INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2017

Public sitting

held on Friday, 10 February 2017, at 3 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President of the Special Chamber, Judge Boualem Bouguetaia, presiding

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE IN THE ATLANTIC OCEAN

(Ghana/Côte d'Ivoire)

Verbatim Record

Special Chamber

of the International Tribunal for the Law of the Sea

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		Jin-Hyun Paik
	Judges *ad hoc*	Thomas A. Mensah
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THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** The Chamber is now in session and will continue its work this afternoon with the follow-on from the first round of Côte d'Ivoire. We will stop at 1800 hours as usual with a break between half past four and five o'clock.

I give the floor forthwith to Professor Alain Pellet.

MR PELLET (*Interpretation from French)***:** Mr President, Judges, at the end of this morning's session I recalled, as an introduction, that equidistance was not a method of delimitation in itself, that it was indissociable from taking into account relevant circumstances which could lead to a change in the direction of the provisional equidistance line, and that, amongst these different relevant circumstances, the configuration of the Parties' coasts played a very important part, especially if it resulted in a cut-off to a State's entitlement to maritime spaces, without this cut-off necessarily having the radical effect of enclaving.

In our case, as you can see from the sketch map now on screen, the detrimental effect of cut-off to Côte d'Ivoire is clear. This is not an isolated phenomenon. Indeed, if you look at what the international courts and tribunals have done, these kinds of examples are not rare. In the *Tunisia* v. *Libya* case the ICJ considered that

> clearly no delimitation of the continental shelf in front of the coasts of the Parties … [which failed to take account of the radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes] … could be regarded as equitable.[1]

As a consequence thereof, the Court departed considerably from the equidistance line, as you can see on the screen. The equidistance line, had it been adopted, would not have deprived Libya of access to the high sea.

In the *Gulf of Maine* case, also the Chamber of the Court, keen to avoid any cut-off effect to the detriment of the United States, deflected the equidistance line proposed by Canada[2] – which you can see in blue on screen – even though this line would in no way have enclaved the United States.

On the diagram you can see now, the green arrows indicate the projection of the Ivorian coast. The cut-off phenomenon is illustrated by their conversion into dotted lines beyond the so-called customary line claimed by Ghana. The area shown as a dotted line, in the triangle to the south-east of the red line, depicts this cut-off phenomenon which covers 33,585 square kilometres. That is indeed the amount of cut-off which results from the Ghanaian claims.

Professor Sands said it is some kind of manipulation by juxtaposing D 3.5 and D 3.6, the sketch maps from our Rejoinder.[3] This is as wrong as it is injurious. These two sketch maps illustrate different propositions. The second, D 3.6, illustrates the cut-off

[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 86, para. 122.
[2] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Memorials, pleadings and documents*, Vol. I, Memorial of Canada, p. 32, para. 6 and *Maps and illustrations*, Vol. III, Memorial of Canada, fig. 3.
[3] ITLOS/PV.17/C23/1, 06/02/2017, p. 19, line 33 (Mr Sands).

effect resulting from the inequitable line supported by Ghana, with respect to the bisector line, and the first one, D 3.5, describes the relevant coasts for applying the equidistance/relevant circumstances method on the basis of their seaward projection.

This was a response to sketch map 5.5 from Ghana's Memorial, which claims to do the same thing, and does it in a wholly misleading fashion. The green arrows stop, very conveniently, to illustrate that there is no overlap. The starting points of the purple arrows have been carefully chosen to avoid giving any impression of any possible overlap, and the segment starting from the boundary with Liberia has been declared non-relevant, although very obviously, as Alina Miron showed this morning, its projection meets at the very least that of the Axim to Cape Three Points segment, if, in any event, you want to give the arrows representing that projection – these are the two arrows furthest to the right on the left-hand screen – their correct orientation, which is not the case in sketch map 5.5. Were you talking about manipulation?

My good friend, Paul Reichler, found a radical means to deny any kind of cut-off effect by cutting off the arrows at just the right length so they cannot possibly meet.

You can also measure the cut-off in a different way, that cut-off resulting from the inequitable line of Ghana. The total length of the Ivorian coasts is 510 kilometres; that of the Ghanaian coasts is 536 kilometres. These are objective measurements, based on a minimal simplification. The proportion is 1:0.95 in favour of Ghana. If you project these coasts to a distance of 200 nautical miles, which is the outer limit of the EEZ, these figures change from 407 kilometres for Côte d'Ivoire – in other words, they decrease by more than 20 per cent – and 764 kilometres for Ghana – that is an increase of 42.5 per cent. In other words, what we have here is 1:1.53 in favour of Ghana. You can quibble about the likelihood of the respective arrival points of the 200 nautical mile line, either side of an equidistance line, but with respect to point Z, which results from the meeting of the equidistance lines between the maritime spaces of Ghana, on one side, and of Togo and Benin, on the other, you can understand why these States are so worried regarding the positions of Ghana, and it certainly explains why they are here today in this room. As to the Côte d'Ivoire-Liberia line, it is wholly hypothetical and of course does not engage Côte d'Ivoire, given that there have been no negotiations between the two countries. I have just put it here in a purely hypothetical way. Whatever the case may be about these possible uncertainties, the fact is this: the coastal projections of Côte d'Ivoire are cut off whereas those of Ghana are increased. It is this double funnel phenomenon, one way up for Côte d'Ivoire, the reverse for Ghana, which leads to the profound inequity produced by geometric equidistance. Without any shadow of a doubt, this is a relevant circumstance, justifying in and of itself an adjustment of the provisional equidistance line.

This situation is all the more preoccupying given that the cut-off impacts a number of important cities, including Assini, immortalized in the unforgettable French movie, *Les Bronzés;* Adiaké, a large fishing port; Grand-Bassam, the first capital of Côte d'Ivoire, a well-known resort and important fishing port; and above all, of course, Abidjan, the economic capital of Côte d'Ivoire, whose port is the biggest in West Africa; indeed, it is the number two in all of Africa after Durban. It is the real economic entry point for the State: 91 per cent of Côte d'Ivoire's foreign trade transits

through it, which represents an annual traffic of 25 million tonnes. It brings in 85 per cent of the country's customs income and about 70 per cent of Ivorian GDP goes through that port. It also employs directly and indirectly more than 54,000 people, and work is under way to construct a new deepwater terminal, which will permit vessels with an even deeper draft to come into it.

This situation in and of itself calls for an adjustment of the equidistance line. Whatever the reasons, courts and international tribunals have to limit as far as possible those cut-off effects engendered by a provisional line.[4] This is something that they have frequently recalled, to take but two recent examples from ITLOS in *Bangladesh* v. *Myanmar* and the ICJ in *Nicaragua* v. *Columbia*,[5] that is what has to be done in this particular case.

Mr President, I will not return in detail to the causes that are at the origin of this cut-off situation and that Me Pitron presented very clearly. In fact, they do not really add very much from the legal standpoint. What counts is remedying the encroachment that would result from the Ghanaian line, which is *per se* incompatible with the equitable solution that it behoves you to confer on the dispute that the Parties have brought before you.

This circumstance that is peculiar to our case can be readily explained. It is due to the concavity of the Ivorian coast, which is itself a disadvantage for Côte d'Ivoire, and the convexity of the Ghanaian coast, which in itself is an advantage for Ghana. Added together, there is more and more for the one and less and less for the other. I understand why our friends and opponents are uniting their efforts to lambast this chart.[6] It highlights strikingly the concavity/convexity of the coasts of the two States, one clearly adding to the other. A point in passing: whatever our good friends would have us say[7], we are restricting ourselves to the general direction of the *relevant* coasts of the Parties and in no way claim that the Ghanaian coast east of Cape Three Points plays a role in the cut-off of the Ivorian *entitlement*. But the marked convexity resulting from this cape, with its corollary, the concavity of the Ivorian coast, constitutes for its part such a circumstance because of the cut-off effect of the *entitlement* of Côte d'Ivoire that it generates.

Case law states that

> when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the

[4] In that respect, see, for example, *Arbitration between Barbados and the Republic of Trinidad and Tobago, RIAA*, Vol. XXVII, p. 243, paras 373-375; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* para. 329 or 334; or *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 710, para. 236.
[5] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* para. 325; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012)*, p. 710, para. 236; see also: *Arbitration between Barbados and the Republic of Trinidad and Tobago, RIAA*, Vol. XXVII, p. 243, para. 375.
[6] ITLOS/PV.17/C23/1, 06/02/2017, p. 19, lines 17-27 (Mr Reichler); ITLOS/PV.17/C23/1, p. 8, lines 8-12 (Mr Sands).
[7] ITLOS/PV.17/C23/1, 06/02/2017, p. 19, lines 7-17 and p. 21, lines 31-40 and p. 22, lines 15-19 (Mr Reichler)

> concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result,[8]

as stated by the Tribunal in the *Bay of Bengal* case. *A fortiori*, that is the case when the effects of concavity combine with that of the convexity of the coast of the other State. As underlined by the ICJ in 1969, it would be unacceptable

> that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States,

and it is clearly the case here "of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result."[9] The arbitral tribunal reached the same conclusion in the *Two Guineas* case.[10]

It behoves you to make these acknowledgements, Members of the Special Chamber: the fact that the Ivorian coast is concave is in no doubt, as stressed by Me Pitron. It consists of three different sectors: of general direction north-east, between the land boundary terminus with Liberia and Sassandra; east-north-east, between Sassandra and Abidjan; and east-south-east between Abidjan and the Côte d'Ivoire-Ghanaian land boundary terminus.[11]

Similarly, it is no less questionable that the Ghanaian coastline has three segments: general direction east-south-east between the Ivorian-Ghanaian land boundary terminus and Cape Three Points, east-north-east between Cape Three Points and Cape St Paul, and north-east between Cape St Paul and the boundary with Togo.

It is of course the combination of these two configurations that has caused the marked cut-off effect produced by the equidistance line to the detriment of Côte d'Ivoire. It results in a spillover of Ghana on the sea of 15,788 square kilometres as compared with a general direction of the coasts of the two States. On the contrary, Côte d'Ivoire, owing to the concavity of the coastline, is set back 13,706 square kilometres as compared with a line drawn between the terminus boundary posts.[12]

Mr President, the second broad category of relevant circumstances leading to an adjustment of the provisional equidistance line lies in the presence of geographical

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[8] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 292; see also: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, para. 272; or *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award of 11 April 2006*, *RIAA*, Vol. XXVII, p. 243, para. 375; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India,* Award of 7 July 2014, para. 405.

[9] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* pp. 49-50, para. 91.

[10] *Delimitation of the Maritime Border between Guinea and Guinea-Bissau*, Award of 14 February 1985, *RIAA*, Vol. XIX, p. 187, para. 103.

[11] In this respect, see the diagram "*Coastal Facades and Their Projections",* at tab 1.3 of the Judges' folder of Ghana.

[12] See CMCI, p. 29, para. 1.32.

irregularities that block the projections of the Parties' entitlements seaward and is "of itself creative of inequity".[13] It may be islands – that is most often the case – or strips of land; the expression is not as unusual as our opponents claim[14] – peninsulas, isthmuses – why not?[15] –, in short, any unusual feature, small or large, that has the effect of cutting off the projections of the coasts of a State.

In practice, the solutions adopted by international tribunals and courts are extremely diverse. It is not easy to summarize them but we can without a doubt deduce with certainty from the abundant existing case law that very systematically tribunals have sought to limit the effects of these unusual geographic effects on the course of the boundary, and this without taking into account exclusively the more or less insignificant, or significant, nature of islands or geographical features in question. Of course, distortions brought about by insignificant islands are fully cancelled out, either when the equidistance line is drawn or during the second stage, in order to correct the direction of the line. But the same goes also for far larger islands or far more considerable land or maritime features.

A few examples, if I may, Mr President.

