# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2015

Public sitting

held on Sunday, 29 March 2015, 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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| *Present:* | President | Boualem Bouguetaia |
| | Judges | Rüdiger Wolfrum |
| | | Jin-Hyun Paik |
| | Judges *ad hoc* | Thomas A. Mensah |
| | | Ronny Abraham |
| | Registrar | Philippe Gautier |

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H.E. Ms Akua Dansua, Ambassador of the Republic of Ghana to the Federal Republic of Germany, Berlin, Germany,

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Mr Nana Asafu-Adjaye, Consultant, Petroleum,

Mr Kojo Agbenor-Efunam, Environment Protection Authority, Environmental Affairs,

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**THE PRESIDENT OF THE SPECIAL CHAMBER** *(Interpretation from French)***:** The Tribunal will now resume the hearing. This afternoon we are going to listen to the first round of oral argument presented by Ghana. Let me without further ado give the floor to the Agent of Ghana, Ms Brew Appiah-Opong.

**MS BREW APPIAH-OPONG:** Mr President, distinguished Members of the Special Chamber, distinguished representatives of Côte d'Ivoire, it is a particular honour and pleasure for me, as the Agent for Ghana, to address you in this important case.

Ghana takes pride in the contribution that our country and citizens make to the rule of law and the United Nations. Therefore it is a delight for me today that there are representatives from the Ministry of Foreign Affairs and our Ambassador to Germany, Akua Dansua, present to listen to this important case. In this introductory address I will highlight key aspects of our position and explain briefly what has led to this Tribunal.

May I begin by emphasizing the mutual respect and affection that Ghana and Côte d'Ivoire share for one another. Our countries have a great deal in common. Both have come a long way since independence, but we have a great deal further to go in improving the lives of our people. We both rely on our natural resources for our economic development and the wellbeing of our citizens. We are each committed to the environment. For both our countries maritime activities are vital. Petroleum exploration has been actively undertaken in both countries for many decades. In partnership with international companies, with whom we have entered long-term contracts, there has been extensive exploration activity. Huge investments have been made by our national petroleum corporations and the international oil companies. Côte d'Ivoire started production ahead of Ghana. Ghana started significant production of oil from its Jubilee field only in November 2010. Based on further important new discoveries, including major fields in the area which Côte d'Ivoire now claims to be its territory, Ghana's production is expected to increase considerably in the coming years.

As you will have seen from our Written Statement, oil and gas production is now highly significant for the Ghanaian economy. It contributes a significant percentage of GDP from the Jubilee field alone, with nearly US$1 billion accrued to the State in 2014. For Ghana, this industry and its planned expansion are vital in supporting key national objectives, including infrastructure development.

Ghana and Côte d'Ivoire share a maritime boundary which has been mutually recognized for decades in numerous ways, although not formally delimited. This customary boundary is based on international law. Equidistance has been recognized by both sides as the basis for it. Mutual recognition of the border pre-dates UNCLOS and it has been recognized for nearly three decades since. The equidistance-based maritime boundary has been relied upon across a range of maritime activities. Ghana and Côte d'Ivoire have repeatedly represented to the world, over many years, including oil companies, that this is where the boundary lies and they have relied on that. Acts and documents under the hand of the founding President of Côte d'Ivoire, Felix Houphouët-Boigny, and of some of its most senior ministers, among many others, indicate a consistent representation of the boundary,

and the clear recognition by Côte d'Ivoire of where its maritime jurisdiction ends and that of Ghana begins.

Our national petroleum corporations have had excellent cooperation over the years. They have had no doubt in their dealings with each other and with the international oil industry about this maritime boundary. The respective Ministries with oversight of these national corporations have also acted with complete consistency in recognizing the same maritime boundary over decades. Billions of dollars of investment and millions of hours of human activity have been expended on the basis of it. Now, after lengthy operations in accordance with this boundary, Côte d'Ivoire asks this Special Chamber to declare that work should stop on Ghana's side of it. We respectfully submit that this would have no justification.

Mr President, Members of the Special Chamber, until Ghana was well advanced with its oil exploration programme on its side of the boundary there were no difficulties. At the time when Côte d'Ivoire had much more oil and gas production than Ghana, there were no claims about moving the maritime boundary. In 2009 Côte d'Ivoire started to make representations to Ghana about their desire to alter the boundary. Yet its public position did not change. None of its inconsistent positions has any proper justification in law.

To try to resolve the boundary issue peacefully and rapidly, Ghana's Boundary Commission actively engaged with Côte d'Ivoire over a period of some five years. Ghana's position was consistent, Côte d'Ivoire's was not. There was no real progress; the only thing provisionally agreed was the coordinates of a base point for the land boundary terminus.

Last year, Côte d'Ivoire sent further hostile correspondence, and it became clear to us that there would be no agreed resolution via the processes led by the Ghana Boundary Commission. Côte d'Ivoire issued threats to our oil companies. Ghana therefore acted to bring the matter to arbitration and ultimately before this Special Chamber, in the interests of continuity, stability and certainty.

The response of Côte d'Ivoire in this application has been extraordinary. For the first time, it accuses Ghana of lax environmental standards, without any credible evidence in support. For the first time, it accuses Tullow Oil, one of its own concessionaires, of incompetence with respect to production. Tullow has been producing effectively for the last five years. Perhaps most surprisingly, Côte d'Ivoire did not mention its own explicit recognition of the boundary from the 1960s to 2009. With all respect, Côte d'Ivoire has not offered a fair or balanced account of the facts and has not attempted to bring this situation within the recognized framework of law established by this Special Chamber.

The issue of alleged environmental harm was raised just three weeks ago in the few pages of the Request for preliminary measures. We have dealt with it fully and comprehensively in the short time available. The relevant institutions of Ghana and Côte d'Ivoire have been working assiduously over a period of years to ensure that oil pollution preparedness and response measures receive the necessary attention in the region. Our countries, together with other West African countries on their own or

under various international auspices (for example the IMO and IPIECA), are already collaborating on a number of environmental projects.

Ghana and Côte d'Ivoire, together with other member States of the Abidjan Convention, are even now working together to develop a protocol for common environmental standards for regulating the oil and gas industry within the region. We are committed to ensuring that oil exploration and extraction takes place within the framework of standards set out in the Convention. None of this is acknowledged by Côte d'Ivoire and, instead, it has chosen to make unfounded allegations against Ghana in respect of our regulatory system, as well as equally unfounded allegations against one of our partner companies. We respectfully invite you to firmly reject these allegations.

I turn to the impact on Ghana of the provisional measures sought. Ghana is particularly well advanced in an exploration and production project which began nearly ten years ago in the Deepwater Tano Block, where the TEN fields are located. It will bring further oil on stream from the TEN fields next year, pursuant to contracts originally signed in 2006. The lead operator, Tullow Oil, is highly experienced, particularly in West Africa. It has held the relevant concession since well before Côte d'Ivoire raised its claim. The project has involved extensive drilling over the past few years. Production equipment is under construction as we speak. Other related facilities are at various stages of maturity, all at a total cost of many billions of dollars. These activities are conducted within a democratic, strict, regulatory and environmental framework.

The impact of the provisional measures sought would be extraordinarily serious for Ghana. If the order were granted and all work had to stop, it would have a devastating impact on our oil production and exploration throughout a large area of maritime territory previously recognized by Côte d'Ivoire as belonging to Ghana. Ghana would risk losing its principal partners. There would be a massive impact on finance, employment and development. The impact would be irreparable and beyond quantification. I note with interest that not once did Côte d'Ivoire in its representations make any reference to Ghana's sovereign rights in the area or the harm that this request would cause to Ghana.

If Ghana were, in the end, held to be right by the Tribunal, the effect of the order sought by Côte d'Ivoire would be to have deprived Ghana for a period of over two and a half years of the majority of the vested rights it is exercising in the region. Côte d'Ivoire is silent on this. These are Ghana's sovereign rights, which it is exercising in accordance with UNCLOS and pursuant to the many contractual relationships it has with those with whom it works. That is not true the other way because, despite what Côte d'Ivoire says, this case has nothing to do with whether the resources should be explored and produced. The case is only about to which State's account the revenues and costs of that activity should be allocated. In the unlikely event that the Special Chamber departed from the established approach to boundary delimitation in this case and moved the boundary from its recognized position, any alleged loss would be quantifiable on the basis of production records.

Mr President, Ghana and Côte d'Ivoire have worked constructively together, sometimes through difficult times, to resolve differences peacefully. The measures

requested by Côte d'Ivoire would put that equilibrium in jeopardy. There is no justification in law, logic, fairness or on the evidence for the measures sought. They would be unprecedented, an invasion of sovereign rights that stand in the face of representations made by Côte d'Ivoire for more than four decades, on which we and others have relied.

May I turn to more recent events to put this application in context. After Ghana filed its claim, Côte d'Ivoire wrote to us last October, requesting that all petroleum activity in the region be halted. They did not mention the alleged concerns raised in the present application. They proposed an urgent meeting, giving just a few days' notice of a date, which in fact coincided with a summit of the ECOWAS in our capital, Accra. We responded constructively and proposed a meeting a few days later. They never took up our proposed dates and, until this application, they never raised with us any of the serious allegations they now advance. We take the view that there is no justification for any of the measures sought.

May I conclude by referring again to the United Nations. A key purpose of UNCLOS, set out in its preamble, is to contribute "to the strengthening of peace, security, cooperation and friendly relations among all nations". I am reminded that, in his speech commemorating the 30th anniversary of the opening for signature of the Convention in 2012, the President of ITLOS highlighted a particular advantage of this Tribunal: by taking an impartial decision on the grievances underlying a dispute, it could defuse international tensions. We respectfully submit that, were this UN Tribunal to shut down, by way of provisional measures, a major part of Ghana's established petroleum industry for two and a half years on the basis of Côte d'Ivoire's most tenuous claim to entitlement, that would have the opposite effect. We invite you firmly to decline the application before you.

I have asked Ghana's external counsel to develop these points in greater detail with reference to the documents and case law. May I therefore hand over to Mr Reichler and Ms Brillembourg to make the next presentation on the facts. They will be followed by presentations by Professor Klein on the international legal principles applicable before this Tribunal and by Ms Macdonald and Professor Sands as to why the measures sought should not be granted. I will then address you briefly again at the conclusion of the second round tomorrow.

Thank you, Mr President.

**THE PRESIDENT OF THE SPECIAL CHAMBER** *(Interpretation from French)***:** Thank you, Minister. I now give the floor to Mr Paul Reichler for his statement.

**MR REICHLER:** Mr President, Members of the Special Chamber, it is an honour for me to appear before this very distinguished panel, and to speak on behalf of the Republic of Ghana.

I will speak about the facts. In doing so, I will rely principally on the contemporaneous documentation: maps published by both Parties, laws and decrees, concession agreements with oil companies, correspondence with each other and third parties, and other published documents. These were annexed to Ghana's Written Statement, submitted on 23 March. The most pertinent of them

have been assembled in your Judges' folders, at tabs 1-22. By reviewing these materials, Ghana submits, you will find:

First, that for more than 40 years, starting in the late 1960s, Ghana and Côte d'Ivoire continuously were in agreement that a border existed between the maritime areas pertaining to the two States, and that the border followed an equidistance line.

