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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

SPECIAL CHAMBER

CASE NO. 23

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

VOLUME I

REJOINDER OF THE REPUBLIC OF CÔTE D'IVOIRE

14 NOVEMBER 2016

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INTRODUCTION

1. By order of 16 March 2016, the Special Chamber authorized the submission of a Reply by Ghana and a Rejoinder by Côte d'Ivoire and fixed their respective dates of filing at 4 July 2016 and 4 October 2016.

2. By order of 25 April 2016, the President of the Special Chamber of the International Tribunal for the Law of the Sea granted the request made by Ghana that the time-limit for submission of its Reply be extended by three weeks, until 25 July 2016, and that Côte d'Ivoire be granted a similar extension for the filing of its Rejoinder, until 14 November 2016. On 25 July 2016 Ghana submitted its Reply to the Chamber in accordance with this new procedural timetable.

3. Côte d'Ivoire hereby submits the present Rejoinder pursuant to those orders.

I. The dispute between the Parties as it stands

4. On 11 May 2015, the Ivorian and Ghanaian Heads of State declared in a joint communiqué drafted at the close of their meeting in Geneva that "[t]he delimitation of the [maritime] border remains the objective of the Parties".[1] Thus, 27 years after a bilateral meeting at which representatives of the two States noted for the first time that the maritime boundary between them was still to be delimited,[2] the two Heads of State publicly mentioned the subject of the dispute between them, the delimitation of their common maritime boundary, which has been referred to the Special Chamber.

[1] Joint Communiqué published at the close of the meeting between the President of the Republic of Côte d'Ivoire and the President of the Republic of Ghana and H.E. Mr Kofi Annan in Geneva, 11 May 2015, RCI, Vol. III, Annex 201.

[2] At the 15th session of the Joint Commission on Redemarcation of the Land Boundary between Côte d'Ivoire and Ghana from 18 to 20 July 1988, the two States added "Delimitation of the maritime and lagoon boundary" as a new agenda item for the work of the Commission. At that meeting Côte d'Ivoire made a first proposal for a maritime boundary. See CMCI, Vol. I, paras 2.34-2.37; see also CMCI, Vol. III, Annex 12.

5. In this connection, in its Counter-Memorial Côte d'Ivoire drew the Chamber's attention to the particular geographical context of the dispute, which justifies the application of the angle bisector method. In the alternative, it underlined the relevant circumstances of the case justifying the adjustment of the equidistance line, were the Chamber to apply the equidistance/relevant circumstances method. In short, Côte d'Ivoire has engaged in the delimitation process, which "consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned",[3] by providing the Chamber with the appropriate tools for that purpose in the light of the circumstances of the case and with a view to achieving an equitable solution.

6. On the other hand, despite its public statements and the unequivocal terms of its Notice of Arbitration of 19 September 2014, Ghana attempted to change the terms of the debate in its Reply, switching from maritime delimitation to demarcation. It claims that the ten meetings between the Parties within the Joint Commission on delimitation of the maritime boundary between Côte d'Ivoire and Ghana were aimed merely at "precisely fixing their agreed maritime boundary".[4] In the Reply of Ghana the very name of the body which hosted those negotiations changed to become the "Joint Ivoiro-Ghanaian Commission of the Demarcation of the Maritime Border".[5] Bent on rewriting history, Ghana uses extensive cartographic material to paint a peaceful image of two States that have coexisted along a maritime boundary which has never been called into question. To serve its argument it arbitrarily describes as "minor, isolated events"[6] the black marks on the picture it produces and rejects all the decisive circumstances of the present case out of hand. It refuses to consider those circumstances in their entirety so as to allow an equitable solution to be found in accordance with the requirements laid down by the applicable law and seeks to confine the debate to an agreement on the western limit of its oil blocks purportedly reached by the Parties more than 50 years ago in unclear circumstances.

[3] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, *Judgment, I.C.J. Reports 2009,* p. 61, at p. 89, para. 77.

[4] RG, Vol. I, para. 1.6.

[5] RG, Vol. I, para. 2.12.

[6] RG, Vol. I, para. 2.42.

7. In its Counter-Memorial, Côte d'Ivoire, for its part, demonstrated a forward-looking willingness, analysing the circumstances of the case militating in favour of the 168.7° azimuth line which constitutes an equitable maritime boundary between the Parties. It will reiterate those circumstances in the present Rejoinder, focusing, as is required by article 62, paragraph 3, of the Rules of the Tribunal, on the issues that still divide the Parties. It is only in the alternative that it will show how the conduct of the Parties in connection with oil activities has no bearing on the delimitation of their maritime boundary.

8. Like any maritime boundary delimitation proceedings, those between Côte d'Ivoire and Ghana which are being heard by the Chamber must achieve an equitable solution. This is the fundamental principle of the law on maritime delimitation, and international courts and tribunals consider that there is no single formula for achieving it.[7] International jurisprudence has therefore developed several methods of delimitation and it is the geographical circumstances of each case that govern the choice of the most appropriate method for achieving an equitable solution. Those circumstances must be assessed in their entirety.

9. The first of these decisive circumstances for the present case is the overall coastal geography of the two States. The terminus of their land boundary and all the base points used for the construction of the provisional equidistance line are located on a tiny portion of their coastlines, the orientation of which runs in the opposite direction to the general direction of the coasts. The line drawn by reference to this segment, which is not representative of the overall coastal geography, cuts off the projection of the Ivorian coast and overly favours Ghana by opening its maritime area to the west. The result obtained is all the more inequitable because it is governed by points which are all located on the Jomoro peninsula, a Ghanaian incursion into Ivorian territory

[7] This position has been reiterated by many lawyers and academics. See, for example, Evans, *Maritime Boundary Delimitation*, Rothwell et al. (eds.), The Oxford Handbook of the Law of the Sea (2015), p. 254, at pp. 260-261, who states, after examining recent decisions, that "it is difficult to avoid concluding that, once again, 'equity' rather than 'equidistance' may be re-emerging as the dominant approach, though couched in the language of equidistance"; see also S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (2016), who conclude: "Neither UNCLOS nor customary international law identifies any prevailing method of delimitation beyond the territorial sea; rather they specify only the objective of an 'equitable solution'. It has been left to international courts and tribunals to identify (and frequently implement) the method (or methods) of delimitation to be adopted in pursuit of the mandated objective."

taking the form of a narrow strip of land that blocks the seaward projection of part of the Ivorian land mass. Far from seeking to rewrite history or geography, or even to deny the existence of the principle of *uti possidetis juris*, as Ghana accuses it, Côte d'Ivoire is quite simply drawing the Chamber's attention to this circumstance which it is required to take into account just like others in its delimitation operation.

10. Another geographical circumstance to be considered in this case is the instability of the Ivorian and Ghanaian coastlines close to boundary post 55, which, as Côte d'Ivoire has never disputed, represented the starting point for the maritime boundary under the agreement reached by the Parties in their negotiations on the delimitation of their common maritime boundary.

11. Côte d'Ivoire will also explain why, in accordance with international jurisprudence, the exceptional concentration of hydrocarbons in the area to be delimited is a circumstance to be taken into account by the Chamber.

12. Lastly, the instant case must be seen in the regional geographical context of the Gulf of Guinea. It is important to avoid the future delimitation setting a precedent which is detrimental to other States in the sub-region. Benin has expressed its interest in these proceedings, requesting that written pleadings and documents be communicated to it and stating that "the view adopted by the Special Chamber on the delimitation of the Ivoiro-Ghanaian maritime boundary is likely to have an influence on the delimitation of the maritime areas of the sub-region, including that of Benin".[8] The application of strict equidistance in the regional geographical context will have *de facto* detrimental effects on the other States on the Gulf of Guinea.[9]

13. The 168.7° azimuth line claimed by Côte d'Ivoire is constructed having regard to all these decisive circumstances and divides the maritime area between the two States equitably both within and beyond the 200 nautical mile limit in accordance with the Montego Bay Convention and the jurisprudence.

[8] Letter from the Minister for Foreign Affairs of the Republic of Benin to ITLOS, 28 September 2016, RCI, Vol. III, Annex 187.

[9] RCI, Vol. II, Sketch map D 3.8, and *infra*, paras 3.46-3.49.

14. As Côte d'Ivoire explained in its Counter-Memorial, that line can be constructed using the angle bisector method or using the equidistance/relevant circumstances method. Côte d'Ivoire is perfectly entitled to claim the application of this latter method. This neither contradicts its line of argument nor can weaken it. In claiming the opposite, Ghana is ignoring the discretion available to the Chamber in choosing the most appropriate method of delimitation from among the different methods which allow an equitable solution to be achieved. Côte d'Ivoire considers that the limited number of base points and their location on an unstable coastline which is not representative of the overall coastal geography make it appropriate to use the bisector.

15. If the Chamber nevertheless opted to apply the equidistance/relevant circumstances method, it would in any event have to use the most recent data for the determination of the low-water mark and the subsequent choice of base points. Those data are shown in the present case on Côte d'Ivoire's official marine charts No 001 and No 002, which alone reflect the actual coastal geography of the Parties, unlike the old marine charts available, which were based on surveys dating from the first half of the 19th century, to which Ghana refers only for the purposes of its argument.

16. The 168.7° azimuth line which Côte d'Ivoire is submitting to the Chamber for appraisal, based on the different points mentioned above, satisfies the objective of equity required by legal instruments and jurisprudence. It is the result of a structured analysis using technical data produced and a rigorous analysis of the facts of the case. It is therefore only in the alternative that Côte d'Ivoire will explain how Ghana's attempts to reshape the past are in vain and will recall the matters of fact and of law capable of repudiating the legal categorizations which Ghana applies to its oil practice in an effort to give it the weight which it does not hold in respect of maritime boundary delimitation. The Parties have not tacitly agreed on a method of delimitation to be used or on an alleged "customary equidistance line" following a western limit of Ghana's oil blocks, which was purportedly established more than 50 years ago. In addition, that western limit does not constitute a *modus vivendi* which can give rise to the adjustment of the provisional equidistance line, contrary to the new argument put forward by Ghana in the alternative. The conditions for estoppel are also not met in the present case.

17. Lastly, Côte d'Ivoire will show that the western limit of Ghana's oil blocks is neither a maritime boundary nor a relevant circumstance justifying the adjustment of the provisional equidistance line. The unilateral activities undertaken by Ghana in the disputed area, despite protests from Côte d'Ivoire, will merely incur its international responsibility.

II. The structure of the Rejoinder

18. This Rejoinder comprises three parts, which are divided into six chapters.

19. **Part 1**, which has three chapters, deals with delimitation of the maritime boundary between Côte d'Ivoire and Ghana.

20. In **Chapter 1**, Côte d'Ivoire presents the applicable law in the present case, namely that seeking an equitable solution is the fundamental principle of the law on maritime delimitation. According to that principle, it is necessary to find, from all the available methods of delimitation, the one which, in the light of the circumstances of the case, allows an equitable solution to be achieved.

21. In **Chapter 2**, Côte d'Ivoire presents the decisive circumstances for an equitable maritime boundary line in this case. These circumstances are the overall coastal geography – of the two Parties, but also of the Gulf of Guinea – the instability of the coastlines close to boundary post 55, the existence of the Jomoro peninsula, and the exceptional concentration of hydrocarbon resources in the area to be delimited.

22. In **Chapter 3**, Côte d'Ivoire demonstrates that the 168.7° azimuth line satisfies the conventional objective of equity, both within and beyond the 200 nautical mile limit, in that it takes account of the overall coastal geography of the Parties, corrects the cut-off effect generated by the equidistance line and takes into consideration the regional context of the Gulf of Guinea. The equitable character of the 168.7° azimuth line is also confirmed by proportionality tests.

23. **Part 2**, which is divided into two chapters, concerns the conduct of the Parties and its absence of effect on the delimitation of the maritime boundary between Côte d'Ivoire and Ghana.

24. **Chapter 4** re-establishes the factual truth of the history of the relations between the two States, which Ghana alters to its advantage. The bilateral relations and the attitude of restraint adopted by Côte d'Ivoire in relation to oil activities bear witness to a disagreement between the two States on their maritime boundary line.

25. In **Chapter 5**, Côte d'Ivoire shows that the oil activities of the Parties cannot constitute a tacit agreement, a *modus vivendi* or a situation of estoppel capable of having any effect on the delimitation of the maritime boundary between Côte d'Ivoire and Ghana.

26. **Part 3**, which consists of a single chapter, deals with Ghana's responsibility for internationally wrongful acts. The unilateral activities conducted by Ghana in the disputed area pending its delimitation (in so far as they have taken place in an area falling under the sovereignty of Côte d'Ivoire), the invasive activities carried out in contravention of article 83, paragraph 3, of UNCLOS and those conducted in violation of the Order for the prescription of provisional measures made by this Chamber on 25 April 2015 incur the international responsibility of Ghana.

27. This Rejoinder ends with the submissions of Côte d'Ivoire.

PART 1

DELIMITATION OF THE MARITIME BOUNDARY BETWEEN CÔTE D'IVOIRE AND GHANA

1. In its Reply, Ghana maintains its position that if the Special Chamber were to proceed with the objective delimitation of its boundary with Côte d'Ivoire:[10]

   - that boundary must be delimited by application of the equidistance/relevant circumstances method;

   - no geographical circumstance necessitates the adjustment of the provisional equidistance line;

   - the provisional equidistance line must, in contrast, be adjusted to the west on account of the oil activities of the Parties, which constitute a *modus vivendi*.

2. Ghana's reasoning is flawed in several respects.

3. It gives a slanted reading of the applicable law in maritime boundary delimitation. The objective of equity advocated by the United Nations Convention on the Law of the Sea means that parties to bilateral negotiations, like courts or tribunals in a judicial delimitation, should have recourse to a method of delimitation which takes account of the decisive circumstances of the case. Contrary to Ghana's rigid reading, methods of delimitation are merely means of achieving the objective of equity in the light of the circumstances of the case (**Chapter 1**).

4. Ghana adopts the same reductive approach to the geographical circumstances of the case. It repeatedly claims that there is no geographical circumstance capable of influencing the line of the maritime boundary between Côte d'Ivoire and Ghana when in fact a number of geographical circumstances are decisive in the present case and the boundary line will have to take them into account (**Chapter 2**).

[10] RG, Vol. I, para. 1.19.

5. The 168.7° azimuth line claimed by Côte d'Ivoire both within and beyond 200 nautical miles satisfies the objective of equity advocated by the Convention; it takes into account the decisive geographical circumstances of the case and allows the area to be delimited to be shared equitably, while respecting the interests of the neighbouring States in the sub-region (**Chapter 3**).

CHAPTER 1

APPLICABLE LAW

1.1 The argument put forward in the Reply of Ghana is founded on a series of skilfully maintained confusions. The first concerns the very nature of the dispute referred to the Chamber, which Ghana is now characterizing not as a case of maritime boundary delimitation, but of its demarcation (**I.**). The second relates to the principle applicable to the delimitation of maritime areas; the Reply of Ghana elevates equidistance as the be-all and end-all of the applicable law, when it is the "equitable solution" that is the fundamental principle, the method of delimitation being merely a technique in service of that principle (**II.**).

I. The nature of the dispute referred to the Chamber

1.2 The applicable law naturally depends on the subject of the dispute. In its Reply Ghana attempts a sudden redefinition and no longer speaks of the delimitation of the maritime boundary with Côte d'Ivoire, but of the "demarcation" of that boundary, in the hope to persuade the Chamber that the boundary has already been defined by agreement between the Parties.[11] However, it was Ghana that, in its Application, had characterized the dispute as "*concerning the delimitation of its maritime boundary with Côte d'Ivoire*".[12] In addition, the Special Agreement to refer the matter to the Chamber describes it as concerning "the delimitation of [the] maritime boundary in the Atlantic Ocean" between Ghana and Côte d'Ivoire, which is also reflected in the title of the case – "Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)". The turnaround by Ghana must be regarded as a vain attempt – one among many – to twist history and the very subject of the dispute, which cannot have any effect on the instant case.

[11] RG, Vol. I, para. 3.92; see also *ibid*., Vol. I, paras 2.54 and 3.5-3.6.

[12] Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of the claim and grounds on which it is based, 19 September 2014.

1.3 In reality, as Côte d'Ivoire showed in its Counter-Memorial, this Chamber must make an actual *delimitation* consisting "in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned".[13] Demarcation, on the other hand, is a "material operation consisting in transferring to the ground the line of a boundary previously delimited between two neighbouring States".[14] As the International Court of Justice has explained, "'demarcation' … presupposes the prior delimitation – in other words definition – of the frontier. Use of the term 'demarcation' creates a presumption that the parties considered the definition of the frontiers as already effected ...".[15]

1.4 That is certainly not the case here. Despite Ghana's claims, there is no agreement, whether express or tacit, between the Parties on their maritime boundary line. In the absence of agreement the Chamber must rely on the principles and methods applicable in the law on maritime delimitation, as set out in UNCLOS to which the two States are parties.

II. The fundamental principle of the law on maritime delimitation: the "equitable solution"

1.5 Ghana gives a biased presentation of the jurisprudence concerning the equidistance/relevant circumstances method, which it elevates to the applicable law. Whether Ghana likes it or not, the "fundamental principle" of the law on maritime delimitation,[16] or even its "paramount objective",[17] is still seeking an "equitable solution". This "actual rule of law which governs the delimitation of adjacent

[13] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 89, para. 77; see also: *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 50, para. 92; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 35, para. 85; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 397; *Arbitration between the Republic of the Philippines and the People's Republic of China, 29 October 2015, Award on jurisdiction and admissibility*, paras 155-156, and *Award, 12 July 2016*, *PCA Case No 2013-19*, para. 155.

[14] J. Salmon (ed.), *Dictionnaire de droit international public*, Bruylant/AUF, Brussels, 2001, p. 317.

[15] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 28, para. 56.

[16] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 47, para. 62. See also *ibid.*, p. 30, para. 28.

[17] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 339.

continental shelves"[18] is doubly binding on the Parties: under treaty law, as it is laid down in article 74, paragraph 1, and article 83, paragraph 1, of UNCLOS, and also under customary law.[19]

1.6 However, Ghana addresses it only peripherally, in the context of the third stage of the equidistance/relevant circumstances method,[20] as if this fundamental principle were now subsumed entirely into the non-disproportionality test. The "equitable solution" is thus downgraded from a fundamental principle to the level of a simple test whose function is "testing the result achieved"[21] by a delimitation which has already been carried out.

1.7 The jurisprudence has identified a number of corollaries of this fundamental principle of delimitation: first, it establishes the coexistence of a plurality of methods of delimitation, the role of which is to permit States and, in the absence of agreement between them, courts and tribunals to achieve an equitable solution (A.). Second, international courts and tribunals underline the absence of a hierarchy between the different methods applicable (B.). Third, it explains the freedom and the duty of courts and tribunals to adapt the applicable method to the geographical circumstances of the case (C.).

[18] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85, and p. 48, para. 88. To the same effect: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 443, para. 294.

[19] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 59, para. 48. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, *Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 443, para. 167; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, paras 138-139; and *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 65, para. 179.

[20] RG, Vol. I, paras 3.98-3.102. The Memorial of Ghana is even less forthcoming on this subject: MG, Vol. I, paras 5.75 and 5.93.

[21] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 715, para. 239.

A. Plurality of methods of delimitation in State practice and in jurisprudence

1.8 As the International Court of Justice has stated, UNCLOS "sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content".[22] This results in a broad range of methods of delimitation, reflecting, first and foremost, State practice. Aside from the equidistance/relevant circumstances method, States have had recourse to:

- parallels[23] and meridians;[24]
- bisector lines;[25]
- the extension of the land boundary;[26]
- a combination of methods of delimitation;[27]

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[22] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 39, para. 28.

[23] See, for example, the following agreements: Colombia/Ecuador, 23 August 1975 (*LIS*, No. 69 (1976); *IMB*, Volume I, Report No. 3-7); Morocco/Mauritania, 14 April 1976 (*IMB*, Volume I, Report No. 4-6); Honduras/United Kingdom, 4 December 2001 (*LOS Bull.*, Vol. 49, p. 60; *IMB*, Volume II, Report No. 2-23); Angola/Namibia, 4 June 2002 (*IMB*, Volume V, Report No. 4-13); and Ecuador/Peru, 2 May 2011 (*UNTS*, Vol. XX, No. 48631; *IMB*, Volume VII, Report No. 3-9 (Add. 1)).

[24] See, for example, the following agreements: Colombia/Costa Rica, 17 March 1977 (*LIS*, No. 84 (1979); *IMB*, Volume I, Report No. 2-1) and France/Venezuela, 17 July 1980 (*IMB*, Volume I, Report No. 2-11).

[25] See, for example, Agreement concluded by an exchange of notes on 26 April 1960 between France and Portugal with a view to defining the maritime boundary between the Republic of Senegal and the Portuguese Province of Guinea (*LIS*, No. 68 (1976); *IMB*, Volume I, Report No. 4-4, and Volume III, Reports No. 4-4(4) and (5)) – **Sketch map D 1.1** in Volume II illustrates that agreement; Agreement between Brazil and Uruguay, 21 July 1972 (*UNTS*, Vol. 1120, No. XX; *IMB*, Report No. 3-4) – **Sketch map D 1.2** in Volume II illustrates that agreement; Seabed Boundary Agreement between the Rulers of Sharjah and Umm al Qaywayn, 1964 (*IMB*, Volume I, Report No. 7-10) – **Sketch map D 1.3** in Volume II illustrates that agreement; Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama signed on 2 February 1980 (see *LIS* No. 97 (1982); *IMB*, Volume I, Report No. 2-6) – **Sketch map D 1.4** in Volume II illustrates that agreement; Offshore Boundary Agreement between Abu Dhabi and Dubai, 18 February 1968 (*IMB*, Volume II, Report No. 7-1) – **Sketch map D 1.5** in Volume II illustrates that agreement; Treaties between Mexico and the United States of America, 24 November 1976 and 4 May 1978, (*IMB*, Volume I, Report No. 1-5) – **Sketch map D 1.6** in Volume II illustrates those treaties; Agreement between the Government of Brazil and the Government of France relating to the Maritime Delimitation between Brazil and French Guyana, 30 January 1981 (*IMB*, Volume I, Report No. 3-3) – **Sketch map D 1.7** in Volume II illustrates that agreement; Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea, 10 October 1996 (*IMB*, Volume IV, Report No. 10-15) – **Sketch map D 1.8** in Volume II illustrates that agreement.

[26] See, for example, The Gambia/Senegal agreement, 4 June 1975 (*LIS*, No. 85 (1979); *IMB*, Volume I, Report No. 4-2).

[27] See, for example, the following agreements: Kenya/Tanzania, 9 July 1976 (equidistance, circular arc and parallel of latitude – *LIS*, No. 92 (1981); *IMB*, Volume I, Report No. 4-5); Argentina/Chile, 29 November 1984

- or even no particular method of delimitation.[28]

1.9 It was on the basis of this principle and bearing in mind the requirement of an equitable solution that, during the negotiations with Ghana, Côte d'Ivoire proposed several methods of delimitation and several boundary lines.[29] After twice proposing the meridian method, at the first and fourth meetings,[30] Côte d'Ivoire reached the conclusion that the bisector method was most suited to the local and regional geographical context.[31] It put forward several justifications in support of that choice. Those same circumstances lead it to advocate its application by the Chamber in the present case.[32]

1.10 This was not the attitude adopted by Ghana, which has stuck doggedly to its claim for the maritime boundary to be established on the line of its oil concessions. Ghana has the bad grace to accuse Côte d'Ivoire of advancing "a series of alternative and constantly changing approaches"[33] in the negotiations and of maintaining during the present proceedings a position which it had nevertheless taken in the negotiations.

1.11 A cursory look at the jurisprudence relating to maritime delimitation reveals the application of a variety of methods:

- *de facto* line and bisector in the *Tunisia/Libya* case;[34]

(loxodromic lines, parallels of latitude and meridians of longitude – *LOS Bull.*, Vol. 4 (1985), p. 11; *IMB*, Volume I, Report No. 3-1) and Mozambique/Tanzania, 5 December 2011 (equidistance and parallel of latitude – *IMB*, Volume VII, Report No. 4-7(2)).

[28] See, for example, the following agreements: Dominican Republic/United Kingdom, 2 August 1996 (*IMB*, Report No. 2-22); Equatorial Guinea/Niger, 23 September 2000 (*IMB*, Report No. 4-9) and China/Vietnam, 25 December 2000 (*IMB*, Report No. 5-25).

[29] CMCI, Vol. I, paras 2.33-2.82.

[30] CMCI, Vol. I, paras 2.56 and 2.65

[31] CMCI, Vol. I, paras 2.70, 2.78 and 2.80.

[32] See *infra*, paras 2.1-2.98 and paras 3.4-3.56.

[33] RG, Vol. I, para. 1.6.

[34] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at pp. 83-85, paras 117-121, and pp. 88-89, paras 128-129.

- a bisector extended "to the outer limit of the maritime territories of each States as recognized under general international law" in the arbitration between Guinea and Guinea-Bissau;[35]

- equidistance/relevant circumstances and (semi-)enclaving in *United Kingdom/France*[36] and *Romania* v. *Ukraine*;[37]

- bisector and (semi-)enclaving in the *Nicaragua* v. *Honduras* case;[38]

- equidistance/relevant circumstances, enclaving and parallels of latitude in *Nicaragua* v. *Colombia*.[39]

1.12 With regard to the bisector more specifically, in *Tunisia/Libya*, the ICJ opted for that method on account of a "radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes"[40] and to allow for the presence of islands and low-tide elevations.[41] In the *Gulf of Maine* case, the Chamber of the ICJ disregarded equidistance on the ground that all the "basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations".[42] The Arbitral Tribunal in the case between Guinea and Guinea-Bissau held that the bisector should be used to take account of the regional geographical and legal context, formed by "the existing delimitations of the West African region and … its future

[35] *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985, RIAA,* Vol. XIX, pp. 149-196, at p. 196, para. 130.

[36] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, RIAA*, Vol. XVIII, pp. 3-413, at pp. 189-190, para. 103, and pp. 231-232, paras 202-203.

[37] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras 115-122, and p. 123, para. 188.

[38] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at pp. 745-749, paras 283-298, and pp. 749-752, paras 299-305.

[39] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at pp. 695-697, paras 190-195, p. 713, para. 237, and pp. 713-715, para. 238.

[40] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 86, para. 122; see also p. 88, para. 127.

[41] *Ibid*., pp. 88-89, paras 127-129.

[42] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 332-333, para. 210.

delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions".[43]

B. The absence of a hierarchy between the methods of delimitation

1.13 In its Reply, Ghana elevates equidistance/relevant circumstances as the automatically applicable method, without any prior consideration of the geographical circumstances of the case. In its view:

> The applicability or inapplicability of the angle bisector method is not the first step to be considered. Resort to equidistance does not depend on a prior finding of inapplicability of the angle bisector. The law is the reverse of that. The first consideration, in a case of two States with adjacent coasts, is whether equidistance is feasible.[44]

1.14 Ghana misinterprets the relevant jurisprudence in two ways. First, it asserts that the angle bisector is acceptable only where it is not possible to draw an equidistance line.[45] The jurisprudence is infinitely more nuanced: in opting for the application of a different method, the courts and arbitral tribunals which have ruled on this point do not place the emphasis solely on whether it is *impossible* to have recourse to equidistance, but also on whether it is *inappropriate* in the circumstances of the case:

> the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method *inappropriate*.[46]

1.15 Similarly, the International Tribunal for the Law of the Sea "notes that, as an alternative to the equidistance/relevant circumstances method, where recourse to it has

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[43] *Ibid.*, para. 109. For a summary of these decisions, see *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 234. See also CMCI, paras 6.2-6.8.