In its award of 1977, the Tribunal that addressed the Anglo-French Arbitration notes that "the further projection westwards of the Scilly Isles" – in yellow here at the tip of Cornwall –

> when superadded to the greater projection of the Cornish mainland [not a small peninsula!] westwards beyond Finistère, is of much the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of “special circumstance”.[16]

This clarification is of particular interest for our case because it shows that geographical features of the territory adjacent to the coast, such as the Jomoro Peninsula, can constitute relevant circumstances, or special, as was said at the time and conforming with the terminology of the Geneva Conventions. In any event, these are circumstances requiring an adjustment of the equidistance line. Let me recall that in the 1977 case the Tribunal held that if “the existence of the Channel Islands [that are not minor geographical features] close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity,”[17] – an acknowledgement that led the Tribunal to enclave them.[18]

[13] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49, para. 89.
[14] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49, para. 89.
[15] See ITLOS/PV.17/C23/1, 06/02/2017, p. 29, lines 19-23 (Mr Reichler).
[16] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977 - 14 March 1978*, *RIAA*, Vol. XVIII, p. 252, para. 244.
[17] *Ibid.*, p. 230, para. 199.
[18] *Ibid.*, p. 231, para. 202.

In the arbitration between Newfoundland, Labrador and Nova Scotia, the Tribunal denied all effect of Sable Island,[19] 31 square kilometres in size, and adjusted the provisional equidistance line that it had previously drawn,[20] which you see here as a solid green line; whilst the dotted green line shows what a line resulting from a "half-effect" attributed to Sable Island would have given. The red line has "no effect" on the correction of the cut-off created by this island.

In the *Black Sea* case, the ICJ concluded that "the presence of Serpents' Island does not call for an adjustment of the provisional equidistance line" because it did not generate "any … entitlements … further than the entitlements generated by Ukraine's mainland coast".[21] It could therefore not, *a fortiori*, cut off the entitlements of Romania to a continental shelf.

Similarly in *Bangladesh* v. *Myanmar* the ITLOS judgment considered that

> giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line,

a distortion that "may increase substantially as the line moves beyond 12 nautical miles from the coast."[22]

Lastly, one final example: in *Nicaragua* v. *Colombia* the Court of the Hague held

> [t]he effect of the provisional median line is to cut Nicaragua off from some three quarters of the area into which its coast projects. Moreover, that cut-off effect is produced by a few small islands which are many nautical miles apart … The Court therefore concludes that the cut-off effect is a relevant consideration which requires adjustment or shifting

a very significant shifting in that case, "of the provisional median line in order to produce an equitable result."[23]

Mr President, from these very diverse cases one may draw a certain conclusion: the significant distortions brought about by geographical features, large or small, be they islands, promontories or peninsulas, must be eliminated or at least attenuated when the provisional equidistance line is drawn. It seems to me difficult here, other than resorting to an angle bisector, as we persist in proposing, or, in the second stage of the equidistance/relevant circumstances method.

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[19] *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas, Award in the Second Phase, 26 March 2002*, para. 5.15.
[20] *Ibid.*, para. 5.13.
[21] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* pp. 122-123, para. 187.
[22] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, para. 318.
[23] *Territorial and Maritime Dispute (Nicaragua* v*. Colombia), Judgment, I.C.J. Reports 2012,* pp. 703-704, para. 215.

Lacking a bisector, this is how one needs to proceed for the Jomoro Peninsula – this word does not please my opposite numbers.[24] Like Cyrano de Bergerac, we could say: "Oh Lord! Many things altogether: a rock, a peak, a cape", or – to please Professor Reichler – an isthmus;[25] but, like Cyrano's nose, it is a peninsula.[26]

Me Pitron described this morning the characteristics of this strip of land caught between the Tendo Lagoon and the sea, forming a right angle with the general direction of the boundary between the two countries. Let me just recall them:

- the peninsula faces the Ivorian mainland;

- it is relatively modest in size and accounts for only 0.1 per cent of the area of Ghana;

- jutting into the Ivorian mainland and lagoon;

- this peninsula was attached to Ghana not, as our opponents claim without any proof, to guarantee equal access to water[27] – the colonisers did not concern themselves with the philanthropic concerns that they give them credit for[28] – but to leave to the country the residence of the British commissioners who were installed there;[29]

- the peninsula blocks the projections of the Ivorian land mass and determines fully the course of the provisional equidistance line out to a distance of 220 nautical miles, since, as we have already said,

- the base points necessary to draw the provisional equidistance line located on the Jomoro Peninsula define the entirety of this line out to 220 nautical miles from the baselines.

As you can see on the next sketch map, the effect of this "historical-geographical" irregularity on the course of the line is quite excessive. If – simply for the purposes of demonstration – we started the boundary not from BP55 but from the extension of the Ivorian-Ghanaian land boundary as far as the sea (before the 90 per cent shift producing the peninsula), instead of the solid line, which denotes the provisional equidistance line, this would be depicted by the red dotted line. Is it normal, Mr President, that this strip of land should be at the origin of a gain of 11,720 square kilometres of maritime area for Ghana? Evidently, the answer is "no": it is a geographical anomaly that leads to a considerable distortion of the provisional equidistance line and consequently calls for an adjustment.

Mr President, I will not dwell at length on another factual circumstance which also justifies that the strict provisional equidistance line be adjusted. The *Earthmoves*

[24] ITLOS/PV.17/C23/1, 06/02/2017, p. 19, lines 7-10 (Mr Sands); or p. 29, lines 19-20 (Mr Reichler).
[25] *Ibid.*, p. 29, line 21 (Mr Reichler).
[26] Edmond Rostand, *Cyrano de Bergerac*, 1897, act 1, scene 4 (the "tirade of the nose").
[27] ITLOS/PV.17/C23/1, 06/02/2017, p. 19, lines 8-9 (Mr Sands), or pp. 29-30 (Mr Reichler).
[28] See, for example: *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 554, para. 164.
[29] See CMCI, pp. 27-28, para. 1.29 and Vol. III, Annex 3, Arrangement concerning the delimitation of French and British possessions on the western coast of Africa, 10 August 1889, Article III.

report in annex 189 of our Rejoinder explains the very specific situation regarding the exceptional concentration of hydrocarbons in the disputed area, which the report calls "the area of interest" (AOI), which Me Pitron described this morning. The Agent for Ghana herself underlined this at the start of these hearings:

> (*Continued in English)*
> As you heard at the Provisional Measures stage, and as you have seen in the Written Pleadings on the merits, the boundary lies in the region of some of the most significant oil reserves in West Africa.[30]

(*Interpretation from French)* To summarize:

- the area of interest covers the Tano basin partially. It is on a transform fault, which means it is an area where there is a collapse due to the separation of the African and American continents – plate tectonics or, if you like, continental drift;

- this area of collapse appears between ridges, in particular along the Dixcove Ridge, which has meant that sand has accumulated and this has encouraged the formation of pockets of hydrocarbons;

- which explains the concentration of fields of oil or gas which have already been discovered or which are probable reserves in the Tano basin and in particular in the area of interest.

The sketch map currently shown illustrates the location of hydrocarbon deposits which have already been discovered and the most probable reserves, and this with respect to three different lines: in orange, the allegedly customary line, which Ghana stubbornly defends; in red, the provisional equidistance line which Ghana has reluctantly suggested. There is no doubt, our Ghanaian friends consider, as Alina Miron showed us this morning, the concentration of wealth in terms of hydrocarbons in the disputed area as being a relevant circumstance for shifting the equidistance line in their favour so as to leave them all of the discovered or probable deposits. It is obviously the opposite line of reasoning which is relevant here. The provisional equidistance line, in blue on the sketch map, calculated by Côte d'Ivoire on the basis of the most recent nautical charts and the most reliable charts, would mean access to these resources in a somewhat less unfair way. If so, it does not take fully into account the very specific geology of the continental shelf in this region.

Mr President, may I make three points here?

First of all, it is not the continuity of the shelf which is the issue here; it is the location of its resources, which are a most unusual circumstance that has to be taken into account. This is not in any way contrary to the contemporary understanding of the continental shelf. For instance, in the *Tunisia* v. *Libya* case, the ICJ, having confirmed the unity of the continental shelf, even so indicated that it "does not necessarily exclude the possibility that certain geomorphological configurations of

[30] ITLOS/PV.17/C23/1, 06/02/2017, p. 6, lines 10-13 (Ms Akuffo).

the sea-bed … may be taken into account for the delimitation … as one of several circumstances considered to be the elements of an equitable solution."[31]

Secondly, we are perfectly aware of the fact that economic considerations, generally speaking, only play a minor role when it comes to maritime delimitation. Even so, economic factors, such as access to natural fisheries resources or hydrocarbons, have been discussed in many disputes.[32] In 1969, in the *North Sea Continental Shelf* case, the ICJ recognized that natural resources – hydrocarbons in that case – were "factors to be taken into account"[33] by the Parties during negotiations.

In subsequent case law, international courts and tribunals have confirmed that access to natural resources was liable to constitute a relevant circumstance.[34] The ICJ recognized that this was indeed so in the *Jan Mayen* case, where they adjusted a delimitation line so that Denmark was "assured of an equitable access" to natural resources – fisheries in that instance.[35] In that case, the Court in a more general way considered "[t]he question whether access to the resources of the area of overlapping claims constitutes a factor relevant to the delimitation."

So far as sea-bed resources are concerned, the Court would recall what was said in the *Continental Shelf (Libyan Arab Jamahiriya v. Malta*) case:

> The natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the *North Sea Continental Shelf* cases[36] … Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them.[37] [38]

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[31] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 58, para. 68; see also p. 64, para. 80. *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 41, para. 50 or *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas, Award in the Second Phase, 26 March 2002*, paras 3.20-3.21.

[32] See Y. Tanaka, *The International Law of the Sea*, 2nd ed., Cambridge University Press, 2015, pp. 266-276 and 287-288.

[33] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 53-54, para. 101(D)(2).

[34] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 78, para. 107; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 41, para. 50; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 706, para. 223; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award of 11 April 2006, RIAA*, Vol. XXVII, p. 214, para. 241; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014,* para. 423.

[35] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 72, para. 76. See also *ibid*., pp. 70-71, paras 73-74 or p. 73, para. 78. See also *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award, 11 April 2006, RIAA,* Vol. XXVII, p. 214, para. 241.

[36] The Court refers to "*I.C.J. Reports 1969,* p. 54, para. 101 D 2".

[37] The Court refers to "*I.C.J. Reports 1985*, p. 41, para. 50".

[38] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 70, para. 72. See also: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 706, para. 223.

This is the situation we are in. Ghana's goal is to keep for itself exclusive access rights to the resources in the overlapping zone, and Côte d'Ivoire's goal is to obtain a fair share; and this objective is all the more legitimate in the instant case, in that there are geomorphological circumstances which are quite exceptional, which would mean that one of the Parties is deprived completely, according to Ghana's claims, or almost completely, if we stick to the provisional equidistance line, which is more accurate, as presented by Côte d'Ivoire, so preventing one of the Parties from any access to the natural resources off those coasts. Without any doubt, Mr President, this is a relevant circumstance which should be taken into account and lead the Special Chamber to adjust the equidistance line.

Ghana feigns indignation at this request and tries to make you feel sorry for the fact that there would be a "severe impact on Ghana's economy" as a result of an adjustment of the inequitable line which they are so keen on. Professor Klein also protests about "considerable prejudice", "billions of dollars invested", "partial freezing of activities in the area", "numerous job losses", "very substantial prejudice", "millions of dollars",[39] "risk of extremely significant prejudice",[40] et cetera. The Agent for Ghana actually welcomed the fact that "Ghana's oil industry has contributed significantly to the increase in prosperity."[41]

Côte d'Ivoire would only welcome this situation if the actions of Ghana had not deprived Côte d'Ivoire of her fair share of oil prosperity, which it has a right to aspire to. We maintain that the concentration of hydrocarbon resources in the Tano basin is a relevant circumstance which you cannot fail to take into consideration, Judges, if by abandoning the bisector method, you were to think in terms of adjusting the provisional equidistance line with a view to arriving at an equitable solution.

However, it is not the same when it comes to the conduct of the Parties, which Ghana would request that you consider as being a *modus vivendi*.