Second, that for those four decades and beyond, Ghana's westernmost oil blocks and Côte d'Ivoire's easternmost oil blocks lined up along the equidistance line, which both States, in the words of the late Côte d'Ivoire President, Felix Houphouët-Boigny, regarded as "the border between the Ivory Coast and Ghana".

Third, that border, identified by its specific coordinates in a presidential decree issued President Houphouët-Boigny in 1970, was fully accepted and respected by both States for the next 40 years. This is demonstrated by consistent State practice over that time, in reliance on the border's existence and its specific location. In particular, Ghana's and Côte d'Ivoire's concessions extended right to the border line, but not beyond it, and they were expressly limited by that line in their respective concession agreements. Ghana's and its licensees' activities, including seismic surveying and other exploratory measures, and all drilling and production, were carried out on Ghana's side of the agreed line. Côte d'Ivoire's and its licensees' oil-related activities were performed on its side of the agreed line.

Fourth, each Party relied on the other's acceptance of the agreed border. As a consequence, they each invested heavily in oil exploration and production activities on their respective sides of the border line, and undertook contractual, financial and budgetary commitments of enormous importance and size. The result of such reliance is that it would today be impossible to halt or reverse ongoing developmental activities without, in the case of Ghana, causing severe and irreparable harm to its rights under the 1982 Convention, to its contractual relationships and to its economy in general, with widespread adverse consequences affecting broad sectors of the population, which depends heavily on revenues and employment generated by oil production, at the Attorney General has just said.

Mr President, the best way for me to take you through the documentary evidence is chronologically, one event at a time, and that is how, with your indulgence, I propose to spend the balance of my time. This offers you the best way to see the evidence for yourselves and not be forced to depend entirely on Counsel's description of it. Nothing relates the history better than the raw material itself, which Côte d'Ivoire, notably, has declined to put before you.

At tab 1 of your Judges' folder is Ghana's map of its offshore oil blocks as they appeared in 1968. It was published by the Ghana Geological Survey. If you look to the extreme left, or west, you will see that Ghana's westernmost oil block, number 1 at that time, is bounded on the west by a line drawn on the basis of equidistance. This was the line observed as the boundary both by Ghana and Côte d'Ivoire, as you will see in the next set of documents.

At tab 2 is an Ivorian document. It is an excerpt from the concession agreement of 12 October 1970 between Côte d'Ivoire and a consortium led by Esso. As you can

see on page 48, which is the second page of this tab in your Judges' folder, it was signed on behalf of Côte d'Ivoire by the President of the Republic, F. Houphouët-Boigny. Annex 1, on the next two pages, described the area delimited by the concession agreement. Under the headings "Region Delimited" and "in the maritime portion", it provides that the concession area is limited on one side "by the border line separating the Ivory Coast from Ghana between points K and L". The specific geographic coordinates of points K and L are then provided. You can see those for point K *here* on *this* page. Point L's coordinates are on the following page. The last page at this tab is a map, which we asked the cartographic firm International Mapping to prepare, plotting the line between points K and L, using the same coordinates as specified in the concession agreement. You can see that it is the same equidistance-based line that Ghana used to mark the western limit of its own oil concessions.

The document at tab 3 confirms this. It is another Ivorian document. This is a presidential decree, issued by President Houphouët-Boigny on 14 October 1970, two days after the concession agreement with the Esso consortium was signed. The decree granted an exclusive petroleum exploration permit to the consortium in the designated concession area. You will see that, in describing the boundaries of the maritime portion of the concession area, the decree states that the concession area is limited "by the border line separating the Ivory Coast from Ghana between points K and L". These are the same points K and L described in the concession agreement. The coordinates of these points, listed below in the presidential decree, match those in the concession agreement. As we have already seen, the line between points K and L, which constituted, in the Ivorian President's words, "the border line separating the Ivory Coast from Ghana", is the same equidistance line that Ghana, too, recognized as the maritime border.

For the next 39 years, at least, this remained Côte d'Ivoire's formal position on the location of the boundary, as well as Ghana's position. It is reflected again in Côte d'Ivoire's concession to Phillips in the 1970's. At tab 4 of your Judges' folders you will find a map called Ivory Coast Synopsis, showing Côte d'Ivoire's concessions as of 1978. You can see clearly here that both the Esso concession area in the north and the much larger Phillips concession area to the south are bounded on the east by the same line. That is the same line, extended seaward, that President Houphouët-Boigny called "the border line between the Ivory Coast and Ghana".

In the meantime, on 17 November 1977 Côte d'Ivoire enacted Law No. 77-926 "delimiting the Maritime Zones placed under the National Jurisdiction of the Republic of Ivory Coast." You will find it at tab 5 of your Judges' folders. In article 2, the law established a 200-mile exclusive economic zone. Article 8 is of considerable relevance to these proceedings:

> With respect to adjoining coastal States, the territorial sea zone and the zone referred to in article 2 of this Law shall be delimited by agreement in conformity with equitable principles and using, if necessary, the median line or the equidistance line, taking all pertinent factors into account.

This is important because of the emphasis it places on equidistance in the determination of Côte d'Ivoire's maritime boundaries. There are only two, with Ghana

and Liberia. So it must be assumed that Côte d'Ivoire understood equidistance to be an equitable solution in respect to those boundaries, including the one with Ghana. This provision of the 1977 law was never repealed, rescinded or amended; it remains Ivorian law today.

Thereafter, consistent with Ivorian law and practice, the equidistance line continued to be observed as the boundary with Ghana. This is reflected in Côte d'Ivoire's subsequent maps and other documentation.

At tab 6 is another Ivory Coast synopsis, showing Côte d'Ivoire's concessions as of 1983. You can see again the Esso and Phillips concession areas. Here the equidistance line that forms the eastern limit of both areas is rendered in the form of an international boundary, marked by the customary symbol of two dots and a dash, which extends beyond Côte d'Ivoire's most seaward concession area.

In response to these documents and maps, and to the others I will review with you this afternoon, two days ago Côte d'Ivoire submitted a single document. Their Counsel discussed it this morning. It is a telex from 1992, from the President of Côte d'Ivoire to his Ambassador in Accra, with instructions to propose to Ghana that, pending a planned meeting of the two States' boundary experts, both States should refrain from further activity in the border area. This, of course, is not evidence of what was said by the Ivorian Ambassador to Ghana, if anything. There is no record of that.

My good friend Professor Pellet told you this morning that all these years are studded with Côte d'Ivoire's protests of Ghana's activities. Mr Pitron told you that there was repeated opposition by Côte d'Ivoire. This surprised us. We waited to see the documentary evidence of these protests, since we were aware of none, and in fact there were none. This 1992 telex is the only stud that they could come up with – not a shred of any other evidence of protests during the 39-year period between 1970 and 2009; and the telex is not much of a stud at that. It is not evidence of protest by Côte d'Ivoire. It does not protest Ghana's activities in the border area of demand their cessation. It proposes only a mutual and temporary cessation, and in fact the telex did not result in a cessation of either Party's activities in the border area.

Most importantly, the telex does not say that the border is somewhere other than along the customary equidistance boundary line that both States recognized in practice as well as law. In fact, both States continued to grant concessions and carried out development activity in that area, in all cases respecting the customary equidistance boundary line, as they had in the past and as you will see.

At tab 7 you will find a document published by Côte d'Ivoire's Ministry of Mines and Energy the very next year, which is entitled "Côte d'Ivoire 1993 Petroleum Evaluation Concessions". The entire document is annexed to Ghana's written submission, in case you want to see this excerpt in context. Here you can see on page 2 the now familiar line that marks the eastern limit of Côte d'Ivoire's concessions. You can also see that the maritime area east of that line is labelled "GHANA".

At tab 8 is an excerpt from PETROCI's 2002 publication entitled "Exploration Opportunities in Côte d'Ivoire". Again, the entire document is annexed to Ghana's written submission in case you wish to see it. Page 3 of this document is a map showing Côte d'Ivoire's Petroleum Exploration Concessions. You will note, of course, that the same equidistance line that appears as the border with Ghana in all previous Ivorian maps and concession agreements appears here as well; and, here again, the line is depicted cartographically as an international boundary, with a dash and two dots.

The document at tab 9 is to the same effect. It is an excerpt from PETROCI's publication, in May 2005, called "Deepwater Opportunities in Côte d'Ivoire". On page 3 there is a map labelled "Petroleum Exploration Concessions". Again, the customary equidistance line is shown as the eastern limit of Côte d'Ivoire's concessions, and the international boundary with Ghana.

Côte d'Ivoire awarded two concessions in the border area in 2005 and 2006, where Esso and Phillips had previously operated. The first was to Vanco, for a block designated as CI-401. The map of the concession area, as depicted by Côte d'Ivoire, is at tab 10 of your Judges' folders. You can see that it is bounded in the east along a line extending from point 5 to point C, whose coordinates are provided. The line between those two sets of coordinates matches the customary equidistance line; and you can see that the maritime area directly across the line is labelled "GHANA".

At tab 11 is a map of the concession area granted by Côte d'Ivoire to YAM's Petroleum the next year, 2006. YAM's block is designated CI-100 and is directly south of Vanco's block. It too is limited in the east by the equidistance boundary with Ghana.

At tab 12 is a document issued by Petroleum Geo-Services in cooperation with PETROCI in February 2008. It shows the areas where Côte d'Ivoire and its licensees carried out seismic surveys. It shows that all of these activities were carried out west of the customary equidistance boundary with Ghana. No such activities are shown east of the boundary, on the Ghanaian side.

Mr President, as you have heard, Côte d'Ivoire informed Ghana, in bilateral talks during February 2009, 39 years after President Houphouët-Boigny's decree, that it would no longer accept the equidistance line as the boundary between the two States, but nothing changed as a result of that statement. Côte d'Ivoire's public position and practices did not change. Its 1977 law referring to equidistance as the basis for its maritime boundaries was not changed. It continued to depict the customary equidistance line as its boundary with Ghana in its maps and other publications and in its communications with the outside world, and it continued to conduct exploratory and drilling activities only on its side of the equidistance line.

Mr President, may I now refer you to tab 13 of the Judges' folders. This map is from Côte d'Ivoire's submission to the United Nations Commission on the Limits of the Continental Shelf presented in May 2009, three months after the bilateral meeting with Ghana. The west-to-east line on the left, in blue and green, is the outer limit of Côte d'Ivoire's continental shelf beyond 200 miles. It stops in the east at the customary equidistance line, which we have superimposed on the map in pink. Also

superimposed, in yellow, is the horizontal line representing the outer limit of Ghana's extended continental shelf, which was presented to the CLCS a month earlier, in April 2009, and which Côte d'Ivoire did not protest. As you can see, in April and May 2009 both Côte d'Ivoire and Ghana were manifesting to the United Nations their acceptance of the equidistance line as the boundary between their respective claims beyond 200 miles.

The document at tab 14 was co-published by PETROCI in November 2009, on the occasion of an international oil industry conference in South Africa. It is in a document entitled "Petroleum Concessions in Africa Upstream: Deepwater Côte d'Ivoire Potential". As you can see, at page 17, Côte d'Ivoire's concession blocks are still shown as limited in the east by the customary equidistance line with Ghana.

