. XXX, para. 467), 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.

8. I recall that in its Order of 25 April 2015, the Special Chamber indicated "significant and permanent modification of the physical character of the area in dispute" as one of the criteria for prescribing provisional measures suspending new drilling in the disputed maritime area (*Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, para. 89). However, this finding was made in the context of determining urgency, a prerequisite for prescribing

provisional measures. Provisional measures, as an exceptional relief, may not be prescribed unless there is urgency in the sense of an imminent risk of irreparable prejudice caused to the rights of the parties pending the final decision. The Special Chamber found that activities resulting in significant and permanent modification of the physical character of the area in dispute could cause such irreparable prejudice to the rights of Côte d'Ivoire. It also found that the acquisition and use of information about the resources of the disputed area could likewise cause a risk of irreversible prejudice to the rights of Côte d'Ivoire.

9. Determination of what acts would cause irreparable prejudice to the rights of the parties pending the final decision and determination of what acts would have the effect of jeopardizing or hampering the reaching of the final agreement are two different legal functions. Therefore it is not guaranteed that criteria for the former can be applied by analogy to the latter. This is clear if the purposes of the two legal functions are compared. While the purpose of provisional measures is to preserve the rights of the parties pending the final decision, that of the obligation not to jeopardize or hamper is rather to facilitate and ensure the reaching of the final agreement, thus "strengthening peace and friendly relations between nations and of settling disputes peacefully".

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.

11. In the present case, Ghana and its contractors have undertaken extensive exploration and exploitation activities in the disputed area. According to the information submitted to the Special Chamber, no fewer than 30 drilling operations including development drillings took place between 2010 and 2014 while the two Parties held bilateral negotiations on delimitation of the maritime boundary. The maritime areas in which some of the drilling operations took place were very close to the "customary equidistance boundary" claimed by Ghana. According to Côte d'Ivoire, at least two deposits in which Ghana

conducted drilling operations, namely the Tano West 1 and the TEN field (especially, "Enyenra" field), straddle the provisional equidistance line drawn either by Côte d'Ivoire or by Ghana. Apparently those drilling operations were undertaken without prior notification to Côte d'Ivoire. Moreover, they continued, and were even accelerated, despite Côte d'Ivoire's repeated requests in 2009, 2011 and 2014 to suspend any unilateral activity in the disputed area until a final determination of the maritime boundary. It may also be added that by April 2015, when provisional measures were prescribed by the Special Chamber, the TEN development project of Ghana, which includes the drilling and completion of up to 24 development wells to be connected through extensive subsea infrastructure in the disputed area, had progressed well on schedule towards the production of first oil in mid-2016.

12. Ghana argues that activities it has carried out in the maritime area in question were not "unilateral", as they were conducted with Côte d'Ivoire's cooperation on the basis of a common understanding of the location of the "customary equidistance boundary". Referring to *Guyana* v. *Suriname*, Ghana also argues that, in applying article 83, paragraph 3, of the Convention, what is important is whether activities may jeopardize or hamper the reaching of the final agreement "as a result of the perceived change to the *status quo* that they would engender". In Ghana's view, its activities in the relevant area, as a continuation of decades-long practice, were the *status quo*, rather than changing the *status quo*, thus not jeopardizing or hampering the reaching of the final agreement.

13. The Special Chamber has found that no tacit agreement on the maritime boundary between the Parties exists and that the requirements of estoppel have not been met in the present case. Therefore Ghana's argument that its activities in the disputed area were not unilateral is untenable. Nor am I convinced by Ghana's argument that its activities were the *status quo,* because drilling operations in the disputed area, unlike less invasive activities such as seismic surveys, would more likely engender the perception of change to the *status quo*. In my view, that is why Côte d'Ivoire broke its silence and decided to react to Ghana, first apparently in 1992 and then clearly in 2009, 2011 and 2014.

14. I assume that Ghana believed for a long time that Côte d'Ivoire tacitly consented to its activities in the area in question. I also understand that it had reason to believe so. However, by February 2009 at the latest, when Côte d'Ivoire made a concrete proposal for the boundary using the geographical meridian, the existence of a dispute and the location of the disputed area were, and should have been, clear to Ghana. However, Ghana did not pay due attention to this development and its legal implications, but instead continued and even stepped up its unilateral activities in the disputed area. Such conduct was far from the exercise of restraint required under article 83, paragraph 3, of the Convention.

15. I acknowledge that Côte d'Ivoire has not fully substantiated the effect of Ghana's unilateral activities upon the then ongoing negotiations for the delimitation of the maritime boundary between the Parties. I further acknowledge that there is no clear indication one way or another in this respect in the minutes of the ten rounds of meetings. However, it would be reasonable to assume that the intensive hydrocarbon activities with accompanying massive financial investment in the disputed area would have left Ghana little room for flexibility in its negotiations with Côte d'Ivoire. This assumption can be further strengthened by Ghana's own position that the purpose of the bilateral negotiations was simply to formalize what the Parties had already agreed in practice.

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.

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.

18. As far as activities in the disputed area are concerned, the obligation not to jeopardize or hamper the reaching of a final agreement under article 83, paragraph 3, of the Convention is all the more important in light of the Special Chamber's finding in paragraph 592 of the Judgment 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." Now States may see less reason to exercise restraint in the disputed maritime area. While a State may still be able to claim for compensation with respect to damage arising from activities of another State in the above situation, for example, on the basis of unjust enrichment, article 83, paragraph 3, of the Convention seems to be the only reliable legal device that can regulate the conduct of States in the area yet to be delimited. This is another reason why the obligation not to jeopardize or hamper should not be taken lightly.

19. In the present case, the Special Chamber decided that the oil concession limits of the Parties could not be considered to be their maritime boundary (see paragraph 225 of the Judgment). In so doing, 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". In a similar vein, 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. I regret that the Special Chamber has just done that.

(*signed*) J.-H. Paik