Pulling out all the stops, our friends on the other side of the bar adduce arguments that they think will prove the existence of the practice of the Parties, which in any case is pretty uncertain and unstable, when it comes to oil concessions. They see a tacit agreement in this, and Sir Michael has shown that that is not the case; or they consider it a manifestation of Côte d'Ivoire's acquiescence leading to an estoppel, and Alina Miron has rightly countered that argument. Doubtless, being aware of the fragility of their claims, Ghana in its Reply, and again on Tuesday through Mr Reichler,[42] decked this practice out with a new disguise, a new avatar: apparently it is the sign of a *modus vivendi* between the Parties; in that respect it should be considered a relevant circumstance leading to an adjustment of the provisional equidistance line, but of course in favour of Ghana.[43]

Mr President, I have just one preliminary comment here. However flawed this argument, it is an impressive omission of the difference between the concessions

[39] ITLOS/PV.17/C23/3 (unchecked), pp. 10, line 32, to p. 11, line 7, and 1-5 (Mr Klein).
[40] *Ibid*., p. 13, lines 23-27 (Mr Klein); see also, p. 16 lines 12-16 (Mr Klein), or ITLOS/PV.17/C23/3, p. 19, lines 29-38 (Mr Alexander).
[41] ITLOS/PV.17/C23/1, 06/02/2017, p. 7, lines 34-35 (Ms Appiah-Opong).
[42] ITLOS/PV.17/C23/3, 07/02/2017, p. 2, lines 40-43 and p. 4, lines 7-10 (Mr Reichler).
[43] See RG, p. 110, para. 3.79. Comp. MG, p. 147, para. 5.93.

line and the equidistance line, because the latter has to be corrected to be superimposed on the former.

However, that is not my point at the moment. I merely wish to recall[44] that a *modus vivendi* of this type cannot be considered a relevant circumstance which could lead to an adjustment of the provisional equidistance line as part of the second step of the equidistance/relevant circumstances method; and, alternatively, in any case, the conditions for a *modus vivendi* to be established are not met.

Ghana itself seems to struggle to differentiate between the argument that it bases on the existence of a tacit agreement:

(*Continued in English)* "The evidence", it writes in its Reply, "of both a tacit agreement and a *modus vivendi* based on that agreement is much stronger in this case than in *Tunisia* v. *Libya*."[45]

(*Interpretation from French)* Agreement? *Modus vivendi?* The second based on the first? *Based on that agreement*? That is not very clear, is it? Indeed, in the precedents cited by Ghana[46] - Mr Reichler wisely mentions only one,[47] of course – the ICJ uses both expressions interchangeably. For instance, in the *Black Sea* case, it "notes that Ukraine is not relying on State activities in order to prove a tacit agreement or *modus vivendi* between the Parties on the line which would separate their respective exclusive economic zones and continental shelves."[48]

In *Cameroon* v. *Nigeria*, it is even more blunt. It says "oil concessions and oil wells [may be taken into account] [o]nly if they are based on express or tacit agreement between the parties",[49] but nothing about a *modus vivendi*.

It should be recalled that, in the only case in which the Court did consider a *modus vivendi*, the *Tunisia* v. *Libya Continental Shelf* case,[50] it was not a matter of applying the three-stage method, which was still in limbo. Here the *modus vivendi* was enough in itself as a method for delimitation, which means that it cannot be distinguished from a tacit agreement nor from being considered as a simple relevant circumstance.

Basically, what is this purported *modus vivendi* about? It is a scholarly Latin term but it simply means the practice pursued by the two countries – "a longstanding practice, or *modus vivendi*", is what Ghana says.[51] All the recent case law on which it relies, starting with the *Romania* v. *Ukraine* judgment, refused to grant any importance to State practice. In its judgment of 2009, the Court states that it does not see "any

[44] See DCI, pp. 152-159, paras 5.19-5.33.
[45] RG, Vol. I, para. 3.91.
[46] RG, pp. 110-115, paras 3.78-3.88.
[47] ITLOS/PV.17/C23/3, 07/02/2017, p. 3, lines 31-41.
[48] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 125, para. 197.
[49] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 447-448, para. 304.
[50] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* pp. 70-71, para. 95.
[51] RG, p. 116, para. 3.91.

particular role for the State activities invoked" by Ukraine – oil, fisheries and police activities – "any particular role for the State activities invoked above in this maritime delimitation."[52]

Similarly, in *Nicaragua* v. *Columbia*, the ICJ, quoting from abundant case law, recalled firmly:

> While it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such an effect.[53]

When it comes to oil activities, whether they be oil concessions or exploration or exploitation wells, the Court considered that, unless there was agreement between the Parties, they did not constitute a relevant circumstance. I quote now from the judgment in the *Cameroon* v. *Nigeria* case:

> Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line.[54]

To conclude on this point, on which I can be brief, I will just say this:

- First, resorting to the *modus vivendi* argument adds nothing to the argument based on a purported tacit agreement;

- second, even if existence were to be established *quod non*, a *modus vivendi* cannot be held to be a relevant circumstance leading to a readjustment of the line;

- third, oil practice can be taken into consideration only in exceptional circumstances, which places the bar, when it comes to evidence, at a very high level, and activities invoked by Ghana are far from reaching that level; and,

- fourth, as Sir Michael rightly said when he showed that the argument of a tacit agreement was untenable, this applies also to the pseudo-relevant circumstance which Ghana would like to see in a pseudo *modus vivendi*. It is hardly necessary to prove that all over again.

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[52] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 125, para. 198.

[53] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 705, para. 220 citing award of 14 June 1993, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 77, para. 86; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 447, para. 304; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 125, para. 198; *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, pp. 147-153, paras 378-391.

[54] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 447-448, para. 304.

Mr President, Members of the Special Chamber, even though this elusive *modus vivendi* belatedly discovered by Ghana is assuredly not a relevant circumstance, on the other hand, the three circumstances that I mentioned earlier are, and they all point in the same direction: the need to adjust the provisional equidistance line with a view to arriving at an equitable solution. Just to remind you, we are talking about the cut-off effect which is the result of the Ivorian concavity and Ghanaian convexity of the Jomoro peninsula and the exceptional concentration of hydrocarbons in the area in dispute.

In concrete, technical terms, how shall we proceed? It is agreed that, according to the felicitous choice of words of the arbitral tribunal in the *Barbados* v. *Trinidad and Tobago* case, then used by ITLOS, "[t]here are no magic formulas in this respect".[55] However, in the absence of any actual figures,[56] you can find in the case law general guidelines which I think we should keep in mind. To adjust an equidistance line, the ICJ and international courts have resorted to “various techniques which allow for relevant circumstances to be taken into consideration in order to reach an equitable solution.”[57]

ITLOS has cited a number in *Bangladesh* v. *Myanmar*, where there is an adjustment of the position of the line or its direction or a combination of both techniques, adjusting all of the line or just part of it.[58] The rule of all rules, as Molière would say,[59] leads us to an equitable solution whereby “the adjacent coasts of the Parties produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way.”[60]

Again, that was a quote from the *Black Sea* case.

So when adjustment is called for by one or more of the relevant circumstances, the international tribunals and courts endeavour, above all, to limit as far as possible any cut-off effects caused by the provisional line;[61] and in *Bangladesh* v. *India* the arbitral

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[55] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award, 11 April 2006*, *RIAA*, Vol. XXVII, p. 243, para. 373; translation by the ITLOS Registry, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012,* para. 327.

[56] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* pp. 52-53, para. 73.

[57] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 709, para. 233.

[58] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012*, paras 328-330.

[59] *La Critique de l’Ecole des femmes*, scene VI.

[60] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 127, para. 201; see also, for example, *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014,* para. 477.

[61] In this respect see also, for example: *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award, 11 April 2006*, *RIAA*, Vol. XXVII, p. 243, paras 373-375; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012*, para. 329 or 334; or *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 710, para. 236.

tribunal added: (*Continued in English)* “Further, the adjustment of the provisional equidistance line must not infringe upon the rights of third States.”[62]

(*Interpretation from French*) It is hard to summarize, but I will have a go.

- the basic principle is that we have to avoid as far as possible any excessive cut off;

- this principle goes for both Parties;

- “[t]here can never be any question of completely refashioning nature” or “of totally refashioning geography.”[63] As Paul Reuter lucidly explained, “we should not worsen the situation by using geometry, which is the inevitable instrument of maritime delimitation, as a way of aggravating the whims and inequities of nature, but they should be reflecting nature in a balanced way.”[64];

- and, in any case, the rights of third parties must be upheld.

It is certainly the spirit of the general directives and guidelines that Côte d’Ivoire had in mind when addressing the issue of the indispensable adjustment of the provisional equidistance line. Without any doubt, one could accept that several solutions may be equitable; and, as I have recalled, there are several possible techniques for adjusting the equidistance line. All this is subject to considerable subjective appreciation, but in the instant case it seems to us that it is possible to limit this subjectivity by referring to a bisector drawn by a method that is different but more clinically objective and ultimately leads to an equitable solution:

- It avoids any excessive cut off for Ghana as for Côte d’Ivoire, in particular by guaranteeing as direct an access as possible to and from the port of Abidjan and to and from the high seas;

- it limits the "whims and inequities of nature" without refashioning it totally, in particular by limiting the distortion which is the result of the Jomoro peninsula and by assuring fairer access to proven and probable hydrocarbon resources that are concentrated in the disputed area; and, last but certainly not least,

- it preserves the interest of third parties, particularly those of Togo and Benin.

For these reasons, and taking into account all the relevant circumstances to the case, it seems that the best, fairest and most objective possible solution to adjust the provisional equidistance line consists in changing the direction of it in line with an angle of 22.9°, which reduces the cut-off effect of the provisional equidistance line, which means that we would retain the 168.7° azimuth line, which is also the result of using the bisector method.

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[62] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014*, para. 477.
[63] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*pp. 49-50, para. 91.
[64] P. Reuter, "Une line unique de délimitation des espaces maritimes?", *in Mélanges Georges Perrin*, Lausanne, Payot, 1984, p. 256.

Mr President, before Mr Pitron comes back to talk about the equitable nature of this boundary line, Sir Michael will briefly indicate why this very same line should be applied when delimiting the continental shelf beyond 200 nautical miles.

Thank you, Members of the Special Chamber, for your attention.

THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** Thank you, Professor Pellet, for that presentation.

(*Continued in English)* Sir Michael, you have the floor.

MR WOOD: Thank you, Mr President. As Professor Pellet has just said, I shall be brief.

Mr President, Members of the Special Chamber, I shall address the delimitation of the continental shelf beyond 200 nautical miles. In fact, it is rather straightforward. There is no tacit agreement on the course of the maritime boundary within 200 nautical miles, no customary equidistance boundary; and so too there is no such agreement, no such customary boundary beyond 200 nautical miles. In any event, it will be recalled that Ghana's claim to a tacit agreement or customary boundary is based almost entirely on the petroleum conduct of the Parties, which does not extend beyond 87 nautical miles from the coast. There is nothing in the Parties' submissions to the Commission on the Limits of the Continental Shelf (to which I shall refer as the CLCS or "the Commission") that assists Ghana's argument.

So far as the actual delimitation line is concerned, the same arguments apply as within 200 nautical miles; the line beyond 200 nautical miles should therefore continue along the 168.7° azimuth until it reaches the outer edge of the continental shelf.

Mr President, Members of the Special Chamber, the main point that I need to cover is the significance, if any, for the delimitation of the Parties' CLCS submissions. On Tuesday, Ms Singh claimed that the submissions confirmed what she referred to as the agreement between the Parties on the customary equidistance boundary.[1] In fact, the submissions clearly show the absence of agreement on delimitation. As we recalled in our written pleadings[2] and as was accepted by Ghana in its first round of pleadings,[3] the Parties are in agreement in acknowledging the distinct roles of the CLCS and the Special Chamber. The role of the CLCS relates to the delineation of the outer limits of the continental shelf of States Parties to UNCLOS and assessing their entitlement (or absence thereof) to a continental shelf beyond 200 nautical

[1] MG, chapter 6; RG, chapter 4; Submission for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (28 April 2009), MG, Annex 74; Submission for the Establishment of the Outer Limits of the Continental Shelf of Côte d'Ivoire pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, Executive Summary (8 May 2009), MG, Annex 75, and CMCI, Annex 175; Amended Submission of Republic of Côte d'Ivoire Regarding Its Continental Shelf Beyond 200 Nautical Miles pursuant to paragraph 8 of Article 76 of the United Nations Convention on the Law of the Sea: Executive Summary (24 March 2016), CMCI, Annex 179.

[2] MG, para. 6.21; CMCI, para. 8.3.

[3] ITLOS/PV.17/C23/3, at p. 5, lines 35-36 (Ms Singh).

miles. By contrast, the role of the Chamber is to delimit the Parties' common maritime boundary. The distinction between delineation and delimitation is well established, including in the case law,[4] most recently by the International Court of Justice in its *Somalia* v. *Kenya* Judgment last week.[5]

On Tuesday, Ms Singh raised some other points concerning the Parties' CLCS submissions. These mainly took us back to the question of tacit agreement, but they ought to be answered.