[44] RG, Vol. I, para. 3.15.

[45] RG, Vol. I, paras 3.3, 3.15 and 3.26.

[46] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 741, para. 272, emphasis added. See also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 695, para. 191, p. 696, para. 194, and pp. 696-697, para. 195; *ibid.*, Separate opinion of Judge Abraham, p. 739, para. 35.

not been possible or appropriate, international courts and tribunals have applied the angle-bisector method…".[47]

1.16 Ghana's error is even worse in relation to the position held by the equidistance/relevant circumstances method. It elevates it to a higher method of delimitation, even though no decision has established any such hierarchy. It should not be ignored here that, because of its largely geometrical character, the equidistance/relevant circumstances method may have a practical advantage. Having said that, this is not enough to impose it as the mandatory or even preferred method in all situations.

1.17 Thus, after noting its practical advantages, the ICJ nevertheless refused to establish equidistance as the rule for delimitation in the judgment in the *North Sea Continental Shelf* cases;[48] similarly, in *Nicaragua* v. *Honduras*, it observed that, because of its practicality, courts and tribunals have tended to favour the equidistance/relevant circumstances method;[49] however, this finding cannot preclude the application of the bisector method in the specific case.

1.18 As a Chamber of the ICJ held in the *Gulf of Maine* case:

> Here again the essential consideration is that none of the potential methods has intrinsic merits which would make it preferable to another in the abstract. The most that can be said is that certain methods are easier to apply and that, because of their almost mechanical operation, they are less likely to entail doubts and arouse controversy. That explains to a certain extent why they have been used more frequently or why they have in many cases been taken into consideration in preference to others. *At any rate there is no single method which intrinsically brings greater justice or is of greater practical usefulness.*[50]

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[47] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 234, emphasis added. See also *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014, PCA Case No. 2010-16*, para. 345.

[48] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23, paras 22-23. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at pp. 78-79, para. 109; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 297, para. 107; see also *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 66, para. 64.

[49] "*The most logical and widely practised approach* is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances", *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 740, para. 268, and pp. 751-752, para. 303, emphasis added.

[50] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 315, para. 162, emphasis added.

1.19 More recently, the Arbitral Tribunal in the *Bangladesh* v. *India* case recalled this fundamental principle of the law on maritime delimitation:

> 339. Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method – if the States concerned cannot agree – is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved.[51]

1.20 In its Counter-Memorial[52] Côte d'Ivoire has already highlighted this consistent case-law, but Ghana preferred to side-step the discussion in its Reply.

1.21 It must be stated that, contrary to the claim made by Ghana, equidistance/relevant circumstances has not become the default method of delimitation, as the ICJ reiterated in 2012:

> The three-stage process is not, of course, *to be applied in a mechanical fashion* and the Court has recognized that it will *not be appropriate in every case* to begin with a provisional equidistance/median line.[53]

1.22 The coexistence of the equidistance/relevant circumstances and bisector methods is made easier by the fact that the latter "may be seen as an approximation"[54] of the former, which also has the advantage that it "avoids the difficulties of application"[55] of the equidistance/relevant circumstances and is "at the same time suitable for producing a result satisfying the … criterion for the division of disputed areas".[56] Consequently, there is nothing to prevent Côte d'Ivoire proposing, as a principal claim,

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[51] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 339.

[52] CMCI, Vol. I, paras 3.46-3.47.

[53] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 695, para. 190, and p. 696, para. 194, emphasis added.

[54] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 746, para. 287. These words were reiterated by ITLOS (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 234). To the same effect: *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 343.

[55] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 332-333, para. 212.

[56] *Ibid.*

the application of the bisector method and, in the alternative, the application of equidistance/relevant circumstances, since the two methods, which have similar characteristics, are neither in a hierarchical relationship nor mutually exclusive.

C. Consideration of all the circumstances of the case by the courts and tribunals

1.23 Judicial and arbitral bodies must assess the circumstances of the case and apply the rules of maritime delimitation accordingly. The circumstances by which the courts and tribunals are guided in their delimitation task are diverse and non-exhaustive, as

> there is no legal limit to the considerations which [they] may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[57]

1.24 The geographical circumstances of the case may come into the delimitation process in two ways. They can come in at an early stage in determining the choice of the most appropriate method, or even a combination of methods, where necessary. They can also come in later, in the second stage of the application of the equidistance/relevant circumstances method, in order to adjust the provisional equidistance line:

> The Tribunal will now turn to the question whether relevant circumstances exist and call for an alternative delimitation method, or for an adjustment of the provisional equidistance line established on the basis of the equidistance/relevant circumstances method.[58]

1.25 It is in order to be able to encompass a wide variety of geographical situations, which make each delimitation case unique, that judicial and arbitral bodies have the power to

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[57] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 50, para. 93. See also *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, RIAA,* Vol. XVIII, pp. 3-413, at p. 385, para. 70; and *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname of 17 September 2007, RIAA*, Vol. XXX, pp. 1-144, at p. 83, para. 302.

[58] *Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014*, para. 395.

choose the method of delimitation most appropriate to the circumstances of the case and most able to meet the requirement of an equitable solution:

> The greater or lesser appropriateness of one method or another can only be assessed with reference to the actual situations in which they are used, and the assessment made in one situation may be entirely reversed in another. … In each specific instance the circumstances may make a particular method seem the most appropriate at the outset, but there must always be a possibility of abandoning it in favour of another if subsequently this proved justified.[59]

1.26 This approach was confirmed by ITLOS in its judgment of 14 March 2012:

> The Tribunal observes that the issue of which method should be followed in drawing the maritime delimitation line should be considered in light of the circumstances of each case. The goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection. Therefore the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result.[60]

1.27 Where the chosen method is equidistance/relevant circumstances, it is when its second stage is applied that courts and tribunals are obliged to identify and give full effect to all the circumstances of the case.[61] It is at this stage that they correct any inequity in provisional equidistance, as the Tribunal stated in its judgment in *Bangladesh/Myanmar:*

> The varied geographic situations addressed … confirmed that, even if the pendulum had swung too far away from the objective precision of equidistance, *the use of equidistance alone could not ensure an equitable solution in each and every case*.[62]

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[59] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 315, paras 162-163. To the same effect, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 443, para. 294; *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985, RIAA,* Vol. XIX, pp. 149-196, at pp. 186-187, para. 102; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA*, Vol. XXVII, pp. 147-251, at p. 215, para. 244.

[60] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 235.

[61] Côte d'Ivoire has already examined the jurisprudence from this point of view in its Counter-Memorial: see CMCI, Vol. I, paras 7. 34-7.36.

[62] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 228, emphasis added.

1.28 Furthermore, it is in the light of the circumstances of the case, considered as a whole, that the adjustment made must correct the inequity of the provisional equidistance line. This was also pointed out by ITLOS in *Bangladesh/Myanmar*:

> The Tribunal agrees that the objective is a line that allows the relevant coasts of the Parties "to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 127, para. 201).[63]

1.29 In the instant case, identifying the decisive geographical circumstances results in either a choice of a method other than equidistance or at least the adjustment of the equidistance line. As Côte d'Ivoire explained in detail in its Counter-Memorial and will reiterate below,[64] non-adjusted geometrical equidistance, as proposed by Ghana, has a number of disadvantages:

- it is founded on base points concentrated on a tiny portion of the coastline, which runs counter to the general direction of the overall Ivorian-Ghanaian coasts and is largely unrepresentative of the coastal geography of the two States;
- it disregards entirely the regional geographical context;
- those points are further located on an unstable coastline;
- and it gives a disproportionate effect to the strip of land formed by the Jomoro peninsula, in particular in the light of the maritime entitlements which it creates in an area with a high concentration of mineral resources.

1.30 It is therefore inevitable that the approach advocated by Ghana produces an inequitable solution.

1.31 That is why Côte d'Ivoire takes the view that the bisector method must be applied as a matter of priority in order to neutralize the excessive influence of "minor

[63] *Ibid.*, para. 326. In the same vein: "The Tribunal must examine the geographic situation as a whole" (*Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 410).

[64] See *infra*, paras 2.1-2.98 and paras 3.4-3.56.

geographical features"[65] on the line of the boundary.[66] It nevertheless considers that the Chamber could also opt for the equidistance/relevant circumstances method, since it cannot confine itself to the first of its stages – the course of an equidistance line – as Ghana asks, because the inequity of strict equidistance must be corrected by taking into consideration the relevant circumstances which require the adjustment of the equidistance line.

Conclusion

1.32 The case referred to the Chamber is therefore both conventional and unique. It is conventional because it is a maritime delimitation case which calls for the application of the fundamental principle of delimitation, which is seeking an equitable solution, and not equidistance, as Ghana would have us believe. It is unique because the case arises in a specific geographical context and it is in the light of all the geographical circumstances that the Chamber must select and utilize the applicable method of delimitation in this case.

[65] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246, at p. 332, para. 210. See also *ibid.*, p. 328, para. 198. With regard to the attenuation of the effects of islands, see *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 122, para. 185; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 48, para. 64; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 104, para. 219; *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 751, para. 302 *et seq.*; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 317.

[66] This solution has also been adopted in certain ICJ cases, cited in para. 1.12 above.

CHAPTER 2

THE DECISIVE ELEMENTS FOR THE DELIMITATION OF THE BOUNDARY BETWEEN CÔTE D'IVOIRE AND GHANA

2.1 According to Ghana, there are no geographical circumstances to be taken into account in connection with the delimitation of its maritime boundary with Côte d'Ivoire.[67] That position is untenable.

2.2 Ghana denies the actual geography in the dispute, not only of the Parties but also of the Gulf of Guinea, which forms the context for the delimitation of the boundary between Côte d'Ivoire and Ghana. In the present case there are a number of decisive geographical circumstances which should be taken into account in order to achieve an equitable result (**I.**).

2.3 It is also necessary to make a few technical clarifications regarding the accurate representation of the actual geography of the Parties (**II.**).

I. The decisive character of the geographical circumstances of the case

2.4 In the present case there a number of geographical circumstances which, taken in isolation and *a fortiori* taken together, are decisive in the delimitation process for the maritime boundary between Côte d'Ivoire and Ghana:

- the overall coastal geography (A.);
- the instability of the coastlines (B.);
- the Jomoro peninsula (the strip of land) (C.);
- the exceptional concentration of hydrocarbon resources in the disputed area (D.).

[67] RG, Vol. I, para. 1.19; "the coasts of this case are remarkable only for the lack of any remarkable features".

A. The overall coastal geography

2.5 Côte d'Ivoire and Ghana disagree profoundly on the approach to be taken in the delimitation of their common maritime boundary. Ghana adopts a micro-geographical approach, constructing its boundary line solely on a segment of coast of around 10 km. Unsurprisingly, this segment is very favourable to it; the provisional equidistance line drawn from this segment can only run towards the south-west, cutting off the Ivorian coast from its natural seaward projection and instead opening up Ghana's maritime area to the west.

2.6 However, to adopt this approach is effectively to choose what is favourable over what is equitable, at the expense of an accurate representation of the geography of the Parties.

2.7 Three circumstances, the tiny segment of coastline used to construct the provisional equidistance line (*1.*) and the fact that it is not representative of the geography of the Parties (*2.*) or of the geography of the Gulf of Guinea (*3.*) are decisive for the line of the boundary between Côte d'Ivoire and Ghana and cannot be ignored in the delimitation process.

1. A tiny segment of coastline

2.8 Côte d'Ivoire argued in its Counter-Memorial[68] that the base points selected both by Côte d'Ivoire and by Ghana[69] are located on a portion of the Ivorian-Ghanaian coastline around 10 km in length and that this is problematical in so far as it is that tiny portion that directs the course of the provisional equidistance line entirely.

[68] CMCI, Vol. I, paras 6.18-6.34.

[69] It should be noted that the Parties did not select the same base points in so far as they did not use the same cartographic resources. Ghana used British Admiralty chart No. 1383, which has the two-fold disadvantage of lacking precision owing to its too small scale and of being obsolete owing to the age of the readings on the basis of which it was drawn up. Côte d'Ivoire used its official marine charts. See CMCI, Vol. I, paras 6.14-615 and paras 7.10-7.15.

2.9 Ghana contests the relevance of this circumstance, relying on precedents in jurisprudence which are, in its opinion, similar. However, none of the geographical configurations mentioned in the jurisprudence cited by Ghana in support of the argument that such proximity of points is common[70] can be compared with the tiny portion of the Ivorian-Ghanaian coastline on which all the base points used for the construction of the provisional equidistance line up to 200 nautical miles are located.

2.10 Thus,

- in the judgment in *Bangladesh* v. *Myanmar*, while the first base point used on the coast of Bangladesh was located 4.7 km from the boundary post,[71] the second point was at a distance of 335 km from the boundary post[72] and the points located on the coast of Myanmar extended over a distance of 120.2 km from the boundary post.[73] The provisional equidistance line between Bangladesh and Myanmar was therefore defined by points located over more than 450 km of coast, representing almost 20% of the total coastline of the States in question;

- in the judgment in *Cameroon* v. *Nigeria*, the distance of 25 km mentioned by Ghana in its Reply[74] corresponds to the distance between the two points located at the estuary closure and that judgment is not therefore relevant;

- the last decision cited by Ghana, *Barbados* v. *Trinidad and Tobago*, is even less transposable to the instant case, as the geographical circumstance accepted by the Arbitral Tribunal was not the location of base points on a

[70] RG, Vol. I, para. 3.34.

[71] Reply of Bangladesh, p. 108, para. 3.102.

[72] Reply of Bangladesh, p. 109, para. 3.103.

[73] The Tribunal selected a fourth base point (u4) on the coast of Myanmar; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 266.

[74] RG, Vol. I, para. 3.34.

representative or non-representative segment, but the disparity in coastal lengths between the States.[75]

2.11 In its Counter-Memorial,[76] Côte d'Ivoire explained the disadvantages inherent in the adoption of a micro-geographical approach which bases delimitation on an insignificant segment of the Ivorian-Ghanaian coast. This segment of coastline is not representative of the Ivorian-Ghanaian coast and the line drawn on the basis of the segment does not reflect the geography of the Parties. In the present case this disadvantage is particularly evident in so far as

- the seven base points which define the provisional equidistance line up to 200 nautical miles are located on a portion of coast only 8.7 km in length, which represents less than 1% of the total coast of the two States and 2% of the coast considered to be relevant by Ghana;

- and there are only 176 metres between the westernmost Ivorian point (C2) and the boundary post.[77]

2.12 If the Tribunal considered that it should accept the base points selected by Ghana and disputed by Côte d'Ivoire, the conclusion would be similar, namely that

- the nine points which define the provisional equidistance line are located on a portion 13.4 km in length,

- four of them (points CI1, GH1, GH2 and GH3), which define more than one third of the maritime boundary, are located on a portion of the coastline less than 700 metres in length.[78]

2.13 This exceptional situation has never arisen in a contentious case and justifies the rejection of a micro-geographical approach in favour of a broader approach which

[75] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA*, Vol. XXVII, pp. 147-251, at p. 243, para 327 *et seq.*

[76] CMCI, Vol. I, paras 6.18-6.34.

[77] CMCI, Vol. I, para. 6.20.

[78] CMCI, Vol. I, para. 6.19.

takes account of the actual geography of the States and not a tiny portion of that geography.

2. A segment which is not representative of the coastal geography of the Parties

2.14 In its Reply Ghana deliberately twists Côte d'Ivoire's argument on the adjustment of the provisional equidistance line on the ground that it causes a cut-off effect.

2.15 The configuration of the coastal segment used for the construction of the equidistance line necessarily causes a cut-off of the maritime territory of Côte d'Ivoire (*a.*). That non-representative segment is thus a decisive geographical circumstance which should be taken into account in the delimitation process for the boundary between Côte d'Ivoire and Ghana, as is advocated by State practice (*b.*) and settled jurisprudence (*c.*).

a. A straight segment running in a different direction from the coasts of the Parties

2.16 Côte d'Ivoire and Ghana do not use the same base points to construct the provisional equidistance line up to 200 nautical miles.[79] On the other hand, the points used by the two Parties all lie on the same coastal segment on either side of the land boundary terminus. The line of the maritime boundary between Côte d'Ivoire and Ghana would therefore be determined entirely on the basis of that coastal segment, were the equidistance method claimed by Ghana to be applied.

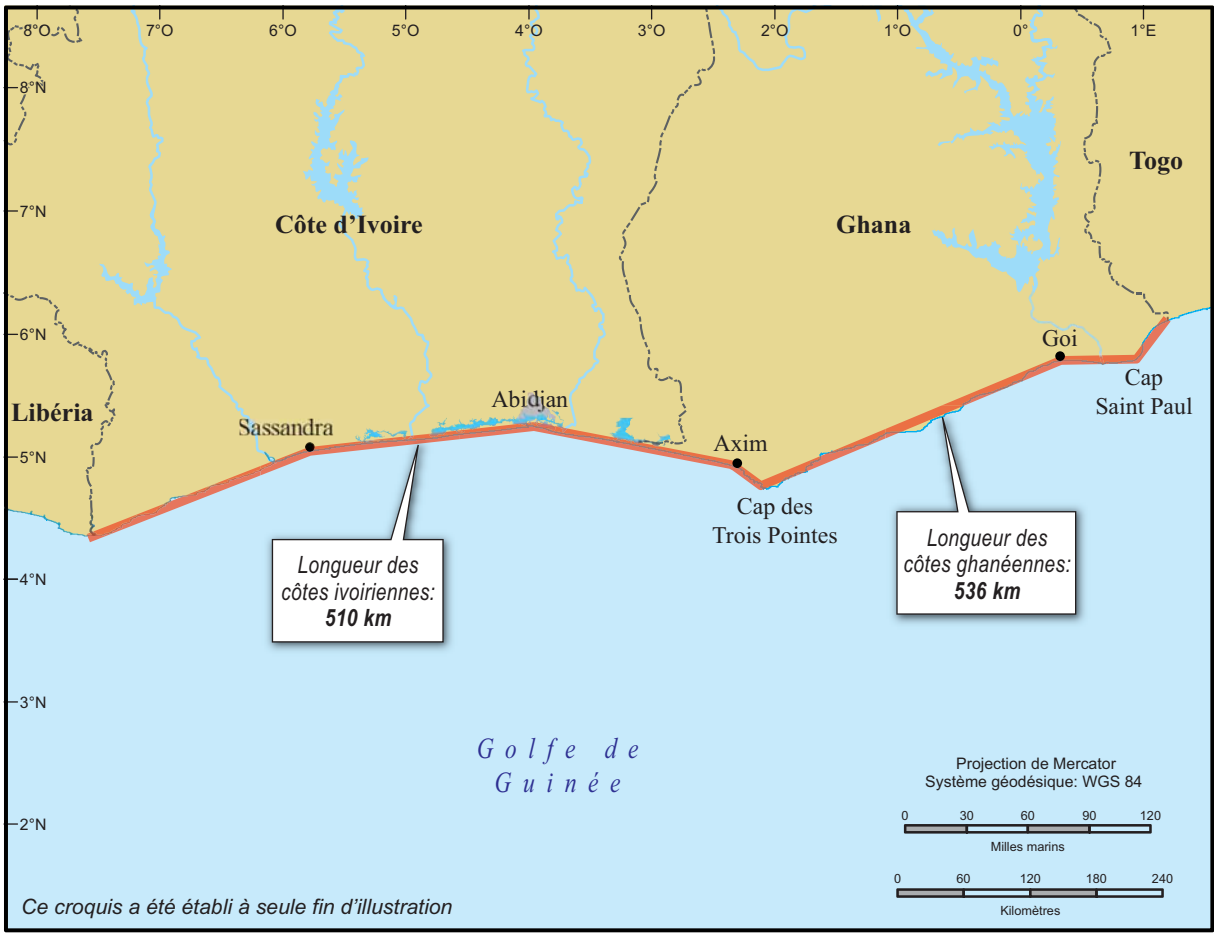
2.17 However, this segment is not representative of the geography of the Parties on account of both its straightness and its orientation. The fact that base points lie on a segment of perfectly straight coast, as in this case,[80] is not problematic in itself. The line thus generated is a straight line that will extend in a single direction, which is the direction in which that segment projects. The problem stems from the fact that this segment

[79] CMCI, Vol. I, paras 6.11-6.17.

[80] Both Côte d'Ivoire and Ghana describe this segment as perfectly straight: CMCI, Vol. I, para. 6.22 ("the portions of coast in question (8.7 km according to Côte d'Ivoire and 13.4 km according to Ghana) are perfectly straight"); RG, Vol. I, para. 3.21 ("As shown in Figure 3.3, following page 86, the coastline located immediately on both sides of the land boundary terminus is remarkably straight").

projects in a completely different direction to the general direction of the coastlines of the States.

2.18 As has been explained by the Parties in their previous written pleadings,[81] the coasts of Côte d'Ivoire and Ghana are concave and convex, respectively, and are formed of seven segments running in different directions, as is shown in **Sketch map D 2.1** below.

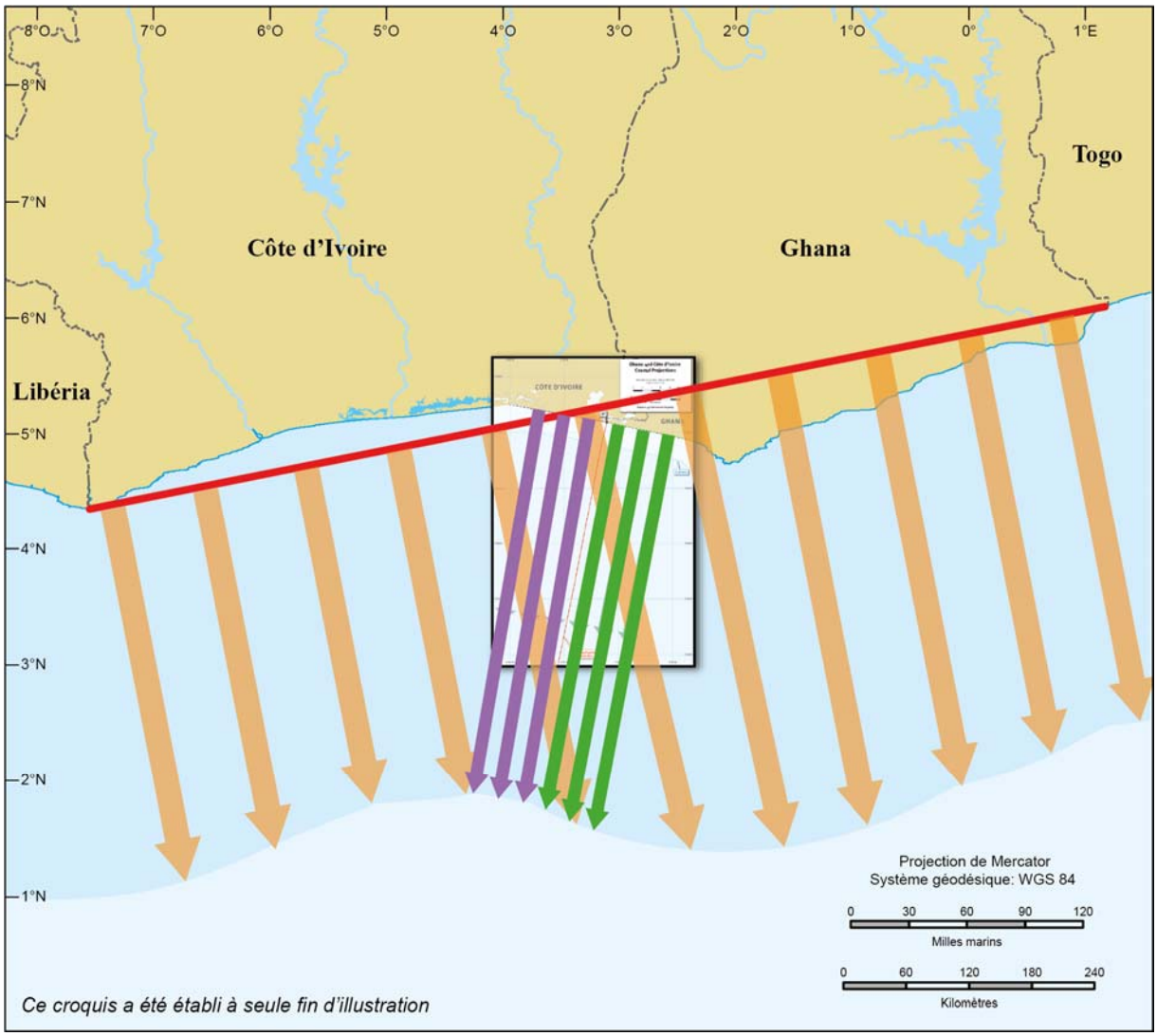


Sketch map D 2.1 Changes in direction of the Ivorian-Ghanaian coasts

2.19 The segment on either side of the land boundary terminus, between Abidjan in Côte d'Ivoire and Axim in Ghana, runs in an east-south-east direction. The direction of this segment can be explained by the fact that it lies on the edge of the concavity of Côte d'Ivoire and on the initial part of the convexity of Ghana, very close to the point at

[81] CMCI, Vol. I, para. 1.16 and para. 1.32; RG, Vol. I, para. 3.24 (Sketch map R 3.3 produced by Ghana on page 86 of its Reply also shows the changes in direction of the coasts of the two States near the land boundary terminus).

which the coasts of the States take their most radical change in direction. The direction of this segment is opposite to the general direction of the Ivorian-Ghanaian coasts as a whole, which is south-south-east, as is clear from **Sketch map D 2.2** below. This segment therefore automatically causes a cut-off effect; the equidistance line generated from this segment can only extend in a south-west direction, the effect of which is to cut off the maritime area of the State, in this case Côte d'Ivoire, in the direction of which the segment projects.



Sketch map D 2.2 The opposite directions of the coastal segment used for the construction of the equidistance line and the coasts of the Parties as a whole

2.20 The maritime boundary between Côte d'Ivoire and Ghana would therefore be drawn on the basis of a segment which:

- is extremely small, representing less than 1% of the total coasts of the two States and around 2% of the coasts considered to be relevant by Ghana;[82]

- is straight and not representative of the many changes in direction of the coastlines, automatically generating a straight equidistance line;

- runs in the opposite direction to the general direction of the coasts, which will inevitably generate an equidistance line extending to the south-west. As this segment is, moreover, the only segment of the entire Ivorian-Ghanaian coasts to have that orientation, any other segment of the coastline would generate an equidistance line running in a different direction.

2.21 It would be inequitable to accept such a maritime boundary constructed on the basis of a tiny segment of non-representative coastline as it would effectively disregard entirely the coastal configuration of the Parties.[83]

2.22 This coastal segment, which is straight and runs in a different direction to the coasts of the Parties, is not representative of the geography of the Parties and constitutes a decisive circumstance to be taken into account with a view to achieving an equitable solution in the delimitation process for the maritime boundary between Côte d'Ivoire and Ghana.

b. State practice

2.23 Some States – which are few in number – are in a similar situation to Côte d'Ivoire and Ghana, where the coastal segment on which the base points used for the construction of a provisional equidistance line are located is not representative of their coasts as it is very small and straight and runs in a very different direction from the

[82] Ghana asserts that the relevant coasts of the Parties measure 429 km (308 km on the Ivorian coast between Sassandra and boundary post 55 and 121 km between boundary post 55 and Cape Three Points), MG, Vol. I, Figure 5.6.

[83] With regard to the resulting cut-off effect, see *infra*, paras 3.33-3.35.

general direction of the coasts of the States as a whole. Where the States have carried out the delimitation of their maritime boundary by agreement, they have adopted a macro-geographical approach and departed from the equidistance line.