At tab 15 is a similar Côte d'Ivoire map, showing its "Petroleum Exploration Concessions", dated January 2010. It, too, shows the customary equidistance boundary as the boundary with Ghana. You will note here that the equidistance line again continues beyond the limits of Côte d'Ivoire's most seaward concessions, indicating that it is more than a line of separation between the Parties' respective oil concessions. It is an international boundary line.

The document at tab 16 is an excerpt from Côte d'Ivoire's Strategic Development Plan for the period 2011-2030, prepared by its Ministry of Mines, Petroleum and Energy. It was prepared with the cooperation of the World Bank, and presented to a conference of donors in December 2012. At page 14, it describes block CI-100 as "located in deep waters (1800 to 3,000 m) east of Côte d'Ivoire and it is right next to the Ghanaian border". As we saw at tab 13, block CI-100 is bounded in the east by the customary equidistance line, referred to here as the Ghanaian border.

At tab 17 is a 2012 publication by PETROCI, which was still accessible on PETROCI's website ten days ago. On page 17, it describes drilling in block CI-401, the former concession area of Vanco that we examined earlier at tab 10, which was bounded in the east by the equidistance line, as "near the border with Ghana".

Like Côte d'Ivoire, Ghana, too, regarded the equidistance line as "the border between the Ivory Coast and Ghana". Ghana has never deviated from this position.

Mr President, you saw in Item 1 that Ghana's maps showed the equidistance line as the boundary with Côte d'Ivoire as far back as 1968. It has treated this line as the international border in every concession agreement, and in all of its seismic and other exploratory activities, and in all of its drilling and development activities, and in all of its communications with Côte d'Ivoire and third parties, ever since.

At tab 18, you will find a sample of five maps from Ghana's written submission plus enlargements covering the period from 1970 to 2003, which show Ghana's oil blocks bounded in the west by the customary equidistance boundary line.

Mr President, as you and your colleagues undoubtedly know, when seismic surveying is done close to an international border, it is frequently the case that, for the surveying ship to complete its mission, it must cross the boundary line for a short distance before it can turn around and swing back the other way. It is necessary, in

these circumstances, for the State whose licensee is doing the surveying to request the permission of the other State to cross into its waters.

This happened regularly between Côte d'Ivoire and Ghana. When Côte d'Ivoire's licensees had to cross the equidistance boundary in carrying out their seismic surveys, Côte d'Ivoire sought permission from Ghana to enter its waters. And when Ghana's licensees had to cross the boundary during their seismic surveying, Ghana regularly sought – and obtained – Côte d'Ivoire's permission to enter Ivorian waters. Ghana's written requests to Côte d'Ivoire sometimes included maps showing the boundary line, and the locations where Ghana's licensees needed to cross it.

At tab 19 you will find a typical exchange. You will find Ghana's request of 31 [October] 1997, pertaining to a seismic survey of Ghana's Tano West Block. This was accompanied by a map showing the area of the survey, and the boundary line, with the words "Ghana" and "Ivory Coast" spelled out just to the east and west of the equidistance line, respectively. You will also find Côte d'Ivoire's response of 28 November 1997, from its Minister of Petroleum Resources, consenting to the crossover into Ivorian waters. Notably, the Ivorian Minister recognizes that Ghana:

> has sought the approval of the authorities of the Republic of Côte d'Ivoire to conduct seismic recordings *[Interpretation from French]* in Ivorian territorial waters close to the maritime boundary between Ghana and Côte d'Ivoire *[Continued in English]* in the zone covering an area of 5 km in length in the immediate vicinity of the IVCO26 IBEX wells in Côte d'Ivoire.

Notably, the Ivorian Minister did not complain, upon seeing this map, that the seismic surveying planned for the maritime area east of the equidistance boundary line was in Ivorian waters. In fact, at no time did Côte d'Ivoire protest to Ghana about Ghana's, or its licensees', seismic surveys, or other exploratory activities, on the east side of the long-established boundary line. Nor did Côte d'Ivoire ever ask Ghana to share with it any of the seismic information Ghana or its licensees had obtained east of the customary equidistance line – never at least before February 2015.

In Ghana's view, these facts demonstrate that over more than four decades there was an agreed maritime border between the two States, and that it consisted of an equidistance line. It is Ghana's further view that, based on Côte d'Ivoire's long and unbroken acceptance of that line as the border between the two States, and Ghana's reliance on it, Ghana has rights – we would say exclusive rights – to explore for and produce oil on its side of the customary equidistance boundary. These are the rights Ghana seeks to confirm in these proceedings, at the merits phase. They are therefore in issue in these proceedings, as Professor Sands will explain. Côte d'Ivoire seeks, by its request for provisional measures, to impair these rights. We say the harm caused by such impairment would be severe and irreparable. My colleague, Clara Brillembourg, will address the severity and irreparability of the harm to Ghana following my presentation.

Mr President, to be sure we are not at the merits stage yet. But even so, Côte d'Ivoire has no plausible case that the boundary line could be anywhere near where they currently claim it to be. Their recent struggle to justify an alternative to the long-accepted and respected equidistance border has been inconsistent and illogical. It has proffered three different lines in discussions with Ghana, in just three

years. At tab 20, we have supplied a map, which depicts the three newly-minted Ivorian claim lines, in comparison with the customary equidistance boundary. As you can see, first there was Meridian 1, proposed in 2009. This was replaced by Meridian 2, in 2010. In 2011, Côte d'Ivoire took an entirely different approach, proposing an angle bisector. What these divergent and contradictory approaches show is that, since 2009, Côte d'Ivoire's claims have been, literally, all over the map.

The so-called "disputed triangle" that we heard about this morning did not even materialize until the angle bisector was proposed in 2011. An angle bisector? On this coast? Not plausible.

In their Request for provisional measures in February 2015, they presented an entirely different line, which they called an "Equidistance Line as calculated by Côte d'Ivoire". You have seen it during their presentation this morning, and, for your convenience, it is at tab 21 of our Judges' folder this afternoon. The new line is not presented as another Ivorian claim line. Instead, it is intended to make it appear to you that Ghana's westernmost concessions extend beyond an equidistance line, and that significant oil deposits straddle the line such that, if Ghana were to exploit these fields, it would extract oil from the Ivorian side.

As Ghana pointed out in its written submission, there are serious problems with Côte d'Ivoire's purported rendition of an equidistance line. In the first place, the dashed black line they have drawn is not the customary equidistance boundary that both States regarded as the border between the Ivory Coast and Ghana for 40 years. The customary equidistance boundary line is shown in red *here*. Côte d'Ivoire has labelled it here as Ghana's claim line. That is, in fact, the line described by President Houphouët-Boigny as the border line between Ghana and the Ivory Coast. As you can see, Ghana's concession areas do not extend beyond the long-recognized customary equidistance boundary, and none of the fields depicted by Côte d'Ivoire – even assuming they are correctly depicted – extends across that line into Ivorian territory. There are, in short, no straddling fields.

At tab 22, you will find a map that shows why Côte d'Ivoire's calculation of an alleged equidistance line, its dashed black line, is manifestly wrong. We explained in our written submission that Côte d'Ivoire's line does not appear to be based on accurate coastlines of either Ghana or Côte d'Ivoire. Those coastlines, in the vicinity of the land boundary terminus, have been identified here based on our map, based on properly geo-referenced satellite imaging, and they are indicated in purple. The coastlines used by Côte d'Ivoire to plot its so-called equidistance line are indicated in gold. As you can see, the coastlines used by Côte d'Ivoire are considerably seaward of the actual coastlines, by distances ranging between 500 and 800 metres. This may be why Côte d'Ivoire offered no base points for its purported equidistance line in its Request for provisional measures.

On top of this, the artificial coastline of Côte d'Ivoire has been extended seaward further south than the artificial coastline of Ghana – 800 metres to 500 metres. This has the effect of rotating the coastline counter-clockwise, so that the equidistance line calculated by Côte d'Ivoire on the basis of these artificial coasts is shifted eastward, that is, into Ghanaian waters, to the advantage of Côte d'Ivoire.

I don't think any more needs to be said about this line except: *one,* it is not an equidistance line; and *two,* more importantly, it is not *the* equidistance boundary line that both Parties regarded as their border for four decades.

I can sum up briefly.

First, for more than forty years, starting at least in the late 1960s, Ghana and Côte d'Ivoire demonstrated in their practices, maps, and statements to one another and third parties, that there was an agreed border separating their respective maritime territories, and that it consisted of an equidistance line, whose specific coordinates were identified and reflected in their oil concession agreements.

Second*,* Ghana's westernmost oil blocks and Côte d'Ivoire's easternmost oil blocks lined up along the same line, which both States regarded as "the border between the Ivory Coast and Ghana".

Third*,* the border as described by President Houphouët-Boigny was fully accepted and respected by both States over a forty-year period, as demonstrated by their consistent State practice and mutual recognition of the border's existence and specific location.

Fourth, each Party relied on the other's repeated manifestations of its acceptance of the agreed border, to invest heavily in activities on its side of the line, and to undertake contractual, financial and budgetary commitments of great importance and size.

Fifth, Ghana claims sovereign rights on its side of the customary equidistance boundary, including the rights to explore for and produce oil. And these rights would be severely harmed if the provisional measures requested by Côte d'Ivoire were ordered.

In particular, as shown in Ghana's written submission, and as the Attorney General has said, it would today be impossible to halt or reverse development activities in Ghana's concession areas without causing serious and irreparable harm to its rights under the 1982 Convention, to its contractual relationships, and to its economy as a whole.

Mr President, Members of the Special Chamber, I thank you for your kind courtesy and patient attention, and ask that you call Ms Brillembourg as Ghana's next speaker.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Reichler. I give the floor to Ms Clara Brillembourg.

**MS BRILLEMBOURG:** Mr President, Members of the Special Chamber, it is my great honour to appear before you on behalf of the Republic of Ghana.

My task is to speak to you about harm. Is there imminent and irreparable harm to Côte d'Ivoire's rights such as to support the measures it seeks? And, if so, does that

harm outweigh the harm that would be caused to Ghana if the request were granted?

I begin with the harm to Ghana. As Mr Reichler has shown, Ghana began its offshore petroleum development in the 1960s. Year after year Ghana continued to openly license its concessions up to the recognized boundary line and invest in developing its resources within those concessions. Today, these activities and investments continue as they have for over 40 years. Ghana currently has nine concessions affected by Côte d'Ivoire's newly claimed territory, shown in the map in tab 23 of your Judge's folder. Eight of the concessions are undergoing exploration and assessment activities, which are fundamental to developing future production and require repeated investigation. Some of the affected concessions are at advanced stages of this process. One concession has moved to the next phase and is in the midst of development for production: the TEN field in the Deepwater Tano Block, Ghana's largest and most productive investment to date. This block consists of two fields, the Jubilee field (which is east of Côte d'Ivoire's current claim) and the TEN field, which sits within Côte d'Ivoire's recently claimed boundary.