First, Ms Singh said that "this Special Chamber, and indeed any international court, is bound to respect the decision of the Commission on the delineation of the outer limits of national jurisdiction."[6] That is no doubt true, up to a point, since delineation is primarily a matter for the CLCS and the coastal State. But that is not necessarily the case with the lateral extent of the delineation lines, since everything done under article 76 and Annex II of UNCLOS is without prejudice to delimitation of maritime boundaries between States with adjacent or opposite coasts. UNCLOS makes it perfectly clear that the procedure before the CLCS has no effect on delimitation. Article 76(10) provides: "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts." Article 9 of Annex II provides that "[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts." And the Rules of Procedure of the CLCS likewise provide, at Rule 46(2), that: "[t]he actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States".[7] In the case of Ghana, the Commission's recommendations expressly noted "the absence of an international continental shelf boundary agreement between Ghana and Côte d'Ivoire".[8]

Mr President, nothing that happens during the CLCS process can affect the positions of States concerning delimitation. Even if those submissions pointed to a particular line, which is not the case,[9] Ghana's attempt to portray the 2009 submissions as confirming an equidistance line must be rejected on this basis alone. In fact, the absence of an agreement and the existence of a dispute concerning delimitation is confirmed, if confirmation were needed, by the 2016 submission.

A second point made by Ghana on Tuesday is also questionable. According to Ghana, the fact that the Parties acted in concert in preparing their respective initial

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[4] *Delimitation of the maritime boundary in the Bay of Bengal* (Bangladesh/Myanmar), Judgment, *ITLOS Reports 2012*, p. 4, at pp. 99-100, paras. 376 and 379; *In the matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India),* Award of 7 July 2014, p. 1, at p. 138-141, paras 456-458.

[5] ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, preliminary objections, Judgment of 2 February 2017, at para. 94.

[6] ITLOS/PV.17/C23/3, p. 7, lines 6-8 (Ms Singh).

[7] Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/Rev.1 (17 April 2008), Rule 46(2).

[8] Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Ghana on 28 April 2009, Recommendations prepared by the Subcommission established for the consideration of the Submission made by Ghana, adopted by the Subcommission 28 February 2014; adopted by the Commission, with amendments, on 5 September 2014, MG, Annex 79.

[9] RCI, para. 3.55.

submissions to the CLCS shows that there was no dispute between them on the maritime boundary.[10] Mr President, Members of the Special Chamber, it does nothing of the sort. Co-operation in the shape of the same expert, the same vessel and the Ghanaian port of embarkation was an entirely practical matter. These facts say nothing whatsoever about a continental shelf agreement. Mr President, Members of the Special Chamber, one only has to look at the actual terms of Ghana's and Côte d'Ivoire's submissions (the Executive Summaries) to see just how wrong Ghana's line of argument is. The existence of a dispute between two States relating to delimitation or the absence of a delimitation agreement does not prevent such States from co-operating in their submissions to the CLCS. On the contrary, using exactly the same language, each Party's 2009 submission expressly acknowledged the absence of any delimitation agreement. You will find that at paragraph 4.1 in each submission. It reads: "Ghana [Côte d'Ivoire] has overlapping maritime claims with adjacent States in the region, but has not signed any maritime boundary delimitation agreements with any of its neighbouring States to date."[11] The undelimited character of the maritime boundaries was one of the reasons behind the ECOWAS meeting held in 2009, about which we heard yesterday.

Ms Singh said on Tuesday that Côte d'Ivoire's 2009 submission "also noted the 'absence of disputes' at that time", and she went on to claim that this "absence of a dispute" lasted until March 2016. This is incorrect. It overlooks the CLCS procedures in the case of areas in dispute, in particular those set out in Annex I to the CLCS's Rules of Procedure. It also overlooks the actual wording of Côte d'Ivoire's submission. The basic rule set out in Annex I provides that the CLCS will not proceed to consider a submission in respect of a disputed continental shelf without the consent of the parties to the dispute. It also requires that the CLCS shall be informed of any dispute. You will find the heading "Absence of disputes" at section 5 of the executive summaries of Côte d'Ivoire's submission. This is a common heading in CLCS submissions. Under this heading Côte d'Ivoire recalled the fundamental rule that the CLCS will only consider submissions in respect to disputed continental shelf areas with the consent of the parties to the dispute.[12] Côte d'Ivoire then reproduced the ECOWAS decision[13] from 2009; it then stated that the submission was without prejudice to the delimitation of the maritime boundaries with, *inter alia*, Ghana;[14] and it stated that the consideration of the submission would not prejudice matters relating to the delimitation of the boundaries between Côte d'Ivoire and any other State.[15] Ghana's submission is in identical terms in this respect.

So, far from indicating an absence of a dispute, both Côte d'Ivoire and Ghana's submissions presuppose that there is a dispute. They indicate that the Parties have overlapping claims and that there is no existing delimitation. They nevertheless, in

[10] ITLOS/PV.17/C23/3, p. 7, lines 24-27 (Ms Singh).
[11] Submission for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (28 April 2009), MG, Annex 74, at section 4.1; Submission for the Establishment of the Outer Limits of the Continental Shelf of Côte d'Ivoire pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (8 May 2009), MG, Annex 75, and CMCI, Annex 175, at section 4.1.
[12] *Ibid*., section 5.1.
[13] *Ibid*., section 5.2.
[14] *Ibid*., section 5.3.
[15] *Ibid*., section 5.4.

accordance with the CLCS Rules of Procedure, gave their consent for the CLCS to consider the other's submission since doing so would not prejudice the eventual delimitation.

Mr President, for Ghana to say that the Parties were in agreement on the delimitation of their maritime boundary when they submitted their initial submissions to the CLCS in April and May 2009 is hard to reconcile with its claim that the emergence of the dispute dates back to Côte d'Ivoire's statement of February 2009,[16] some months before the submission. It is simply not the case that there was no dispute at the time the Parties made their initial submissions to the CLCS. All the evidence points to the opposite conclusion.

Another point raised by Ghana on Tuesday is this. Ms Singh said:

> Any delimitation effected by the Special Chamber beyond 200 nautical miles would have to be contingent on the Commission finding that Côte d'Ivoire does, in fact, have an outer continental shelf entitlement that extends to the established outer continental shelf entitlement of Ghana.[17]

It is not very clear to us what implications lie in this statement. Ghana itself explicitly requested first an arbitral tribunal and now the Special Chamber to delimit the continental shelf of the Parties both within and beyond 200 nautical miles.[18] Both Parties are in agreement on this request and on the jurisdiction of the Special Chamber. We see no reason why the Special Chamber should not draw a boundary beyond 200 nautical miles to the outer limit of the continental shelf. It is by no means unknown for States to agree on a delimitation beyond 200 miles, or indeed for a court or tribunal to effect such a delimitation, before the CLCS has made recommendations. That happened, for example, in both *Bay of Bengal* cases.[19] In any event, as I shall now explain, the CLCS is acting currently on Côte d'Ivoire's submission.

Mr President, Members of the Special Chamber, I shall now say a few words about Ghana's suggestion that our amended submission was prepared specifically for the present case, and should therefore be discounted. This assertion has no basis in fact.

As you will recall, Ghana and Côte d'Ivoire made their initial submissions to the CLCS in April and May 2009, respectively.[20] Ghana made an amended submission,

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[16] MG, at para. 2.20.
[17] ITLOS/PV.17/C23/3, p. 10, lines 13-17 (Ms Singh).
[18] ITLOS/PV.17/C23/1, p. 2, lines 29-31.
[19] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at p. 102, para. 393; *In the matter of the Bay of Bengal Maritime Boundary Arbitration* (Bangladesh/India), Award of 7 July 2014, p. 1, at p. 22, paras. 82.
[20] Submission for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (28 April 2009), MG, Annex 74; Submission for the Establishment of the Outer Limits of the Continental Shelf of Côte d'Ivoire pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (8 May 2009), MG, Annex 75, and CMCI, Annex 175.

over four years later, in August 2013[21] and Côte d'Ivoire did the same in March 2016.[22]

Côte d'Ivoire's amended submission of 24 March 2016 should be taken into account by the Special Chamber.[23] The revised submission was prepared on the basis of technical information that was not available to Côte d'Ivoire in 2009. Because of the lack of time to prepare the initial submissions in 2009, it is understandable that the research was not as detailed as it could have been and that some significant technical information became available to Côte d'Ivoire only later. As we have seen, Ghana and Côte d'Ivoire made an amended submission several years later, in 2013 and 2016, respectively.

By 2016, Côte d'Ivoire was facing another deadline. Its original submission from 2009 was among the next on the list of submissions to be considered by the CLCS in July 2016. Given that Côte d'Ivoire was in possession of new technical information, it had no choice but to prepare and submit an amended submission. Amending its submission after the CLCS had started its consideration of the original submission would have greatly complicated matters.

At the July 2016 session of the Commission, the Commission considered Côte d'Ivoire's amended submission and transferred it to a sub-commission, which has now begun its consideration of the submission. You can find this in the documents CLCS 95 and 96.

Mr President, Members of the Special Chamber, it is simply not the case that the amended submission was prepared for the purpose of this case, as Ghana wrongly speculates without any justification.[24] It was prepared to meet the timetable of the CLCS. I would also note that international courts and tribunals have taken account of a party's Submission that has been made to the CLCS during the course of proceedings, for instance, in *Bangladesh/Myanmar*.

Finally, Mr President, I turn to the actual delimitation of the continental shelf beyond 200 nautical miles. For the same reasons as within 200 miles, delimitation beyond 200 miles should follow the angle bisector along the 168.7° azimuth, thus achieving an equitable solution.

In the alternative, should the Special Chamber decide to apply the equidistance/ relevant circumstances method, the same circumstances that prevail within 200 miles will apply beyond 200 miles and lead to an adjustment of the provisional

[21] Revised Executive Summary of the Submission by the Government of the Republic of Ghana for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea (21 August 2013, Accra), p. 7, MG, Annex 78.

[22] Amended Submission of Republic of Côte d'Ivoire Regarding Its Continental Shelf Beyond 200 Nautical Miles pursuant to paragraph 8 of Article 76 of the United Nations Convention on the Law of the Sea: Executive Summary (24 March 2016), CMCI, Annex 179.

[23] CMCI, paras 8.18-8.20; RCI, paras 3.52-3.54; Opinion of the United Nations Legal Counsel on amendments to submissions to the CLCS under examination, document CLCS/46, 25 August 2005, p. 6, CMCI, Annex 174.

[24] MG, para. 1.14.

equidistance line to the same azimuth.[25] Professor Pellet has explained this, and I need not repeat the reasons now.

In conclusion, Mr President, Members of the Chamber, Côte d'Ivoire's written pleadings and our oral statements show that Ghana has failed to establish the existence of a tacit agreement on delimitation between the Parties within or beyond 200 nautical miles. The Parties' submissions to the CLCS are the only additional basis invoked by Ghana to claim a tacit agreement beyond 200 miles. However, these submissions do not evidence any tacit agreement. Indeed, they show that there is a dispute, that there are overlapping claims, and that there is no agreement, tacit or otherwise. By contrast, Côte d'Ivoire's 168.7° azimuth line ensures an equitable result both within and beyond 200 miles. It would set a good example for other delimitations in the sub-region, as will be explained by Maître Pitron in a moment.

Mr President, Members of the Chamber, that concludes my statement, and I request that you invite Maître Pitron to the podium.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Sir Michael, for your statement. I give the floor now to Maître Pitron.

MR PITRON (*Interpretation from French*)**:** Mr President, distinguished Members of the Chamber, we are almost at the end of our presentations today. I have 18 minutes before the break and I am going to try to pull all the strands together and show you why the 168.7° azimuth line is equitable in our opinion.

In order to do this, and to conclude, I am going to show that the proportionality resulting from the division produced by this line is confirmed.

The proportionality brought about by this 168.7° azimuth line is very clear when you compare the length of useful coasts for the construction of the angle bisector – since it is our main argument –, which were presented to you this morning, and the area of the maritime spaces attributed to each State subsequent to the effect of the 168.7° azimuth line. Have a look at the screen. You can see the almost equivalent length of the coasts: 497 kilometres for Côte d'Ivoire and 490 kilometres for Ghana.