2.24 Three agreements are particularly illustrative.

2.25 In the delimitation agreement concluded in 1964 between the Rulers of Sharjah and Umm al-Quwain, the equidistance line between the two States was constructed from a narrow segment running in a general north-south direction which was not representative of the convex coasts of the States, as shown in **Sketch map D 1.3** in Volume II.[84] The limit adopted (the angle bisector formed by drawing straight lines between the land boundary terminus points) is not equidistance.[85]

2.26 The second delimitation agreement with similar circumstances to Côte d'Ivoire and Ghana is the agreement concluded between Abu Dhabi and Dubai in 1968 on their continental shelf.[86] Once again, the two States shared a relatively straight coastline close to their land boundary that projects in a general north-north-west direction, which is different from the north-west projection of the coasts of the States as a whole. The geographical configuration of the States played a prominent role in the delimitation of the maritime boundary adopted, namely a perpendicular to the general direction of the coastline, as is shown in **Sketch map D 1.5** in Volume II.[87]

2.27 Lastly, the Treaty concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama signed on 2 February 1980 (**Sketch map D 1.4** in Volume II[88]) provides an illustration, with regard to the line of the maritime boundary in the Pacific where the coastal segment close to the land boundary post was straight and ran in a different direction from the coasts as a

[84] RCI, Vol. II, Sketch map D 1.3.

[85] *IMB,* Volume I, Report No. 7-10.

[86] *IMB,* Volume II, Report No. 7-1.

[87] RCI, Vol. II, Sketch map D 1.5.

[88] RCI, Vol. II, Sketch map D 1.4.

whole, of how States have departed from a micro-geographical approach to adopt an angle bisector based on a macro-geographical approach.[89]

c. Treatment in jurisprudence of the non-representative character of the coastal segment

2.28 The provisional equidistance line up to 200 nautical miles created on the basis of the coastal segment which is not representative because its orientation is different from the general orientation of the Ivorian-Ghanaian coasts gives rise to a cut-off effect for the Ivorian maritime area.

2.29 Ghana confines the jurisprudence relating to the cut-off effect to situations where the maritime area of a State is cut off to a point of enclaving by virtue of the convergence of two equidistance lines. For Ghana, the inequity is thus based on enclaving and not cut-off.

2.30 This position stems from a misreading of the jurisprudence. The key decisions dealing with the cut-off effect created by the coastal configuration of States are the *North Sea Continental Shelf*, *Tunisia/Libya*, *Gulf of Maine, Guyana* v. *Suriname* cases and the two Bay of Bengal cases.[90]

2.31 Those decisions deal with a wide variety of geographical configurations. The change in direction of the coasts of the States concerned can take many forms:

- it can modify the opposite or adjacent character of the coasts of the States, as in the *Gulf of Maine* judgment, where the coasts of the United States and Canada are adjacent then opposite on account of the rectangular configuration of the Gulf;

[89] *LIS* No. 97 (1982); *IMB*, Volume I, Report No. 2-6.

[90] The judgment of the International Court of Justice in *Cameroon* v. *Nigeria* does not directly address the influence of concavity on maritime boundary delimitation. Cameroon's argument relating to the cut-off effect caused by the concavity of its coast was considered not to be a relevant circumstance by the Court, not because of the weak or strong concavity of the Cameroonian coastline, as Ghana wrongly suggests in paragraph 3.23 of its Reply, but because of the position of the island of Bioko, which was under the sovereignty of a State that was not a party to the proceedings.

- it can lead to the enclaving of a State located in the centre of a concave gulf, as in the North Sea and Bay of Bengal decisions;

- it can create a promontory or a cape, giving rise to an inequitable deviation of the line, as was the case in the *Tunisia/Libya* judgment and as was claimed by Suriname in the case between it and Guyana.

2.32 Despite the variety of geographical configurations referred to in those judgments, they have one point in common: the source of the cut-off effect is the change in direction of coastlines. The reasoning followed by the courts and tribunals in each of those decisions was that where the change in direction has an inequitable cut-off effect, the boundary line must be adjusted accordingly. Failing this, that line would create an inequitable cut-off effect.

2.33 The reasoning followed by the courts and tribunals in those decisions is applicable in the present case.

2.34 The boundary line to be drawn by this Chamber must take account of the concavity and convexity of the coasts of Côte d'Ivoire and Ghana. The segment on which the base points are located is straight and runs in a direction that is different from all the other segments of the Ivorian-Ghanaian coast and, moreover, is opposite to the general direction of the coastlines on account of its position on the edge of the concavity of the coasts and close to the change in direction of Ghana's coast after Cape Three Points.[91]

2.35 The line claimed by Ghana does not therefore take account of the change in direction of the Ivorian-Ghanaian coasts and creates an inequitable cut-off effect. Consequently, it is wrong to take the view, like Ghana in its Reply, that the jurisprudence on the cut-off effect concerns only extreme situations where a State is enclaved. Such an approach would effectively distort the notion of cut-off, assimilating it with the enclaving effect, and would be contrary to the decisions in the *Tunisia* v. *Libya* and *Gulf of Maine* cases, in which a change in direction of coasts causing a cut-off but not an enclaving was recognized as a relevant circumstance.

[91] See above, paras 2.16-2.22.

3. A segment which is not representative of the coastal geography of the Gulf of Guinea

2.36 The coastal segment used for the construction of the equidistance line is representative neither of the Ivorian-Ghanaian coasts nor of the regional coastal geography.

2.37 In its Counter-Memorial Côte d'Ivoire presented the regional context of the delimitation of its maritime boundary with Ghana.[92] That context, between Senegal and Gabon, can be illustrated by three segments running in very different general directions, illustrating the two directions of the West African coast. The boundary between Côte d'Ivoire and Ghana lies on the central segment running in a general east-north-east direction, between Cape Palmas in Liberia and Lekki Lagoon in Nigeria.

Sketch map D 2.3 West Africa

2.38 This central segment of the Gulf of Guinea, on which five States have their coastline, follows the same general direction as the Ivorian-Ghanaian coasts. Using the coastal

[92] CMCI, Vol. I, para. 1.11.

segment 10 km in length which defines the provisional equidistance line up to 200 nautical miles entirely therefore gives rise to the same consequences: it creates an equidistance line oriented in an opposite direction to this segment of the Gulf of Guinea and is not representative of the sub-regional geographical context.

2.39 The sub-regional geography must nevertheless be taken into account in the delimitation process for the boundary between Côte d'Ivoire and Ghana. The Parties had made express reference to the regional context in their negotiations until the sudden turnaround by Ghana.[93] Moreover, Togo and Benin have, since the beginning of their negotiations together and with their respective neighbours, Ghana and Nigeria, called for the application of an alternative method to equidistance, as an equidistance line deprives both of them of access to the high seas.[94]

2.40 The States in the region are aware of the indirect influence which this Chamber's decision could have on the delimitation of their own boundaries. It is undoubtedly for this reason that Benin has officially expressed its interest in the outcome of the present proceedings by asking the Chamber to communicate to it the written pleadings and documents submitted by Côte d'Ivoire and Ghana.[95]

2.41 Moreover, the non-representativeness of the coastal segment used for the construction of a provisional equidistance line is all the more unprecedented in this case as Ghana benefits from it both to the west with Côte d'Ivoire and to the east with Togo and Benin.[96] Ghana is one of a very small number of States that, by reason of the geographical configuration of its coasts and of those of its neighbours, would have a maritime area that flares out seaward if strict equidistance were applied. If the course of its two eastern and western maritime boundaries follows an equidistance line, as it claims in respect of Togo and Côte d'Ivoire, the lateral limits of its maritime area extend off the coasts of its neighbours and the length of its 200 nautical mile line will

[93] CMCI, Vol. I, paras 6.56-6.59.

[94] CMCI, Vol. I, paras 6.65-6.69; see also, *infra*, paras 3.48-3.49 and Sketch map D 3.8.

[95] Letter from the Minister for Foreign Affairs of the Republic of Benin to ITLOS, 28 September 2016, Vol. III, Annex 187; see *infra*, paras 3.44-3.45.

[96] The application of strict equidistance would create a common maritime boundary between Benin and Ghana; see *infra*, para. 3.48.

then be much greater than the length of its coastline.[97] This is a rare situation. As far as Côte d'Ivoire is aware, only Liberia and Guatemala, and to a lesser extent Peru, Namibia and South Africa, would also be able to claim a flared maritime area.[98]

2.42 For the other States in the world, at least one of their maritime boundaries does not encroach on the maritime area of their neighbour and their own maritime area does not therefore take the form of an inverted funnel. Because of its rarity and the degree of encroachment caused, this situation is a specific circumstance which must be taken into consideration in maritime boundary delimitation. Just as the jurisprudence ensures that no State is enclaved by reason of its geographical situation and thus attenuates the effects of a very unfavourable configuration, the law must attenuate the effects of a geographical configuration which, although very favourable to one State, automatically produces an inequitable result for its neighbours.

B. The instability of the coastlines

2.43 Another significant circumstance for the delimitation of the boundary between Côte d'Ivoire and Ghana is the instability of the coastlines. In its Counter-Memorial Côte d'Ivoire showed how the instability of the Ivorian and Ghanaian coastlines – and not their erosion, to which Ghana incorrectly refers, purposefully and systematically[99] – close to boundary post 55 was such as to have an unfavourable influence on the final course of the maritime boundary.[100]

2.44 Ghana's criticism stems from a misunderstanding of the jurisprudence.

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[97] See *infra*, para. 3.47 and Sketch map D 3.8.

[98] The ratios for Peru, Namibia and South Africa are much lower than for Ghana: Peru has a ratio of 1.02:1 (its coastline measures 336 km and its 200 nautical mile line would measure 402 km), Namibia a ratio of 1.14:1 (its coastline measures 417 km and its 200 nautical mile line would measure 611 km) and South Africa a ratio of 1.24:1 (its coastline measures 2,597 km and its 200 nautical mile line would measure 3,215 km).

[99] Contrary to the suggestion made by Ghana in paragraph 3.30 of its Reply, Côte d'Ivoire considers that the coast close to boundary marker 55 is unstable, and not that it is eroding, as is clear from its Counter-Memorial, paragraphs 1.20 *et seq.* and 6.25 *et seq.*

[100] CMCI, Vol. I, paras 6.25-6.33.

2.45 First of all, Ghana claims that in *Nicaragua* v. *Honduras* the bisector was used because it was not feasible to construct an equidistance line by reason of the instability of the States' coastlines.[101] According to Ghana, if an equidistance line could have been constructed in that case, that method and not the angle bisector method would have been used. However, Honduras was in fact able to construct a provisional equidistance line, which it proposed in its Rejoinder.[102] Furthermore, during the hearings the two Parties discussed the application of that method to the case, with graphical representations in support of their views.[103] The use of the bisector method by the Court therefore stems from a reasoned choice on its part, as opposed to equidistance, based partly on the instability of the coastlines. This jurisprudence can be applied perfectly well to the instant case.

2.46 Furthermore, Ghana claims that in the two Bay of Bengal cases the Tribunals rejected the argument of instability as a basis for using the bisector method. However, it was not the instability of the coastlines that was the justification for rejecting the bisector method in those cases, but the method of construction of the bisector line proposed by Bangladesh.[104]

2.47 As Côte d'Ivoire demonstrated in its Counter-Memorial,[105] the instability of the coastline runs counter to the requirement of reliability governing the maritime boundary line; if the base points from which it is constructed are moving, the entire line will also move.

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[101] RG, Vol. I, para. 3.26.

[102] *Maritime delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Rejoinder of Honduras, p. 130, paras 8.16-8.20, Plate 48.

[103] For Honduras, CR 2007/6, pp. 28-30, 32; CR 2007/13, p. 36; CR 2007/14, p. 11, 18-24, 29; for Nicaragua, CR 2007/1, pp. 61-62; CR 2007/3, pp. 2-8; CR 2007/5, pp. 7-9; CR 2007/11, pp. 53-54; CR 2007/12, p. 29.

[104] In *Bangladesh* v. *Myanmar*, the Tribunal found that the bisector proposed by Bangladesh was "markedly different" from that drawn by reference to the relevant coasts selected by the Tribunal, which thus applied the equidistance/relevant circumstances method (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, paras 237-238). In *Bangladesh* v. *India*, the Tribunal held that "the depiction of the coastal façade proposed by Bangladesh [is not] convincing as it does not reflect the geography of the northern part of the Bay of Bengal"; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 346.

[105] CMCI, Vol. I, paras 6.25-6.27.

2.48 This geographical circumstance is therefore significant for the line of the boundary between Côte d'Ivoire and Ghana and should be taken into account for the purposes of its delimitation.

C. The Jomoro peninsula

2.49 Contrary to the claim made by Ghana, Côte d'Ivoire has never claimed that the strip of land should be "discounted"[106] or "washed away";[107] the existence of the strip of land and the principle of *uti possidetis juris* are not in any way disputed by Côte d'Ivoire.

2.50 On the other hand, it considers that strip of land to be a geographical circumstance which must be taken into account for the line of the maritime boundary between Côte d'Ivoire and Ghana in so far as, depending on the effect accorded to it, it blocks the projection of the Ivorian land mass (*1.*). For that reason account will have to be taken of that circumstance in the delimitation process for the maritime boundary between Côte d'Ivoire and Ghana, as is required by the relevant jurisprudence (*2.*).

1. The blocking of the projection of the Ivorian land mass

2.51 The line of the land boundary between Côte d'Ivoire and Ghana is peculiar in that it follows a north-south direction for around 650 km then deviates sharply less than 4 km from the coast, running perpendicular to the general north-south direction on a thin strip of land around 40 km in length, the Jomoro peninsula.

2.52 The Jomoro peninsula, which represents 0.1% of Ghana's land territory, constitutes a relevant circumstance in the delimitation process for the maritime boundary between Côte d'Ivoire and Ghana for a number of reasons.

[106] RG, Vol. I, para. 3.65.

[107] RG, Vol. I, para. 3.73.

2.53 *First*, that thin strip of land separates the Ivorian land territory from the Atlantic Ocean and thus blocks the seaward projection of the Ivorian territory, as can be seen in **Sketch map D 2.4** below.

Sketch map D 2.4 The Jomoro peninsula

2.54 *Second*, it defines, by itself, the entire line of the maritime boundary between Côte d'Ivoire and Ghana in so far as all the base points are located on it.

2.55 *Lastly*, all the base points used for the construction of the provisional equidistance line are concentrated on the western part of the Jomoro peninsula, where it is most narrow and where it actually reduces in size to become a thin barrier beach. It is therefore this

narrow barrier beach, which is offset from the land masses of Côte d'Ivoire and Ghana, that, despite its very small area, defines the entire provisional equidistance line.

2.56 By virtue of its effect of blocking the Ivorian land mass and its very small area, the Jomoro peninsula has disproportionate consequences for the line of the maritime boundary between Côte d'Ivoire and Ghana and it is essential that this circumstance is taken into account in order to achieve an equitable result.

2. The effect accorded by the jurisprudence to minor geographical circumstances

2.57 According to the jurisprudence, where a small or medium-sized geographical circumstance is such as to block the projection of the coasts of another State, it is necessary to adjust its effect on the maritime boundary line; otherwise the line constructed would be inequitable.

2.58 This line of reasoning has been adopted thus far principally with respect to the influence that islands can have on a maritime boundary line. In the jurisprudence on the effect of islands, courts and tribunals take two elements into consideration in deciding on the effect – full, partial or zero – of an island on the maritime boundary line: the size of the island and the blocking of the projection of the coasts of one of the States because of the presence of that island. Thus, in *Bangladesh* v. *Myanmar*, no effect was granted St Martin's Island by the Tribunal, which held that, despite its "important" size, "giving effect to St Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line *blocking the seaward projection from Myanmar's coast* in a manner that would cause an unwarranted distortion of the delimitation line".[108]

2.59 This reasoning cannot be confined to islands. It can be applied, *inter alia,* to peninsulas, as Côte d'Ivoire argued in its Counter-Memorial, to which Ghana has not

[108] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 318, emphasis added.

responded; in this regard the Arbitral Tribunal in the *Case concerning the delimitation of continental shelf between United Kingdom and France* held:

> when account is taken of the fact that in other respects the two States abut on the same continental shelf with coasts not markedly different in extent and broadly similar in their relation to that shelf, a question arises as to whether giving full effect to the Scilly Isles in delimiting an equidistance boundary out to the 1,000-metre isobath may not distort the boundary and have disproportionate effects as between the two States, In the view of the Court, the further projection westwards of the Scilly Isles, when superadded to the greater projection of the Cornish mainland westwards beyond Finistère, is of much the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of "special circumstance". In the present instance, the Court considers that the additional projection of the Scilly Isles into the Atlantic region does constitute an element of distortion which is material enough to justify the delimitation of a boundary other than the strict median line envisaged in Article 6, paragraph 1, of the Convention [on the continental shelf of 1958].[109]

2.60 This reasoning must therefore be applied to any kind of geographical circumstance, including the strip of land on which the Ivorian-Ghanaian land boundary terminus is located and which blocks the projections of the land mass of the other State.

2.61 The Jomoro peninsula, a tiny strip of land representing only 0.1% of Ghana's territory, thus constitutes a doubly peculiar circumstance in this case: the provisional equidistance line is defined by points located *solely* on this minor geographical circumstance and, in addition, it is such as to block the projection of the land mass of Côte d'Ivoire.

D. The exceptional concentration of hydrocarbon resources in the Tano Basin

2.62 In its Counter-Memorial, Côte d'Ivoire relied on access to the hydrocarbon resources of the disputed area as a relevant circumstance justifying the adjustment of

[109] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, RIAA*, Vol. XVIII, pp. 3-413, at p. 252, para. 244.

equidistance. This argument is based on the exceptional concentration of hydrocarbons in that area, as a result of its history and its specific geological structure.

2.63 In its Reply, Ghana challenges this argument on the following grounds:

- the location of hydrocarbons in the disputed area cannot, *per se*, constitute a relevant circumstance;[110]

- access to resources has been taken into account by the jurisprudence as a relevant circumstance only where this was necessary to avoid "catastrophic repercussions for the livelihood and economic well-being for the population for the countries concerned";[111]

- Côte d'Ivoire is not under threat of any such repercussions because it does not at present derive any economic benefit from that area.[112]

2.64 That argument errs both in law and in fact.

2.65 In law, the mere presence of hydrocarbons in the area to be delimited constitutes a relevant circumstance which must be taken into account. Furthermore, Ghana twists the notion of catastrophic repercussions through a simplistic reading of the jurisprudence. The law as it stands will therefore be recalled (*1.*). In fact, the concentration of hydrocarbons in the disputed area is such that in the present case it must be taken into account in the maritime boundary line in order to permit equitable access to those resources (*2.*). For the sake of completeness, Ghana cannot invoke its own turpitude by claiming that Côte d'Ivoire should be permanently deprived of the resources of the disputed area because it does not have access to them at present, since this situation results solely from the *fait accompli* strategy developed by Ghana (*3.*).

1. The law as it stands relating to the presence of natural resources in an undelimited area

[110] RG, Vol. I, para. 3.75.

[111] RG, Vol. I, para. 3.77, citing *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 71, para. 75.

[112] RG, Vol. I, para. 3.77.

a. The presence of hydrocarbons in an undelimited area constitutes a relevant circumstance within the meaning of the jurisprudence

2.66 By focusing solely on the attention which courts and tribunals have paid to the economic repercussions of granting a State access to resources or depriving it of those resources through delimitation, Ghana disregards a whole swath of case-law which considers the location of hydrocarbons in an area to be delimited to be a relevant circumstance *per se*.

2.67 *First*, Ghana wrongly invokes the decision given in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria.* In that case it was the oil practice of the States that was invoked as a relevant circumstance capable of bringing about an adjustment of the provisional equidistance line.[113] The Court examined only the effect to be accorded to the oil concessions granted by the Parties in an undelimited area and concluded that the oil practice of the Parties was not a factor to be taken into account in the maritime delimitation in that case.[114] On the other hand, the Court did not consider the effect on delimitation of the location of hydrocarbons, as claimed by Côte d'Ivoire in the present case.

2.68 The principle of taking into account the presence of hydrocarbons in a disputed area as a relevant circumstance is, however, accepted in jurisprudence.

2.69 It was first established in the *North Sea Continental Shelf* case. The International Court of Justice regarded as "factors to be taken into account [in the course of negotiations]" the "physical and geological structure, *and natural resources, of the continental shelf areas involved"*, provided those elements are "as known or readily ascertainable".[115] This principle has been reaffirmed on a number of occasions.

2.70 In the *Libyan Arab Jamahiriya/Malta* case, the Court also ruled that:

> [t]he natural resources *of the continental shelf under delimitation* "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation … . Those

[113] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 447, paras 302-304.

[114] *Ibid.*, p. 448, para. 304.

[115] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 54, para. 101(D)(2), emphasis added.

> resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them.[116]

2.71 It was because "the Court ha[d] not been furnished by the Parties with any indications on this point" that the Court did not take that relevant circumstance into account in that case.

2.72 Arbitral tribunals have followed the approach taken by the Court. The Arbitral Tribunal formed in the case of the maritime delimitation between the two Canadian provinces of Newfoundland and Labrador and Nova Scotia thus ruled, with regard to hydrocarbon resources whose presence was this time documented by the Parties,[117] that "as to access to the specific resources of the zone in question, the Tribunal does not think that this factor is irrelevant", referring to the possibility

> "already recognized in the *North Sea Continental Shelf Cases*, of having regard in any delimitation to the natural resources of the area in question 'so far as known or readily ascertainable'", concluding that "the effect of any proposed line on the allocation of resources is, in the Tribunal's view, a matter it can properly take into account among other factors."[118]

2.73 After finding that the line drawn allocated the hydrocarbon resources of the Laurentian sub-basin equitably, contrary to the maximalist claims of the Parties,[119] the Tribunal ruled that no further adjustment was required.[120]

2.74 According to the jurisprudence, the presence of hydrocarbons in an undelimited area must thus be taken into consideration as a relevant circumstance provided the location of the hydrocarbons in question can be ascertained. Where that presence was proven and ascertained, it was taken into account in order to ensure equitable access to the resources for the two States in dispute.[121] In the present case the exceptional

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[116] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 41, para. 50.

[117] *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas, Award of the Tribunal in the second phase, Ottawa, 26 March 2002*, p. 60, para. 3.20.

[118] *Ibid.*, p. 61, para. 3.21.

[119] *Ibid.,* p. 62, para. 3.22.

[120] *Ibid.,* p. 62, para. 3.23.

[121] *Ibid.,* p. 62, para. 3.23.

concentration of hydrocarbons in the disputed area will have to be taken into account by the Chamber.

b. The misleading reading by Ghana of the jurisprudence on "economic repercussions"

2.75 Ghana claims, at the expense of a simplistic reading of the jurisprudence on natural resources in undelimited areas, that such resources are taken into account only where it is necessary to avoid one of the States being deprived of a resource, of any kind, to which, moreover, it has always had access in the past. It thus asserts that Côte d'Ivoire's population "has never depended on these waters (or seabed) for the income they generate" and that Côte d'Ivoire "could not, therefore, suffer any catastrophic repercussions to its population from an adjusted equidistance line".[122]

2.76 This analysis of jurisprudence wrongfully assimilates hydrocarbon resources with fishery resources. It also distorts the reasoning adopted by the courts and tribunals in the relevant cases, giving a limited description of the reasoning centred around deprivation of resources, when it is actually based on a general pursuit of equity in the allocation of resources.

2.77 *First*, the potential "*catastrophic repercussions*" brought about by the delimitation "for the livelihood and economic well-being for the population for the countries concerned" have been assessed by the courts and tribunals only in respect of fishing activities, as is confirmed by the jurisprudence cited by Ghana[123] and, moreover, all the judgments and awards[124] which used that notion. In that jurisprudence account is taken of specific socio-economic interests, and the economic well-being of fishing communities, in the few cases where the delimitation was likely to have a direct impact on their activities. These have nothing in common with oil activities, which have a general socio-

[122] RG, Vol. I, para. 3.77.

[123] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 38.

[124] *Arbitral Award in the Case concerning the Delimitation of Maritime Areas between Canada and France of 10 June 1992, RIAA*, Vol. XXI, pp. 265-341, at pp. 265-341, in particular p. 294, paras 84-85; see also *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, pp. 335-410, in particular p. 352, paras 72-73; see also *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 126, para. 198.

economic impact from which the State benefits. That is why the presence of hydrocarbons in a disputed area is dealt with distinctly in the jurisprudence. Ghana wrongly thought that it could assimilate the interests thus protected, in disregard of the clear wording of the relevant decisions which, where there is mention of the presence of hydrocarbons in a undelimited area, recall the well-established principle set out above.[125]

2.78 Thus, in the *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the notion of catastrophic repercussions was mentioned by the Court only in respect of fishing activities and the need to protect fishing communities.[126] On the other hand, in respect of hydrocarbons, it has fully maintained its jurisprudence on taking account of the location of hydrocarbon resources in the area to be delimited as a relevant circumstance.[127] Ghana's analysis is therefore incorrect as it does not make any distinction between these two kinds of resources.

2.79 *Second*, contrary to the claim made by Ghana, the State is not required to prove its economic dependence on natural resources present in a disputed area in order to claim access to them in the delimitation operation.[128] That condition does not appear in the jurisprudence on the presence of hydrocarbons in an area to be delimited or, in any event, in the entire jurisprudence relating to the presence of natural resources in such areas. Ghana distorts the meaning and scope of the judgments in the Gulf of Maine and Jan Mayen cases to its advantage by elevating original access by the State to the resources of the area to be delimited to an essential condition for claiming those resources in the delimitation operation. Contrary to this kind of privileged right of access reserved for the first operators, which Ghana believes it can infer from that jurisprudence, the case-law actually advocates, and implements, equitable access to

[125] See above, paras 2.66-2.74. See also *Equitable principles of maritime boundary delimitation, The quest for distributive justice in international law*, Thomas Cottier, p. 583: "this may be due to the fact that drilling operations are mainly undertaken either on a national basis or by licensing agreements that provide revenues to the State in general".

[126] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at pp. 71-72, para. 75.

[127] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 70, para. 72. It should be noted that in that case the hydrocarbon exploration activities in the area were still at an early stage.

[128] RG, Vol. I, paras 3.76-3.77.

resources present in areas to be delimited, without any preferential consideration for the State(s) that already have access to the resources, subject to the abovementioned condition that there are no serious economic repercussions for certain communities dependent on fishery resources.[129]

2.80 The *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* is particularly illustrative of the solution to that problem offered by the case-law.

2.81 With regard to fishery resources, the Court thus ruled that "there is no reason to consider *de jure* that the delimitation … must result in each Party's enjoying an access to the regional fishing resources which will be equal to the access it previously enjoyed *de facto*."[130] Accordingly, the Chamber satisfied itself of the equitable allocation of the fishery resources in the area between Canada and the United States without giving special consideration to the State that exploited the resources of the area before the delimitation operation.

2.82 With regard to hydrocarbons, in that ruling the Chamber also satisfied itself of their equitable distribution between the two States by the line drawn, ruling that "it may be pointed out that the delimitation line drawn by the Chamber so divides the main areas in which the subsoil is being explored for its mineral resources as to leave on either side broad expanses in which prospecting has been undertaken in the past and may be resumed to the extent desired by the Parties."[131]

2.83 The resources in the subsoil, which are "the essential objective envisaged by States when they put forward claims to sea-bed areas containing them",[132] are taken into account as relevant circumstances in the delimitation operation. The Chamber will necessarily have to ensure that Côte d'Ivoire has equitable access to those resources, especially as they are particularly concentrated in the area in this case.