Ghana's concession agreement for this block was signed in March 2006, with Tullow as the lead partner. Côte d'Ivoire did not object. Ghana's Parliament publicly debated and ratified the agreement. Côte d'Ivoire did not object. Tullow announced a major oil discovery in 2007 and made public its plans to significantly increase investment and activities in the block. Côte d'Ivoire made no objection. Only in late 2011, some four years later, did Côte d'Ivoire tell Tullow and Ghana's other concession holders that it objected to these activities.

As set out in Ghana's Written Statement, the provisional measures Côte d'Ivoire seeks would deliver a crippling blow to Ghana's petroleum industry, cause major dislocations and set back economic development for many years.[1] Ghana has endeavoured to identify the most significant of these consequences, as has Tullow.

In his statement on behalf of Tullow Oil, found in tab 24 of your Judge's folder, its Chief Operating Officer, Mr McDade, explains in paragraphs 33 and 34 that after signing the 2006 concession agreement, US$ 1 billion was spent on exploration and assessment in Deepwater Tano. The resulting development of the TEN field, which is now 50 per cent complete, has required another US$ 4 billion, already committed in a series of lump sum contracts with major contractors across the globe. US$ 2 billion of this has already been expended. Today, the TEN project is recognized to be one of the most significant offshore oil developments underway anywhere in the world.

An order to stop these activities would have grave consequences. In the next paragraph of his statement, paragraph 35, Mr McDade describes the complex, widespread and potentially irreversible ramifications of such an order: "A mega-project of this scale and complexity involves bringing together myriad contractors, subcontractors, community stakeholders and lending parties in a series of highly complex and interlinked relationships."

[1] See Ghana's Written Statement, para. 48 et seq.

Because of this, he explains, "[s]topping such a project midstream is physically very difficult and not possible without incurring enormous adverse financial consequences for all of the parties involved."

Tullow estimates the additional cost that would result from a suspension of operations in the disputed area to be in the order of US$ 1-2 billion.

On top of this, there is the irreversible loss to Ghana's economy and development in the next several years that would result from an order to suspend these activities. This was all in our Written Statement. Côte d'Ivoire had no response this morning. I would like to draw your attention to tab 25 of your folder, where you will find the statement of Dr Asenso, on behalf of Ghana's Ministry of Finance. In paragraph 19 he explains, that

> the loss of revenue that would result from a moratorium would have a severe impact on Ghana's budget, which would restrict Ghana's ability to provide for its citizens' wellbeing, and result in a significant, complex, and difficult (and perhaps impossible) redistribution of Ghana's limited resources to attempt to compensate for the loss.

Such losses are inherently unquantifiable.

In the next paragraph he provides a clear example of what Côte d'Ivoire's requested order could mean:"ALL infrastructure projects in the 2015 budget are being funded by earmarked petroleum funds."

An order to suspend oil activities in this area would mean massive cutbacks in the future construction of roads to take farmers to the market and drive Ghana's economy forward, schools to educate Ghana's growing population, and modern hospitals and remote medical centres to keep Ghana's people healthy and alive.

The implications of an order go even further. Dr Asenso explains on the next page that Ghana has taken active steps to meet its international obligations by devoting part of the revenue received from its petroleum activities to "the retirement of the $500 million balance of the 2017 Eurobond, the entire 2023 and 2024 Eurobonds of $1 billion each and subsequent Eurobond issues".[2]

He then explains that the moratorium Côte d'Ivoire is requesting "will further deepen the liquidity constraints of the country, leading to: high fiscal deficits; loan repayment defaults; and unpreparedness for disasters."

The foreign exchange Ghana receives by exporting the oil it produces is also used for budget stabilization, as highlighted earlier, in paragraph 11.

> The rising export earnings have coincided with a rising import bill, leading to the furtherance of a current account deficit. A moratorium on oil production activities will thus have a serious impact on Ghana's current account position and ultimately the stability of the local currency.

[2] Statement of MOF, para. 22.

The magnitude of the impacts to Ghana from even a short-term loss of production are illustrated by the following figures: the TEN field is projected to provide Ghana US$ 2.2 billion in revenue in 2017, if operations continue. That is equivalent to over 250% of Ghana's annual budget for health services. It is more than 100% of Ghana's education budget. Accordingly, as Dr Asenso observes, at paragraph 27:

> Losing petroleum revenue as a result of a moratorium would have a dramatic effect on the State's budget, and therefore its ability to provide services to its citizens and to maintain economic self-sufficiency. Compensating for the loss in the near and medium term would be impossible.

All these serious harms with widespread reach and deeply felt impacts must be considered against Côte d'Ivoire's actions in previous years, offering no objections as the projects were put in place. After four decades of no harm, it now asserts imminent and irreparable harm to its rights, such as to require extraordinary and unprecedented measures. These measures are not justified. Côte d'Ivoire's allegations are contradicted by its prior practice and are unsupported by evidence.

Côte d'Ivoire cannot simply complain that Ghana's activities on Ghana's side of the customary equidistance boundary will deprive it of revenue. That type of harm, if it were alleged, is easily quantified and remedied by monetary compensation. It is not irreparable injury.

Since it cannot claim irreparable harm on that basis, Côte d'Ivoire argues that it is harmed irreparably by environmental harm to the marine environment, caused by Ghana's failure to take steps to protect its waters. This allegation is offensive, unsupported by the evidence, and untrue.

The environmental assessment process in Ghana is described fully in the statement by Mr Efunam of Ghana's Environmental Protection Agency, found in tab 27 of your folder. Every oil and gas project must have a comprehensive environmental impact assessment, which can take several months and sometimes years. In addition to an EIA for the project as a whole, site and task-specific environmental assessments are carried out before and after the EIA to provide tailored environmental permits for work to proceed.[3] As the project continues, Ghana requires an environmental management plan for every three years of operation. Constant monitoring is required by law. Concessionaires provide monthly and annual environmental monitoring reports. The monitoring for Jubilee is carried out by internationally recognized companies, such as Baker Hughes.[4] Operations are inspected and audited by the EPA's Department of Environmental Assessment and Audit or third parties. Tullow's operations in Ghana have also received independent assessments from the World Bank's International Finance Corporation to confirm that they meet its Environmental and Social Performance Standards, which are seen globally as best practice, as well as independent audits by recognized authorities to ensure that they meet other international standards, including the best-in-class ISO14001.[5]

[3] See also Statement of Tullow, para. 54.1 & Appendix 17.
[4] Statement of EPA, para. 26.
[5] Statement of Tullow, para. 53.

In addition to this rigorous process of checks and double-checks, which Dr Miron chose to ignore this morning, Ghana and its concessionaires have taken extraordinary steps to prevent any oil spills and to be fully prepared should one occur. Even before it became a signatory to the Oil Pollution Preparedness and Response Convention, Ghana established, and has continued to update, its oil spill contingency plan. In addition to having equipment and trained personnel in country, it has contracted with Oil Spill Response Limited to receive any international resources or assistance needed.[6] Tullow has also subscribed to ORSL and has a comprehensive seven-volume Oil Spill Response Action Plan.[7]

As a result of the high level of prevention and monitoring in place, Ghana's EPA confirms that "since the start of the Jubilee operations, there has not been an oil pollution incident resulting in an oil slick that has reached the shores of Ghana".[8]

Tullow affirms "with confidence that, to the extent there is any pollution in the area, it has nothing to do with activities in either the Jubilee or TEN Fields".[9]

Côte d'Ivoire's only evidence of environmental harms are satellite images showing what it claims is "endemic pollution" related to Tullow's operations and reports of dead whales arriving on Ghana's shores. The evidence offers no support to Côte d'Ivoire's imagined harms.

The use of satellite imagery to detect pollution is known to be subject to significant limitations.[10] Tullow's internal records confirm no spills or abnormal discharges during any of the dates presented in Côte d'Ivoire's images,[11] which do not show otherwise. To see this, please turn to tab 28 of your folder, which is annex 23 to Tullow's Statement. This technical analysis by Tullow reviews each of Côte d'Ivoire's alleged images of pollution and reveals their many shortcomings. For example, page 2 shows Côte d'Ivoire's first alleged incident, and page 3 shows Tullow's analysis of it. You'll see on page 3 that just left of the claimed pollution in the yellow square is a cloud and its shadow on the water. It is identical to the claimed pollution to its right. Côte d'Ivoire's so-called evidence turns out to be as evanescent as a shadow. The analysis continues from there, going through each of Côte d'Ivoire's alleged events. To this they responded this morning with hearsay from their experts, defending the flawed conclusions they had already reached.

Another significant limitation is that, even when done properly, satellite images cannot discriminate between oil and other organic matter that may be in the water, so "for example dark areas on imagery can also be caused by 'algae blooms'".[12]

This is a particular problem in the Gulf of Guinea. To illustrate this, I ask you to turn to the next tab 29 in your folder.[13] This is an aerial photograph of an oil slick in the

[6] Statement of EPA, para. 34-35.
[7] Statement of Tullow, para. 54.2-54.9.
[8] Statement of EPA, para. 36.
[9] Statement of Tullow, para. 85-86.
[10] Statement of Tullow, para. 85-86.
[11] Statement of Tullow, para. 85.
[12] Statement of Tullow, para. 86.
[13] Statement of EPA, Annex 2.

Jubilee area, reported by a passenger on a commercial flight. Or so it seemed from far above. Ghana's EPA promptly investigated the alleged slick, first through aerial inspection, which resulted in the photograph before you, then in an on-site inspection. The next photos show what they found. Seaweed – a lot of seaweed.

Côte d'Ivoire also unsuccessfully attempts to tie Ghana's oil activities to the death of whales washed onto Ghana's shores. What Côte d'Ivoire does not tell you is that this sad event has also been occurring in Togo, Benin, and Côte d'Ivoire. Scientific investigation has found no correlation between Ghana's oil and gas development and the beached whales.[14] What an investigation did find is that "the dead whales beached on Western Region shores since 2009 would have very likely died in marine waters well to the west of the Ghanaian marine zone".[15]

That is Côte d'Ivoire's case on harm. As the evidence makes clear, Côte d'Ivoire's accusations are unfounded. There is no evidence before you of proven harm and no evidence of risk of harm, much less the serious, imminent, and irreparable harm required for provisional measures, which Professor Klein will now address. By contrast, the harm to Ghana resulting from Côte d'Ivoire's requested order would be real, and it would be severe. The revenue on which Ghana relies to provide for the future welfare of its people, and to secure its economic stability, would be gone; and no payment of damages could possibly rectify that.

Mr President, Members of the Special Chamber, I thank you for your attention, and ask that you call Professor Pierre Klein as Ghana's next speaker.

**THE PRESIDENT OF THE SPECIAL CHAMBER** *(Interpretation from French)***:** Thank you, Ms Brillembourg.

I now call Mr Pierre Klein for his oral presentation. I must inform you, Mr Klein, that you will have to break off your statement at half past four to enable the Chamber, and you too, to have a 30-minute break. We will then resume later, at 5 o'clock.