The maritime areas resulting from the 168.7° azimuth line, which separates the two States out at sea, are also almost the same size: you have 67,000 square nautical miles on one side and 66,000 on the other. The division of these spaces by the 168.7° azimuth line is perfectly proportional to the length of the useful coasts of the Parties and is equitable.

However, if you place over that sketch map the adjusted equidistance line claimed by Ghana – and this is quite illuminating –, you see a distribution of the maritime areas between the two States that is far less equitable. If you were to adopt this, it would give Ghana 20,000 square nautical miles more than Côte d'Ivoire, despite the

[25] CMCI, paras. 7.39 to 7.59; *Delimitation of the maritime boundary in the Bay of Bengal* (Bangladesh/Myanmar), *Judgment, ITLOS Reports 2012*, p. 4, at p. 118, paras 461-462.

exact identical length of the coastlines, and it would also give Ghana a maritime space that flares as it progresses seaward, like an upturned funnel.

The resulting inequity, because of the encroachment of the Ghanaian maritime area on the neighbouring maritime areas, whether of Côte d'Ivoire to the west or Benin and Togo to the east, is also striking too, as you can see on the screen, as I said this morning.

That was the test of proportionality resulting from the division of the maritime areas by the angle bisector.

Let us now look at the test of non-disproportionality, which is the classic test that you all know, and which is the third stage of the equidistance/relevant circumstances method.

As the Court said in the *Peru* v. *Chile* case, you have to see whether the equidistance line adjusted according to the relevant circumstances "produces a result which is significantly disproportionate in terms of the lengths of the relevant coasts and the division of the relevant area".[1]

If the answer to that is “yes”, then the line has to be changed.

Côte d'Ivoire explained this morning what, according to our point of view, the relevant coasts of the two States were, and what the corresponding pertinent relevant area was. You can see those illustrated on the screen.

You will recall that the two States are in agreement about the definition of Ghana’s relevant coasts, which extend over 121 kilometres from BP55 to Cape Three Points – the part shown in red.

You will also recall that the Parties do not agree about the definition of the relevant coasts of Côte d’Ivoire because Ghana considers that they should stop at Sassandra, whereas Côte d’Ivoire thinks they should go all the way to the land boundary terminus with Liberia. I feel, and we have demonstrated very clearly, that the relevant coasts of Côte d’Ivoire also have to include the segment between Sassandra and the land boundary terminus with Liberia. If you take all of that, that would be a length of 510 kilometres for Côte d'Ivoire from BP55.

If you use those figures, the Ivorian relevant coasts are 4.2 times longer than those of Ghana; so that is 4.2 to 1 in favour of Côte d'Ivoire. The portion of the relevant area awarded to Côte d’Ivoire on account of the 168.7° azimuth line is 7.3 times larger than that awarded to Ghana. In other words, it is a ratio of 7.3 to 1. Côte d'Ivoire, on the basis of this 168.7° azimuth line, has 67,492 square nautical miles of maritime area in the relevant zone, and Ghana has 9,200 square nautical miles. You can see on the left and in the middle in dark red, as displayed on the screen. The relation between these two ratios is less than 2 to1 in favour of Côte d’Ivoire – 1.73 to 1 in fact; so it fits with the requirements of case law. Can I remind you of the

[1] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 69, para. 192.

Nicaragua v. *Columbia* case where this ratio was 2.4 to 1 in favour of Nicaragua[2] and the Court ruled that "this line does not entail such a disproportionality as to create an inequitable result".[3]

Distinguished Members of the Special Chamber, the line that Côte d'Ivoire has submitted for your examination easily meets the non-disproportionality test, as indeed does that of Ghana, but that is not the challenge here.

However – and I will end here –, the equitable character of a delimitation line is not the only result of this test because the function, as we know from *Romania* v. *Ukraine* is "to make sure that there is no significant disproportionality"[4] between the parts of maritime areas attributed to each State.

However, as the ICJ judge said in the *Nicaragua* v. *Colombia* case, proportionality is not a question capable of being answered "by reference to any mathematical formula, but it is a matter that can be answered only in the light of all the circumstances of the particular case".[5]

And it is indeed in the light of all these circumstances, the geographical circumstances and the decisive circumstances which we have shown you yesterday and today, that the fundamentally equitable nature of this line appears.

I said "all the circumstances", because they all have to be taken into account, the ones with the others, as Professor Pellet showed you this morning. The Court formulated it extremely well in the *North Sea* case – and it is very apposite in this particular case: "It is the balancing up of all such considerations that will produce this result, rather than reliance on one to the exclusion of all others."[6] How could you put it better with respect to our case and the positions adopted by the Parties?

Ghana's vision of the dispute is a micro-geographical one, and diametrically opposed to this approach. Ghana has attempted to discredit each of the circumstances picked out by Côte d'Ivoire, to invalidate them *seriatim*. Ghana makes no kind of dynamic overall assessment and seeks not to put the different geographic circumstances into perspective. Why? It is because Ghana only wants to retain the one that is to its advantage: its unilateral oil practice.

Mr President, distinguished Members of the Special Chamber, let us have a look at equity face-to-face, if I may express myself thus, and let us list the virtues of this 168.7° azimuth line.

This line transcends the negative effects that the geographical specificities of the case have, to wit the contradiction between the direction of the coastal segment,

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[2] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 716, para. 243.
[3] *Ibid.,* p. 717, para. 247.
[4] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* para. 214.
[5] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 716, para. 242.
[6] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* paras 93-94.

where the base points used for drawing the equidistance line are located, and the general direction of the coasts, as well as the Jomoro Peninsula.

This line awards to each of the two States a maritime area that is proportionate to the length of its coasts. This line makes the Tano basin's exceptional concentration of hydrocarbons available to both Parties. This line, as you can see on the screen, fits within a coherent approach to the sub-region and to its present and future interests.

Distinguished Members of the Special Chamber, by using this 168.7° azimuth line, you will – as Professor Lachs said, to define equity – have "made a bridge between nature and law".[7]

I would like to thank you very much for your kind attention. Would you be so kind as to give the floor to Professor Miron, either before or after the coffee break, who will explain the various counts on which Ghana's international responsibility is engaged, before Mr Kamara closes today's proceedings?

THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** Thank you, Maître Pitron, for this presentation. Does the next speaker wish to start or wait until the end of the coffee break, which will last thirty minutes, in which case we would resume at about five minutes to five. I give the floor to the coffee break. We resume at five minutes to five.

(*Break*)

THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** We will continue our proceedings and I give the floor to Ms Alina Miron.

MS MIRON (*Interpretation from French*)**:** Thank you.

Mr President, Judges, this final part of Côte d'Ivoire's oral submissions takes you to the law of international responsibility for internationally wrongful acts.

Up until Tuesday, I was pleased that, in theory at least, the Parties to these proceedings shared a common view of their primary obligations which apply in an area awaiting delimitation, but Ghana has gone back on the meaning of its written submissions. It seems that it now only pays lip service to the existence of legal obligations of this kind, as Alison Macdonald mentioned *(Continued in English)* "an alleged rule against activities in a disputed area."[1]

(Interpretation from French) I will show that these rules certainly do exist, both in treaty law and in customary law, and that their application in the present case leads to the engagement of Ghana's responsibility. In my presentation I will make numerous references to the written submissions of our opponents, which, aside from a few minor differences, confirm our interpretation of the existing law.

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[7] M. Lachs, "*it serves to make a bridge between nature and law"*, *in* "Equity in Arbitration and in Judicial Settlement of Disputes", *in The Flame Rekindled: New Hopes for International Arbitration*, Martinus Nijhoff, 1994, p. 130.

[1] ITLOS/PV.17/C23/3, 07/02/2017 p.m., p. 24, line 39 (Ms Macdonald).

The second part of my oral statement, which will be shorter, will rebut the various circumstances put forward by Ghana to exonerate itself of its international responsibility, and I will conclude even more briefly on the terms of the reparation.

Mr President, the principle of the protection of sovereign rights in an area awaiting delimitation has three unchallenged foundations:

- first, the rights pertaining to the exploration and exploitation of the continental shelf are exclusive rights;

- second, those rights exist *ipso facto* and *ab initio*;

- third, the delimitation does not have the effect of creating them but of clarifying their scope.

These three combined principles make it possible to protect the rights to the exploration and exploitation of the continental shelf of Côte d'Ivoire against violations that occur before the boundary with Ghana is delimited. Allow me to come back to each of these three foundations.

The principle of the exclusivity of the rights to the exploration and exploitation of the continental shelf is clearly set out in paragraph 1 of article 77 of the Convention. Paragraph 2 of that provision states that, in this context, "sovereign" is synonymous with "exclusive":

> The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

The principle of exclusivity therefore requires that the exploration and exploitation of the continental shelf are conducted either by the coastal State itself, whether on its behalf or with its authorization, or with its express consent.

Of course, Ghana loudly claims the existence of tacit consent by Côte d'Ivoire, which it infers from an alleged *(Continued in English)* "common understanding of a customary boundary".[2] *(Interpretation from French)* We have amply demonstrated that the Parties do not agree on the delimitation of their maritime boundary. Let me add that, for the purposes of article 77, reliance on tacit consent is ineffective.

What is the scope *ratione materiae* of the sovereign rights? According to the wording that you used in your Order prescribing provisional measures, these are "all rights necessary for or connected with the exploration of the continental shelf and the exploitation of its natural resources."[3] The Convention makes no distinction between the technical means by which such activities are conducted. Thus, seismic

[2] RG, para. 5.20. See also ITLOS/PV.17/C23/3, 7/02/2017, p. 24 (Ms Macdonald).
[3] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, Case no. 23*, para. 61. See also *ibid*., para. 94.

exploration, being necessary for and connected with the exploitation of the continental shelf, constitutes a violation of sovereign rights if it has not been conducted with the express consent of the coastal State.

Accordingly, you quite naturally considered – *prima facie* – that "the exclusive right to access to information about the resources of the continental shelf is … among"[4] the sovereign rights. This ruling confirmed the conclusion reached by the ICJ four decades earlier in the *Aegean Sea* case.[5] Yet Ghana maintains against all odds that *(Continued in English)* "Côte d'Ivoire failed to establish the existence of the right to information."[6]

(Intrepretation from French) Two concordant rulings by the courts in The Hague and Hamburg are obviously not enough to convince our opponents.

Having said that, it is true that invasive activities such as drilling are regulated in particular by the Convention. Indeed, article 81 of the Convention provides that: "[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes."

As you also noted in your Order prescribing provisional measures, the justification for this increased protection is that, unlike seismic work, drilling operations "result in significant and permanent modification of the physical character of the area in dispute."[7]

In its Reply Ghana expressly recognized the exclusivity of the rights of exploration and exploitation.[8] However, our opponents refuse to carry this reasoning to its conclusion, as they persist in denying that their unilateral exploration and exploitation activities could constitute a violation of the sovereign rights of Côte d'Ivoire.[9] I am not sure I understand. Does Ghana stand in its defence on the ground of the applicable rules, believing in general that sovereign rights cannot as a matter of principle be violated in an area awaiting delimitation, or does it stand on factual ground, considering that that area has always been Ghanaian?[10]

If it stands on the ground of the rules, the answer is simple: it was presented back in 1969 in the *North Sea Continental Shelf* Judgment:

> [t]he rights of the coastal State in respect of the area of continental shelf that constitute a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose

[4] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* para. 94.
[5] *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976,* pp. 10-11, para. 31.
[6] RG, para. 5.24. See also *ibid*., paras 1.30, 5.4, 5.23. See also ITLOS/PV.17/C23/3, 7/02/2017, p. 27, lines 29-35 (Ms Macdonald).
[7] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015,* para. 89.
[8] RG, p. 140, para. 5.9.
[9] RG, p. 140, para. 5.10.
[10] See ITLOS/PV.17/C23/3, 7/02/2017, pp. 25-26 (Ms Macdonald).

> of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[11]

It therefore follows that the rights to the exploration and exploitation of the continental shelf enjoy the permanency of territorial sovereignty. In that respect they are timeless, a quality to which the term "*ab initio*" also refers.

In its Reply Ghana had also accepted the inherence of sovereign rights.[12] It would have been difficult to do otherwise. However, it has never accepted its consequence – and it is a logical consequence: the exclusive rights to the continental shelf can be violated even when the delimitation line is still to be defined.