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[129] See above, paras 2.77-2.78.

[130] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 342, para. 236, see also *ibid.*, p. 343, para. 238.

[131] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 343, para. 239.

[132] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 41, para. 50.

2. In the present case the exceptional concentration of hydrocarbons in the area to be delimited must be taken into account

2.84 The hydrocarbon deposits originate from the decomposition of organic matter from living organisms (plankton, plants, animals). Some of that matter, known as biomass, is not destroyed by bacteria and is deposited on the ocean floor, then is mixed with minerals to form sedimentary sludge, which accumulates. Under the effect of their own mass and that of new deposits, those sedimentary layers naturally sink into the earth's crust.

2.85 As they sink into the earth's crust, the sedimentary layers are subject to increasing heat and pressure, under the effect of which they are gradually turned into hydrocarbons (oil or gas depending on depth and the corresponding degree of heat and pressure). Once formed, those hydrocarbons migrate out of the bedrock and circulate in rock formations until they are trapped by impermeable geological configurations of various kinds (convex (anticlinal) folds, faults, etc.). It is here that oil and natural gas can be found today.

2.86 In the instant case there is an exceptional concentration of hydrocarbon resources in the disputed area, which can be explained by the particular geological history of the Tano sedimentary basin.[133]

2.87 It was formed by the drift of the African and South American continents and the subsequent opening of the Atlantic Ocean during the Albian period. That drift created fracture zones, including the Romanche and Saint Paul Fractures, which lie adjacent to the Tano sedimentary basin. The Romanche Fracture is a transform fault, a source of loosening and sliding movements conducive to the creation of sedimentary basins and geological formations capable of trapping hydrocarbons. A minor collision along the Romanche Fracture caused by plate tectonics thus resulted in the creation of the Tano Basin during the Albian.

[133] RCI, Report by Earthmoves, 9 November 2016, Vol. III, Annex 189. See also CMCI, para. 1.35 *et seq.*

2.88 Today it is one of the richest basins in West Africa.[134] The abovementioned geological conditions, which are particularly favourable, caused sizeable sediment deposit and retention during the Cenomanian and the Turonian. It is in sediments from those geological ages that the fields which are now significant have been discovered, such as the TEN field which recently began exploitation and holds reserves estimated at 240 million barrels of oil.

2.89 If that deposit is particularly concentrated in the disputed area and to the east of it,[135] this is because of the natural obstacles formed by the Dixcove Ridge to the south-east and the Tano Nose to the north-east of the area. Influenced by those obstacles, the sediment deposit took the shape of a boomerang in the sedimentary basin. The Jubilee field, which holds reserves estimated at 600 million barrels of oil, lies at the centre of this geometric shape. On each side, on the arms of the boomerang, sediment deposition took place along the different anticlinal ridges, in a similar orientation to the Dixcove Ridge. The Tweneboa, Enyenra and Ntomme fields, as well as the Almond and Pecan fields, thus have an elongated shape.

2.90 This specific geological configuration and the available scientific data allow the statement to be made that, in addition to the hydrocarbon fields already identified, the disputed area also has significant hydrocarbon potential which remains to be discovered, as is pointed out by the expert commissioned by Côte d'Ivoire:[136]

> The concentration of oil fields, oil discoveries and hydrocarbon potential in the Tano Basin indicates that it was a preferential area for sand input in the Late Cretaceous period.
>
> The formation of the Albian fold ridge barriers has produced the ideal geological setting for sandstones to be trapped on the continental shelf. The main oil source rocks range in age from Turonian to Early Campanian, and the migration pathway from the source shales to the reservoirs is short and simple.

[134] Report by Earthmoves, 9 November 2016, RCI, Vol. III, Annex 189. See also Joel Teye Tetteh, *The Cretaceous Play of Tano Basin, Ghana*, International Journal of Applied Science and Technology, February 2016, RCI, Vol. III, Annex 191.

[135] Report by Earthmoves, 9 November 2016, RCI, Vol. III, Annex 189.

[136] *Ibid.*

> This geological context explains why hydrocarbons are highly concentrated in the Tano basin, and particularly within the [disputed zone].
>
> It is clear that, based on current understanding of the hydrocarbon distribution in the [disputed zone] and its significant hydrocarbon potential evinced by the many undrilled prospects and leads already identified, it represents an exceptional area of interest for oil and gas exploitation.

2.91 In generally seeking an equitable solution it must be ensured that Côte d'Ivoire has access to these resources, whose presence and exceptional concentration are proven.

3. For the sake of completeness, Ghana cannot invoke its own turpitude

2.92 The position taken by Ghana leads it to take its arguments to the point of absurdity. It claims the absence of any economic dependence by the Ivorian population on the resources of the area to justify the rejection of the relevant circumstance relied on by Côte d'Ivoire: "Côte d'Ivoire's population has never depended on these waters (or seabed) for the income they generate. It could not, therefore, suffer any catastrophic repercussions to its population from an adjusted equidistance line."[137] It ignores the fact that it is as a result of its own hegemonic policy of controlling the disputed area, by adopting a strategy of unilateralism and *fait accompli*, that Côte d'Ivoire is deprived of access to the hydrocarbon resources contained in the area and cannot therefore demonstrate any economic dependence.

2.93 This reasoning is ineffective on several grounds.

2.94 *First*, Côte d'Ivoire has already pointed out how Ghana's assessment of the jurisprudence relating to catastrophic repercussions is incorrect and does not require any economic dependence by the State on the resources of the area in order to be able to claim access to them in the delimitation operation.[138]

2.95 *Second*, Ghana's claim that it alone currently benefits from the disputed area is particularly ill-founded given that it imposed that situation on Côte d'Ivoire, without

[137] RG, Vol. I, para. 3.77.

[138] See above, paras 2.755-2.833.

due regard to the obligations of States in undelimited areas, an attitude for which it incurs its international responsibility.[139] In other words, Ghana cannot derive benefit from its own wrongful act, a principle that is well established in international law and which is expressed by the maxim "*nemo auditur propriam turpitudinem allegans"*.

2.96 The cautious and peaceful attitude adopted by Côte d'Ivoire, which has refrained from exploiting the area pending a definitive delimitation, cannot prejudice it, even though it has already suffered economic repercussions through loss of jobs and revenue, from which Ghana alone benefits at present; Tullow, for example, states that "nearly 28 million man hours of work" were carried out on the TEN field before it went into production in August 2016.[140] Ghana also made much of the beneficial effects of the investments made in the disputed area on employment, GNP growth and reducing poverty in its Written Statement in the Request for the prescription of provisional measures by Côte d'Ivoire.[141]

2.97 Ghana is even less justified in claiming the exclusive nature of its activities in the area, to which Côte d'Ivoire has regularly objected;[142] Côte d'Ivoire has itself refrained from exploring or exploiting that area in the absence of a delimited maritime boundary between the two States.[143]

2.98 It will not have escaped the Chamber that this is at most an attempt by Ghana to impute new legal significance to the oil practice of the Parties, on which it has already focused excessively.

II. Technical clarifications regarding the representation of the actual coastal geography of the Parties

[139] See *infra*, paras 6.1-6.40.

[140] Report by Tullow, *TEN Project – first oil,* 2016, p. 3, RCI, Vol. III, Annex 200.

[141] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Written Statement of Ghana*, paras 53-58; see also CMCI, paras 5.41-5.44.

[142] CMCI, Vol. I, paras 2.41-2.42 and paras 4.23-4.24.

[143] CMCI, Vol. I, paras 2.111-2.113.

2.99 In its Reply Ghana levels two criticisms at Côte d'Ivoire concerning its construction of the provisional equidistance line. First, it claims that Côte d'Ivoire proposes a number of starting points for the maritime boundary, in particular point Ω. Second, it asserts that the marine charts from which Côte d'Ivoire determined the low-water line should not be taken into account by the Chamber in the present litigation.[144]

2.100 These criticisms are unfounded. Maritime delimitation requires an accurate representation of the actual coastal geography of the Parties and it is in response to this technical requirement that Côte d'Ivoire offers clarifications regarding the use of:

- point Ω for the construction of the provisional equidistance line, while boundary post 55 remains the starting point for the maritime boundary between Côte d'Ivoire and Ghana (A.);

- official marine charts which, to the exclusion of the old marine charts referred to by Ghana, alone are capable of reflecting precisely the present coastline of Côte d'Ivoire (B.).

A. The unnecesary debate regarding the starting point for the maritime boundary

2.101 In its Reply Ghana wrongly claims that Côte d'Ivoire proposes a new starting point for the maritime boundary, namely point Ω.[145] As it explained in its Counter-Memorial,[146] point Ω is used by Côte d'Ivoire to comply with the technical requirements for the construction of the provisional equidistance line and not as the starting point for the maritime boundary between Côte d'Ivoire and Ghana, which, as agreed between the Parties, is boundary post 55.

2.102 There is no ambiguity in this regard in the written pleadings of Côte d'Ivoire, which

[144] RG, Vol. I, paras 3.55-3.63.

[145] RG, Vol. I, para. 3.97.

[146] CMCI, Vol. I, para. 7.23.

- mention the coordinates of point Ω only in connection with the construction of the provisional equidistance line, the first stage in the application of the equidistance/relevant circumstances method.[147] Unlike boundary post 55, point Ω is located on the low-water mark and is thus appropriate for the construction of the provisional equidistance line;

- mention exclusively boundary post 55 as the sole starting point for the boundary between Côte d'Ivoire and Ghana[148] and refer expressly to the coordinates of boundary post 55 jointly surveyed by the Parties,[149] even though they are different from those surveyed by Côte d'Ivoire in December 2014.[150]

2.103 Moreover, the difference caused by the use of point Ω rather than boundary post 55 is 0.03 M² (given that after point PEL-2 the provisional equidistance line is the same whether its starting point is boundary post 55 or point Ω) and is not therefore significant, as is clear from **Sketch map D 2.5** on page 56 of the present Rejoinder.

B. Côte d'Ivoire's official marine charts reflect the actual geography of the Parties

2.104 As Côte d'Ivoire explained in its Counter-Memorial, in January 2016 it published official marine charts in order to address the two-fold disadvantage of the old marine charts available, namely their lack of precision owing to their small scale and their

[147] CMCI, Vol. I, para. 7.27.

[148] *Ibid.*, para. 7.28; see, in particular, the Submissions in its Counter-Memorial in which Côte d'Ivoire requests the Chamber to declare and adjudge that the sole maritime boundary between Ghana and Côte d'Ivoire follows the 168.7° azimuth line, which starts at boundary post 55 and extends to the outer limit of the Ivorian continental shelf, CMCI, Vol. I, p. 271, emphasis added.

[149] CMCI, Vol. I, para. 2.65: Côte d'Ivoire "nevertheless [accepts], as Ghana had proposed, that the border starts from border post 55"; see, to the same effect, CMCI, paras 2.76, 4.23, 6.47, 6.70 and 7.29.

[150] As part of the work undertaken by Côte d'Ivoire with a view to drawing up its official marine charts, in December 2014 it conducted high-precision surveys of the coordinates of boundary post 55. According to that work, the coordinates jointly surveyed by the two States in November 2013 are slightly different from the precise coordinates of boundary post 55, which are: 05° 05' 28.36176'' N, 003° 06' 21.76342" W.

obsolescence on account of the age of the surveys on the basis of which they were produced.[151]

2.105 It was using those rigourous marine charts, which reflect the precise coastal geography of Côte d'Ivoire and part of the Ghanaian coast, that it identified the base points used for the construction of the provisional equidistance line, which are different from those used by Ghana.

2.106 In its Reply Ghana challenges their use on several grounds and asks the Special Chamber to use the old international marine charts for the construction of the provisional equidistance line or, failing this, the coastline drawn by EOMAP, a private company commissioned by Ghana to critique the cartographic data of Côte d'Ivoire.[152]

2.107 However, Ghana's criticisms of the use of Côte d'Ivoire's official marine charts are unfounded (*1.* to *3.*) and, unlike the marine charts used by Ghana and the coastline drawn by EOMAP, only those official charts reflect the actual coastal geography of the Parties (*4.*).

1. Procedural admissibility of the official marine charts

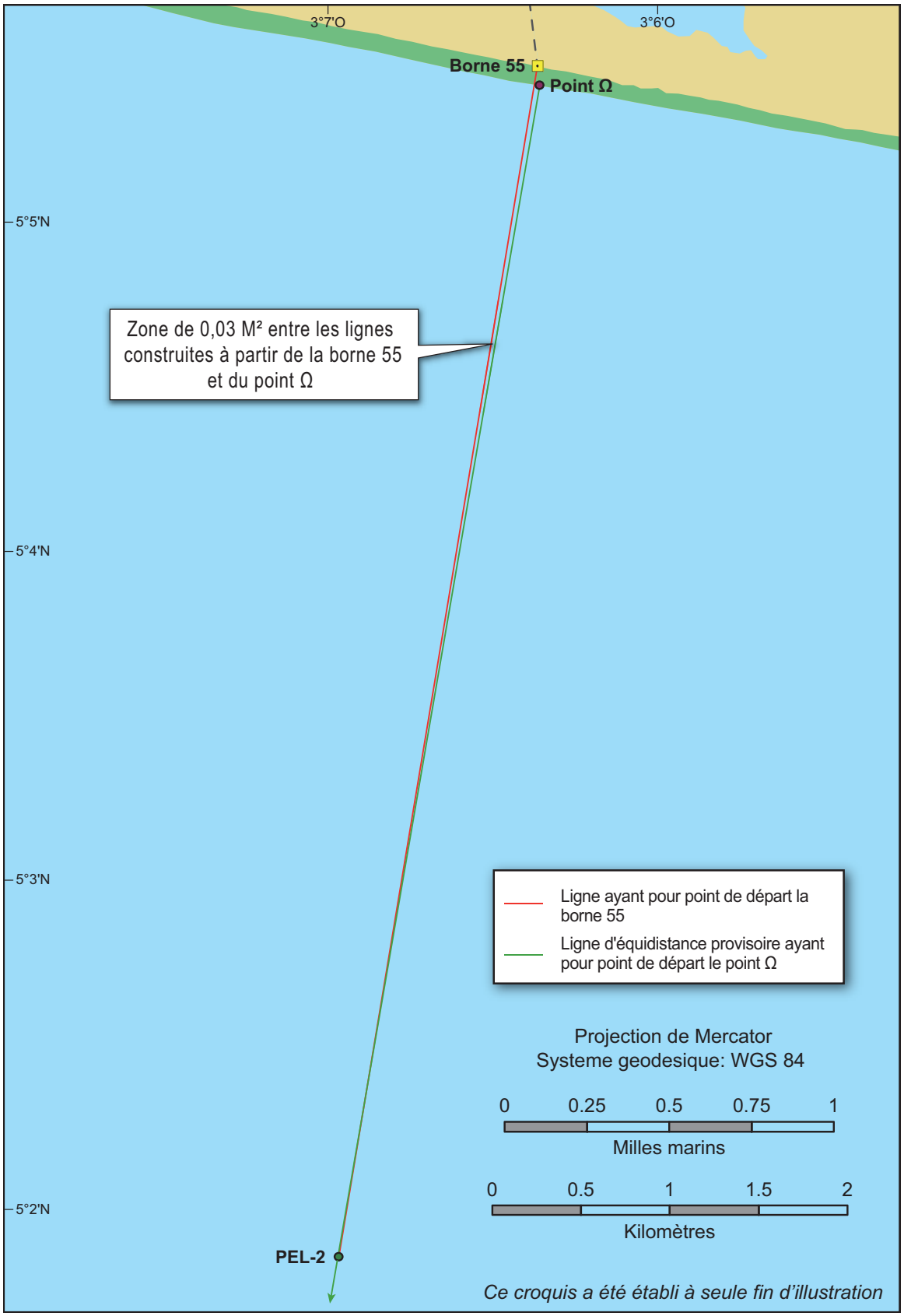
2.108 Ghana first challenges the admissibility of Côte d'Ivoire's official marine charts. It asserts that those official charts are inadmissible in so far as they have been "expressly developed for the purposes of this litigation and after its commencement".[153]

2.109 This position has no foundation in fact or in law.

[151] CMCI, Vol. I, paras 6.13-6.17 and 7.10-7.19.

[152] RG, Vol. I, para. 3.63.

[153] RG, Vol. I, para. 1.15, see also paras 3.11 and 3.28.



Sketch map D 2.5 The area of 0.03 M² between the lines constructed from boundary post 55 or from point Ω

2.110 *In fact*, those charts were not prepared for the purposes of the present litigation, contrary to the claim made by Ghana.[154] As Côte d'Ivoire explained in its Counter-Memorial[155] and as is argued in the Report by Argans annexed to the present Rejoinder,[156] as early as February 2014 Côte d'Ivoire noted technical difficulties connected with the use of outdated and imprecise charts. In March 2014, five months before the present proceedings were initiated by Ghana, Côte d'Ivoire decided, on the advice of Argans, a company specializing in marine cartography, satellite-based earth observation and research and development (R&D) work for satellite systems, to produce new marine charts.[157] The process (including selecting and commissioning experts and collecting all the data to be used in producing the charts) began at a time when no litigation was looming or could be initiated by Côte d'Ivoire on account of the declaration relating to article 298 of UNCLOS made by Ghana, which prevented any court or tribunal being seized.

2.111 *In law*, according to international courts and tribunals, the most recent data must be used to determine the low-water mark and the subsequent choice of base points.

2.112 Thus,

- in *Bangladesh* v. *India*, the Arbitral Tribunal stated that it "will avail itself of the most reliable evidence, resulting from the latest surveys and incorporated in the most recent large scale charts officially recognized by the Parties in accordance with article 5 of the Convention";[158]

- similarly, in *Philippines* v. *China*, a large number of charts published by several countries at a variety of times were submitted to the Tribunal. In some cases those charts showed very different results as regards the classification of certain disputed geographical features as islets, islands or low-tide elevations. In order ensure a "contemporary" reflection of the geography, the

[154] RG, Vol. I, paras 1.13, 1.16 and 3.55.

[155] CMCI, Vol. I, para. 7.15.

[156] Report by Argans, 9 November 2016, RCI, Vol. III, Annex 190.

[157] Presentation given by Argans to the Ivorian delegation, March 2014, CMCI, Vol. III, Annex 45.

[158] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 224.

Arbitral Tribunal gave precedence not to the most recently published charts, but to those based on the most recent surveys: "as an initial matter, the Tribunal considers it more important to focus on the timing of surveys rather than the publication of charts".[159] Where there was a conflict between a number of charts, it thus used the one representing "the most recent evidence".[160]

2.113 The principle governing acceptance of the most recent data by courts and tribunals is the need to reflect the geography at the time of the delimitation, as the Arbitral Tribunal in *Bangladesh* v. *India* held, "[t]he Tribunal will determine the appropriate base points by reference to *the physical geography at the time of the delimitation* and to the low-water line of the relevant coasts."[161]

2.114 Thus, in *Guyana* v. *Suriname*, Guyana challenged the position of a base point selected by Suriname (point S14) in so far as it was based on a chart published by the Netherlands Hydrographic Office, with the assistance of Suriname, after the proceedings in the arbitration had commenced. The Arbitral Tribunal rejected Guyana's argument on the ground that "[t]he Tribunal is not convinced that the depiction of the low-water line on chart NL 2218, a chart recognized as official by Suriname, is inaccurate. As a result, the Tribunal accepts the basepoint on Vissers Bank, Suriname's basepoint S14".[162]

2.115 Côte d'Ivoire's official marine charts, which were not prepared for the purposes of the litigation, constitute the most recent data capable of presenting the most accurate geography of the Parties and are therefore admissible.

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[159] *Arbitration between the Republic of the Philippines and the People's Republic of China, 12 July 2016, PCA Case No. 2013-19*, p. 141, para. 329.

[160] *Ibid.*, p. 155, para. 354.

[161] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 223, emphasis added.

[162] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname of 17 September 2007, RIAA*, Vol. XXX, pp. 1-144, at p. 110, para. 396.

2. The absence of an agreement between Côte d'Ivoire and Ghana on the marine charts to be used

2.116 Ghana wrongly claims that at the ninth meeting of the Côte d'Ivoire-Ghana Joint Commission on delimitation of the maritime boundary an agreement was reached between the Parties on the charts to be used in the delimitation of their maritime boundary and that Côte d'Ivoire cannot now rely on different charts without breaching that agreement.[163]

2.117 No such agreement was ever made.

2.118 Ghana bases the existence of that agreement on an extract from the minutes of the ninth meeting of the Côte d'Ivoire-Ghana Joint Commission, according to which "[t]he two parties agreed, from now on, to use the same international hydrographical charts on a scale of 1:150,000, where they exist, or on a scale of 1:350,000 or other scale appropriate for delimitation of maritime boundary or relevant remote sensing data".[164] Ghana gives this extract of the negotiation minutes much greater meaning than it actually has and ignores the context in which that ninth meeting took place.

2.119 During their negotiations the two States had decided to exchange base points to be used for the construction of equidistance lines.[165] Those base points were presented in the form of lists of coordinates at the eighth meeting, without any explanation being provided by the Parties regarding the sources from which they had been identified.[166] At the ninth meeting, the Parties discussed the sources used to determine the points which they had communicated at the preceding meeting and took note that:

- for the first time since the start of the negotiations they were using the same cartographic resources (chart INT 2805 for the Ivorian part and chart UKHO 3113 for the Ghanaian part);

[163] RG, Vol. I, paras 1.13, 3.54-3.55 and 3.61.

[164] Minutes of the ninth meeting of the Ghana-Côte d'Ivoire maritime boundary negotiations, 23-24 April 2014, CMCI, Vol. III, Annex 47, emphasis added.

[165] CMCI, Vol. I, paras 2.75-2.79.

[166] Minutes of the eighth meeting of Côte d'Ivoire-Ghana Joint Commission on delimitation of the maritime boundary between Côte d'Ivoire and Ghana, 18-19 February 2014, CMCI, Vol. III, Annex 44.

- in future, their work would be simplified by the use of common cartographic resources ("the same collections of international marine charts"), preferably on a scale of 1:150,000 ("where they exist") or on a scale of 1:350,000 or other scale.[167]

2.120 The Parties did not reach any agreement on the exclusive use of the charts relevant for the base points and did not rule out the possibility of relying on other charts in future. As further proof that no agreement was reached between the Parties, at the tenth meeting, held just one month after ninth, Ghana informed Côte d'Ivoire that:

- the 121 base points transmitted at the ninth meeting were based on charts other than chart UKHO 3113 – on which agreement had allegedly been reached between the Parties – namely three Russian nautical charts and two British nautical charts (Charts 1383 and 1384);[168]

- "the international hydrographic nautical charts" used by it in future would be charts UKHO 3100 and 1383 on a scale of 1:350,000,[169] and not chart 3113, on which agreement had allegedly been reached at the ninth meeting of the Joint Commission. Furthermore, it is that British Admiralty chart No 1383 that Ghana uses today.

2.121 Accordingly, there has been no agreement between the Parties on the exclusive use of old charts and this Chamber cannot be required to use those charts.

[167] Minutes of the ninth meeting of the Ghana-Côte d'Ivoire maritime boundary negotiations, 23-24 April 2014, CMCI, Vol. III, Annex 47, emphasis added.

[168] Minutes of the tenth meeting of Côte d'Ivoire-Ghana Joint Commission on delimitation of the maritime boundary between Côte d'Ivoire and Ghana, 26-27 May 2014, CMCI, Vol. III, Annex 48, p. 2.

[169] *Ibid.*, p. 3.

3. Technical reliability of the official charts

2.122 Ghana's third argument has two parts: Ghana asserts, on the one hand, that Côte d'Ivoire's official charts are not official charts and, on the other, that they are technically inaccurate.[170]

2.123 *First of all*, those charts are official charts of the Republic of Côte d'Ivoire and not mere "calculations" or a "technical study", as Ghana wrongly claims.[171] Moreover, Côte d'Ivoire communicated them as soon as they were published, on 28 December 2015, to the Secretary-General of the United Nations, who immediately published them on the website of the Division for Ocean Affairs,[172] and to the International Hydrographic Organization, SHOM and the UKHO.[173]

2.124 *Second*, contrary to the claim made by Ghana, Côte d'Ivoire's official marine charts comply with the technical requirements mentioned by the Parties at the ninth meeting of the Joint Commission:

- they are on a scale of 1:100,000, which is the largest scale available – an important factor for Ghana, which wrongly claims in its Reply that chart UKHO 1383 used by it "remains the largest scale"[174] – and are therefore on "an appropriate scale";

- they also contain all the technical parameters required by the Parties at that meeting, namely "WGS84 geodetic reference, geographical coordinates (longitude and latitude) in degrees, minutes and seconds, UTM rectangular

[170] RG, Vol. I, paras 3.55 and 3.62.

[171] RG, Vol. I, paras 1.16 and 3.9.

[172] Circular SN.1/Circ.333 published by the International Maritime Organization, 20 May 2016, RCI, Vol. III, Annex 192.

[173] CMCI, Vol. I, para. 7.16. See also Letter from the President of the National Commission for Maritime Boundaries to the Director of SHOM (Naval Hydrographic and Oceanographic Service), 31 December 2015; Letter from the President of the National Commission for Maritime Boundaries to the United Kingdom Hydrographic Office, 31 December 2015; Letter from the President of the National Commission For Maritime Boundaries to the President of the International Hydrographic Organization, 31 December 2015, CMCI, Vol. VI, Annex 171.

[174] RG, Vol. I, para. 3.53.

coordinates … , data acquisition period, data acquisition method, and tide data".[175]

2.125 Those official marine charts were produced according to the proper rules. With the assistance of the British company Argans, as Argans explains in its Report,[176] Côte d'Ivoire undertook a great deal of work to produce an up-to-date and precise coastline. In particular, it acquired high-precision, high-quality satellite images, carried out their calibration and orthorectification, conducted land surveys throughout the Ivorian coast, determined beach slopes, and observed water levels and depths by radiance inversion, utilizing the most current techniques. It then redrew that coastline on two marine charts, chart A001 on a scale of 1:1,000,000 and chart A002 on a scale of 1:100,000.

2.126 *Lastly*, all the data used by Côte d'Ivoire to draw up its official marine charts have been produced in the present proceedings,[177] contrary to the claim made by Ghana.[178]

4. The technical elements used by Ghana do not reflect the actual coastal geography of the Parties

2.127 Ghana asks the Special Chamber to reject the use of Côte d'Ivoire's official marine charts for the construction of the provisional equidistance line and to utilize the old international marine charts or, failing this, the coastline drawn by EOMAP.[179] However, neither the marine charts used by Ghana nor the coastline drawn by EOMAP properly reflects the actual geography of the Parties.

2.128 *First*, Ghana claims that the provisional equidistance line must be constructed on the basis of "official charts recognized by both Parties as of the time the present dispute

[175] Minutes of the ninth meeting of the Ghana-Côte d'Ivoire maritime boundary negotiations, 23-24 April 2014, p. 4, CMCI, Vol. III, Annex 47.