**MR KLEIN** *(Interpretation from French)***:** Thank you very much. Mr President, distinguished Members of the Chamber, it is a signal honour for me to intervene here in the instant case on behalf of the Republic of Ghana. As has already been pointed out to you, it falls to me right now to briefly recall the legal framework of this Request for the prescription of provisional measures filed by the Republic of Côte d'Ivoire and to demonstrate subsequently that there is no urgency to prescribe such measures in the instant case given the lack of any imminent of prejudice to the rights of the opposing Party. My colleagues Alison Macdonald and Philippe Sands will demonstrate subsequently that the other conditions required to prescribe provisional measures are not met in the case both as regards the alleged serious harm to the environment and also regarding the injury to the rights alleged by the other side.

The conditions required for the prescription of provisional measures on the basis of article 290, paragraph 1, of the Montego Bay Convention are well known to us all. First of all, the *prima facie* jurisdiction of the court or tribunal seized, then there is a

[14] Statement of EPA, para. 45-47.
[15] Statement of Tullow, Appendix [28], p. 50.

risk of imminent irreparable harm being caused to the rights of one of the parties to the case, or serious damage to be caused to the environment, and finally urgency to act to ensure the protection of these rights before the tribunal seized can hand down its final ruling.

The jurisdiction of the Special Chamber can obviously not be called into question in the instant case because both Parties agreed to submit their dispute to it, but that is the sole point on which the Parties agree. In its Request for the prescription of provisional measures Côte d'Ivoire singularly failed to demonstrate, first, that there was any sort of urgency in the matter; secondly, that there was any sort of imminent risk of injury either to its rights or to the environment; thirdly, how the alleged harm to its rights could possibly be irreparable. If you allow me, I would like to run through the first two points, starting with this issue of the lack of urgency. The very essence of a request for the prescription of provisional measures resides in the fact that such request is based on urgency. It is self-evident, as one can see from the fully settled case law both of the International Tribunal for the Law of the Sea and the International Court of Justice, but our opponents seem to have totally lost sight of this self-evidence. Côte d'Ivoire does not say a word about it in its Written Request. Its very behaviour is particularly eloquent of this lack of urgency. Just to remind you, it was in September 2014 that Ghana filed its Request to submit the dispute to an arbitral tribunal under Annex VII of the Montego Bay Convention.

As of that moment, Côte d'Ivoire could have undertaken international action by relying on article 290, paragraph 5, of the Convention to request provisional measures with a view to protecting its rights. It did nothing of the sort. It was only in a note verbale at the end of October 2014 that the other side evoked for the very first time its intention to request such measures. However, once again, here urgency seems wholly relative because you have to wait another four months before finally Côte d'Ivoire files a request for the prescription of provisional measures, which is now before this Chamber. At the end of the day, one might say that the only urgency that the Ivorian authorities seem to have felt over time was the urgency to do nothing at all.

In reality, if the other side has lacked this feeling of urgency, it is because urgency did not exist and, if it did not exist, that is because there is no imminent risk of irreparable harm likely to be caused to its rights. Judge Ndiaye perfectly understood and underscored the close link between these two elements when he wrote that if irreparable harm is not imminent, then there is no urgency.[1]

Just as Côte d'Ivoire fails to establish any urgency whatsoever in this case, it also fails to show the imminence of any risk of harm to their rights or to the environment – and for good reason. The situation underpinning the current proceedings has existed for decades. A few minutes ago my colleague Paul Reichler amply demonstrated the extent to which the entire situation is characterized by stability and the wholly constant and consistent position of the two States regarding the course of their maritime boundary in this area – at least, that is, until the about turn of Côte d'Ivoire in 2009, and that is a crucial element. Since 2009 Ghana has done nothing that

[1] "[I]f the irreparable harm is not imminent, there is no urgency"; Ndiaye, "Provisional Measures before the International Tribunal for the Law of the Sea", in *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, at 98.

might call into question the state of play in the area concerned. It is only in a very roundabout fashion that the opposing Party adduces the imminence of the risk of irreparable prejudice to its rights in its Request for the prescription of provisional measures.

Côte d'Ivoire thus attempts to construct a scenario whereby Ghana's attitude is allegedly characterized since the filing of proceedings by "a desire to create a *fait accompli*, which will largely render the future delimitation ineffective".[2] The opposing Party uses as evidence for this "a steady acceleration of unilateral Ghanaian activities in the disputed area". This acceleration is inferred from the fact that "seven of the nine Ghanaian petroleum blocks located partially or wholly in the disputed area were awarded by Ghana in 2013/2014".[3] This allegation of acceleration in the zone, let me repeat once again, is something that was repeated over and over again this morning.

Once again, our contradictors propose a scenario to you which has nothing whatsoever to do with the reality of the facts. As you know, on this chart annexed to the written observations of Ghana – 17 – already in 1977 the quasi totality of the area concerned had been awarded for exploration to Phillips. There have been many changes of concession-holders and subdivisions of blocks since then, and seven of the blocks in the disputed area were re-awarded in 2013/2014. However, what we are talking about here is a re-awarding; we are not talking about a first award, as the other side would have you believe.

Has there been an acceleration of activities in the area? Yes, but it has nothing whatsoever to do with any kind of strategy devised by Ghana. It is quite simply the result of the major discovery in the area in 2007, which will lead to the exploitation of the field TEN block in 2016, as Ms Brillembourg explained a short while ago. The dates 2007 and 2016 speak for themselves, but there is no evidence at all of some Ghanaian Machiavellian strategy.

Let me now come back to the legal issues. Even if Côte d'Ivoire's written pleadings do not express it in these terms, it is this so-called "new situation" that allegedly could lead to the imminent risk of irreparable harm to the rights of Côte d'Ivoire, justifying the prescription of provisional measures.

On this point our opponents base their argument on two legal precedents which allegedly would establish the unacceptable character of unilateral actions undertaken by a State in a disputed maritime area. In this connection they refer to the *Continental Shelf in the Aegean Sea*, brought before the International Court of Justice, and the *Maritime Delimitation between Guyana and Suriname* decided by an arbitral tribunal set up on the basis of Aannex VII of the Montego Bay Convention. However, if you look at these two precedents a little more closely, one quickly realizes that they provide no support whatsoever for Côte d'Ivoire's argument, whether in terms of the facts or the law.

[2] Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, 27 February 2015, p. 12, para. 18.
[3] *Ibid.*

Let us look at the facts first. It is clear that the contexts of these two cases differ radically from the context of the present case. Both the *Continental Shelf in the Aegean Sea* and the *Maritime Delimitation between Guyana and Suriname*, the two relevant jurisdictions were seized of situations in which exploration activities had been conducted for the first time in areas long been disputed between immediately adjacent neighbouring States. As has been underscored on a number of occasions, that is not so in the instant case. The exploration and production activities that are carried out or authorized by Ghana in the area in question are not new facts. Quite to the contrary, they are but the prolongation of a continuing state of affairs based over a very long period of time on the agreement of the two States concerned. In this particular case we are quite a long way from the situations that prevailed between Turkey and Greece in the Mediterranean and between Guyana and Suriname in the Atlantic.

Mr President, if you wish, before looking at the rather more legal questions raised by these two precedents, possibly this would be an opportune time for the planned break.

**THE PRESIDENT OF THE SPECIAL CHAMBER** (*Interpretation from French*)**:** Yes, let us take a half-hour break. We will come back here at 5 o'clock.

(*Break*)

**THE PRESIDENT OF THE SPECIAL CHAMBER** (*Interpretation from French*)**:** We shall resume the hearing.

Mr Klein, you have the floor, but be aware that we have two other speakers who together add up to 55 minutes' speaking time, so you can see that in one hour you have not much time left, but of course my colleagues are generous and they say that they are willing to allow an additional five minutes.

**MR KLEIN** (*Interpretation from French*)**:** Thank you, Mr President. We shall do our utmost to stick to our originally allotted speaking time.

Mr President, Members of the Special Chamber, I have demonstrated that the two precedents on which Côte d'Ivoire relies in its argumentation are factually unrelated to the present case; and, as regards the law, the least you can say is that our learned friends offer an odd reading of the two precedents. First of all, with regard to the *Aegean Sea Continental Shelf*, the Written Statement of Côte d'Ivoire cuts up the arguments of the Court into wafer-thin slices, which are then reassembled in a particular manner. Judge for yourselves – and I trust that Members of the Chamber will excuse the relatively piecemeal reading that is about to follow – but on page 15 of their Statement, the relevant excerpt of which you now have on the screen, our opponents declare that,

> the oil activities undertaken by Ghana in the disputed area go well beyond simple seismic exploration activities in so far as they involve drilling together with 'the establishment of installations on or above the seabed of the continental shelf' which, as the International Court of Justice pointed out in its Order of 11 September 1976 in the *Aegean Sea Continental Shelf Case*, raise 'a question of infringement of the … exclusive right of exploration' of

> the other State in the dispute and are likely 'to justify recourse to its exceptional power … to indicate interim measures of protection'.[4]

This is an odd reading of the Court's order. What does the Court actually say in point of fact? Two things. First: "seismic exploration of the natural resources of the continental shelf without the consent of the coastal state might, no doubt, raise a question of infringement of the latter's exclusive right of exploration …".[5]

Secondly, "
… the possibility of such a prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection ...."[6]. The Court recalling the necessity of demonstrating that the rights in issue may suffer irreparable prejudice.

In other words, starting from a judgment which states that exploration activities are not sufficient to justify indicating measures unless there is also a risk of irreparable prejudice to the rights of the coastal State, our opponents seem to have developed a form of reverse reasoning. According to the opposing party, in its 1976 order, the Court purportedly concluded that if the activities concerned go beyond exploration, then an indication of measures is justified. However, as we have just seen, the Court said no such thing. On the contrary, it refused to indicate measures, and pivotal in its reasoning was the absence of a risk of irreparable prejudice to the rights of one of the Parties and not the nature of the activities concerned. Shortly, Philippe Sands will show you that there is no such risk in the situation before the court today.

If I can be allowed to return to my metaphor, we can enjoy creative cooking, but it must be said that there are times when it is particularly indigestible, and that is certainly the case where, as here, we are dealing with fraudulent misrepresentation of the goods, and the way in which our learned friends handled the second precedent – Guyana and Suriname – unfortunately follows the same pattern.

According to the Written Statement of Côte d'Ivoire, the arbitral tribunal purportedly said the following regarding unilateral acts undertaken by a state in a disputed area:

> *(Continued in English)*
> Unilateral acts that cause physical change to the marine environment (...) could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardizing the reaching of a final agreement.[7]

(*Interpretation from French*) In other words, regardless of context, unilateral acts leading to a physical change in the environment are therefore unacceptable because they hinder the reaching of a settlement in the dispute, and consequently they are deemed to justify provisional measures.

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[4] *Ibid.*, p. 15, para. 23, citations omitted.
[5] *Aegean Sea Continental Shelf*, *I.C.J. Reports 1976*, pp. 11-12, para. 31.
[6] *Ibid.*, p. 12, para. 32.
[7] Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, 27 February 2015, p. 15, para. 23.

Yet if we refer to the judgment itself, the conclusion has to be that what the arbitrators actually said was rather more subtle than that, and I think it relevant to recall that this was not at all concerned with a request for provisional measures. May I now quote the original – this time not sliced and diced but the real thing – which I think will have us salivating?