Furthermore, paragraph 3 of article 77 of the Convention codifies this principle of inherence and points to two corollaries. The first is that the rights to the continental shelf do not depend on any express proclamation. That is a difference which distinguishes them from the rules governing the exclusive economic zone.[13]

As the Tribunal itself stated in *Bangladesh* v. *Myanmar*:

> A coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits. Article 77, paragraph 3, of the Convention confirms that the existence of entitlement does not depend on the establishment of the outer limit of the continental shelf by the coastal State.[14]

What is true for the outer limits is also true for the lateral limits. Therefore the permanence of rights to the continental shelf and their applicability to third parties cannot be made subject to the precise identification by the coastal State of the lateral limits of its claims.

Ghana nevertheless endlessly repeats that *(Continued in English)* "until 2009 … there was no disputed area".[15]

(Interpretation from French) In short it feels authorized to explore the boundary area as it pleases, claiming that Côte d'Ivoire has not notified it of the exact extent of its claims.[16] That argument has no basis in fact or in law. We demonstrated that back in 1988 Ghana had been officially informed that Côte d'Ivoire had claims in the maritime boundary area and that those claims did not coincide with its own.[17] And in

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[11] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*p. 22, para. 19; see also *ibid.*, p. 29, para. 39, p. 31, para. 43; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 665, para. 115. See also: *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* p. 30, para. 27.

[12] Cf. RG, para. 5.11, underlined in original.

[13] See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985*, pp. 32-33, paras 32-34.

[14] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012,* para. 409.

[15] RG, para. 5.3; RG, para. 5.11, 5.21.

[16] See also ITLOS/PV.17/C23/3, 7/02/2017, pp. 25-26 (Ms Macdonald).

[17] See CMCI, pp. 43-47, paras 2.33-2.47; DCI, pp. 113-119, paras 4.9-4.22.

law, I see nothing abnormal in Côte d'Ivoire stating the precise extent of its claims during the negotiating process, which was actually only resumed in 2008.

In fact, 2008 is a turning point in terms of both the crystallization of the dispute and the creation of the *fait accompli*, because it is from that date that Ghana authorized an intensive drilling campaign in the disputed area, upsetting the status quo.[18]

This leads me to analyze the second corollary of the principle of inherence: "effective or notional occupation" of the continental shelf has no effect on the entitlement of the coastal State. This should be a sufficient rebuttal of the argument put forward insistently and cynically by Ghana *(Continued in English)* that "Ghanaian activity in the relevant area is the status quo."[19]

(Interpretation from French) In summary, our opponents' argument is as follows: if the Chamber were not to recognize a tacit agreement, at least it could rely on Ghana's unilateral activities to exonerate it of its international responsibility.[20] And that is how Ghana would like to convince you to turn a ground for engagement of responsibility into a ground for exoneration. But, honourable Judges, the law of maritime delimitation does not operate according to the adage "first come, first served". Ghana's effective occupation of the areas neither gives it entitlement to resources nor exonerates it of its international responsibility.

Having exposed these aporia, Mr President, I will continue to what seemed to be a further area of common ground at the time, from reading the written submissions of Ghana, namely that, the judicial process of delimitation has a declarative, non-constitutive value.[21] To quote the ICJ's well-known formula in the *North Sea Continental Shelf*: "Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area."[22]

The delimitation judgment does not therefore create sovereign rights; it merely clarifies their geographic scope with the force of *res judicata*. As the ICJ stated in *Libya* v. *Malta*: "That the questions of entitlement and of definition of continental shelf on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident."[23]

The case before you highlights this complementarity. Your judgment on the merits is not a precondition to the *engagement* of responsibility for which the combination of the two elements is necessary and sufficient: first, the infringement of a rule of law and, second, the attribution of wrongful acts to Ghana. Both conditions are met in this case. The rule stems from the inherent rights of Côte d'Ivoire to its continental shelf which predate your decision on the merits. The infringement consists in the

[18] CMCI, paras 2.107-2.108; DCI, paras 4.40-4.43.
[19] RG, para. 5.40. See also *ibid*, paras 1.31, 2.48, 5.5, 5.20, 5.35, 5.38.
[20] Cf. RG, paras 3.90, 5.4, 5.16, 5.35. See ITLOS/PV.17/C23/3, 7/02/2017, p. 29 (Ms Macdonald).
[21] CMCI, p. 241, para. 9.8-9.10; DCI, para. 6.5; RG, paras 5.8-5.9.
[22] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 22, para. 18. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 46-47, para. 44; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* pp. 66-67, para. 64.
[23] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* p. 30, para. 27.

unilateral activities of Ghana, activities in an area that you could declare to be Ivorian.

On the other hand, your judgment on the merits is certainly a precondition to the *implementation* of responsibility, because it is only following your decision that Côte d'Ivoire and Ghana will know the precise limit of their sovereign rights. The judgment on the merits will therefore make it possible to determine the extent of the infringement and to quantify the damage sustained. In fact, Ghana does not seem to view things any differently because, in theory at least, and I quote from its Reply, *(Continued in English)* "Ghana's case is that all of the area in dispute belongs to [it]".[24]

(Interpretation from French) It will fall to you to state whether that is the case. Côte d'Ivoire is convinced that the application of the equitable principles of the law of delimitation will lead you to restore its rights in the disputed area.

This entire presentation will, I hope, be sufficient to dispel any confusion that our opponents believed they could detect in our written submissions.[25] The violation of sovereign rights can be found only for the past activities of Ghana in an area that you might declare to be Ivorian.

Mr President, I now come to the interpretation of the paragraph 3 of article 83 of the Montego Bay Convention. This famous provision stipulates that

> 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.

Aside from the restatement of the general obligation to negotiate in good faith, the main contribution of this provision lies in the fact that it imposes on States an obligation to exercise restraint during the transitional period before the conclusion of an agreement on delimitation or the end of judicial proceedings.

Unilateral exploration and exploitation activities in the disputed area are in particular of a nature "to jeopardize or hamper the reaching of the final agreement", both because they always create an atmosphere of animosity between the Parties and because they tend to create a *fait accompli* on which the wrongdoing State may subsequently attempt to rely. Any resemblance to the facts of the present case is not at all purely coincidental.

One may well wonder whether a distinction should be made between non-invasive activities like seismic exploration and drilling activities.[26] The Arbitral Tribunal in the case of *Guyana* v. *Suriname* did so, holding that invasive activities *(Continued in*

[24] RG, para. 5.7. See also ITLOS/PV.17/C23/3, 7/02/2017, pp. 24-25 (Ms Macdonald).
[25] ITLOS/PV.17/C23/3, 7/02/2017, p. 24, lines 39-43(Ms Macdonald).
[26] *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA*, Vol. XXX, p. 132, para. 467.

English) "would … have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary."[27]

(Interpretation from French) However, it would seem that there is no room for this question in this case because Ghana, like Côte d'Ivoire, considers that – and here, I am quoting Ghana *(Continued in English)*: "Any activity in a disputed area must … be judged, not on the basis of its physical effects, but on the basis of its likely effect on the process of reaching a final agreement."[28]

(Interpretation from French) And Ghana says that drilling does not necessarily affect the negotiation process. But Ghana would struggle to give a single example of invasive activities which did not hamper the reaching of an agreement.

On the contrary, the general practice of States shows that they refrain from such activities and their attitude reflects both the expression of a legal conviction and a policy of prudence before making any major investments. Our written pleadings fully substantiate these examples,[29] so I will not dwell on them any further. Even if seismic exploration has not harmed "the spirit of understanding and cooperation" between Côte d'Ivoire and Ghana[30] in the present case, that does not hold for the drilling operations undertaken by Ghana, to which Côte d'Ivoire has been resolutely and consistently opposed.[31]

Mr President, the two arguments invoked by Ghana in order to be exonerated of its responsibility are different in nature. The first says that there is no precedent where international courts have found that there is responsibility of a State for unilateral activities in an area awaiting delimitation.[32] The second argument in Ghana's defence is a factual one. It is the same old story about Côte d'Ivoire's acquiescence both to a purported common boundary and to Ghana's wrongful activities in the disputed area. We responded to the latter argument at length yesterday, so let us spend a little more time on the first.

And this first argument, the absence of precedent, seems rather surprising, hopeless and artificial. It is a surprising argument because if we were always looking for a precedent that fitted the facts of the case at issue precisely, the jurisprudence would run the risk of being frozen in eternal expectation. Furthermore, in the law of the sea, as in other branches of the law, there are always judicial decisions which are at the vanguard because they provide important clarifications about the interpretation of the Convention or about the scope of customary international law.[33]

The argument is also hopeless because the primary explanation for the relative rarity of decisions on this subject is that the parties to the proceedings had generally refrained from unilateral activities in a disputed maritime area or had simply

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[27] *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA*, Vol. XXX, p. 32, para. 166.
[28] RG, para. 5.38. See also ITLOS/PV.17/C23/3, 7/02/2017, p. 29 (Ms Macdonald).
[29] Examples in: CMCI, pp. 258-259, paras 9.46-6.48; DCI, pp. 173-174, paras 6.22-6.23.
[30] See also ITLOS/PV.17/C23/4, p. 32 (Ms Miron).
[31] CMCI, Vol. I, paras 5.13-5.25; paras 9.16-9.17; DCI, pp. 174-175, paras 6.25-6.28.
[32] RG, p. 140, para. 5.10. See also ITLOS/PV.17/C23/3, 7/02/2017, p. 25 (Ms Macdonald).
[33] See DCI, paras 6.7-6.8.

suspended them following protests from the other State. I refer in particular here to the following cases: *North Sea Continental Shelf*;[34] *Libya* v. *Malta*;[35] *Gulf of Maine*;[36] *Saint-Pierre-et-Miquelon*;[37] and *Maritime Delimitation in the Black Sea*.[38] Ghana has not followed the same path of wisdom, as we know.

It is an artificial argument, lastly, because there are indeed decisions which recognize the principle of State responsibility for activities in a disputed area. We have analyzed them in our written pleadings,[39] so I shall merely recall the clearest examples.

The arbitration in *Guyana* v. *Suriname* is the first clear example of engagement of responsibility for wrongful acts in a disputed area.[40] Ghana's interpretation, according to which the Tribunal considered the submissions relating to responsibility admissible without actually ruling on them,[41] is quite simply incorrect. Of the three substantive points in the operative part of the award, two are devoted to the responsibility of the two Parties.[42]

The second example is the 2012 judgment in *Nicaragua* v. *Columbia*, where the ICJ likewise did not reject the principle of responsibility. It simply held that the claims for compensation by Nicaragua for violation of its exclusive economic zone were unfounded.[43]

More recently, in the joined cases between Costa Rica and Nicaragua, the ICJ, having concluded that "[s]overeignty over the disputed territory … belongs to Costa Rica"[44] and having established that "Nicaragua carried out various activities in the disputed territory",[45] again drew the necessary inferences in terms of engagement of the responsibility of Nicaragua.[46]

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[34] See DCI, para. 6.10.
[35] *Continental Shelf (Libyan Arab Jamahiriya/Malta),* 26 October 1983, *Pleadings*, Vol. II, p. 21, paras 1.23-1.24.
[36] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*pp. 279-281, paras 61-65. See also CMCI, para. 9.47.
[37] *Case concerning the delimitation of maritime areas between Canada and France, Decision of 10 June 1992 RIAA*, Vol. XXI, pp. 285-286, para. 89. See also CMCI, para. 9.48.
[38] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009,* pp. 123-124, paras 191 and 193.
[39] CMICI, pp. 241-243, paras 9.8-9.14; p. 257, para. 9.65; DCI, pp. 168-171, paras 6.9-6.17.
[40] *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007RIAA*, Vol. XXX, pp. 118-138, paras 423-486.
[41] Cf. RG, para. 5.14. See also ITLOS/PV.17/C23/3, 7/02/2017, p. 29 (Ms Macdonald).
[42] *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007RIAA*, Vol. XXX, p. 139, para. 488, points 2 and 3.
[43] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 718, para. 250. See also DCI, para. 6.14.
[44] *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015,* para. 95.
[45] *Ibid*., para. 93.
[46] *Ibid*., para. 93.