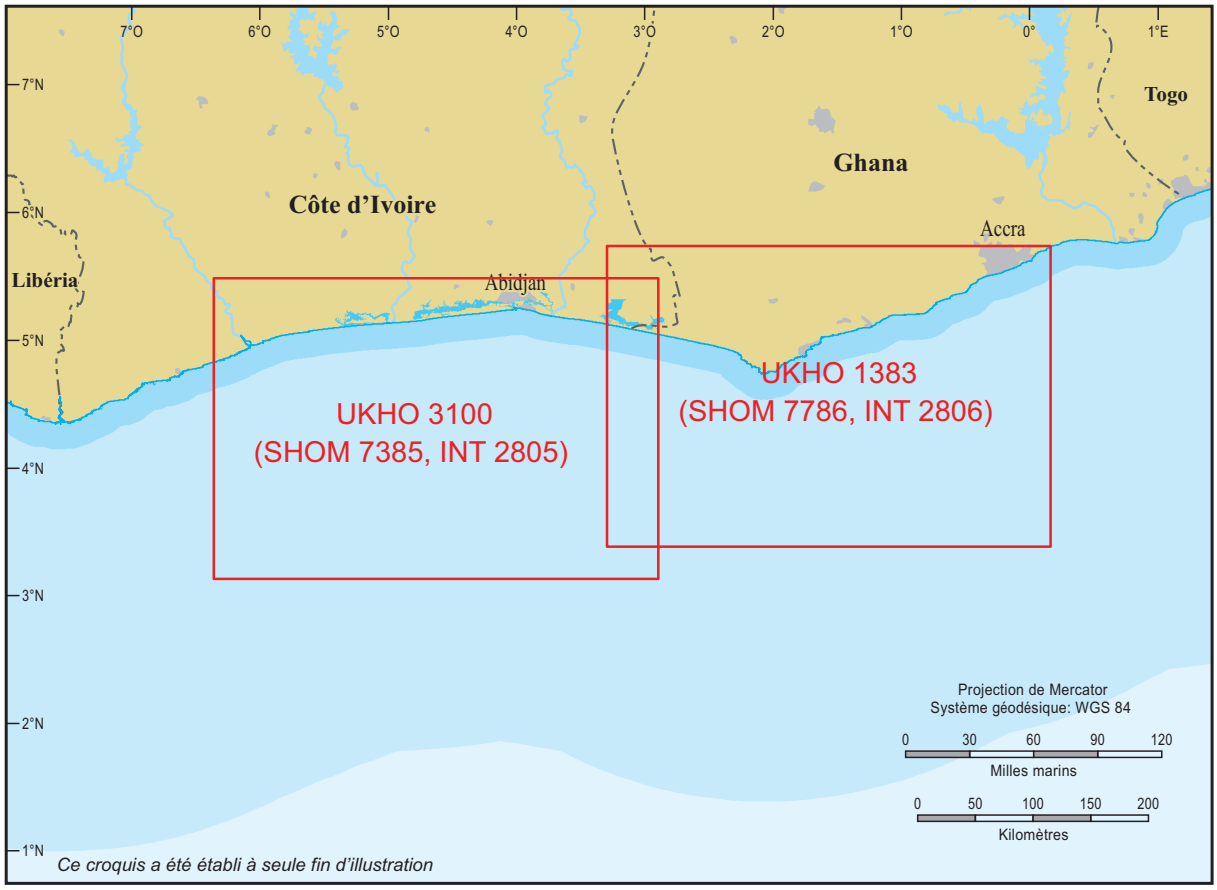
[176] Report by Argans, 9 November 2016, RCI, Vol. III, Annex 190.

[177] CMCI, Annexes DT1-DT69.

[178] RG, Vol. I, paras 1.15, 3.9 and 3.55

[179] RG, Vol. I, para. 3.63.

arose",[180] which, in Ghana's view, means chart UKHO 1383. However, that chart is not reliable. Côte d'Ivoire has compared that chart with chart UKHO 3100, which also covers the portion of coast close to boundary post 55, as is shown in **Sketch map D 2.6** below, and which was also used by Ghana in the bilateral negotiations.[181]



Sketch map D 2.6 Geographical coverage of charts UKHO 3100 and UKHO 1383

2.129 Although, logically, charts UKHO 1383 and 3100 should give similar results, according to an analysis of those charts they show two very different coastlines, which

[180] RG, Vol. I, para. 3.63.

[181] Minutes of the 10th meeting of the Côte d'Ivoire-Ghana Joint Commission on delimitation of the maritime boundary between Côte d'Ivoire and le Ghana, 26-27 May 2014, p. 3, CMCI, Vol. III, Annex 48.

therefore generate two different provisional equidistance lines (see **Sketch map D 2.7** below), as

- the two provisional equidistance lines are not based on the same number of base points: six points – in green – for chart UKHO 3100 and nine points[182] – in pink – for chart UKHO 1383;

- those base points are located on a portion of coast – which is tiny in both cases – which are different in length: 2.4 km of coast for chart UKHO 3100 and 13.4 km of coast for chart UKHO 1383;

- the two coastlines are located up to 650 metres apart;

- the provisional equidistance line derived from the coastline in chart UKHO 3100 is less favourable to Ghana; it is located to the east of that derived from chart UKHO 1383, the distance between those two lines being 291 metres at 12 nautical miles and more than 6 kilometres at 200 nautical miles.

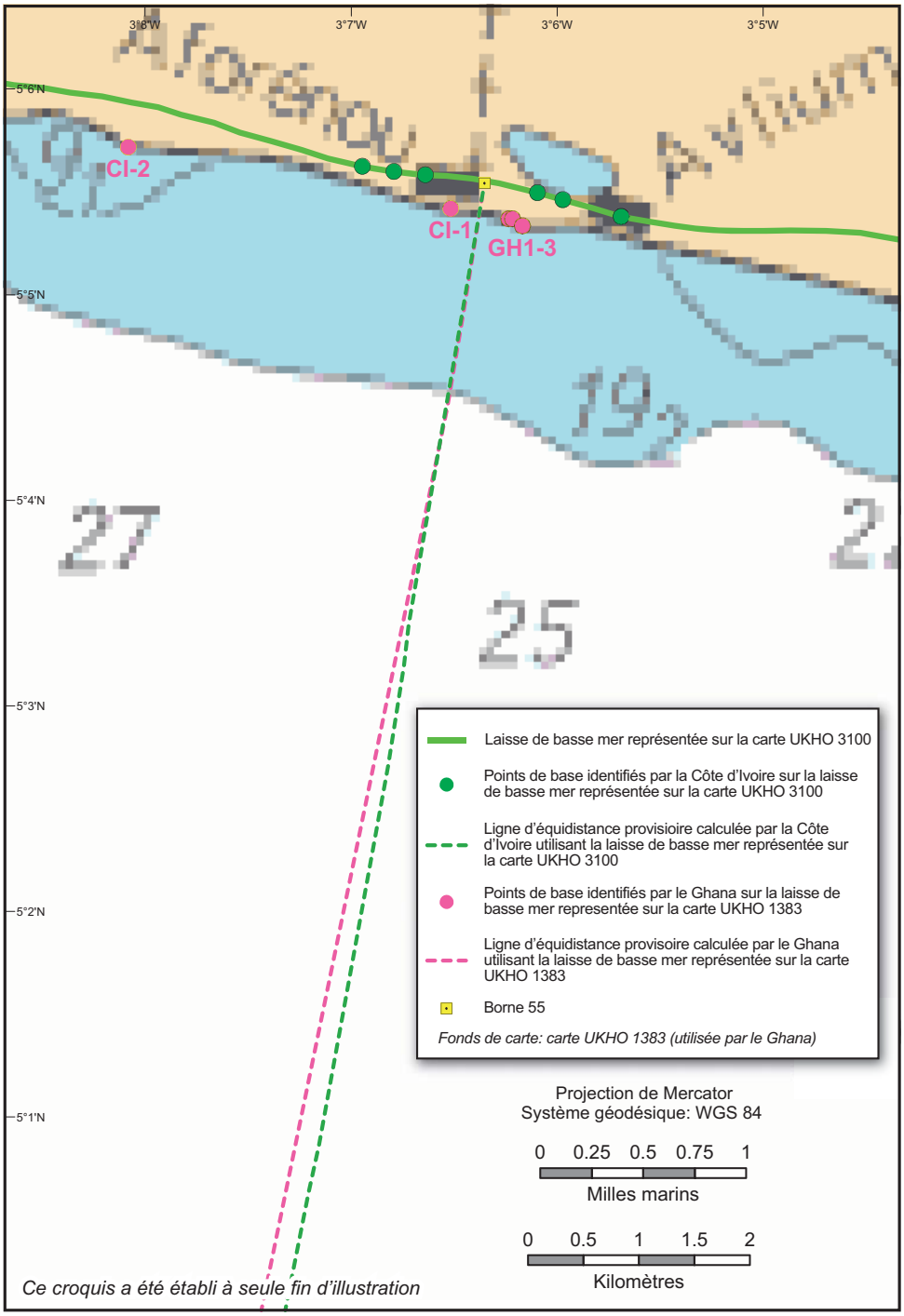
2.130 These different results are, moreover, expressly mentioned in the inset for chart UKHO 1383[183] (and in the inset for chart UKHO 3100[184]), which states that "[p]ositions on chart 1383 differ from those on chart 3100 by varying amounts; positions should be transferred by bearing and distance from common charted objects, not by latitude and longitude".

2.131 For these reasons, the use of chart UKHO 1383, which Ghana is seeking to impose as the reference for the boundary line between Côte d'Ivoire and Ghana, is highly questionable, as is the provisional equidistance line proposed by Ghana in these proceedings and constructed on the basis of chart UKHO 1383.

[182] In view of the large scale of Sketch map D 2.7, only 5 of the 9 base points have been shown on the sketch map.

[183] Chart UKHO 1383, RCI, Vol. II, Sketch map D 2.8.

[184] Chart UKHO 3100, RCI, Vol. II, Sketch map D 2.9.



Sketch map D 2.7 Comparison of coastlines derived from charts UKHO 3100 and UKHO 1383

2.132 Ghana proposes that, failing this, the Special Chamber use the coastline determined by the private company EOMAP if it has "doubts about the reliability of the official charts – because of the age of the survey information or other factors".[185]

2.133 However, it is not a valid alternative solution to use the coastline drawn by EOMAP, a company commissioned by Ghana. The work carried out by EOMAP is unsatisfactory on several grounds:

- no *in situ* survey was conducted;
- the satellite images cover a very short period and were chosen arbitrarily by that company;
- and the scale of those images is not precise enough to produce reliable results on such a small segment of coastline.[186]

2.134 In the *Philippines* v. *China* case, EOMAP had been commissioned by the Philippines to calculate the "Lowest Astronomic Tide, Highest Astronomic Tide, and Mean High Water"[187] in order to classify certain islets and low-tide elevations located in the South China Sea. The arbitrators criticized its use of satellite imagery, partly on the ground that "the resolution of the satellite imagery being used here is insufficient to establish the presence or absence of such features",[188] and thus concluded that "the Tribunal is unwilling to give weight to this evidence [the satellite bathymetry materials prepared by EOMAP]".[189] The same criticisms can be made of the methodology employed by EOMAP in the instant case.

2.135 Thus, neither marine map UKHO 1383 used by Ghana nor the conclusions of EOMAP, which was commissioned by Ghana to critique the coastline derived from Côte d'Ivoire's official marine charts, can therefore be used as an alternative to charts

[185] RG, Vol. I, para. 3.63.

[186] Report by Argans, 9 November 2016, RCI, Vol. III, Annex 190.

[187] *Arbitration between the Republic of the Philippines and the People's Republic of China, 12 July 2016, PCA Case No. 2013-19*, p. 128, para. 294.

[188] *Ibid.*, p. 138, para. 322

[189] *Ibid.*, p. 155, para. 354.

officially recognized by a sovereign State in delimiting the maritime boundary with its neighbour.

2.136 On the contrary, in order to construct the provisional equidistance line, it is necessary to determine the base points located on the coasts of the Parties on the basis of the official marine charts produced in Annexes C-6 and C-7, which reflect the coastal geography of the Parties, were drawn up according to the proper rules and are the most precise and most recent.

Conclusion

2.137 It has therefore been demonstrated in this case that the overall coastal geography (which is accurately reflected in Côte d'Ivoire's official charts), the instability of the coastlines, the Jomoro peninsula and the exceptional concentration of hydrocarbon resources in the disputed area constitute decisive geographical circumstances which must be taken into account in order to arrive at an equitable maritime boundary line.

CHAPTER 3

THE 168.7° AZIMUTH LINE TAKES INTO ACCOUNT THE ACTUAL GEOGRAPHY IN ORDER TO ACHIEVE AN EQUITABLE SOLUTION

3.1 It would seem that Ghana considers that the only place that equity surfaces in the law on maritime delimitation is when the non-disproportionality test is carried out[190] in the third stage of the equidistance/relevant circumstances method.

3.2 That is not so. The pursuit of an equitable result permeates the law on maritime delimitation as a whole[191] and such a result cannot be achieved without taking the geographical circumstances of the case into consideration. In particular, as ITLOS recalled in its 2012 Judgment,

> the objective is a line that allows the relevant coasts of the Parties "to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 127, para. 201).[192]

3.3 This objective of equity is achieved by the 168.7° azimuth line, which should constitute the maritime boundary, in the view of Côte d'Ivoire, as that line allows the coasts of the States to produce their effects on the delimitation in a reasonable way (**I.**) and its equitable character is ultimately confirmed by the application of proportionality tests (**II.**).

[190] RG, paras 1.19 and 1.26.

[191] *Supra*, paras 1.5 – 1.32.

[192] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 326.

I. The 168.7° azimuth line takes the decisive geographical circumstances into consideration

3.4 All international courts and tribunals before which a maritime delimitation case has been brought have stressed that the delimitation line used must allow the relevant coasts of the Parties "to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way".[193]

3.5 In the approach adopted by them, the courts and tribunals emphasize a variety of considerations:

> The Tribunal considers that a cut-off produced by a provisional equidistance line must meet two criteria to warrant adjustment of the provisional equidistance line. First, the line must prevent a coastal State from extending its maritime boundary as far seaward as international law permits. Second, the line must be such that – if not adjusted – it would fail to achieve the equitable solution required by articles 74 and 83 of the Convention. This requires an assessment of where the disadvantage of the cut-off materializes and of its seriousness. In adjusting the provisional equidistance line in the present case, the Tribunal must give due consideration to the need to avoid encroaching on the entitlements of third States and also the entitlement of India, including the entitlement arising from the presence of the Andaman Islands.[194]

3.6 This is precisely the approach taken by Côte d'Ivoire in the present case, in that it opts for a 168.7° azimuth line which:

- takes into account the overall coastal geography of the two Parties (A.);
- corrects the cut-off effect caused by the provisional equidistance lines (B.);
- takes into account the regional context of the Gulf of Guinea (C.).

[193] *Supra*, paras 3.1-3.2.

[194] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 417.

A. The 168.7° azimuth line takes into account the overall coastal geography of the two Parties

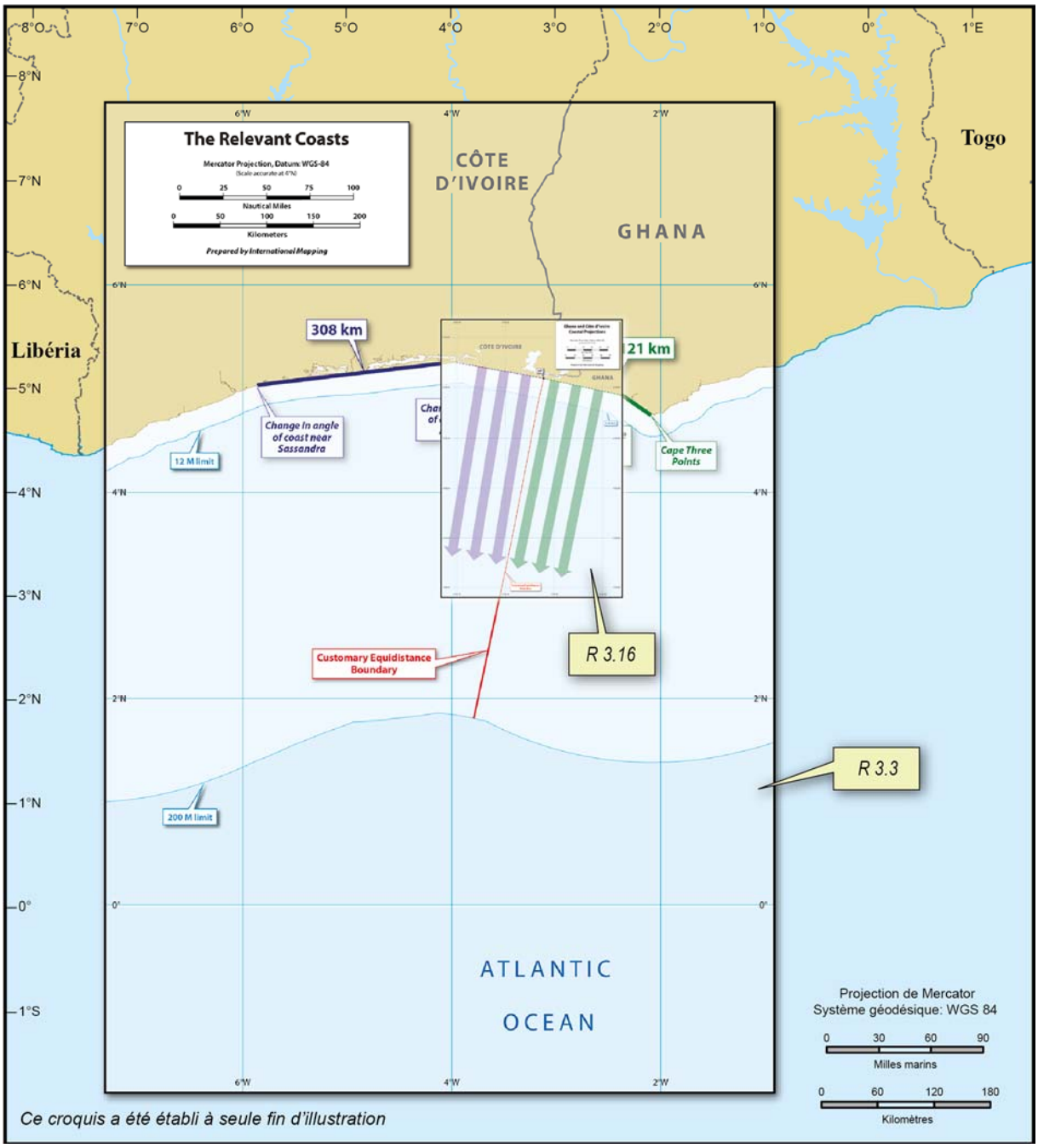
3.7 As in its Memorial, in its Reply Ghana displays a strong liking for coastal micro-geography, a tendency that is especially visible in its sketch maps, which show only a section of the coast around 20 km in length on either side of boundary post 55,[195] as if only that coastline gave rise to maritime entitlements in this case. It is also striking that those sketch maps, which allow Ghana to create the illusion of a remarkably regular geography and a straight coastline,[196] do not encompass the relevant coasts as identified by Ghana itself (**Sketch map D 3.1** below, formed by overlaying Figure R. 3.16 on Figure R. 3.3 in the Reply of Ghana, with the two being shown in the context of the overall coastal geography of the two States).

3.8 Whether the method of delimitation used is the angle bisector method or the equidistance/relevant circumstances method, the delimitation line cannot be determined on the basis of partial coastal geography, which is, moreover, depicted in a misleading way. While the bisector is, by definition, based on the general direction of the coastal geography of the two States, the application of the equidistance/relevant circumstances method must correct, as far as possible, the inequitable effects of the decisive geographical circumstances of the case. The same holds for the identification of the relevant coasts and the adjustment of equidistance in the light of the relevant circumstances.

3.9 It is with this in mind that Côte d'Ivoire has identified the coasts of the States which should be taken into account, both in the context of the application of the bisector method (where these coasts are the coasts "to be used") (*1.*) and in the context of the application of the equidistance/relevant circumstances method (where they are the "relevant" coasts) (*2.*).

[195] That is the case with Figure R. 3.18. See also Figures R 3.1, R. 3.9, R. 3.11, R. 3.12, R 3.13, R. 3.14, R. 3.15 and R. 3.16.

[196] RG, Vol. I, para. 1.19. See also *ibid.*, Vol. I, para. 3.21 and para. 3.101; MG, Vol. I, para. 1.14, para. 4.56 and para. 5.87.



Sketch map D 3.1 Coastal micro-geography in Ghana's sketch maps

1. The coasts to be used for the construction of the bisector

3.10 It must be borne in mind that the jurisprudence draws a distinction between the coasts to be used for the construction of the bisector and the relevant coasts in the context of the equidistance/relevant circumstances method. It is to that effect that the Arbitral Tribunal in *Bangladesh* v. *India* held that:

> the identification of the relevant coasts for the delimitation in general and the depiction of the general direction of the coast when applying the angle-bisector method are two distinctly different operations.[197]

3.11 There is nothing automatic about the determination of the relevant coastal geography; it "calls for the exercise of judgment in assessing the actual coastal geography".[198] The judicial examination of the coastal geography, and thus the general representation of the façades, are different depending on whether the bisector or equidistance/relevant circumstances method is used, since "[t]he bisector method … seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast."[199] The macro-geographical approach at work in the application of the bisector is thus based on the "general direction of the respective coasts of the Parties".[200]

3.12 In its Counter-Memorial Côte d'Ivoire stated that all the coastal façades of the two States should be taken into consideration[201] and not a tiny portion of them, as Ghana would want. The coasts to be used in the instant case are reproduced in **Sketch map D 3.2** below.

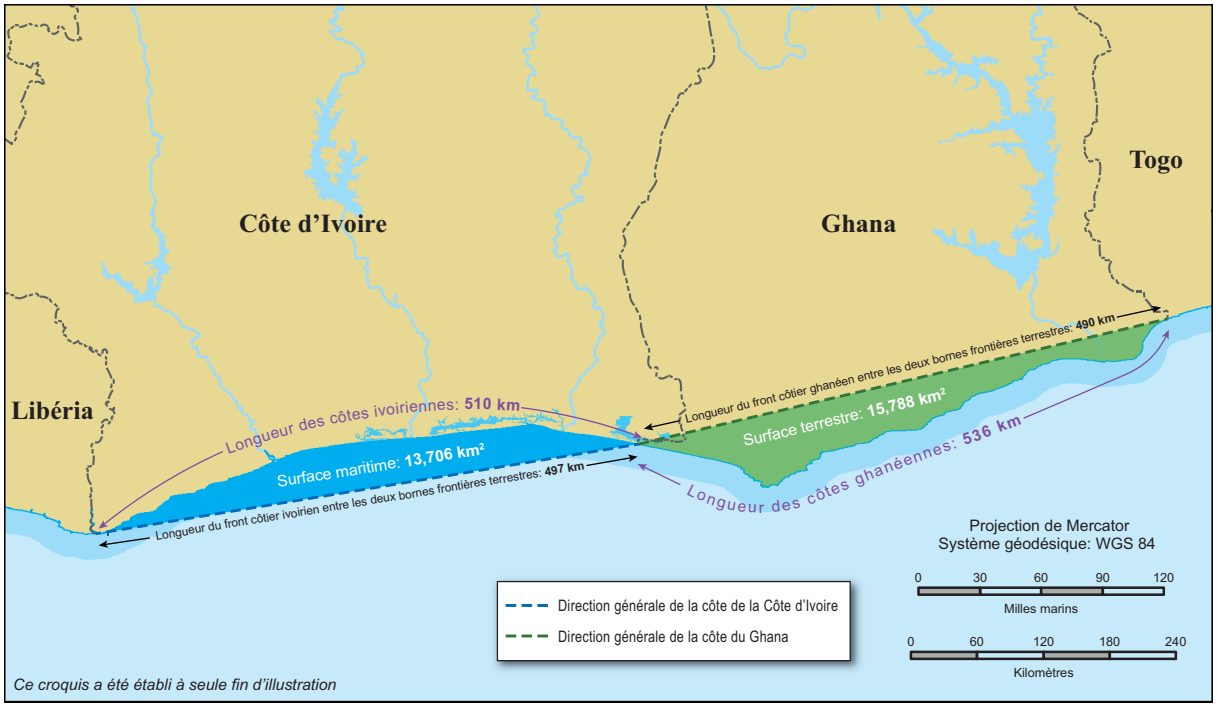
[197] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 277.

[198] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 747, para. 289.

[199] *Ibid.*

[200] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 236.

[201] CMCI, Vol. I, paras 6.35-6.48.



Sketch map D 3.2 The coasts to be used for the construction of the bisector

3.13 The coasts to be used for the construction of the bisector, determined in a simplified manner, neutralize geographical features and emphasize the particular geographical characteristics of this case, especially the concavity of the Ivorian coast combined with the significant convexity of the Ghanaian coast. This also illustrates the distortion effect caused in Ghana's coastal façade by Cape Three Points. It is because of this distortion that part of the Ghanaian coastline generates westward projections, whereas, owing to its general concavity, the Ivorian coast generates eastward projections.[202] In addition, it avoids focusing on a tiny portion of the coast for the construction of provisional equidistance and giving disproportionate weight to the Jomoro peninsula.

3.14 Ghana's criticisms ignore the rules for determining the coasts to be used for the construction of the bisector. The bisector is constructed from a series of straight lines, which inevitably generalize and simplify the coastal relationships. By definition, those representations are not supposed to follow the sinuosity of the coasts. This is clearly

[202] See also *infra*, Sketch map D 3.5.

shown by the way in which judicial and arbitral bodies have represented the coasts to be used in cases where the bisector has been applied.[203]

3.15 Furthermore, the simplified lines are far from refashioning nature, as Ghana claims. In the context of the application of the bisector, it is necessary to select "a coastal façade of sufficient length to account properly for the coastal configuration in the disputed area."[204] This certainly provides "a balanced translation" of the "whims and inequities of nature",[205] allowing an equitable result to be achieved, the very purpose of any delimitation.

3.16 In the instant case, **Sketch map D 3.2** above shows that the area created by the concavity of the Ivorian coast (13,766 km²) and the area created by the convexity of the Ghanaian coast (15,788 km²) balance each other. In addition, the length of the actual coasts of the two States is roughly equal (510 km for Côte d'Ivoire and 536 km for Ghana), as is the length of the simplified coastal façade (497 km for Côte d'Ivoire and 490 km for Ghana). The simplification of the coast also accounts for the general direction of the coasts of the two States, which take an east-north-easterly direction and not a westerly direction, as Ghana would like.

2. The relevant coasts in the context of the equidistance/relevant circumstances method

3.17 In the application of the equidistance/relevant circumstances method, identification of the relevant coasts makes it possible to show areas of overlapping titles, but also, and in that connection, to determine the relevant area for the non-disproportionality test calculation.[206] This is clear from consistent jurisprudence, according to which the determination of the relevant coasts fulfils those two functions:

> The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone.

[203] CMCI, Sketch maps 6.4 (*Nicaragua* v. *Honduras*) and 6.5 (*Guinea/Guinea-Bissau*).

[204] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 749, para. 298.

[205] P. Reuter, *Une ligne unique de délimitation des espaces maritimes?*, *in* Mélanges Georges Perrin, Lausanne, Payot, 1984, p. 256.

[206] Ghana emphasizes this aspect in its Reply (see RG, Vol. I, paras 3.9 and 3.47-3.48).

> First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line.[207]

3.18 Ghana's criticisms concerning a failure by Côte d'Ivoire to identify the relevant coasts are particularly ill-founded. Côte d'Ivoire had explained in its Counter-Memorial that it was "difficult or arbitrary" to carry out the non-proportionality test using the methodology established by recent jurisprudence, namely determining the relevant coasts first and the relevant area second.[208] This is confirmed emphatically by Ghana's analysis, which shows that, in this exercise too, the Chamber must demonstrate a degree of flexibility and an "*esprit de finesse*" in order to avoid arriving at an unreasonable result.