> *(Continued in English)*
> Unilateral acts that cause a physical change to the marine environment will generally be comprised in a class of activities that can be undertaken only jointly or by agreement between the parties. This is due to the fact that these activities may jeopardize or hamper the reaching of a final delimitation agreement as a result of the perceived change to the status quo that they would engender.[8]

(*Interpretation from French*) When you read those two extracts in parallel, it is all too clear that our opponents have deliberately omitted from their citation elements that quite plainly were central and key to the reasoning of the tribunal. Professor Pellet was far more complete in the reading that he offered this morning. In any case, what appears crucial is that these unilateral acts may not be carried out without the consent of the other Party or if they entail a risk of challenging or changing the status quo; and yet how could that possibly be the case for activities carried out or authorized by Ghana in the area concerned? Earlier this afternoon my colleagues showed that Côte d'Ivoire's consent to the activities carried out in the area by Ghana was beyond all doubt, at least up until 2009, and perhaps beyond because, as was pointed out a few moments ago, by remaining silent in its dealings with Tullow and the other companies working in the area up until 2011, the Ivorian authorities did nothing to deter them from continuing their projects.

It is equally clear that these activities have not changed the *status quo* either. This area, which had consistently been considered as belonging to Ghana, simply continues to be explored or exploited by the latter, or under its authority.

It would be most inappropriate now for our opponents to talk about an imminent risk of irreparable damage resulting from acts carried out by or authorized by Ghana in absolute continuity of a situation which has obtained, quite clearly, for several decades.

Mr President, Members of the Special Chamber, you know all too well that much hinges on the choice of words in a legal argument – the decision to use a term, for example, but also the decision not to use a certain term. The opposing Party has filed a Request for provisional measures based on a 29-page written statement. It succeeds in not once using the words "urgency" or "imminent risk", which is a remarkable achievement; and yet these are requirements that are unanimously recognized as necessary for the prescription of provisional measures. The terms selected by Mr Pitron this morning are equally telling because he himself says that he had set aside the matter of urgency. You cannot be much clearer than that. Ghana can only invite the Chamber to note the attitude of our opponents in assessing the merits of its Request.

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[8] Award of 17 September 2007, *Delimitation of the maritime boundary between Guyana and Suriname*, *RIAA*, vol. XXX, p. 137, para. 480.

I thank the Members of the Chamber for their attention. I request, President, that you now hear my colleague Alison Macdonald.

**THE PRESIDENT OF THE SPECIAL CHAMBER** *(Interpretation from French)***:** Thank you, Mr Klein, in particular for respecting your speaking time so that your colleagues can now continue their statements. I give the floor to Ms Alison Macdonald.

**MS MACDONALD:** Mr President, Members of the Special Chamber, it is my privilege to continue the oral argument on behalf of the Republic of Ghana.

Following on from Professor Klein's analysis of the applicable law, Professor Sands and I will apply those legal principles to the facts which Mr Reichler and Ms Brillembourg have outlined. We will present Ghana's submissions that no provisional measures are justified in this case, and that Côte d'Ivoire's application should be refused in its entirety. My submissions will focus on the environmental issues, and Professor Sands will cover the other rights which Côte d'Ivoire claims require interim protection.

Protection of the marine environment is, rightly, a high priority of the Convention. And the starting point for considering the environmental issues is that an imminent risk of serious and irreparable harm to the marine environment would, of course, be a situation in which some form of provisional measures may be justified. But the State which alleges such a risk must back up those allegations. The environment is not a trump card which can simply be waved in order to get what the State wants. Just as with every other allegation, whether at preliminary measures stage or at the merits stage, allegations of environmental harm must be supported by sound and persuasive expert evidence.

In his separate opinion in the *MOX Plant* case,[1] Judge Wolfrum emphasized that even where "an applicant argues with some plausibility that its rights may be prejudiced or that there was serious risk to the marine environment", the grant of provisional measures should not become automatic. As he said, "[t]his cannot be the function of provisional measures, in particular since their prescription has to take into consideration the rights of all parties to the dispute".

In other words, provisional measures are flexible and nuanced; they are not rigid and mechanical. But for the reasons which I will develop in a moment, Ghana submits that this is not even a case where the State requesting preliminary measures has argued, in Judge Wolfrum's words, "with some plausibility" that the marine environment is at risk. This is a case in which Côte d'Ivoire asserts environmental harm but offers not a shred of real evidence in support.

Côte d'Ivoire's claims that there is an imminent risk of serious and irreparable harm to the marine environment are set out in seven brief paragraphs of its Request. The supporting documentary evidence is scant, to put it generously. Côte d'Ivoire

[1] *MOX Plant (Ireland* v. *United Kingdom)*, *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, *Separate Opinion of Judge Wolfrum*, p. 134.

supplies no witness statements to back up its claims, and precious little other documentation, primarily a short selection of press articles. There are no reports of experts suggesting the possibility of environmental harm.

The first time that Ghana was aware of these allegations was when it read Côte d'Ivoire's Request for provisional measures. This, we submit, tells you a lot about the true urgency of the situation. If Côte d'Ivoire genuinely believed that there was endemic pollution in the Jubilee field; or that this situation was starting to be, or was likely to be, reproduced in the TEN field; or that Ghana had entrusted important petroleum operations close to the maritime boundary to an operator with poor environmental standards, then why did it not say so earlier?

Ghana submits that the failure to do so is highly relevant to the Chamber's assessment of the evidence. Is there *really* an environmental emergency, such that the Chamber should take the exceptional and unprecedented step of shutting down a substantial part of Ghana's petroleum operations? If there *was* and *is* such an emergency, why has Côte d'Ivoire never mentioned it before? It has said absolutely nothing on the subject; yet, as you have heard, these are two neighbouring States with excellent relations. Why not mention their concern during the ongoing bilateral talks? Why not take the simple step of sending a note verbale? Why not raise it as part of the frequent and cordial contact between Ministers of the two States?

Then, when Ghana instituted its claim under the Convention, why not raise the supposed environmental emergency promptly after that? The moment Ghana filed its claim, Côte d'Ivoire had access to ITLOS under article 290, paragraph 5, giving it the opportunity to seek provisional measures from the full Tribunal. The Tribunal has proved on many occasions that it can act quickly, yet it took Côte d'Ivoire more than five months after Ghana filed its claim even to make this application. If the risk to the environment is so serious and so pressing, how could such a delay possibly be justified? What responsible State with a true concern would delay while its waters were being subjected to endemic pollution?

Ghana suggests that, regrettably, when one combines the lack of evidence and the failure to raise these matters sooner, one sees the environmental allegations for what they are – completely unfounded.

The requirements of article 290 are difficult to meet in this case because, at heart, Côte d'Ivoire's complaint is simply that Ghana intends to continue petroleum operations in the newly disputed area while this case is pending before the Special Chamber. This is *not* a case where one State wishes to keep the disputed area untouched, and the other wishes to exploit its natural resources. On the contrary, it is quite clear that Côte d'Ivoire wishes to do exactly what Ghana is doing – that is, to license operators to explore and in due course recover oil and gas.

As I have said, in scrutinizing this request, the Chamber must consider whether Côte d'Ivoire's belated environmental allegations have any substance. In saying so, we are again mindful of Judge Wolfrum's observation in the *MOX Plant* case that "it would not have been in conformity with the limited jurisdiction the Tribunal has in prescribing provisional measures if it had evaluated the limited documentary evidence submitted by both parties".

However, the Chamber will need to form a view as to the weight of the evidence which supports Côte d'Ivoire's allegations of environmental risk, and Ghana's case to the contrary, in order to decide whether Côte d'Ivoire has met the requirements of article 290 and, if there is indeed a serious and imminent risk of irreparable harm, the Special Chamber will have to consider how that harm balances against the harm which would be caused to Ghana by the measures sought.

In order to form a view on this issue, you have Ghana's written submissions, and the oral presentation of Ms Brillembourg. In sharp contrast to the seven paragraphs provided by Côte d'Ivoire, Ghana has carefully analyzed those allegations and provided a wide range of evidence in response. You have, in particular, the statements of Kojo Abgenor-Efunam, Head of the Petroleum Department of Ghana's Environmental Protection Agency, and Paul McDade, Chief Operating Officer of Tullow Oil Company.

I would suggest, Mr President, that several key points can be drawn from the evidence. First, Mr McDade of Tullow describes Tullow's long history of operations in Côte d'Ivoire, stretching back to 1997. It would be very surprising, we suggest, if Côte d'Ivoire had worked for eighteen years with a company that was as incompetent as it now tries to portray it. Indeed, Côte d'Ivoire's own legislation requires it to award a petroleum contract only to an entity which has the necessary technical, financial and legal capabilities.[2]

Second, Ghana has in place a comprehensive regulatory framework for its petroleum operations, which places great emphasis on the protection of the environment. Côte d'Ivoire seeks to portray this framework as "brief". It is not. As Ms Brillembourg has explained it is comprehensive and we know that Côte d'Ivoire offers no details of its own regulatory framework, nor is it offering to stop its operations on its side of the line on the basis of the risks that they may cause.

Third, and very importantly, this is not just a paper exercise. Contrary to Côte d'Ivoire's vague assertions, the environmental standards that Ghana provides in the regulatory framework actually translate into standards and practices on the ground. Ghana's evidence on this point gets right to the heart of Côte d'Ivoire's allegations of harm to the environment and shows just how hollow those allegations are.

As Ms Brillembourg has covered in greater detail, Côte d'Ivoire's case on environmental harm rests on two propositions: first, that there is endemic pollution in the Jubilee field, and that this is "in the process of being reproduced on the TEN field" and, second, that there has been an increase in the number of dead whales washed ashore.

But what evidence is provided to back up these serious allegations? The first two – endemic pollution in the Jubilee field, and its reproduction on the TEN field – are evidenced only by the satellite photographs at annex 22 to the Request. Côte d'Ivoire provides no analysis of *why* it says that the arrows on those small photographs are pointing at areas of pollution. As Ms Brillembourg has explained,

[2] Article 8(3) of the Petroleum Code of Côte d'Ivoire; paragraph 12 of the statement of Paul McDade.

Ghana has provided the Special Chamber with Tullow's exhaustive technical analysis of those images.[3] This careful analysis shows the many and serious deficiencies in Côte d'Ivoire's claim to have produced images of pollution, leaving that claim, we would suggest, without any credibility at all. This is a perfect example of how Côte d'Ivoire has presented its case – long on assertions, but short on evidence.

As for the sad fact that whales have washed up on shore, Côte d'Ivoire seems to be making two allegations, express or implied: first, that those deaths were caused by Ghana's petroleum operations and, second, that Ghana's Environmental Protection Agency has failed to react. Côte d'Ivoire has offered no evidence to support those allegations. As Ms Brillembourg has explained, careful investigation by Ghana has found no correlation between Ghana's oil and gas development and this phenomenon. As Côte d'Ivoire does *not* mention, whale deaths have been observed onshore in Togo, Benin, and Côte d'Ivoire itself. Without a shred of evidence, and when Côte d'Ivoire has also been conducting petroleum operations in the same region, Côte d'Ivoire presents a currently-unexplained regional phenomenon as something which should be laid at the door of Ghana's petroleum operations. Again, we invite you to dismiss this allegation as failing to provide any support at all for Côte d'Ivoire's claims about the environment.