Finally, in its award of 12 July 2016 in the case of *Philippines* v. *China*, the Arbitral Tribunal held that China's activities in areas or on maritime features also claimed by the Philippines also engaged its international responsibility.[47]

Ghana rejects the relevance of these examples on the pretext that the activities at issue there involved the threat or use of force,[48] whereas all it could be criticized for was *(Continued in English)* "peaceful economic activity"[49] *(Interpretation from French)* on the Ivorian continental shelf. You cannot be swayed, Judges, by this argument plucked from the air. The use or threat of force is certainly a serious violation of international law, but it is not the only one. Furthermore, in *Costa Rica* v. *Nicaragua*, the responsibility of Nicaragua was also engaged for peaceful activities, such as the excavation of three *caños*; and in *Guyana* v. *Suriname* the Tribunal considered that the drilling of a single well – a single well – was enough to engage the responsibility of Guyana.[50]

What about the other arguments that Ghana puts forward in its defence? The purported acquiescence of Côte d'Ivoire which wipes out the unilateral character of its neighbour's activities?[51] We demonstrated sufficiently yesterday that, far from acquiescing, even tacitly, to Ghana's activities, Côte d'Ivoire has resolutely and consistently opposed all drilling in the disputed area.[52]

Ghana even introduces the idea that its rights in the disputed area were consolidated over time. These would be, to some extent, acquired rights. You will recognize the mantra of the status quo.[53]

We have shown that the term "fait accompli" would be more appropriate than "status quo" over decades. Ghana's invasive activities began after the question of delimitation of the maritime boundary was raised between the Parties. Côte d'Ivoire has opposed any invasive activity since 1988. After the discovery of the Jubilee field in 2007, Ghana extended drilling into the disputed area, disregarding the negotiation process and the opposition from its neighbour. It stepped it up markedly once it was protected from any judicial action.

Furthermore, Ghana's invasive activities are focused in particular on the fields which very closely follow the line which it is claiming. In fact, as we said yesterday several times,[54] these fields overlap the provisional equidistance line, whether it be Ghana's line or the correct line proposed by Côte d'Ivoire. The same is true of the Tano

[47] *The South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, *Award of 12 July 2016*, paras 649-716; *ibid*., paras. 994-1110.
[48] RG, paras 5.12-5.15.
[49] RG, paras 1.5, 1.31, 5.5, 5.13, 5.16.
[50] *Delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA*, Vol. XXX, p. 137, para. 452. See also DCI, paras 6.11-6.13.
[51] Cf. RG, para. 5.3. See also *ibid*., paras 1.10, 5.2-5.3, 5.18, 5.20-5-21.
[52] See ITLOS/PV.17/C23/4, 09/02/2017 morning, pp. 34-36 (Ms Miron). See also CMCI, Vol. I, paras 5.13-5.25, 9.16-9.17; DCI, paras 6.24-6.27.
[53] RG, para. 5.40; see also *ibid*., paras 1.19, 1.21, 1.22, 2.1, 2.2, 2.84, 2.113, 3.77, 4.2, 5.3, 5.10, 5.18, 5.21, 5.33, 5.35, 5.39 (*inter alia*).
[54] See ITLOS/PV.17/C23/4, 09/02/2017, pp. 35.

West 1 field[55] and the Tweneboa, Enyenra, Ntomme field, which has now entered the production phase.[56] In those fields, Ghana has engaged in well drilling and construction activities at a sharply accelerated rate, very consistently.

It is only the "customary equidistance boundary", this unidentified legal object, that narrowly avoids overlapping these fields. However, unless it is an amazing coincidence, it can be assumed that it is Ghana's claim which matches the configuration of the deposits rather than the deposits that align with Ghana's claim.[57]

Mr President, we are not here because Côte d'Ivoire suddenly realized in 2009 that there was oil in the area. We are here because in 2009 Ghana had confirmation of substantial deposits, some of which overlap the equidistance line, which it wished to appropriate, disregarding the competing entitlement of its neighbour and the obligation to negotiate a delimitation agreement with Côte d'Ivoire.

I come to my last point, which will be fairly quick and which concerns the terms of reparation.

What specifically are the consequences of establishing the engagement of the responsibility of Ghana? This is, to some extent, a premature question because the two Parties agree that it should be addressed initially in the bilateral negotiation process,[58] and there is no reason to presume that those negotiations will fail.

Having said that, your decision, Members of the Special Chamber, can and should guide the negotiators in their task. First of all, by recalling the main principles governing reparation, the first and most important of which is that "the breach of an engagement involves an obligation to make reparation in an adequate form." That is the wording used in the *Chorzów Factory* judgment of the Permanent Court of International Justice.[59] As is stated in article 31 of the ILC Articles on Responsibility of States, adequate reparation is *full* reparation "for the injury caused by the internationally wrongful act." It is for the parties to specify the nature of the damage sustained and to assess that damage, but their reparation must "wipe out all the consequences of the illegal act."[60]

The three forms of reparation enshrined in that article are appropriate in the instant case. *Restitutio in integrum* is required as the appropriate reparation for the information obtained by Ghana concerning resources under the sovereignty of Côte d'Ivoire.[61] Reparation by equivalence should be envisaged both for the loss of hydrocarbon production and for any damage that Ghana's activities may have caused to rocks and deposits.[62] Finally, satisfaction in the form of a judicial ruling is an appropriate form of reparation for the violation of article 83, paragraph 3.

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[55] See Status of activities in the oil blocks granted by Ghana in the disputed area, 27 February 2015, CMCI Vol. IV, Annex 83, p. 4.
[56] See *Second Statement of Paul McDade on behalf of Tullow Oil plc* (11 July 2016), p. 4, Appendix A), RG, Vol. IV, Annex 166.
[57] See also CMCI, paras 7.32-7.33.
[58] CMCI, paras 9.37-9.39 and 9.76; RG, para. 5.4; DCI, para. 6.66.
[59] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A*, *No. 9,* p. 21.
[60] *Factory at Chorzów, Merits, Judgmetn No. 13, 1928, P.C.I.J., Series A*, *No. 17,* p. 47.
[61] CMCI, paras 9.27-9.32; DCI, paras 6.68-6.69.
[62] CMCI, paras 9.33-9.39; DCI, para. 6.70.

Before concluding, I have one last word to say on reparation. Less than two years ago, Ghana committed, before you, to repair immaterial[63] and material[64] damage caused to Côte d'Ivoire if the Chamber were to hold that all or part of the disputed area should revert to its neighbour. Those commitments carried weight in your decision.[65] We regret today to hear Ghana reneging on them,[66] in so far as they accept reparation only for loss of revenue from hydrocarbons extracted since your Order for provisional measures.[67]

Mr President, *(Continued in English)* "a disputed area is not to be treated as *terra nullius* until a tribunal rules on the location of the maritime boundary."[68] *(Interpretation from French)* We subscribe fully to this statement, which actually can be found in Ghana's Reply. We would also add that *a fortiori* a State must not act in a disputed area as though it already belonged to it.

It is up to you, Members of the Special Chamber, to rule and to rule strongly; otherwise, a reckless State could consider that the path is clear to appropriate non-renewable resources on a disputed continental shelf, whilst prevaricating in the dispute settlement process. Once these resources have been exploited, the continental shelf may well become an empty shell and the delimitation process would lose its raison d'être. Members of the Special Chamber, you cannot reward unilateralism, as Ghana wishes you to. No, unilateral activities in a disputed area constitute violations of international law and not a legal entitlement or a ground for exoneration from responsibility.

I will conclude there. Thank you for your patient attention. I would ask you, Mr President, kindly to give the floor to Mr Kamara.

THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** Thank you, Professor Miron, for your statement. I will immediately give the floor to Mr Adama Kamara, who will conclude the first round of oral submissions for Côte d'Ivoire. You have the floor, Mr Kamara.

MR KAMARA (*Interpretation from French*)**:** Thank you, Mr President.

Mr President, Members of the Special Chamber, Professor Miron has just brilliantly shown how Ghana's responsibility should be implemented in respect of its violation of the sovereign rights of Côte d'Ivoire on the one hand and in respect of the violation of its obligations under article 83, paragraph 3, of the Montego Bay Convention on the other.

[63] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Provisional Measures, ITLOS Reports 2015,* para. 93
[64] *Ibid*., para. 87.
[65] *Ibid*., paras 88 and 92.
[66] See also DCI, para. 6.67.
[67] See ITLOS/PV.17/C23/3, 7/02/2017 p.m., p. 28, lines 26-36 (Ms Macdonald).
[68] RG, para. 5.9.

The responsibility of Ghana is further engaged on a third ground – the violation[1] of two of the provisional measures prescribed by your Chamber in your Order of 25 April 2015.[2]

The binding effect of those provisional measures prescribed under article 290 of the Convention is indisputable. This is clear from the provisions of that Convention[3] and from the Rules of the Tribunal[4] and has been recognized by case law and legal literature.[5] The natural corollary of the binding character of those provisional measures is that their violation, just like the violation of any decision given by an international court or tribunal, constitutes an internationally wrongful act, which, according to case law, engages the responsibility of the State perpetrating it.[6] As Ghana does not challenge this, I shall not dwell on this particular point.

By its Order, your Chamber decided to ring-fence Ghana's oil activities in the disputed area by making it subject various strict conditions in order to protect the sovereign rights of Côte d'Ivoire. Let me recall to Ghana that it was indeed the Chamber, and not Côte d'Ivoire,[7] that noted in paragraph 60 of its Order the geographical limits of the disputed area within which the provisional measures apply.[8]

Ghana believes that it can argue that the issue of this Order, at the request of Côte d'Ivoire, would engage the latter's responsibility. Now this must be the first time that a State has ventured to suggest an order prescribing provisional measures as a ground for responsibility for an internationally wrongful act.

It is quite the other way round. It is Ghana's inexplicable and unjustified attitude that constitutes a violation of two of the provisional measures prescribed by you on 25 April 2015, namely the obligation to cooperate and the prohibition of new drilling.

Let me now deal with the violation of each of these measures in turn.

Mr President, distinguished Members of the Special Chamber, from the very moment the Order was delivered, Ghana's attitude gave rise to serious doubts as to its genuine willingness to comply. And for good reason.

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[1] See CMCI, Vol. I, paras 9.58 to 9.74 and DCI, Vol. I, paras 6.41 to 6.65.
[2] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Provisional Measures, ITLOS Reports 2015.*
[3] Article 290, para. 6 and 291 para. 1 of UNCLOS.
[4] Article 95, para. 1.
[5] *Arctic Sunrise (Kingdom of the Netherlands* v*. Russian Federation), Merits*, *Arbitral Award, 14 August 2015,* para. 336; see also Wolfrum, "Provisional Measures of the International Tribunal for the Law of the Sea" in P. Chandrasekhara Rao & R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice*, 2001, pp. 185-186; see also T. A. Mensah, "Provisional measures in the International Tribunal of the Law of Sea (ITLOS)", (2002) 62 *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht*, pp. 44-45.
[6] *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), Merits, Arbitral Award, 14 August 2015*, para. 337.
[7] ITLOS/PV.17/C23/3, 07/02/2017, p.17, lines 12-15 (Mr. Alexander).
[8] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Provisional Measures, ITLOS Reports 2015,* para. 60.

As it explained in the report submitted to the Chamber on 25 May 2015, as the only measure to implement the provisional measures prescribed by the Chamber against it, Ghana sent a copy of the Order delivered by your Chamber to the oil companies operating in the disputed area under permits issued by it.[9]

By behaving like a mere messenger, your courier, Ghana has thus attempted to shift the burden for the implementation of the provisional measures, and indeed for their interpretation, to the oil companies. However, those measures were prescribed in respect of Ghana, not the oil companies. Their violation engages the responsibility of Ghana, and not of those companies. Tullow has made no mistake about this and refrains from asserting that it has complied with the Order, merely indicating in its statement that it has complied with Ghana's "instructions", which do not exist, as we have just seen.[10]

Ghana's systematic and wilful withholding of information since the Order was delivered, despite repeated requests from Côte d'Ivoire, has only reinforced its fears.

On 27 July 2015, barely three months after the Order was delivered, the Agent of Côte d'Ivoire wrote to his counterpart, the Agent of Ghana, to express his concern in light of information that had recently been brought to his attention[11] by the press and in Tullow's public statements, which reported intensive activities being carried out in the disputed area, including by drilling platforms.