3.19 First, the relevant coasts, including those selected by Ghana, have no influence on the construction of the provisional equidistance line having regard to the objective selection of base points using the Caris Lots software[209] and their location on a tiny portion of the coasts of the two States (see **Sketch map D 3.3** below). They are located on the Ivorian coastline at a distance of 171 metres from point Ω, while on the Ghanaian coastline they extend over a distance of just over 8.5 km to the east of point Ω.[210] This represents 0.02% of the total Ivorian coastline and 1.20% of the Ghanaian coastline, a proportion which, in itself, shows that the equidistance line is not based on the actual coastal geography of the two States in this case. Second, those two portions of coast are located on a segment of coastline running in an opposite direction to the general direction of the coasts of the two Parties.

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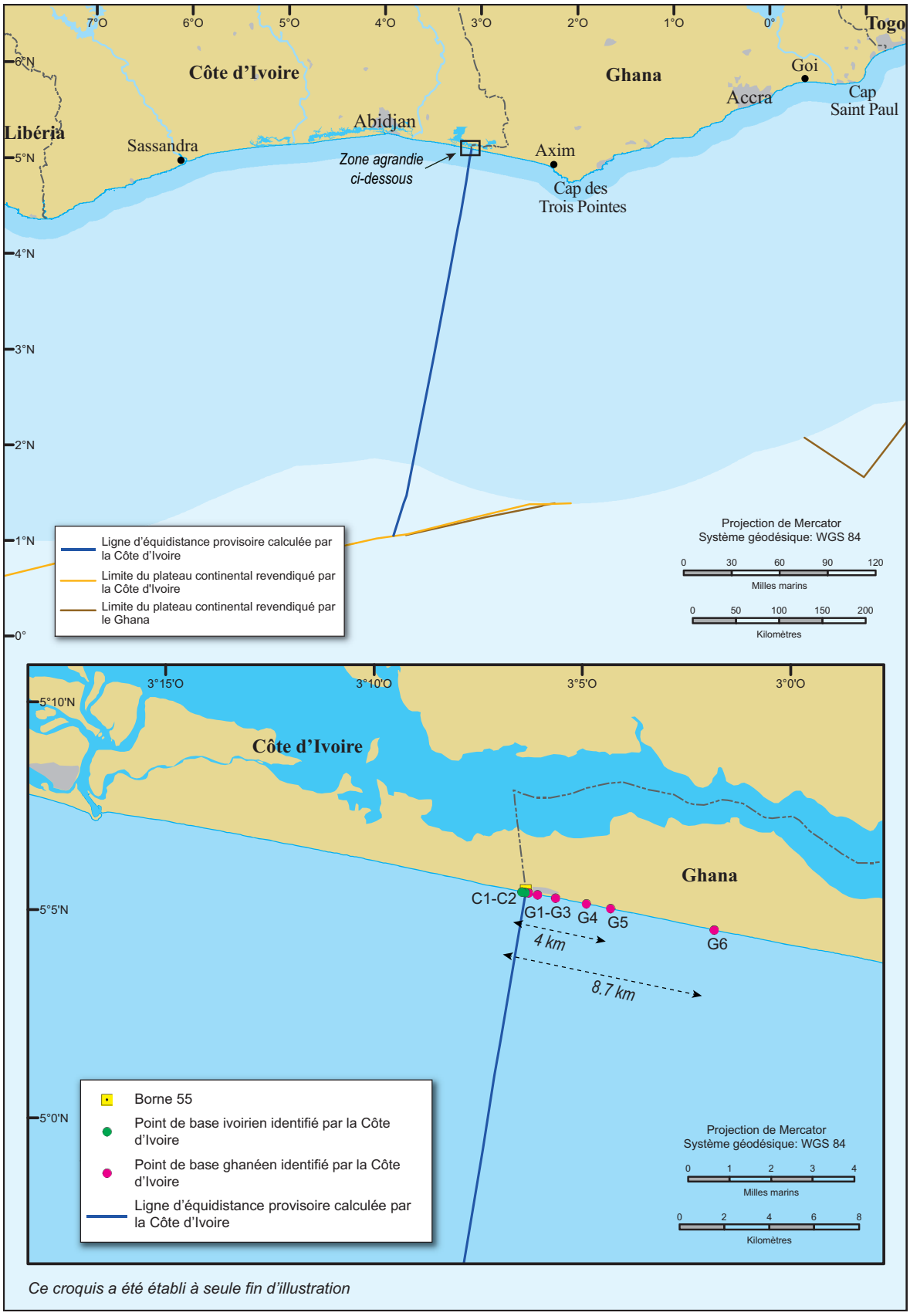
[207] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 89, para. 78, also cited in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 675, para. 141, and *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 278.

[208] CMCI, Vol. I, para. 8.48.

[209] For a brief description of the program, see CMCI, Vol. I, para. 6.13.

[210] CMCI, Vol. I, para. 7.23. See also CMCI, Vol. I, paras 6.10-6-24, and *supra*, paras 2.11-2.13.



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Sketch map D 3.3 The base points identified by Côte d'Ivoire

3.20 In these circumstances, it is clear that those points do not account at all for the general orientation of the coasts of the two States. It can only be stressed that the choice of base points made by a software program can be arbitrary, and how arbitrary it is in this case, in so far as it cannot provide an acceptable representation of the general direction of the coastlines. Where a provisional equidistance line is to be drawn, the Chamber is required to identify

> the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography.[211]

3.21 On the other hand, although there is no legal obligation blindly to follow the scientific guidance provided by the Caris Lots software, there is no credible alternative in the instant case in so far as, for Côte d'Ivoire, the points marking a significant change in the direction of the coast are located further north than the base points selected by Caris Lots, owing to the general concavity of those coasts. This case is one in which the base points used for the construction of the provisional equidistance line do not take due account of the actual coastal geography – and cannot take it into account if regard is had to the general guideline that the base points must be the most protuberant points situated nearest to the area to be delimited:

> Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited.[212]

3.22 Curiously, Ghana draws a correlation between its choice of relevant coasts and the identification of base points by Côte d'Ivoire. It even claims (still assuming that equidistance would be used) that:

> Ironically, the Counter-Memorial confirms that Ghana's identification of the relevant coasts is correct. All of the base points identified by Côte d'Ivoire in the construction of

[211] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 105, para. 127.

[212] *Ibid.*, p. 101, para. 117.

> its provisional equidistance line, on both sides of the LBT, fall along the relevant coasts as identified by Ghana; none are located beyond the limits of these relevant coasts.[213]

3.23 There is irony somewhere, as there is no correlation between the base points and the relevant coasts, including those identified by Ghana. It is true that those base points are located on the relevant coasts identified by Ghana, but they are exclusively on tiny segments of those coasts, representing 0.06% of the relevant coasts of Côte d'Ivoire and 7.02% of those of Ghana. Taken together, the base points are thus located on 2.02% of the relevant coasts of the two States, as those coasts are identified by Ghana itself **(see Sketch map D 3.4** below).

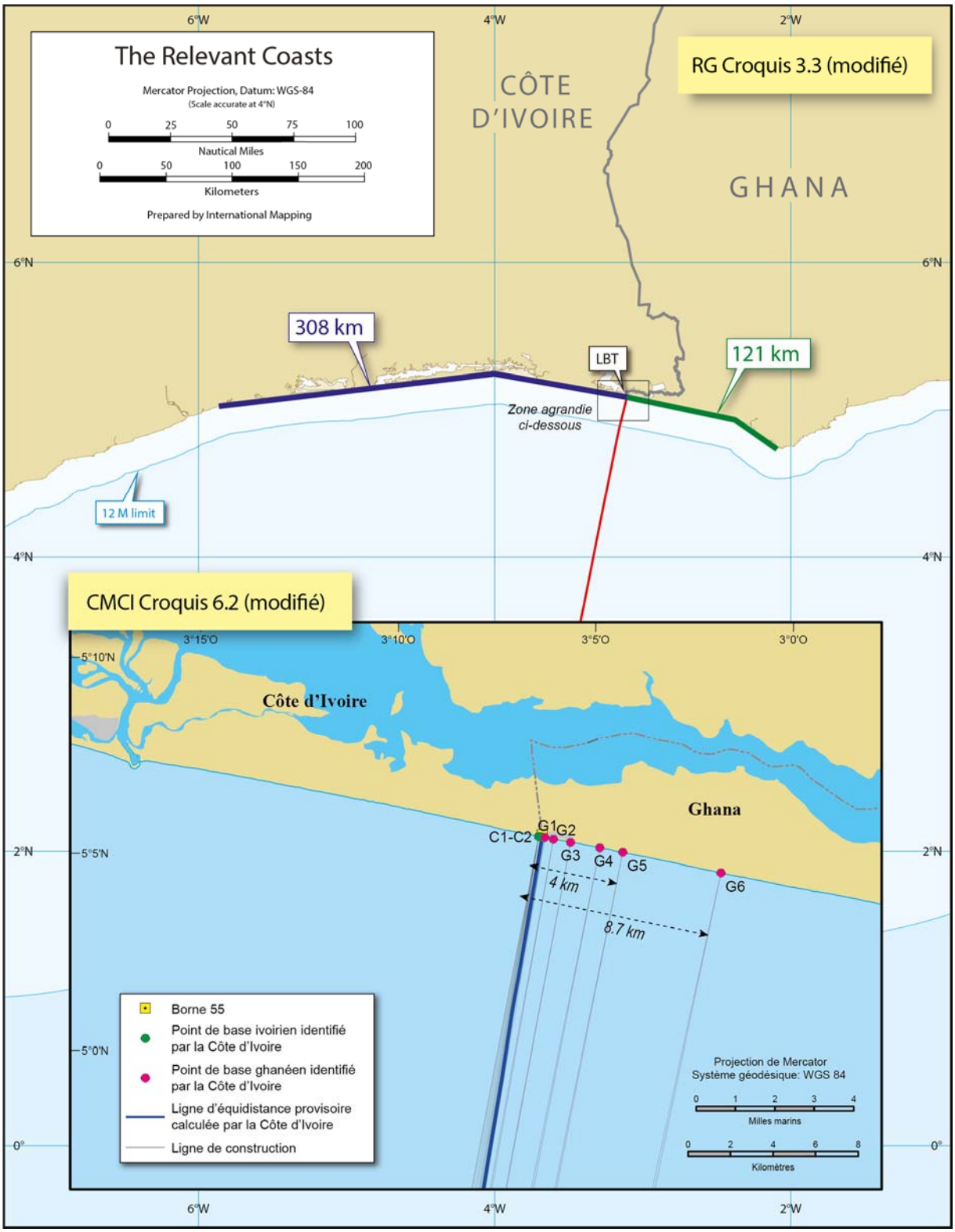
3.24 In a situation of adjacency, as in this case, determination of overlapping projections is more complex. Technically, the overlap can be illustrated either by a "directional" projection or by a "radial" projection[214] of the coasts. None of Ghana's sketch maps identifies the overlap of the coastal projections, although Figure 5.5 of the Memorial of Ghana (reproduced as Figure R 3.6 of the Reply) claims to do so, by illustrating (non-overlapping) directional projections. This had been noted by Côte d'Ivoire in its Counter-Memorial,[215] but Ghana failed to respond to this point in the Reply.

3.25 The application of the directional projections technique by Ghana is, moreover, highly arbitrary, which can probably be explained by the geographical factors which make the application of this technique to a situation of adjacency complex. The presence of Cape Three Points makes Ghana's coastline as a whole convex, while it introduces a slight concavity at its western extremity.

[213] RG, Vol. I, para. 3.50.

[214] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 300, citing *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII*, pp. 147-251, at p. 235, para. 331.

[215] CMCI, Vol. I, para. 8.49 and footnote 589.



Sketch map D 3.4 Absence of any correlation between the base points and the relevant coasts identified by Ghana

3.26 Consequently, only the portion between the land boundary terminus and Cape Three Points is directly opposite the area to be delimited. The rest of Ghana's coastal façade, namely the portion between Cape Three Points and the end of its land boundary with Togo, projects in a south-south-easterly direction opposite the area to be delimited. From this point of view, Cape Three Points produces a blocking effect in respect of the rest of Ghana's coastal projections. The application of the directional projections technique therefore results in the Ghanaian coast located to the east of Cape Three Points being disregarded in so far as its extension could not meet that of the coastline of Côte d'Ivoire, as Ghana agrees in its Memorial[216] and in its Reply.[217]

3.27 However, Ghana is mistaken regarding the relevance of the Ivorian coast. It wrongly stops at Sassandra, on the ground that "[a]fter that point, where Côte d'Ivoire's coasts turns to the southwest, it is too far from the area in dispute to be taken into account."[218] In actual fact, as is stressed by the jurisprudence, it is not distance that is crucial, but "the capacity of the coasts to generate overlapping titles".[219] Using the same directional projections technique, it would appear that, precisely because it takes a south-westerly direction, completing the concavity of the Ivorian coastline, the portion of Ivorian coastline between Sassandra and the land boundary terminus with Liberia continues to be opposite the area to be delimited and to generate directional projections up to the outer limit of the continental shelf (see **Sketch map D 3.5**). As the Arbitral Tribunal stated in *India* v. *Bangladesh*:

> To establish the projection generated by the coast of a State, the Tribunal considers that "what matters is whether [the coastal frontages] abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation".[220]

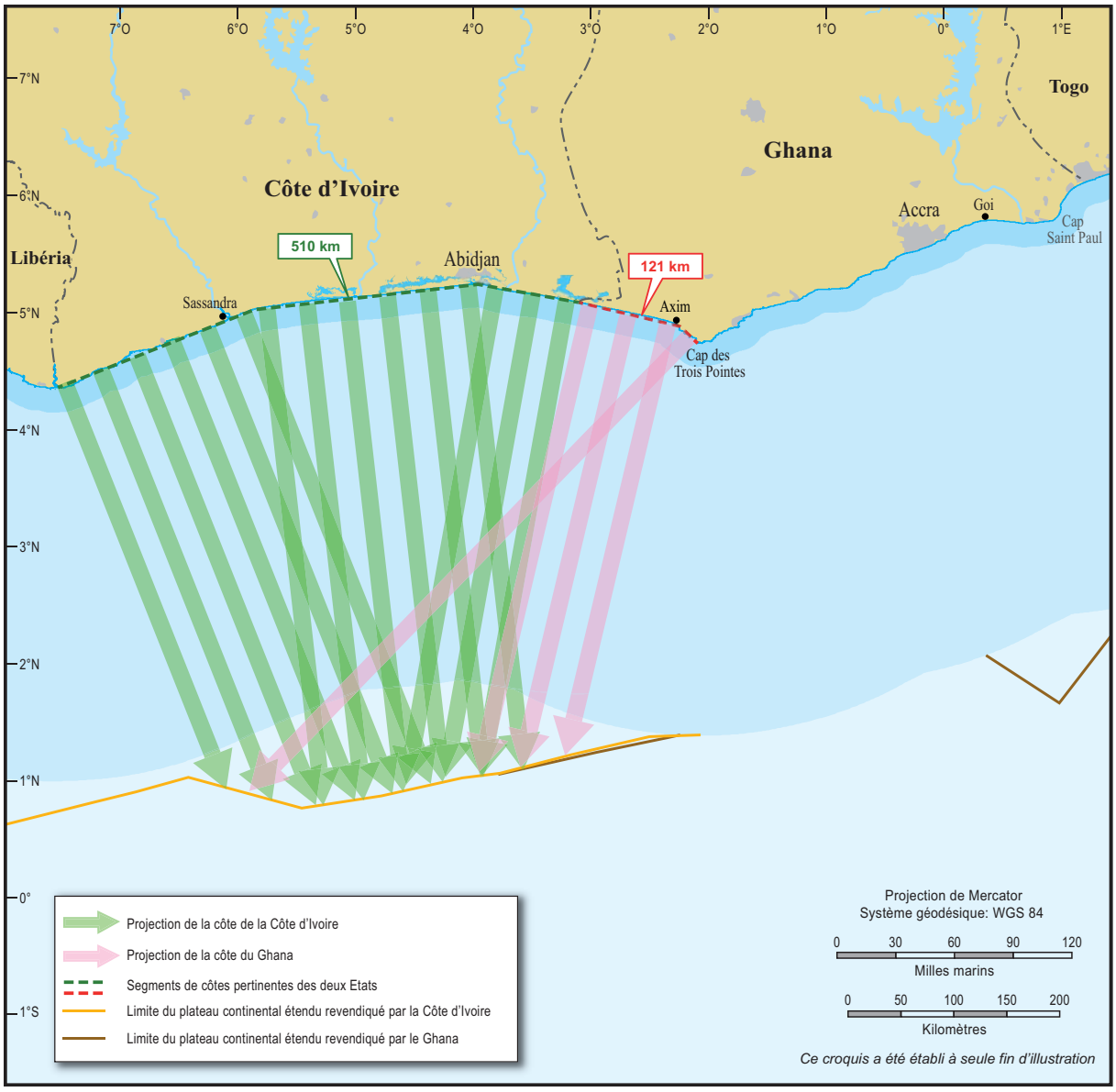
[216] MG, Vol. I, para. 5.80.

[217] RG, Vol. I, para. 5.80.

[218] MG, Vol. I, para. 5.80.

[219] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 105, para. 128.

[220] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 300, citing *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA*, Vol. XXVII, pp. 147-251, at p. 235, para. 331.



Sketch map D 3.5 The relevant coasts for the application of the equidistance/relevant circumstances method

3.28 Even if the projections of the Ivorian coast located between Sassandra and the boundary with Liberia, on the one hand, and those of the coast of Ghana, on the other, overlap beyond 200 nautical miles, "[there is] no basis for distinguishing between projections within 200 nm and those beyond that point. ... That being so, the coast is relevant, irrespective of whether that overlap occurs within 200 nm of both coasts, beyond 200 nm of both coasts, or within 200 nm of one and beyond 200 nm of the

other."[221] In the present case, there is therefore no reason to exclude from the relevant coasts the portion of the Ivorian coastline between Sassandra and the land boundary terminus with Liberia.

3.29 It thus appears that the entire Ivorian coast, from boundary post 55 to the boundary with Liberia, generates projections in the maritime area to be delimited which overlap projections of the Ghanaian coast. On the other hand, from Ghana's coast, only the section of coast between boundary post 55 and Cape Three Points projects into the maritime area to be delimited such as to overlap the projections from the Ivorian coast. Cape Three Points has a two-fold effect, closely linked to its convexity: on the one hand, it allows Ghana's coasts to project into an area of competing claims; on the other, it creates a blocking effect in respect of the projections of Ghana's coasts lying to the east of Cape Three Points.

3.30 Two conclusions can be drawn at this point: first, the length of the properly identified relevant coasts is therefore 510 km for Côte d'Ivoire and 121 km for Ghana and the ratio between the lengths of the respective coasts of Côte d'Ivoire and Ghana is thus approximately 1:4.2.

3.31 Second, regard must be had to this marked disparity in the respective lengths of the coasts in seeking and assessing the equitable solution, as:

> The reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria.[222]

3.32 Accordingly, the marked disparity between the respective coasts of the States is considered by the jurisprudence a circumstance to be taken into account in the context of the second stage of the equidistance/relevant circumstances method: "[w]here disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some

[221] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 299.

[222] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA*, Vol. XXVII, pp. 147-251, at p. 214, para. 239.

adjustments to the provisional equidistance line to be made."[223] The same must hold in the present case.

B. The 168.7° azimuth line corrects the cut-off effect caused by the equidistance lines

1. The cut-off effect of the line claimed by Ghana

3.33 In the preceding chapter, Côte d'Ivoire identified the geographical circumstances owing to which the equidistance lines (the incorrect line proposed by Ghana, the alleged "customary equidistance line", but also the precise geometric equidistance line identified by Côte d'Ivoire) cause a cut-off effect in respect of the maritime entitlements generated by the Ivorian coast. It may be recalled that the cut-off is caused by the general concavity of the Ivorian coast combined with the convexity of the relevant Ghanaian coast, which the geometric equidistance line does not take into consideration. It is also caused by the discrepancy between the general direction of the coasts of the two States and the tiny portion of coast on which the provisional equidistance line is based. This is accentuated by the disproportionate effect of the strip of land, which blocks the projections of the Ivorian land mass.

3.34 As is clear from **Sketch map D 3.6** below, the line claimed by Ghana cuts off the coastal projections of a portion of Côte d'Ivoire's coastline of more than 100 km in length, located between boundary post 55 and Abidjan, from a distance of 12 nautical miles from the coast. Access to the sea is thus reduced considerably for several important towns with more than 10,000 inhabitants, including the economic capital of Côte d'Ivoire, Abidjan. It is only in the vicinity of Grand Lahou that the coastal projections of Côte d'Ivoire benefit from an opening up to 200 nautical miles, as the

[223] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 116, para. 164. See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246, at pp. 312-313, para. 157; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J Reports 1985*, p. 13, at p. 43, para. 54, and p. 49, para. 66; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 65, para. 61, and pp. 67-68, paras 65-68; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 702, paras 209-211.

line claimed by Ghana approaches its exclusive economic zone at a distance of around 50 nautical miles from Abidjan, which could be particularly detrimental to the interests of Côte d'Ivoire in view of the rights enjoyed by coastal States in the EEZ. The same holds for the rights exercised under article 60 of UNCLOS (creation of safety zones around installations and structures[224]).

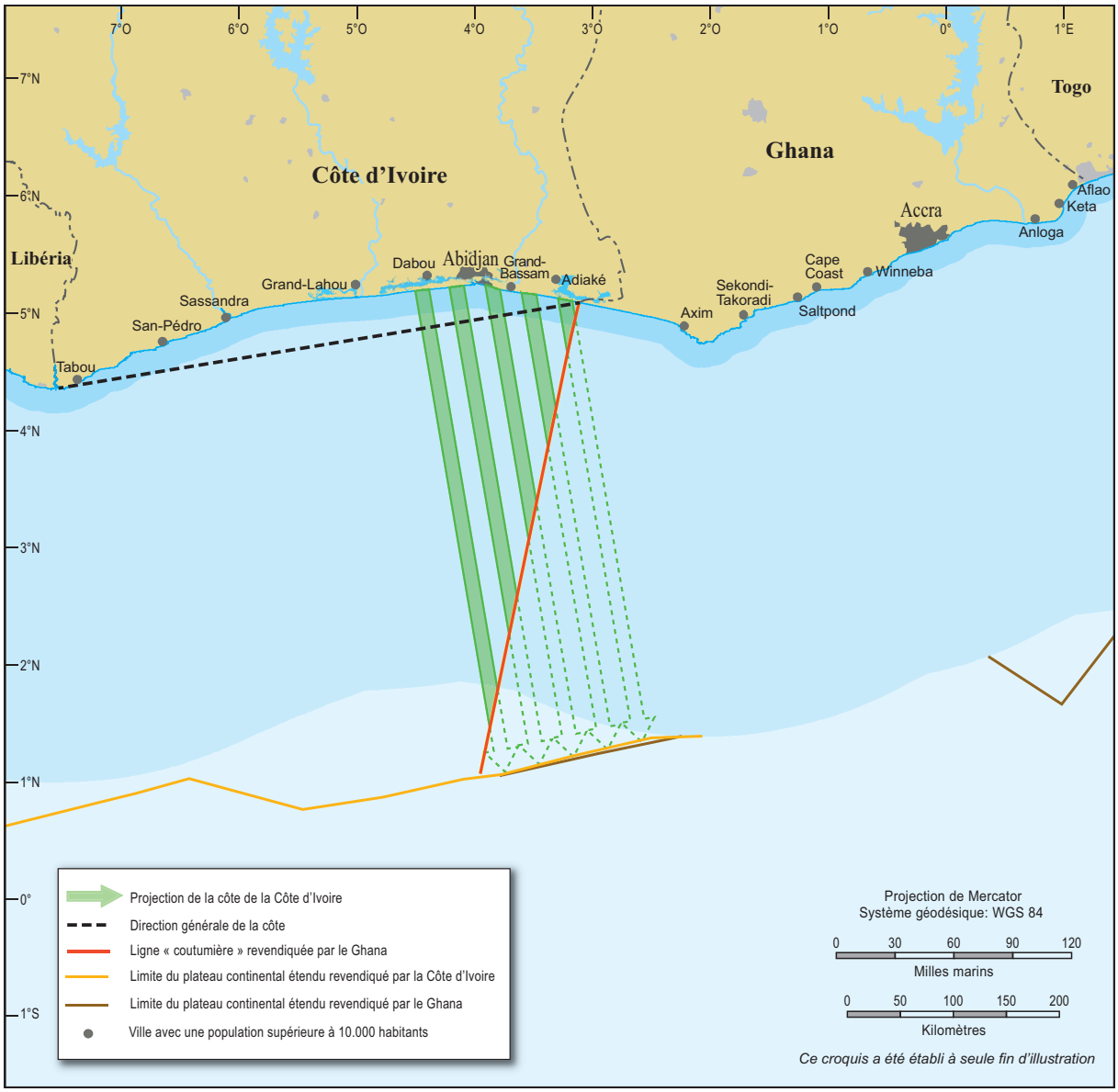
3.35 Ghana's attempts to prove that there is no cut-off effect caused by the line claimed by it are misleading. Figure R 3.16 which it produces (after page 105 of the Reply) does not demonstrate that "both Parties' coasts in the vicinity of the land boundary terminus project seaward in parallel with the equidistance line, and with each other without being cut off".[225] In reality, given that the line claimed by Ghana is constructed from base points located on this segment and that the segment is perfectly straight,[226] the coastal projections from this segment can never overlap the line. This is the very principle governing the construction of an equidistance line. As with its other sketch maps,[227] in this one too, Ghana has conveniently opted for a very large scale which shows only the projections from the coastal segment used for the construction of equidistance. As this segment is straight, the provisional equidistance line is necessarily a perpendicular to the segment which does not cut off the projections of the portions of coast located on either side of it. If a smaller scale had been used, the projection from the segment of coast located beyond Abidjan, the next point at which there is a change in direction of the coast, would have been visible.

[224] It is normal to create safety zones around exploration and production platforms (see, for example, the routeing measures adopted by the IMO following the proposal by Ghana; International Maritime Organization, Sub-Committee on Navigation, Communications and Search and Rescue, Routeing measures and mandatory ship reporting systems, Amendment to the existing area to be avoided off the coast of Ghana in the Atlantic Ocean, document submitted by Ghana, NCSR 3/3/6, 24 November 2015, CMCI, Vol. VI, Annex 169, and Circular SN.1/Circ.333 published by the International Maritime Organization, 20 May 2016, RCI, Vol. III, Annex 193).

[225] RG, Vol. I, para. 3.68.

[226] *Supra*, paras 2.16-2.22.

[227] *Supra*, para. 3.7.