In conclusion, Mr President, Members of the Special Chamber, Ghana submits that Côte d'Ivoire's allegations of environmental harm fall far short of justifying the indication of *any* provisional measures, let alone the draconian steps you are asked to take. On this issue, Côte d'Ivoire has produced only belated allegations, not supported by any credible evidence.

Mr President, Members of the Tribunal, I thank you for your attention, and ask you to call upon Professor Sands.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Ms Macdonald. I give the floor to Mr Philippe Sands.

**MR SANDS** *(Interpretation from French)***:** Mr President, Members of the Special Chamber, it is a privilege for me to appear before you in these proceedings, this time once again on behalf of Ghana.

The Agent of Ghana underlined earlier the friendly relations between the two Parties to these proceedings. However, Ghana now finds itself called upon to oppose a very strange request, under which Côte d'Ivoire seeks to obtain nothing less than to shut down a significant part of Ghana's offshore oil activities. This request is not founded on any evidence, not even when it comes to responding to the very substantial body of evidence produced by Ghana. It is a request that disregards historical, geographical or even legal realities. This morning there was complete silence on these points.

In the view of Ghana, there is no reason for the Special Chamber to grant Côte d'Ivoire's request. The written observations from Ghana have demonstrated that the

[3] Annex 23 to Tullow's Statement.

requirements under article 290 were clearly not met in this case, either with regard to the alleged “harm to the environment”, as my colleague Alison Macdonald has just explained, or on the other grounds put forward by Côte d'Ivoire, as we will now see. One can only be struck by the fact that Côte d'Ivoire has not presented any testimony, any expert environmental report, or any report whatsoever from its own national petroleum company, PETROCI. In such circumstances, one can easily understand that what speaks most is what is not said or what is not done.

Professor Klein has addressed the applicable law and the failure by Côte d'Ivoire to invoke any urgency. Ms Macdonald has explained the absence of any proof of serious risk (or of any risk whatsoever) to the environment. Côte d'Ivoire’s allegation of an irreversible infringement of its rights is also unfounded, if only because Côte d'Ivoire is now claiming rights which it has never even mentioned before, either in 1970, in 1978, in 1983, in 2005 or in 2012.

In so far as we can identify them, three such rights seem to be mentioned in the Request:

- first of all, the right to explore and exploit the natural resources of the seabed and its subsoil by carrying out seismic studies and drilling operations and by installing subsea infrastructures;

- second, the right of exclusive access to confidential information about those natural resources;

- third, the right to select oil companies to conduct exploration and exploitation operations in the sector concerned in accordance with Côte d'Ivoire regulations.[1]

In the view of Ghana, where each of these rights is concerned, Côte d'Ivoire has not been able to produce any evidence to establish, on the one hand, a risk of prejudice to its rights or, on the other, that the prejudice allegedly caused to its rights is irreparable, in the sense that it could not be repaired following a judgment on the merits and, if appropriate, by compensation. These points have been detailed in Ghana’s written observations.

Conversely, Ghana’s rights are clearly infringed and are at real risk of suffering irreparable and unquantifiable harm.

Before embarking on our response to Côte d'Ivoire’s arguments on the need to ensure the preservation of its rights, it is worth recalling the following points.

- activities undertaken on the Ghanaian side of the customary boundary based on equidistance, about which Côte d'Ivoire is now complaining, have been carried out there for decades;

- those activities have always been widely known;

[1] Côte d’Ivoire PM, para. 53.

- Côte d'Ivoire does not claim that it only recently became aware of those activities, their nature or their scale. Indeed, it would find it hard to do so;

- Côte d'Ivoire has cooperated with Ghana in carrying out activities which it is now seeking to prevent, including seismic studies. It has never raised the slightest protest against them;

- for more than four decades Côte d'Ivoire has respected precisely the same equidistance line as Ghana;

- Côte d'Ivoire has publicly expressed its acceptance of that line, on which Ghana and third parties have relied in determining their courses of action.

As you know, Mr President, Members of the Chamber, Côte d'Ivoire has opted not to address any of these questions in its Request. There is an elephant in the room and it is what happened between 1960 and 2009 or 2011.

*(Continued in English)* I turn to the first of Côte d'Ivoire's newly claimed rights: that Ghana's oil and gas activities are somehow harming the rights of Côte d'Ivoire in relation to the seabed and subsoil.[2]

Mr President, we make two responses: first, there is no factual basis for the alleged risk of harm; second, the harm that Côte d'Ivoire alleges is plainly not "irreparable". Côte d'Ivoire now claims that activities carried out by Ghana's concessionaires in the disputed area affect a number of its rights under UNCLOS, and a so-called "exclusive right to authorize and regulate drilling" in areas of the continental shelf.[3] Strangely, that was not a right it claimed in 1970, when its President recognized "the border line between Ghana and the Ivory Coast" located on the customary equidistance boundary line,[4] and subsequently respected for some 40 years.

This morning we heard how these rights are allegedly breached as a result of activities of Ghana's oil concessionaires. Côte d'Ivoire even tells us that the situation with regard to the TEN block is "particularly troubling".[5] That is very strange, because the activities in these areas date back many years, decades even, to times when Côte d'Ivoire knew about them and accepted them. What should be "particularly troubling" for Côte d'Ivoire is the vast disconnect between what it says today in this courtroom and what it has done for more than four decades. There were no objections over a lengthy period of Ghanaian oil operations, which rather begs the question: if Côte d'Ivoire has all these rights, why did it not object earlier? The answer is plain: there were no objections because there were no rights, and if there were no rights then, there are no rights today.

In this regard, it is notable that Côte d'Ivoire has introduced no evidence – none – to show that the activities of which it now complains are new activities, or that it has

[2] Côte d'Ivoire PM, p. 12, Section 3.1. a.
[3] Côte d'Ivoire PM, para. 15 (translation by Ghana; original French text: "le droit exclusif d'autoriser et de réglementer les forages sur le plateau continental, quelles qu'en soient les fins").
[4] Ghana's Written Response, para. 19.
[5] Côte d'Ivoire PM, para. 24.

only recently become aware of them. The only thing that is new is yet another change of position by Côte d'Ivoire and a new claim.

Let us suspend disbelief, and let us imagine that the rights newly claimed by Côte d'Ivoire do somehow actually exist, and that there is also evidence that harm might occur, for example, by the removal of oil from the seabed. Are provisional measures needed to protect those rights? No. Why? Because any hypothetical harm to these hypothetical rights can be fully repaired in due course with a judgment on the merits. The International Court made this clear in *Aegean Sea*, as Professor Klein has explained.[6]

So Côte d'Ivoire is left to rely only on the bare fact that, should it somehow succeed in its claim on the merits, which seems an unlikely prospect given the fatal combination of history, geography and law on which Côte d'Ivoire had remarkably little to say this morning, then Ghana's concessionaires will have extracted oil from Ivorian waters from which Côte d'Ivoire claims it might have benefitted had it licensed operators to extract the very same oil.

Yet, as Professor Klein made clear, this is not a situation in which new activity is being envisaged, as in *Guyana v. Suriname*.[7] Nor is this a case in which one side – Côte d'Ivoire – wishes to maintain the area as a pristine, wonderful wilderness, whilst the other – dastardly Ghana – does not. If it could, Côte d'Ivoire would be doing exactly what Ghana is doing. Exactly the same or similar changes would take place, to the seabed and subsoil, and to the marine environment. The reality of this case, and let us face it, is that the only point in issue between these Parties is who gets the economic benefits that flow from these activities. The only conceivable loss to Côte d'Ivoire – on its own case – is a loss of revenue derived from oil production, net of costs. This is what is called pure financial loss, and it is addressed by information and accounting and, if necessary, by a judgment of this Special Chamber in due course. This is the stuff of standard practice in petroleum production and revenue accounting and sharing. It is not complex.

So let me turn to the second right for which Côte d'Ivoire claims protection: the allegedly imminent and irreparable harm that would be caused to its rights regarding access to and control of information relating to natural resources.

Côte d'Ivoire claims that its rights as a coastal State include access to and control of the information in areas over which it now claims sovereign rights, and it has argued in effect that, by allowing oil companies to collect such information in the disputed area, Ghana is preventing Côte d'Ivoire from accessing and using this information.

Côte d'Ivoire does not base these alleged rights on any specific provisions of UNCLOS. It cannot do so, despite Sir Michael Wood's rather heroic efforts this morning. Côte d'Ivoire has failed to establish a basis for the legal existence of an alleged right to information newly claimed to be harmed. Côte d'Ivoire has cited no legal authority for any such right to information, let alone a right to information relating to commercial activities, or for the prescription of provisional measures to

[6] *Aegean Sea Continental Shelf [Greece* v. *Turkey]*, *Interim Protection*, *Order of 11 September 1976, I.C.J. Reports 1976*.
[7] *Guyana v. Suriname*, PCA, Award of the Arbitral Tribunal (17 Sept. 2007).

preserve such an alleged right. These rights, even if they exist, are akin to procedural rights of the kind which Judge Mensah addressed in his Separate Opinion in the *MOX Plant* case, and which he said are "capable of being made good by reparations that the arbitral tribunal may consider appropriate".[8]

Once again, Côte d'Ivoire is in tremendous difficulty seeking to explain how on earth these alleged rights would suffer irreparable harm during the lifetime of this case. The information it suddenly now deems to be significant has been collected for years and years, with its knowledge and acquiescence and, in relation to seismic surveys, with its active support. At no point before February 2015 has Côte d'Ivoire previously sought this information, either from the oil companies active on Ghana's side or from Ghana itself, despite the passage of many years. Indeed, as you have heard, the documents in evidence prove that Côte d'Ivoire gave Ghana and its operators permission to turn in Ivorian waters during seismic studies.[9] Côte d'Ivoire for years has facilitated Ghana's efforts to collect information, yet now, suddenly, out of the blue, it asks you to order Ghana to halt the very activities that it has supported on the footing that it is its right to conduct these activities.

I have to confess, I listened to my good friend, Sir Michael, this morning with a touch of incredulity as he gave us his account of the situation. I would remind him that it was only a year ago, in February 2014, that Côte d'Ivoire allowed Tullow to execute a planned TEN/Wawa 3D seismic acquisition survey. It asked only that Côte d'Ivoire's Ministry of Petroleum be provided with a map of the survey area. Did Côte d'Ivoire ask for the data? No. Was it given the data? No. Did Côte d'Ivoire complain? No. Did Côte d'Ivoire protest? No. Did it give permission for the activity? Yes.[10]

Mr President, Members of the Chamber, you are well aware that ITLOS has never prescribed provisional measures requiring the provision of information by one party to the other when the information sought was for the protection of the alleged rights of the party applying for such measures. In both the *Land Reclamation* case and in the *MOX Plant* case, the Tribunal specifically declined to do so[11] and of course, in those cases, unlike this one, the Tribunal was not concerned with information for commercial usage, as in this case. We know that the case of *Timor-Leste*, and at least one of you knows very well, that the case of *Timor-Leste* was concerned with information of a very different kind from that which is in issue now in these proceedings.

Once more, Côte d'Ivoire has failed to offer any explanation as to why, in the unlikely event the Special Chamber were to conclude that any part of the disputed area belongs to Côte d'Ivoire, the provision of information to it at the conclusion of the case would somehow cause it any harm.