Côte d'Ivoire repeated this request two months later during a bilateral meeting held on 10 September 2015 in Accra, precisely on the subject of the steps taken to comply with the provisional measures. All that Ghana did was stonewall, saying – and I am quoting from the minutes – that it "did not believe this was required".[12] The evidence showing that invasive oil activities were being conducted in the disputed area continued to build up as the months went by. Let me give you one illustration. The Ghana Maritime Authority stated publicly on 4 April, 2016 that *(Continued in English)* "[Tullow] is engaged in well drilling and installation of subsea infrastructures … at the TEN Field Deep Water Port in the Atlantic Ocean."[13]

(Interpretation from French) On 4 July 2016, after the filing of Ghana's Rejoinder, Côte d'Ivoire again asked Ghana for information regarding the activities being carried out in the disputed area.[14] Once again, Ghana refused, on the ground that this was

[9] Report by Ghana on the follow-up to the implementation of provisional measures, 25 May 2015, p. 2 and Annex A, CMCI, Vol. IV, Annex 53.
[10] Second statement of Paul McDade, 11 July 2016, RG, Vol. IV, Annex 166, para. 10.
[11] Letter no. 068 MPE/CAB sent by the Agent of Côte d'Ivoire to the Agent of Ghana, 27 July 2015, CMCI, Vol. IV, Annex 54.
[12] Minutes of the meeting between the two agents of Côte d'Ivoire and Ghana, Accra, 10 September 2015, p. 4, CMCI, Vol. IV, Annex 55; see also CMCI, Vol. I, para. 9.72 and DCI, Vol. I, para. 6.63.
[13] Ghana Business & Finance, *Ten Oil Project: Ghana Maritime Authority Warns Fishermen*, 28 January 2016, CMCI, Vol. V, Annex 147; see also B&FT Online, *Seafarers warned as TEN Project picks steam,* 5 February 2016, CMCI, Vol. V, Annex 148.
[14] Letter from the Agent of Côte d'Ivoire to the Agent of Ghana, 4 July 2016, DCI, Vol. III, Annex 202.

neither required by the Chamber nor "reasonable or necessary",[15] as we heard yet again from Mr Alexander on Tuesday.[16]

Since the Order was delivered, Côte d'Ivoire has continually requested the information which it is owed, and has systematically been met with refusals from Ghana, without any real reason or further explanation being given, as if its mere statements sufficed to show that the provisional measures were being complied with.

Such an attitude, Mr President, Members of the Chamber, is a patent and contemptuous breach by Ghana of the obligation of cooperation imposed by you on the Parties.

You considered, Mr President, after consulting the Members of the Chamber, that production of these documents was relevant and thus "reasonably necessary" and you instructed Ghana to communicate to Côte d'Ivoire documents relating to activities in the disputed area from 25 April 2015.[17]

The reports on activities that Ghana was finally required to communicate[18] – and Côte d'Ivoire appreciates that – are sufficient evidence that Ghana has failed to comply with a second provisional measure, that which prohibits any new drilling in the disputed area, prescribed in paragraph 108(1)(a) of the Order.

The reports on the activities of the two drilling rigs present in the disputed area refer to 15 activity campaigns, that is to say an uninterrupted period of activity on a well by a drilling rig, totaling 496 days of activity on the TEN field between 25 April 2015 and 30 September 2016.[19] A summary table identifying these various campaigns, the well concerned, their date, and the nature of the works conducted can be found at tab 40 of the Judges' folder.

More specifically, it appears that the Nt07 well, which is located in the disputed area in the Ntomme field, one of the three TEN fields, was drilled during two distinct drilling campaigns.

The first was completed to a depth of 2,740 metres in a few weeks during the time of the proceedings on the prescription of provisional measures,[20] without either Côte d'Ivoire or even, as a matter of courtesy, the Chamber being informed. This drilling campaign was concluded before the Order was delivered, as is evidenced by the documents obtained from Ghana. After this first drilling campaign was over, the well was temporarily abandoned and the StenaDrillMax drilling platform left the area.

[15] Letter from the Agent of Ghana to the Agent of Côte d'Ivoire, 25 August 2016, DCI, Vol. III, Annex 203.
[16] ITLOS/PV.17/C23/3, 07/02/2017, p.23, line 20 (Mr Alexander).
[17] Decision of the President of the Special Chamber, 23 September 2016, DCI, Vol. III, Annex 205.
[18] Letter from the Agent of Ghana to ITLOS, 14 October 2016, DCI, Vol. III, Annex 206.
[19] Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207 [Judges' folder, tab n°40].
[20] Second statement of Paul McDade, 11 July 2016, RG, Vol. IV, Annex 166, para. 9; see also Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207, Appendix 1, Document G0001.

The second drilling phase for this well began on 13 July 2015 and ended on 5 August. It is the drilling reports obtained as a result of your decision of 23 September 2016, Mr President, that have allowed us to discover that. The summary of those reports is on screen. As you can see, during that drilling campaign nearly 1,400 further metres' depth of rock were drilled, within a period of 24 days of continuous drilling.[21]

Ghana does not contest these facts;[22] which speak for themselves. It expressly authorized them[23] in response to Tullow's inquiries.

However, in its Reply[24] and in its oral submissions,[25] Ghana maintains that the drilling of the Nt07 well out to its final depth after the Order had been delivered was expressly permitted by the Order.

To that end Ghana assimilates the notions of drilling and wells, and claims that by prohibiting any "new drilling", the Chamber actually intended solely to prohibit the drilling of a "new well"[26] and not the deepening of a "pre-existing well",[27] such that the partial drilling of a well before 25 April 2015, if only by one metre, automatically authorized Ghana to conduct any kind of operation on that same well after that date, even if these are drilling operations.

Mr President, Members of the Special Chamber, this interpretation by Ghana is contrary to the letter and the spirit of your Order.

It is contrary to the letter of the Order, first, which provides in paragraph 108(1)(a) that no "new drilling" may be conducted, and not no new well, as the Chamber could have put it.

It is contrary to the spirit, second. It is clear from the grounds of the Order that the prohibition of any "new drilling" is actually the result of a compromise sought by the Chamber, aimed at prohibiting Ghana from conducting certain activities likely to cause irreparable harm to the rights of Côte d'Ivoire, provided this is not seriously detrimental to Ghana or the marine environment. As Judge Mensah stated in his Separate Opinion, "[s]uch an order takes due account of the interests and rights of both parties."[28]

With regard to the prohibited activities, paragraph 89 of the Order states that they are those which "result in significant and permanent modification of the physical

[21] Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207, Appendix 1.
[22] RG, Vol. I, para. 5.52.
[23] Letter from Ghana to Tullow of 11 June 2015, RG, Vol. IV, Annex 166, Appendix C.
[24] RG, Vol I, para. 5.52.
[25] ITLOS/PV.17/C23/3, 07/02/2017, p.21, line 7 (Mr Alexander).
[26] RG, Vol. I, para. 5.50.
[27] RG, Vol. I, para. 5.52.
[28] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures,* Separate Opinion of Judge *Ad Hoc* Mensah, para. 13.

character of the area in dispute and where such modification cannot be fully compensated by financial reparations."[29]

With regard to the protection of Ghana's interests and the marine environment, paragraph 99 states that this entails not suspending "ongoing activities conducted by Ghana in respect of which drilling has already taken place [which] would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment."[30]

So, contrary to what Mr Alexander claimed on Tuesday, the second drilling campaign conducted by Ghana on the Nt07 well was both prohibited under paragraph 89 and excluded from the protection afforded by paragraph 99.

This is for three reasons.

First of all, as I have stated, 1,400 metres' depth of rock were drilled in the Nt07 well during this campaign.[31] That is certainly a significant and permanent modification of the physical character of the continental shelf made after 25 April 2015, and is prejudicial to the rights of Côte d'Ivoire within the meaning of paragraph 89.

Furthermore, this drilling campaign began on 13 July 2015, almost two and a half months after the Order had been delivered. It is therefore not an "ongoing activity" on the date when the Order was delivered, which is sufficient grounds to exclude it from the protection offered by paragraph 99. The fact that a first partial drilling campaign for that well had been conducted before 25 April 2015 in no way supports Ghana's argument because it had been terminated on that date, with the result that that no drilling activity was "ongoing" on the date when the Order was delivered.

Lastly, and *ex abundanti*, I would add that the suspension or rather the non-implementation, as it was not ongoing on the date of the Order, of this second drilling campaign, would not in any event have entailed either "considerable financial loss to Ghana" or "serious danger to the marine environment" within the meaning of paragraph 99 of the Order.

As is clear from Tullow's statements[32] and the oral submissions of Ghana,[33] this well is not a first oil well necessary for the entry into production of the TEN field, which took place in August 2016. The failure to bring this well into service was not therefore likely to block the entry into production of the Ntomme field on which it is located, which could have entailed considerable financial loss to Ghana and its concessionaires. Mr Alexander also explained that the Nt07 well was not an oil-producing well, but a water-injector well; that is to say, a well designed to increase the pressure in a deposit subject to a naturally low pressure, in order to allow

[29] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Order of 25 April 2015,* para. 89.
[30] *Ibid*, para. 99.
[31] Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207, Appendix 1.
[32] Second statement of Paul McDade, 11 July 2016, RG, Vol. IV, Annex 166, para. 9.
[33] Second statement of Paul McDade, 11 July 2016, RG, Vol. IV, Annex 166, para. 9.

"optimal hydrocarbon flow".[34] The entry into service of this well was therefore only intended to increase the yield from the deposit, but was not crucial to its entry into production.

It is also clear from the reports on the activity of the Nt07 well communicated by Ghana, the relevant extracts of which are at tab 45 in the Judges' folder, that this well had been temporarily abandoned in a fully secure manner at the end of the first drilling campaign, such that its maintenance would not have entailed any danger of serious harm to the marine environment. To this end, the well was equipped in three ways. A casing for its full depth,[35] preventing the rock from collapsing inside the well; a cement cap at its lower end on the subsoil side,[36] providing a seal with the deposit, and a temporary abandonment cap at its upper end on the surface side, providing a seal with the marine environment.[37] This is confirmed by the statement given by Mr McDade from Tullow. Contrary to what Ghana tried to have him say during its oral pleadings, that statement does not say that *(Continued in English)* "a well half drilled … can lead to problems",[38] but merely specifies that such a situation requires "additional monitoring to verify environmental integrity".[39]

(Interpretation from French) Mr President, Members of the Special Chamber, it must therefore be stated that by conducting, after 25 April 2015, a drilling campaign on a well that was temporarily abandoned before that date, Ghana manifestly and knowingly violated your measure prohibiting it from conducting any new drilling.

According to case law, the violation of provisional measures is a ground for responsibility independent of the violation of the primary obligations applicable between States, to which it is added.[40]

As Professor Miron explained to you, Ghana's drilling in the disputed area constitutes a violation of the exclusive sovereign rights of Côte d'Ivoire to the continental shelf, for which it requests reparation.

Consequently, Côte d'Ivoire requests the Chamber, by way of reparation, to declare that by failing to comply with the Order imposed on it, Ghana has committed an internationally wrongful act engaging its responsibility.

Mr President, Members of the Special Chamber, this concludes Côte d'Ivoire's submissions in this first round of oral pleadings. Thank you very much for your kind attention.

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[34] ITLOS/PV.17/C23/3, 07/02/2017, p.20, line 12 (Mr Alexander).
[35] Drilling report of Nt07 well of 13 July 2015, Document G0001 in Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207, Appendix 1 [Judges' folder, tab n°45].
[36] Drilling report of Nt07 well of 16 July 2015, Document G0001 in Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, Vol. III, Annex 207, Appendix 1 [Judges' folder, tab n°45].
[37] Drilling report of Nt07 well of 14 July 2015, Document G0001 in Study of drilling rig activities in West Leo and Stena DrillMax since 25 April 2015, DCI, Vol. III, Annex 207, Appendix 1 [Judges' folder, tab n°45].
[38] ITLOS/PV.17/C23/3, 07/02/2017, p.20, line 32 (Mr Alexander).
[39] Second statement of Paul MDdade, 11 July 2016, RG, Vol. IV, Annex 166, para. 9.
[40] *Ibid*., para. 129.

THE PRESIDENT OF THE SPECIAL CHAMBER (*Interpretation from French*)**:** Thank you, Mr Kamara, for your presentation.

That presentation indeed brings us to the end of the first round of oral pleadings. We will meet again at ten o'clock on Monday morning to begin the second round of oral pleadings in the *Ghana*/*Côte d'Ivoire* case. Ghana will begin the first oral submissions in the second round at ten o'clock on Monday morning.

I wish you all a very pleasant evening and an excellent weekend. See you on Monday morning. The sitting is closed.

(*The sitting closed at 5.55 p.m.*)