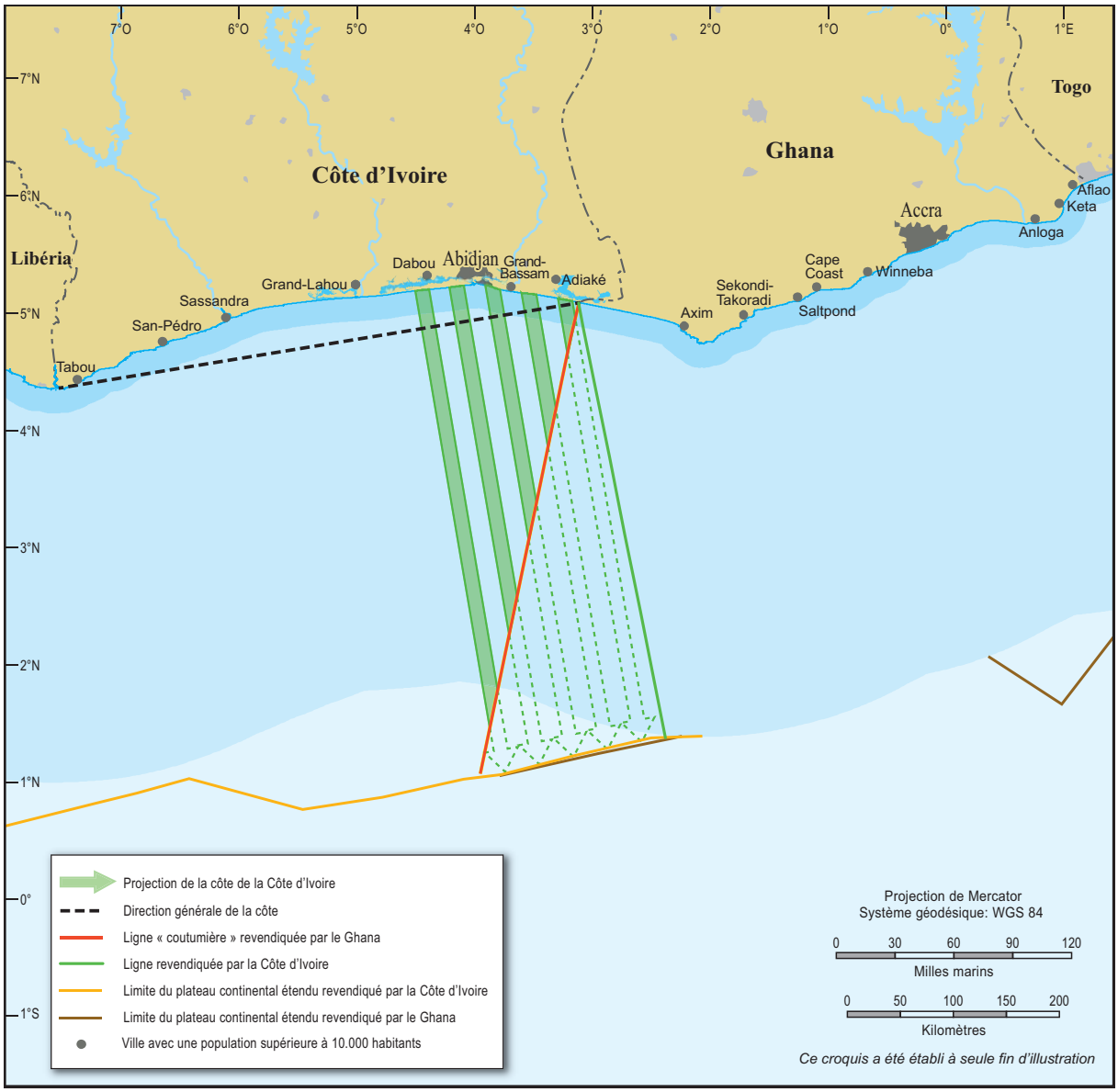
Sketch map D 3.6 Cut-off effect of the line claimed by Ghana

2. The correction of the cut-off by the 168.7° azimuth line

3.36 On the other hand, because it is based on a general representation of the coasts of the two States, the 168.7° azimuth line addresses those disadvantages, whether it is constructed using the angle bisector method or using the equidistance/relevant circumstances method (see **Sketch map D 3.7** below). If the Tribunal were to adopt the equidistance/relevant circumstances method, it should consider that "the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection of the [Côte d'Ivoire] coast. The direction of the adjustment is to be determined in the light of those circumstances."[228]

3.37 Furthermore, the 168.7° azimuth line corrects the disproportionate effect of the strip of land formed by the Jomoro peninsula, which blocks the projections of a sizeable Ivorian land mass and which, on the Ghanaian side, defines the course of the provisional equidistance line entirely. Without denying the existence of the Jomoro peninsula, it reduces its influence on the delimitation of the maritime boundary by attenuating the blocking effect in respect of the projections from the Ivorian land mass. It is especially important to note that Ghana's claims to a substantial proportion of the hydrocarbon resources at issue in the present dispute are generated by the maritime projections of the strip of land (cf. Sketch map 7.12, CMCI).

[228] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 329.



Sketch map D 3.7 Correction of the cut-off by the 168.7° azimuth line

C. The 168.7° azimuth line is equitable in the regional context of the Gulf of Guinea

1. Interests of third parties are taken into consideration

3.38 A further merit of the 168.7° azimuth line is that it takes account of the presence of the other States in the region, which are third parties to the present proceedings but whose interests are jeopardized irreparably by Ghana's arguments, in disregard of the most basic equity.

3.39 In its Counter-Memorial[229] Côte d'Ivoire noted that, in the regional geographical context, applying the geometric equidistance line would produce disastrous effects for the other States on the Gulf of Guinea, in particular Togo and Benin, which would be deprived of a substantial part of their maritime areas. The approach proposed by Côte d'Ivoire respects fully the rights and interests of these other States, as, by contrast, neither the angle bisector nor adjusted equidistance sets a harmful precedent in the region.

In response to this argument put forward by Côte d'Ivoire, Ghana adheres to a micro-geographical and micro-legal line of argument, claiming that the decision by this Chamber has no bearing on the delimitations still to be made in the Gulf of Guinea region.[230] However, it is a very abstract perspective to believe that the judgment to be delivered by the Special Chamber will not affect the delimitations to be made between the other States in the region; as has been written, "[t]he Court's judgment [231] will … be imposed on third parties almost inevitably".[232]

3.40 From a factual point of view, Ghana's rigidly individualistic approach is in contrast with the care taken by courts and tribunals seized of maritime delimitation problems not to affect the interests of third States in the region detrimentally. Account is

[229] CMCI, Vol. I, paras 6.60-6.69.

[230] RG, Vol. I, para. 3.42.

[231] The same applies to the judgment that this Chamber is required to deliver.

[232] E. Jouannet, *L'impossible protection des droits du tiers par la Cour internationale de Justice dans les affaires de délimitation maritime*, in V. Coussirat-Coustère, Y. Daudet, P.-M. Dupuy, P.-M. Eisemann and M. Voelckel (dir.), *La mer et son droit – Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, p. 330 – "The Court's judgment will … be imposed on third parties almost inevitably".

consistently taken of such interests in the international jurisprudence relating to maritime delimitation. For example, in *Cameroon* v. *Nigeria*, the ICJ found that the rights of two other States, Equatorial Guinea and São Tomé and Príncipe, could be affected by the maritime delimitation between the Parties to the proceedings. As neither was a party to the proceedings,[233] the Court satisfied itself that its judgment did not affect the rights of those two countries.[234] In the same vein, in its 1985 judgment in *Continental Shelf (Libya/Malta)*, the Court declined to rule on segments of the boundary in areas which could be claimed by Italy or Tunisia.[235] In *Jan Mayen*, the ICJ also preserved in full the maximum claim by Iceland.[236] In general, international courts and tribunals are concerned "to refrain from prejudicing the rights of third States …".[237]

3.41 This consideration led the Arbitral Tribunal in the case between the Republic of Guinea and Guinea-Bissau to state that it could not ignore "future delimitations of the region" and to consider relevant not just the coasts of the two States but those of the region as a whole – which it called the "long coastline".[238]

3.42 Moreover, the strictly bilateral approach advocated by Ghana from a geographical point of view also contrasts with its line of argument during the negotiations. Thus, in 2011, Ghana had claimed that "the precedent of equidistance as a delimitation

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[233] Equatorial Guinea intervened as a non-party intervener (see *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999*, p. 1029).

[234] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 421, para. 238.

[235] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 26, para. 21.

[236] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 68, para. 67.

[237] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 757, para. 312. The Court refers, by way of example, to the following judgments: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 91, para. 130; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, at p. 27, and *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 26-28, paras 21-23; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 421, para. 238, p. 424, para. 245, and p. 448, para. 307. See also, for example, *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 477.

[238] *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985, RIAA*, Vol. XIX, pp. 149-196, at p. 189, paras 108-109; see *supra*, paras 1.11-1.12.

principle in the sub-region is overwhelming".[239] Ghana based that assertion on the misleading statement that all the maritime boundaries in the sub-region had been delimited partially or entirely on the basis of equidistance. In this regard it cited three examples of delimitation in the Gulf of Guinea (Cameroon/Nigeria, São Tomé and Príncipe/Equatorial Guinea and Nigeria/Benin[240]). Ghana's position in the bilateral negotiations contrasts with its stance before this Chamber, according to which the equidistance which it claims with Côte d'Ivoire is circumstantial and confined to the present case.

3.43 Furthermore, at the initiative of Côte d'Ivoire, the bilateral negotiations were initially in keeping with the desire of the two States to respect the interests of third States in the sub-region.[241] It was only at the last meeting, when it became aware of the sub-regional issues and of the concessions that taking them into consideration necessarily entailed for the line of the maritime boundary between Côte d'Ivoire and Ghana, that Ghana made an about-turn and "made objections regarding the reference made to Togo and Benin [by Côte d'Ivoire] in [its] presentation".[242]

3.44 In addition, it is in order to safeguard its interests that on 28 September 2016 Benin requested this Chamber to communicate to it the documents in the file. In his letter, the Minister for Foreign Affairs and Cooperation of the Republic of Benin expressed its strong interest in the present proceedings in the following terms:

> Benin has taken very careful note of the respective attitudes of the parties to this dispute presented during the preliminary stage of the proceedings for the prescription of provisional measures, leading to the Order issued by the Special Chamber on 25 April 2015.
>
> It would appear that the view adopted by the Special Chamber on the delimitation of the Ivoiro-Ghanaian maritime boundary is likely to have an influence on the delimitation of the maritime areas of the sub-region, including that of Benin.[243]

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[239] Ghana Boundary Commission, Response to Côte d'Ivoire's proposals towards the 5th Côte d'Ivoire/Ghana maritime boundary delimitation meeting, 31 August 2011 (CMCI, Vol. III, Annex 39, p. 5).

[240] With regard to the rejection of equidistance by Benin, see CMCI, Vol. I, para. 6.68.

[241] CMCI, Vol. I, para 6.56 *et seq.*

[242] Communication of the Ivorian party in response to the Ghanaian proposals of 27-28 April 2010, 31 May 2010, p. 10, CMCI, Vol. III, Annex 38.

[243] Letter from the Minister for Foreign Affairs of the Republic of Benin to ITLOS, 28 September 2016, RCI, Vol. III, Annex 187.

3.45 Benin thus requested communication of the "documents in the proceedings on the merits and documents annexed thereto lodged thus far at the Registry".[244] The President of the Chamber granted that request.[245]

2. Strict equidistance sets a harmful precedent in the region

3.46 The application of "equidistance" as claimed by Ghana would have a very harmful effect not only on Côte d'Ivoire, but also on Togo and Benin, which would be enclaved (see **Sketch map D 3.8** below). As Côte d'Ivoire explained in its Counter-Memorial, the two States also deny that equidistance is able to offer an equitable solution.[246]

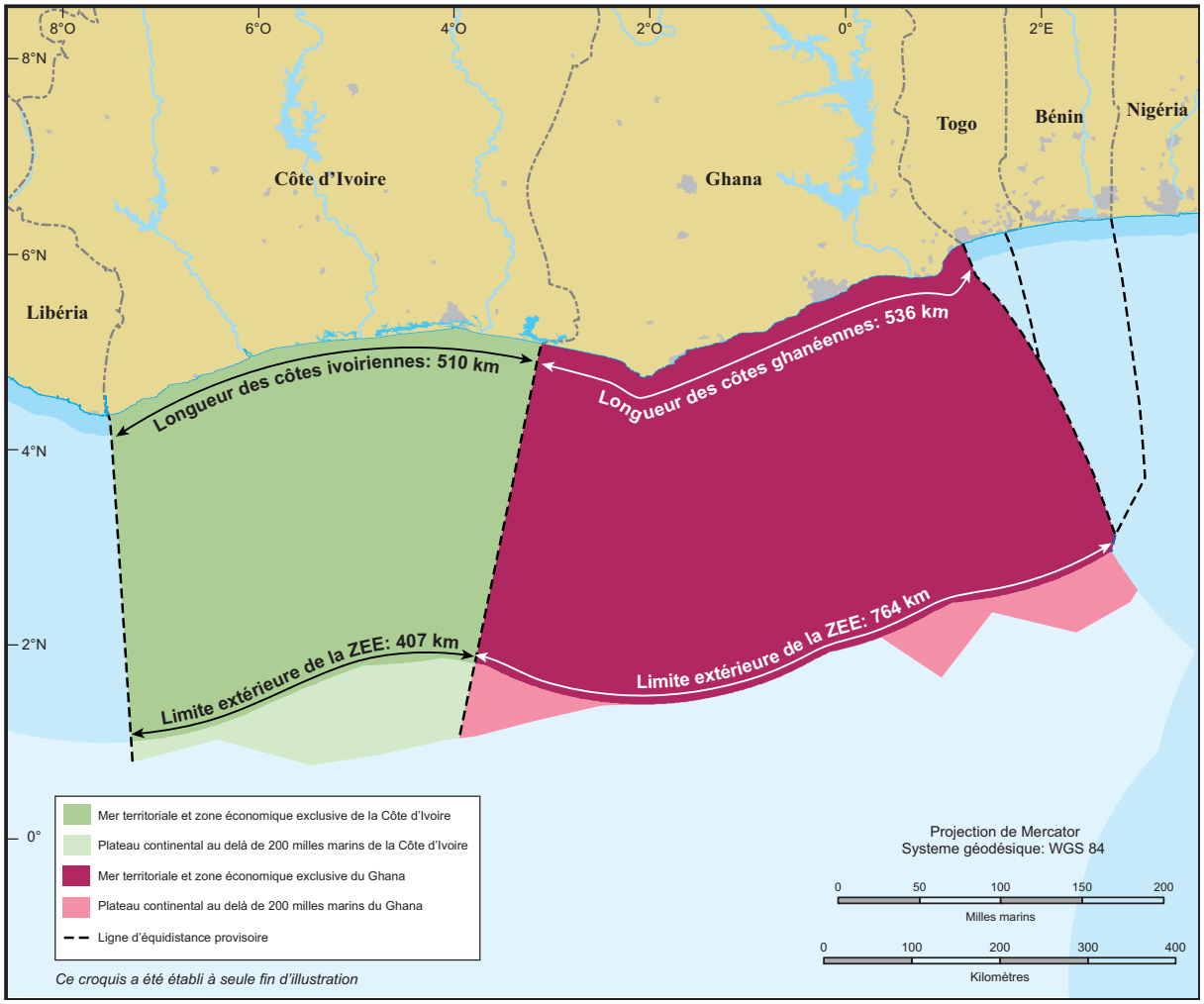
3.47 On account of the particular geographical configuration of its coasts (convexity, presence of a strip of land on both the Côte d'Ivoire side and the Togo side), Ghana could benefit from a maritime area flared out seaward if strict equidistance were applied.[247] This would give it a maritime area in the form of an inverted funnel which is incommensurate with the length of Ghana's coastal façade. While that façade measures 536 km, the outer limit of Ghana's exclusive economic zone would be 764 km, giving an expansion ratio of 1.42:1.

[244] *Ibid.*

[245] Letter from ITLOS to the Agent of Côte d'Ivoire, 7 October 2016.

[246] CMCI, Vol. I, paras 6.65-6.69.

[247] *Supra*, paras 2.41-2.42.



Sketch map D 3.8 The cut-off effect of the strict equidistance line in the sub-region

3.48 The flared seaward character of Ghana's maritime area is to the detriment of its neighbours, in particular Côte d'Ivoire, Togo and Benin. Ghana, on the other hand, would have a maritime boundary with Benin and even with Nigeria, when it does not have a land boundary with those countries. If strict equidistance were adopted as the boundary, Togo would be substantially enclaved and Benin's maritime area would not extend to 200 nautical miles. The two States would be deprived of any continental shelf beyond 200 nautical miles, even though they would be entitled to it under article 76 of UNCLOS.[248]

[248] CMCI, Vol. I, para. 6.67.

3.49 It thus appears that strict equidistance as claimed by Ghana would be highly advantageous to that State, while setting a harmful precedent for the other States in the region whose boundaries are still to be delimited. That is not the case with the method advocated by Côte d'Ivoire, in which the geographical circumstances of the case are fully taken into consideration.

II. The decisive circumstances for the delimitation of the continental shelf beyond 200 nautical miles

3.50 As Côte d'Ivoire explained in its Counter-Memorial,[249] the same geographical circumstances that play a prominent role in the delimitation of the maritime boundary within 200 nautical miles are applicable in the delimitation of continental shelf beyond 200 nautical miles.

3.51 Ghana nevertheless significantly complicates the delimitation exercise beyond 200 nautical miles. It alleges the existence of a tacit agreement on delimitation for that geographical area, or even a situation of estoppel, relying, for its entire evidence, on a purported alignment of the original submissions by Ghana and Côte d'Ivoire to the CLCS in 2009.[250] Côte d'Ivoire has already demonstrated in its Counter-Memorial that this argument is lacking in law and in fact.[251] It will return to this point in Chapter 4 of this Rejoinder.[252]

3.52 To that same end, Ghana fosters ongoing confusion between the entitlement of the Parties to an extended continental shelf and proof of its existence, and between the delineation procedure before the CLCS and the delimitation procedure before this Chamber.[253] More specifically, Ghana asserts that the Chamber should not take into consideration the amendment made by Côte d'Ivoire in 2016 to its submission of

[249] CMCI, Vol. I, paras 8.24-8.53.

[250] RG, Vol. I, paras 4.13-4.33.

[251] CMCI, Vol. I, paras 4.111-4.128.

[252] *Infra*, paras 4.63-4.71.

[253] RG, Vol. I, paras 4.13-4.33.

8 May 2009[254] on the ground that it was made too late and only for the purposes of the delimitation procedure.[255] That position is untenable in several respects.

3.53 First, from a procedural point of view, it should be noted that amendments to submissions for the extension of the continental shelf are not considered inadmissible solely because they have been made during litigation.[256] Moreover, this is a logical approach: in the delimitation procedure, submissions to the CLCS are simply a means of evidence regarding the extent of entitlements to the continental shelf enjoyed by coastal States who are parties to proceedings. Furthermore, there is nothing to prevent that evidence being adduced during the written proceedings.

3.54 Second, Ghana gives a misleading depiction of the circumstances in which Côte d'Ivoire made its original submission to the CLCS in 2009[257] and its amended submission in 2016. It is true that the 2009 submission did not fully document the entitlement to an extended continental shelf, both to the east and to the west, as it did not make sufficient use of data for that purpose.[258] However, there is nothing unusual in this approach given, on the one hand, the urgency for submitting preliminary information before the deadline of 13 May 2009[259] and, on the other, the lack of urgency for supplementing that information. The Rules of Procedure of the CLCS are flexible in this regard and permit submissions to be amended even in the course of the examination of the submission by the CLCS,[260] which Ghana has done, moreover, on two occasions. However, in 2016 it had become urgent for Côte d'Ivoire to provide the CLCS with all the information required for it to assess the extent of Côte d'Ivoire's

[254] Executive Summary, Amended Submission of the Republic of Côte d'Ivoire regarding its continental shelf beyond 200 nautical miles, 24 March 2016, para. 6.1, FR/EN, CMCI, Vol. VI, Annex 179.

[255] RG, Vol. I, paras 4.4-4.5.

[256] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, paras 82, 442 and 452, and CMCI, Vol. I, para. 8.18.

[257] RG, Vol. I, paras 4.14-4.15.

[258] CMCI, Vol. I, paras 8.14-8.15.

[259] CMCI, Vol. I, para. 4.114.

[260] CMCI, Vol. I, para. 8.19.

entitlement, as its submission was next in line as queued by the Commission in the order received.[261]

3.55 Lastly, Ghana cannot, without contradicting itself, claim on the one hand that there is no dispute between the Parties regarding the existence of an entitlement to an extended continental shelf[262] and on the other that those entitlements do not overlap,[263] whilst requesting the Chamber to delimit them. It is true that, in the documentation as submitted by the two States to the CLCS in 2009, there was a disparity of approximately 20 km between their respective submissions.[264] However, if those submissions constituted the ultimate proof of the entitlement of the Parties, which they do not, it would be difficult to see how the Chamber could delimit on the basis of those non-overlapping entitlements.[265] This is a further argument in favour of the Chamber taking into account all the evidence documenting the extent of the respective entitlements of the Parties, which actually shows that they do overlap.[266]

3.56 In substance, the Reply of Ghana does not offer any response to the arguments presented by Côte d'Ivoire in its Counter-Memorial.[267] There is therefore no need to reiterate them here. Ghana simply disputes Côte d'Ivoire's proportionality calculations,[268] an aspect on which a response will be given in the next section of this chapter.

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[261] Under rule 51 of the Rules of Procedure of the CLCS, the Commission may include the consideration of a submission in the agenda for its plenary meeting only if the executive summary of the submission was published at least three months before the date of the meeting. The Commission met in plenary in July 2016, considered the submission of Côte d'Ivoire, as it was next in line as queued, and, noting that no objections had been raised by neighbouring States, established a subcommission (see CLCS, Statement by the Chair, *Progress of work in the Commission on the Limits of the Continental Shelf*, doc. CLCS/95, 21 September 2016, para. 72.).

[262] RG, Vol. I, para. 4.7.

[263] RG, Vol. I, paras 4.3, 4.16, 4.23 and 4.26.

[264] Demonstrating the same inconsistency, Ghana nevertheless claims that the 2009 submissions were aligned (see RG, Vol. I, para. 4.3), which is clearly also incorrect.

[265] As ITLOS held in *Bangladesh/Myanmar:* "[d]elimitation [of the continental shelf beyond 200 nautical miles] presupposes an area of overlapping entitlements. Therefore, the first step in any delimitation is *to determine whether there are entitlements and whether they overlap*" (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, para. 397, emphasis added).

[266] CMCI, Vol. II, Sketch map 8.3.

[267] See, on the one hand, CMCI, Vol. I, paras 8.24-8.40, and, on the other, RG, Vol. I, para. 4.40.

[268] RG, Vol. I, para. 4.41.

III. Confirmation of the equitable character of the 168.7° azimuth line in the light of the proportionality tests

3.57 Côte d'Ivoire is aware of the fact that:

> [t]he purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.[269]

3.58 The fact remains that final confirmation of the equitable character of the delimitation line is given by comparing the coasts which are the source of maritime rights and the maritime areas thus attributed. In the present case such final confirmation can be given in two ways: by taking into consideration the coasts of the two States as a whole in the context of the application of the angle bisector method (A.) or by conventionally proceeding to apply the non-disproportionality test in the context of the third stage of the equidistance/relevant circumstances method (B.).

[269] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at pp. 99-100, para. 110.

A. The proportionality of the 168.7° azimuth bisector line

3.59 As Côte d'Ivoire has stated, a general representation of the coasts of the two States shows that they are virtually equal in coastal length and, as it demonstrated in its Counter-Memorial,[270] the 168.7° azimuth line leads to the area in which the States can claim maritime entitlements being apportioned in almost equal shares. Almost equal coastal façades correspond to maritime areas which are also almost equal (see **Sketch map D 3.9** below), that is, an area of 67,492 M^2 for Côte d'Ivoire and of 66,424 M^2 for Ghana, taking all maritime areas into account.[271]

3.60 Furthermore, the slight advantage for Côte d'Ivoire can be explained primarily by its potential rights to the continental shelf beyond 200 nautical miles, or more precisely by the fact that Ghana claims a smaller entitlement to a continental shelf beyond 200 nautical miles than Côte d'Ivoire. This is not due to the apportionment of the overlapping titles of the Parties by the delimitation line but to the absence of geological entitlement on the part of Ghana in accordance with the submissions to the CLCS and its recommendations. These calculations thus merely confirm the equitable character of the 168.7° azimuth line in the light of the overall geographical circumstances.

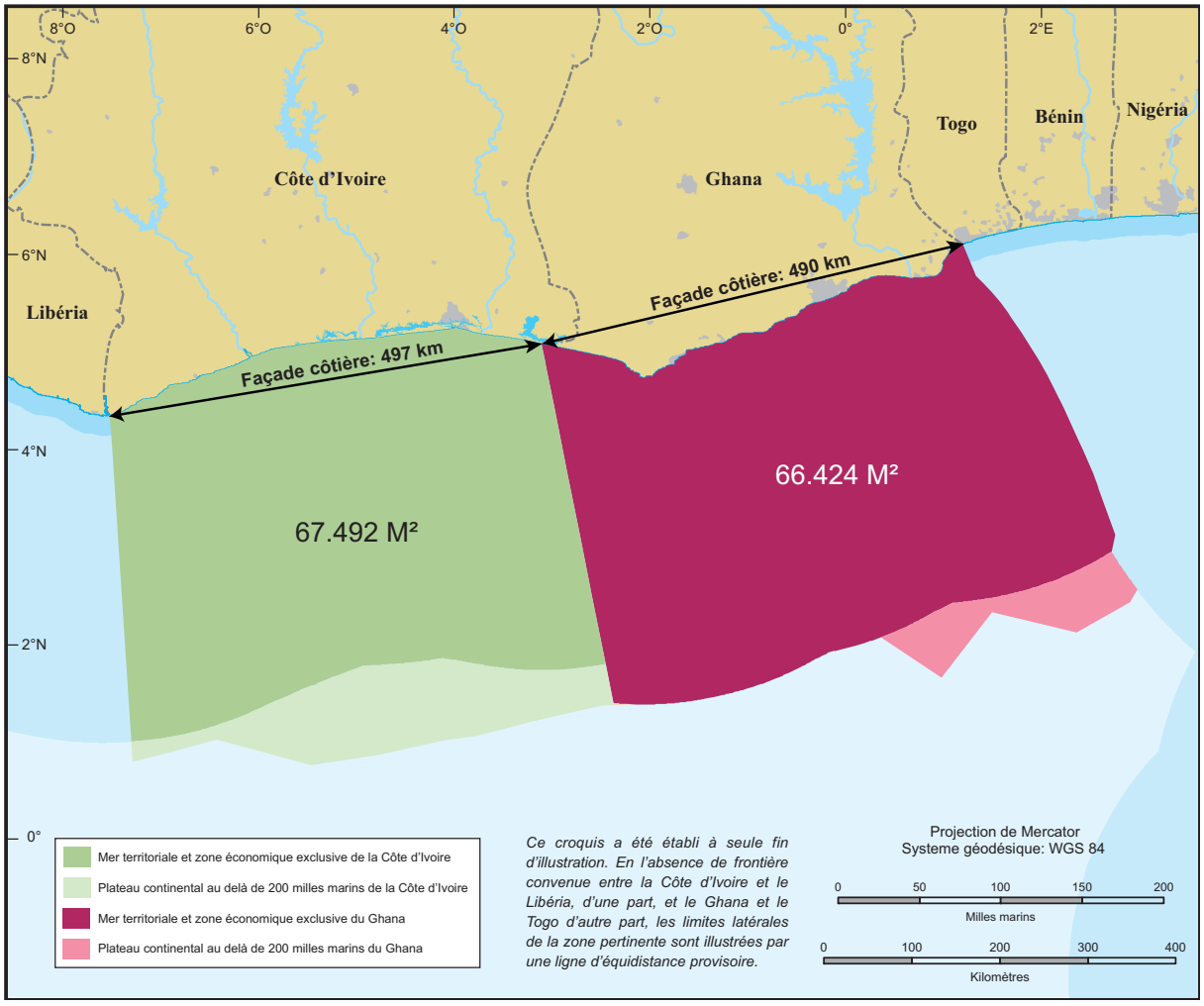
3.61 On the other hand, the boundary claimed by Ghana is highly inequitable, not only if it is viewed in a regional context,[272] but also in terms of the strictly bilateral relationship. Despite the equal length of the coastal façades of the two States, it would result in Côte d'Ivoire being apportioned around 20,000 M² less maritime area than Ghana (see **Sketch map D 3.10** below).[273]

[270] CMCI, Vol. I, para. 6.71, paras 8.51-8.53.