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[8] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate Opinion of Judge Mensah*, p. 123.

[9] Ghana's Written Statement, paras 39-42 and related annexes.

[10] Statement of Tullow, para. 26 and Appendix 10 (Ghana PM, Vol. III, Annex S-TOL).

[11] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003*, *ITLOS Reports 2003*, para. 99. See also *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001*, *ITLOS Reports 2001*, para. 84.

I will only very briefly touch upon the third alleged harm to its rights that Côte d'Ivoire invokes, and little was made of it today: the supposed infringements resulting from the conditions under which Ghana conducts oil operations in the disputed area.[12] Ms Brillembourg has addressed Côte d'Ivoire's unjustifiable (and we say rather unfortunate) criticism of Ghana's regulatory and legal framework.[13]

Ghana has a rigorous regulatory framework under which it awards and operates its concessions. Yet again Côte d'Ivoire argues by assertion, not evidence. It could have introduced expert evidence to support its argument, or brought in an expert witness but it has not done so. Ms Brillembourg reminded you as to the procedure followed in Ghana. Yet one of our operators on the Ghanaian side, Tullow, has had a presence in Côte d'Ivoire since 1997, and entered into direct negotiations with PETROCI, Côte d'Ivoire's State-owned oil company, as far back as 2004.[14] It is currently active in two major concession areas. We presume that, like Ghana, Côte d'Ivoire awarded Tullow such concessions on the basis of its financial and technical competence. Of course, we have noticed that PETROCI isn't here today, and no one from the company has been offered as a witness who might explain why it is that Côte d'Ivoire is in the habit of offering long-term concessions to incompetent corporations. As the witness statement from Mr McDade of Tullow makes clear, it demonstrated its financial and technical competence to Côte d'Ivoire when it became an operator for its production-sharing contracts in Côte d'Ivoire.[15]

So what does Côte d'Ivoire say? Based on its limited knowledge of the exploitation of the main field off Ghana's coast – the Jubilee field – Côte d'Ivoire implausibly claims that Ghana has somehow selected a concessionaire unable to fully exploit the resource. This, it claims, prejudices its rights.[16] What might be an ingenious argument nevertheless faces a significant hurdle, namely, that it is entirely bereft of any supporting evidence. Tullow has offered a complete response to the allegation, and so has the spokesman for the Ghana National Petroleum Corporation, whose witness statement was annexed to our written submission and reviewed with you earlier by Ms Brillembourg.

Côte d'Ivoire has not challenged that testimony. It stands unchallenged. This argument, we say, is as forlorn as the others. Côte d'Ivoire has not demonstrated that it has rights in the area. One need only look at the evidence that is before this Chamber as to the positions Côte d'Ivoire adopted over four decades on the material that is before you.

It is therefore necessary to ask a question that Côte d'Ivoire never asks in its Request and at no point today in these hearings: what would be the harm to Ghana's rights if the Special Chamber were to accede to the request? It is to this matter that I now turn.

[12] Côte d'Ivoire PM, p. 21, Section 3.C.
[13] Ghana's Written Statement, paras 64-70.
[14] Statement of Tullow, para. 7 (Ghana PM, Vol. III, Annex S-TOL).
[15] Statement of Tullow, para. 12 (Ghana PM, Vol. III, Annex S-TOL).
[16] Côte d'Ivoire PM, paras 40-45.

In our submission there is a very real and serious risk of irreparable and unquantifiable harm to Ghana if the provisional measures, or any of them, requested by Côte d'Ivoire are granted.

Let us not forget what article 290, paragraph 1, actually says. It gives this Chamber the power to prescribe provisional measures "to preserve the respective rights of *the parties* to the dispute". I emphasize the words "of the parties". That means both parties. It is not only the claimed rights of the party that seeks provisional measures that are to be preserved, but also the rights which may be claimed by the other party. The International Court has emphasized – rightly in our view – that it "must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong *to either party*".[17]

We understand that this Special Chamber cannot enter into a detailed analysis of the merits of the underlying dispute at this stage, and we do not invite you to do so. However, you have heard a summary of the Parties' respective positions, and you have also heard from Mr Reichler that until the discovery of oil in the disputed area, both Parties proceeded on the basis of respect for an equidistance-based boundary line.

The novel position that Côte d'Ivoire now advances, as to the losses it will suffer during the lifetime of these proceedings, faces the not inconsiderable obstacle of its own past practice. As this Tribunal put it in the *Bangladesh/Myanmar* case:

> [I]n international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation.[18]

That same view has recently been affirmed by the arbitral tribunal in the case concerning the Chagos Marine Protected Area. As the Aannex VII tribunal in that case put it, "estoppel is most at home in situations in which the existence of a formal agreement may be in doubt, but the course of the Parties' subsequent conduct has consistently been as though such an agreement existed".[19]

As Mr Reichler has made clear, Côte d'Ivoire's conduct over more than forty years has consistently been as though an agreement on the maritime boundary existed. There was no reason for Ghana to doubt that Côte d'Ivoire was acting in good faith. On this basis Ghana has granted concessions and allowed substantial investments

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[17] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia*), *Provisional Measures, Order of 3 March 2014*, I.C.J., para. 22 (emphasis added).
[18] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, *ITLOS Reports 2012,* para. 124. See also the analysis of estoppel in *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, Joint Separate Opinion of Judge Wolfrum and Judge Cot*, *ITLOS Reports 2012*, paras 53-55; and the analysis of the ICJ in *Temple of Preah Vihear [Cambodia* v. *Thailand]*, *Merits, Judgment, I.C.J. Reports 1962*, pages 22-25.
[19] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 444.

to be made, and undertaken financial commitments and obligations of its own. This is confirmed in the witness testimony.

Mr President, you will recall that in the course of our consultations with you, Côte d'Ivoire reserved its right to introduce witness evidence to challenge any witness evidence we might introduce, yet it has tendered none. Dr Asenso and Ghana's other witnesses could have been called by Côte d'Ivoire for cross-examination, but they were not. Their testimony is unchallenged.

Today, Côte d'Ivoire had nothing to say about the impact of the provisional measures requested on Ghana's rights, even though we raised that issue in our Written Statement. The rights guaranteed by the Convention itself, to continue to exploit its natural resources, is of course the central right that Ghana asserts, just as the right to place reliance upon representations made over many decades by Côte d'Ivoire. Ghana's extensive contractual rights are another source of rights that we are entitled to invoke.

If given effect, Côte d'Ivoire's request would result in the most enormous losses to Tullow and its partners, as the statement of Mr McDade made clear. As witness evidence tendered by Ghana makes clear, it would cause untold and unquantifiable harm to Ghana. In addition to grave financial, economic and employment-related consequences, a stop-work order would have devastating effects for these projects.

Mr President, Members of the Special Chamber, this case has its own history. We are not, as Professor Klein explained, in a situation of an intractable dispute that has lasted many decades in the course of which no activity has been undertaken in the area in question. That was *Guyana v. Suriname* – seven decades of dispute between the colonial powers and the newly independent States. Here, there has been a settled and constant practice on both sides of the border. Only recently has Côte d'Ivoire changed its position, and not just once but three times. Ghana has observed Côte d'Ivoire support an equidistance line for forty years, and then abruptly, privately, disown it in favour of a meridian line. Incidentally, we did not see the word "meridian" appear in the 1977 Côte d'Ivoire law. That first meridian line was dumped in favour of a second meridian line; and then when that second meridian line did not quite do the trick, it was then dumped for a more aggressive bisector line. We know that the word "bisector" does not appear in the 1977 law either. With each new line Côte d'Ivoire seeks to re-fashion geography and it seeks to abandon the real coastline for an imaginary one.

Mr President, Ghana submits that the *prima facie* merits of its case are manifest. They cannot be ignored in assessing Côte d'Ivoire's request, made by a State with a poor case on the merits but with a considerable commercial interest in a newly disputed area. It seeks provisional measures on the basis of wholly theoretical rights and wholly theoretical risks of harm, and it does so in circumstances where any harm that might arise can all be fully repaired in a judgment on the merits.

The principle of proportionality is fundamental in public international law. It is appropriate to assess the disproportionality of the approach that is taken. The impact of granting the measures sought and the effect they would have on Ghana, on the one hand, as compared with the impact on Côte d'Ivoire of not granting the

measures – this is, in effect, the approach taken by Judge Abraham in his separate opinion in the *Pulp Mills* case. As he put it**:**

> *(Interpretation from French)*
> When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two Parties; and it cannot avoid weighing those rights against each other.[20]

*(Continued in English)* President Abraham also went on to observe (again, rightly in our view) that an international court or tribunal will not order provisional measures**:**

> *(Interpretation from French)*
> Unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated – and irreparably so – in the absence of the provisional measures the Court has been asked to prescribe: thus unless the Court has given some thought to the merits of the case.[21]

*(Continued in English)* Respecting the rights of both Parties, and preserving those rights and the *status quo*, means giving some thought to the substance, to what has happened over more than four decades. It does not mean coming to a complete, final view on the merits, of course; but it does mean that you cannot entirely ignore the real facts in regard to what has actually happened; and that is what Côte d'Ivoire invites you to do.

Mr President, Members of the Tribunal, my good friend Professor Pellet told you this morning that all Côte d'Ivoire has to do is show a plausible claim to rights, and then somehow the five of you just keel over and give them everything they have asked for. He said nothing about Ghana's rights; indeed no one on that side of the room did. There is a most unhappy consequence if the approach he invites you to take is adopted by this Tribunal.

What is to stop Ghana claiming vast tracts of an area that Côte d'Ivoire now claims on the other side of the equidistance line, and then coming to this Tribunal and saying: "Oh, we have got a new claim; please adopt an order to stop all work on that side of the line"? They need to answer that possibility, and we do not think they can do so because if they get these orders then all we have to do is change our position and come back to you and get the same thing. That, plainly, is not the right position; it cannot be. It would have adverse consequences all over the world.

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[20] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006*, p. 139, para. 6:

> When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two Parties, and it cannot avoid weighing those rights against each other.

[21] *Ibid*., p. 140, para. 8:

> unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated – and irreparably so – in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.

*(Interpretation from French)* Mr President, Members of the Chamber, it is of course for Côte d'Ivoire to decide what request it wishes to submit, but it is not for this Tribunal to rule on such a request without taking into account the rights of both Parties, the law, and all the facts before you, all of which are elements that Côte d'Ivoire asks you to ignore completely.

For the reasons we have outlined, Ghana requests that the Chamber reject the request and that it do so resolutely.

Mr President, Members of the Chamber, this concludes my presentation today and the first round of oral argument from Ghana. I would like to thank you warmly for your patient attention.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Philippe Sands.

*(Interpretation from French)* With your presentation, we have come to the end of the first round of oral argument on the request for the prescription of provisional measures submitted by Côte d'Ivoire.

We will meet again tomorrow for the second round of the oral proceedings. At ten o'clock we will hear Côte d'Ivoire, until 11.30, and in the afternoon we will hear oral arguments from Ghana, from three o'clock until 4.30.

Thank you. Good evening to you all.

*(The sitting is closed at 6.02 p.m.)*