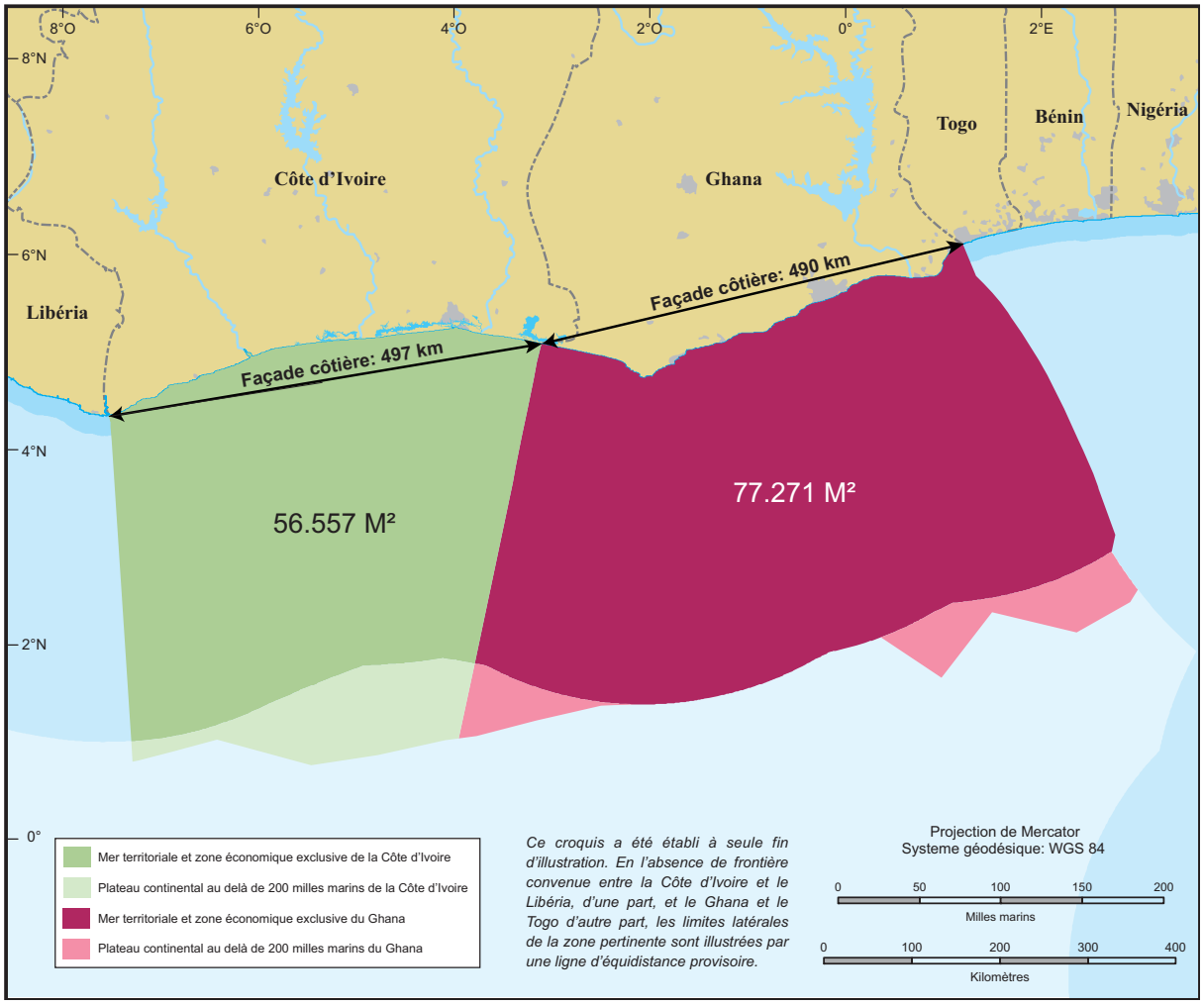
[271] Ghana alleges that those calculations are based on a hypothesis of study in which the lateral limits of the maritime areas in question are represented by equidistance lines (RG, Vol. I, para. 3.102). This complaint has no practical importance: if the lateral limits were to be determined by bisectors, this would not make much difference in terms of general proportionality. The figures would be as follows: 73,293 M² for Côte d'Ivoire and 59,774 M² for Ghana, taking all maritime areas into account.

[272] *Supra*, para. 3.46.

[273] CMCI, Vol. I, para. 8.52



Sketch map D 3.9 Apportionment of maritime areas by the line claimed by Côte d'Ivoire in the context of the application of the bisector method



Sketch map D 3.10 Apportionment of maritime areas by the line claimed by Ghana in the context of the application of the bisector method

3.62 This solution is clearly inequitable, since:

> Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.[274]

B. No manifest disproportion created by the adjusted equidistance line with an azimuth of 168.7°

3.63 If final confirmation of the equitable character of the 168.7° azimuth line is given in the context of the application of equidistance/relevant circumstances, the relevant coasts of the Parties are in a ratio of 4.2:1 in favour of Côte d'Ivoire.[275] The relevant area measures approximately 75,742 M^2 in total (including the maritime areas within 200 nautical miles and the continental shelf beyond[276]),[277] assuming its lateral limits are equidistance on the Liberian side and a line perpendicular to the coast of Ghana, starting from the promontory of Cape Three Points. It should also be noted that Ghana had adopted this same limit to the east. As can be seen in **Sketch map D 3.11** below, the 168.7° azimuth line would apportion Côte d'Ivoire 67,492 M² of maritime area in the relevant area,[278] if all areas are taken into account, and Ghana 9,200 M², if all maritime areas are taken into account.[279] The ratio between the maritime areas apportioned in the relevant area is thus approximately 7.3:1 in favour of Côte d'Ivoire.

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[274] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 50, para. 91.

[275] *Supra*, para. 3.30.

[276] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 493; see also *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, para. 490.

[277] i.e. 57,486 M² + 9,056 M² + 8,241 M² + 9 M² + 950 M².

[278] i.e. 57,486 M² + 9,056 M² + 950 M².

[279] i.e. 8,241 M² + 9 M² + 950 M².

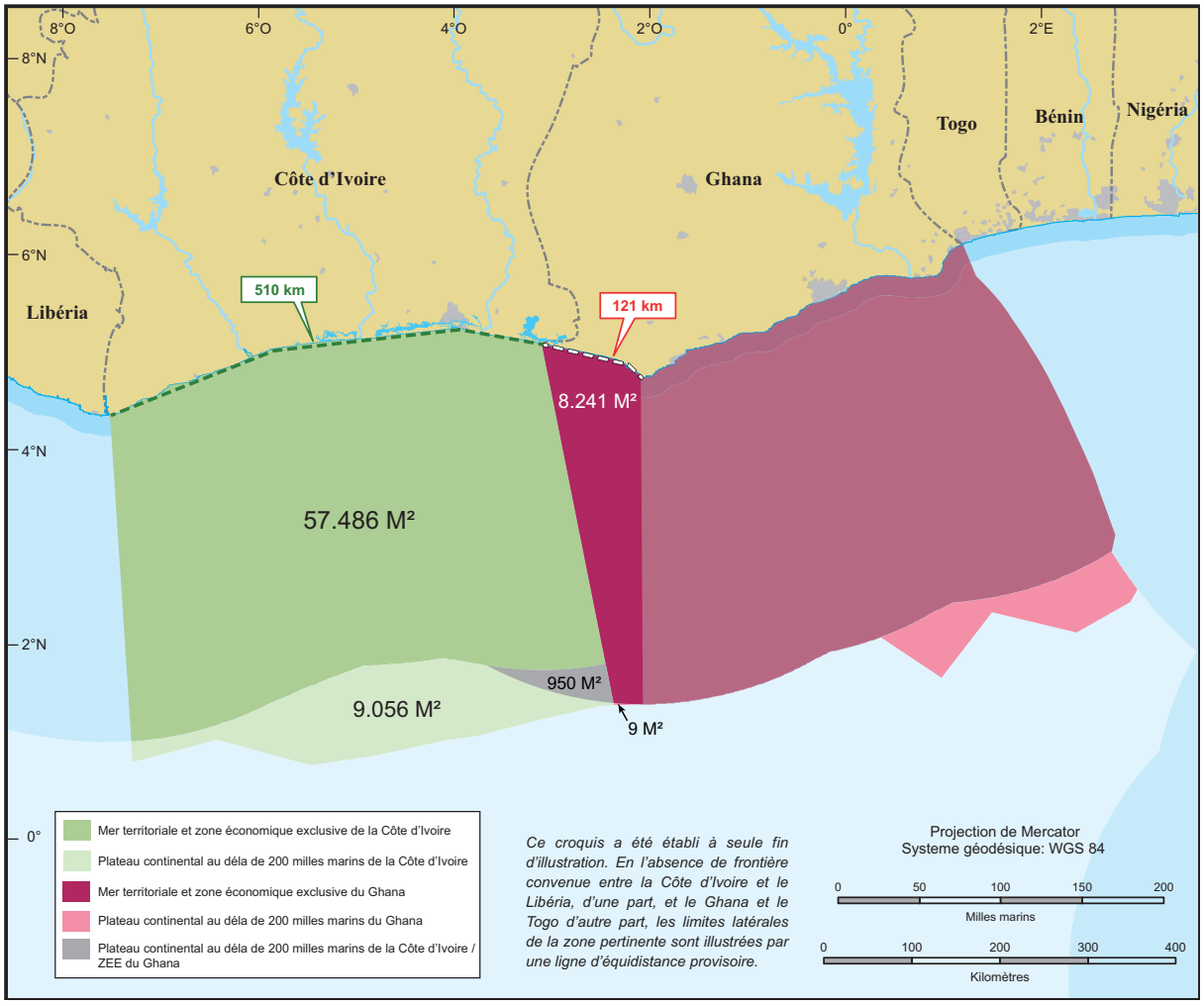
This calculation does not reveal any marked disproportion in the apportionment of the maritime areas to the Parties, in comparison with the ratio between the lengths of their respective coasts, as the *ratio* between the two is less than 2:1 in favour of Côte d'Ivoire. This *ratio* can also be explained primarily by the fact that Côte d'Ivoire would benefit from a continental shelf beyond 200 nautical miles, which is factored into the calculation of the relevant area, while Ghana has never claimed any entitlement in this regard.

3.64 On the other hand, the line claimed by Ghana would lead to it being apportioned around 19,184 M^2 of maritime area[280] and Côte d'Ivoire around 56,557 M^2;[281] the zonal ratio under that apportionment would be less than 3:1 in favour of Côte d'Ivoire, when the ratio of the relevant coasts is 4.2:1 in its favour (see **Sketch map D 3.12** below). The *ratio* between these two ratios would therefore be negative for Côte d'Ivoire.

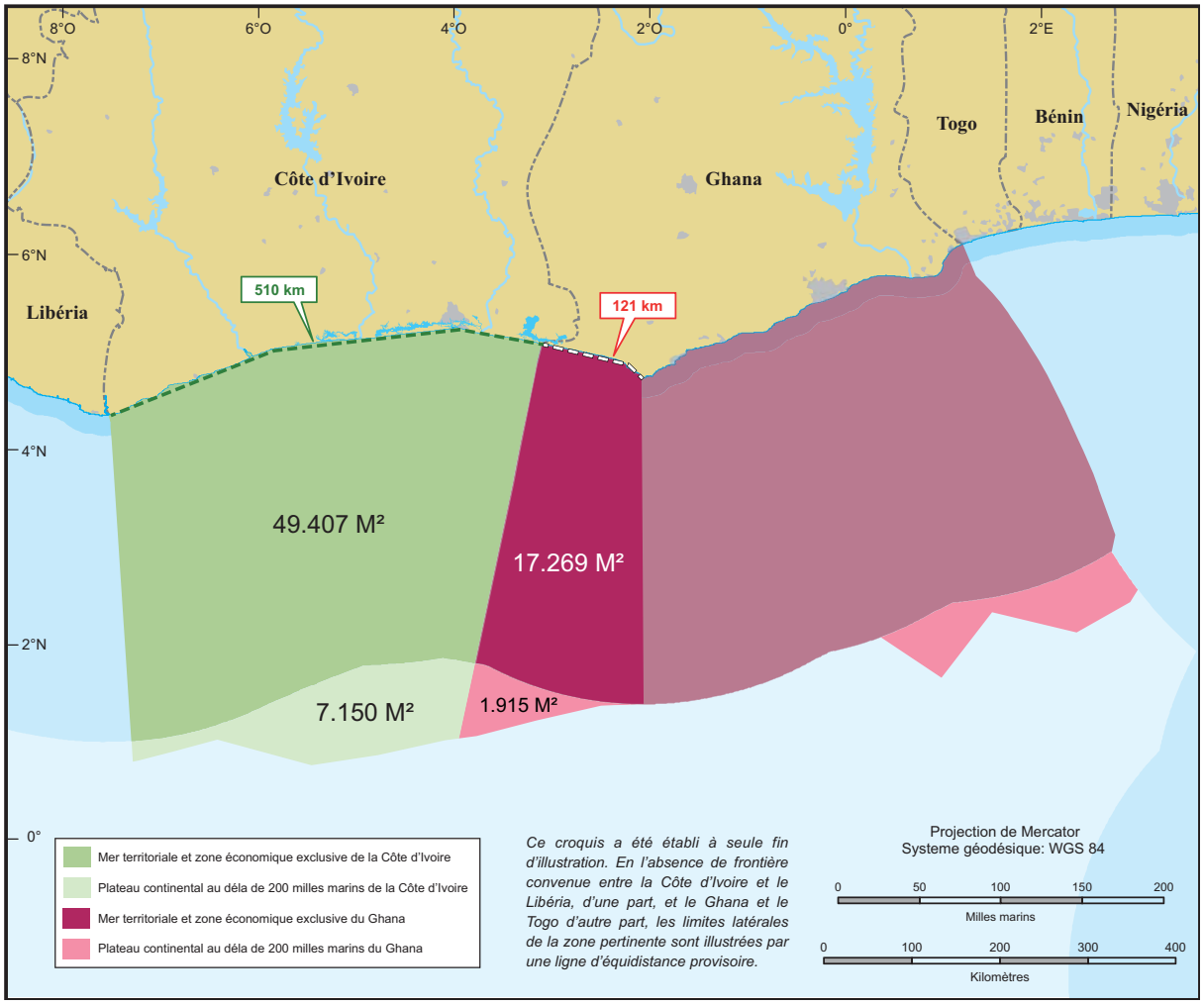
3.65 Consequently, it is indisputable that the 168.7° azimuth is an equitable delimitation line which gives each of the Parties a maritime area reflecting the actual geography of the coasts of the two States and which avoids a disproportionate solution.

[280] i.e. 17,269 M² + 1,915 M².

[281] i.e. 49,407 M² + 7,150 M².



Sketch map D 3.11 Apportionment of maritime areas by the line claimed by Côte d'Ivoire in the context of the application of the equidistance/relevant circumstances method



Sketch map D 3.12 Apportionment of maritime areas by the line claimed by Ghana in the context of the application of the equidistance/relevant circumstances method

Conclusion

3.66 The Chamber has the power and the duty to correct the highly inequitable effect which the strict equidistance line would have, both in terms of the relationship between Côte d'Ivoire and Ghana and in the regional context. In order to do so, it must do no more and no less than apply the relevant law, under which, in maritime boundary delimitation, the court or tribunal must take due account of all the circumstances of the case in order to achieve an equitable solution.

3.67 In Chapter 2 Côte d'Ivoire identified the particular geographical circumstances of the case which are decisive for the delimitation. In the present chapter it has demonstrated that the 168.7° azimuth line effectively takes those circumstances into account in so far as it is based on the geographical representation of the coasts of the Parties as a whole and corrects the cut-off effect of minor geographical features. Lastly, whether in the context of the application of the bisector method or in the context of the third stage of the application of equidistance/relevant circumstances method, the equitable character of the 168.7° azimuth line is confirmed by testing the proportionality of the result obtained.

PART 2

THE PARTIES' CONDUCT HAS NO EFFECT ON THE DETERMINATION OF THE BOUNDARY

1. Côte d'Ivoire has amply demonstrated in its Counter-Memorial that it has never acknowledged that Ghana's oil activities had established a maritime boundary between the two States. Côte d'Ivoire's position is clearly reflected in its legislation, its trade contracts, the proposals it made during negotiations with Ghana and its objections to Ghana's unilateral activities in the disputed area. Nevertheless, according to Ghana, the Parties' conduct as regards oil operations is the sole factor which the Special Chamber should take into account for applying the law in the present case, and maintains that this alleged conduct combines all the necessary aspects, since it:

   - is indicative of a tacit agreement;

   - justifies, as a subsidiary measure, the provisional equidistance line's being adjusted in Ghana's favour on the ground that its unilateral activities in the disputed area constitute a *modus vivendi*;

   - prevents, at all events, Côte d'Ivoire from claiming some other line according to the theory of estoppel; and

   - could justify Côte d'Ivoire's responsibility being engaged for its having requested the prescription of provisional measures.[282]

2. This claim is defective on two counts:

   - In fact, because it is based on a conveniently erroneous and biased historical error, the true facts of which should be re-established; and

   - In law, because it is based on an incorrect reading of the law concerning tacit agreements, *modus vivendi* and estoppel.

[282] RG, Vol. I, para. 5.30.

3. Once the true facts have been re-established (**Chapter 4**), the Special Chamber will note that, in the present case, the Parties' conduct is indicative neither of a tacit agreement, a *modus vivendi* nor an estoppel situtation likely to have any effect on the maritime delimitation (**Chapter 5**).

CHAPTER 4

IN FACT: GHANA'S PRESENTATION OF THE PARTIES' CONDUCT IS ERRONEOUS

4.1 In its Reply, just as in its Memorial, Ghana has not presented any convincing proof of the existence of a tacit agreement, a *modus vivendi* or an estoppel situation between the Parties. The necessary conclusion of the study, in this chapter, of the evidence submitted by Ghana in its Reply is that this evidence, individually or collectively, establishes the existence neither of a tacit agreement, a *modus vivendi* nor an estoppel situation.

4.2 Côte d'Ivoire has already shown in its Counter-Memorial that the basis of Ghana's boundary claim is erroneous in law and deficient in fact.[283]

4.3 In law, although case law constantly recalls that an agreement delimiting a boundary "is not easily to be presumed",[284] Ghana's entire legal basis is founded on the presumption that a boundary between the maritime areas of the two States is the result of the configuration of their respective oil concessions. Ghana is thus disregarding the sound case law of the ICJ, ITLOS and arbitral tribunals which have continually refused to conclude that agreements on maritime boundaries based on oil activities exist.

4.4 Again in law, international courts and tribunals have always insisted on the importance of the subject and scope of an agreement,[285] whilst refusing to assume that, if such an agreement existed, it could cover all the maritime areas - that is, the territorial sea, the EEZ and the continental shelf, over their entire area. So it was in the two exceptional cases in which the judge noted that a delimitation agreement did exist in the absence

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[283] CMCI, Chapter 4.

[284] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment*, *I.C.J, Reports 2007*, p. 735, para. 253; *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 86-87, paras 68-69; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 705, para. 219; see also *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, *ITLOS Reports 2012*, para. 95.

[285] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA,* Vol. XIX, pp. 169-181, paras 46-85; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway*), *Judgment, I.C.J. Reports 1993*, pp. 50-52, paras 26-32; *Maritime delimitation in the Black Sea (Romania* v. *Ukraine*), *Judgment, I.C.J. Reports 2009*, pp. 86-89, paras 68-76; *Maritime Dispute (Peru* v. *Chile*), *Judgment, I.C.J. Reports 2014*, pp. 28-29, paras 59-62, and p. 38, para. 90.

of a formal delimitation treaty.[286] However, Ghana is maintaining an embarrassed silence as concerns the nature, scope and date of the alleged tacit agreement on which it is basing all its arguments; and it is taking care not to reply to Côte d'Ivoire's expositions in this respect in its Counter-Memorial.[287]

4.5 In its Reply, Ghana is further maintaining a position which is untenable in fact. It claims that a tacit agreement came about more than fifty years ago and was then confirmed by the Parties' practice, consisting of all the different activities mentioned by Ghana and essentially concerning oil operations.[288] However, Ghana has been unable to demonstrate either that these subsequent activities confirmed the existence of such an agreement or, more fundamentally, the conditions in which this tacit agreement allegedly came about more than fifty years ago. A tacit agreement which is non-existent today could not *a fortiori* cover such a long period.

4.6 In any case, Ghana's claim that a tacit agreement has been in existence for more than half a century is contradicted by the absence of any substantial drilling activities in the disputed area before 2009[289] and by the lack of any subsequent Ghanaian investment of any note. Before that date, there was no particular urgency which - apart from Côte d'Ivoire's repeatedly stated principle position - called for a firm reaction on its part to what at the time was limited to Ghana's only slightly intrusive activities in the disputed area. Moreover, Ghana is not taking account of the serious internal conflicts which Côte d'Ivoire suffered for some fifteen years and which distracted it from the delimitation of its maritime boundary.

4.7 On the contrary, Côte d'Ivoire has repeatedly demonstrated its opposition to the boundary line's following the configuration of the oil concessions.[290] In spite of the constancy of this position of the Ivorian Party, Ghana claims that Côte d'Ivoire had acquiesced to it. Thus, according to Ghana, "silence implies consent". What is more,

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[286] *Guyana* v. *Suriname*, *RIAA*, *Award of 17 September 2007,* Vol. XXX, para. 307; *Maritime Dispute (Peru* v. *Chile*), *Judgment, I.C.J.Reports 2014*, p. 41, paras 102-103.

[287] CMCI, Vol. I, paras 3.26-3.33.

[288] See, *inter alia*, RG, Vol. I, paras 2.6 and 3.94.

[289]Before 2009, Ghana had only carried out four drilling operations in the disputed area in 1989, 1999, 2002 and 2008, without informing Côte d'Ivoire (MG, Vol. II, Annex M49).

[290] CMCI, Vol. I, paras 4.12-4.24.

Côte d'Ivoire has continually demonstrated its opposition, not only to the oil activities which Ghana has been carrying out in the maritime border area as from 2009, but also to all drilling activity carried out at least since 1992 in the area to be delimited. Although these protestations were of a highly official nature, Ghana claims that its oil activities in the disputed areas were "undertaken with Côte d'Ivoire's full knowledge and cooperation",[291] which at the very least is a denial of the actual facts.

4.8 Several decisive factors confirm that the effect of the Parties' conduct in no way delimited the maritime boundary. These factors are in particular the bilateral reports which provide evidence of a maritime boundary dispute (**I.**) and also of Côte d'Ivoire's cautionary approach in oil-related matters (**II.**). Finally, the evidence provided by Ghana does not supports its contention (**III.**).

I. The Parties' bilateral reports provide evidence of a maritime boundary dispute

A. The Ivorian proposal of 1988

4.9 The difference in the Parties' positions as concerns the delimitation of their maritime boundary dates back to the first exchanges on the matter, that is, therefore, to 1988, taking the form of an Ivorian proposal which neither follows the equidistance line nor makes reference to the equidistance/relevant circumstances principle, and even less to oil practice. In its Reply, Ghana mentions the lack of details concerning the content of the Ivorian proposal in the minutes of the 15th regular session of the Joint Commission on Redemarcation of the Ivoiro-Ghanaian maritime boundary, held from 18 to 20 July 1988, in order to minimize its importance[292] or question the very existence of the Ivorian proposal for the boundary put forward at this meeting.[293] On the one hand, the minutes of the meeting themselves establish that the Ivorian party made such a

[291] RG, Vol. I, para. 1.10.

[292] RG, Vol. I, para. 2.42.

[293] RG, Vol. I, para. 2.40.

presentation at that meeting, the minutes being a contemporary report which documents the facts, was approved by both Parties and expressly mentions "the Ivorian delegation's statement regarding delimitation of the maritime boundary".[294] Furthermore, Ghana is not contesting the existence of this presentation.[295] On the other hand, Côte d'Ivoire has already shown that the documents subsequently prepared by the Ivorian authorities clearly evidence the content of the Ivorian presentation at the 1988 meeting, that is, an alternative proposal for the maritime boundary - which is also not contested by Ghana[296] - based on the seaward extension of the terminal section of the land boundary connecting boundary posts 54 and 55.[297] It is not clear why Ghana, which, moreover, is relying very heavily on its own internal documentation in an attempt to support its claims, should suddenly call into question the credibility of similar documents of the other Party on the ground that their content compromises its claims.

4.10 There is no need to dwell on Ghana's whimsical interpretation of the wording of the minutes of the 1988 meeting, which merely shows that "the issue of formalizing the maritime boundary"[298] was included on the agenda, whilst the minutes themselves state that "[t]he purpose of the Session was to … consider the possibility of *delimiting* the maritime and lagoon boundary between the two countries", "[t]he *delimitation* of the maritime and lagoon boundary"[299] being a new agenda item. Despite its efforts, Ghana has failed to make of this meeting "a minor, isolated event"[300] the importance of which would be eroded by "Côte d'Ivoire's [alleged] consistent conduct"[301] regarding the line claimed by Ghana. As embarrassing as it may be for Ghana, the Chamber will on the contrary note that it was indeed back in 1988 when the first bilateral meeting

[294] Minutes of the 15th regular session of the Joint Commission on Redemarcation of the Boundary between Côte d'Ivoire and Ghana, 18-20 July 1988, p. 5, CMCI, Vol. III, Annex 12.

[295] RG, Vol. I, para 2.39.

[296] RG, Vol. I, para. 2.39.

[297] CMCI, Vol. I, para. 2.36.

[298] RG, Vol. I, para. 2.39.

[299] Minutes of the 15th regular session of the Joint Commission on Redemarcation of the Boundary between Côte d'Ivoire and Ghana, 18-20 July 1988, pp. 2-3, CMCI, Vol. III, Annex 12 – emphasis added.

[300] RG, Vol. I, para. 2.42.

[301] RG, Vol. I, para. 2.42.

concerning in particular the delimitation of the maritime boundary between the Parties was held, during which Côte d'Ivoire submitted a first proposal for the boundary;[302] and that, far from being "minor and isolated", this event confirms the existence of a dispute between the Parties on the matter of the maritime boundary.

B. The Ivorian position in 1992

4.11 Ghana's response in 1992 to the bilateral meeting of 1988 is also significant in terms of the Parties' lack of agreement on their maritime boundary.

4.12 In 1992, Ghana took the initiative, again bringing up "the boundary delimitation" and suggesting that a "meeting of Ghanaian and Ivorian experts responsible for discussing the matter of boundary delimitation"[303] be convened. As the note verbale from the Ivorian Ministry of Foreign Affairs to the Ghanaian Ministry of Foreign Affairs shows, Côte d'Ivoire looked favourably on this request.[304] If, as Ghana claims, no maritime boundary dispute existed at that time,[305] it is difficult to comprehend why Ghana took the initiative to request that a bilateral meeting of experts be convened "in order to discuss the question of boundary delimitation",[306] some years after the matter had been raised for the first time in a bilateral forum. Furthermore, it was indeed the question of "delimitation" with which Ghana was concerned in its request of 1992, and it is as a result of an improper interpretation of the 1992 note verbale that Ghana claims that the Parties were concerned only with "formally and precisely establish[ing] what they had

[302] CMCI, Vol. I, paras 2.34-2.37.

[303] Ghanaian fax n°233-21-668 262 from the Ghanaian Energy Secretariat, February 1992; see note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

[304] Note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

[305] RG, Vol. I, para. 2.38.

[306] Ghanaian fax n°233-21-668 262 from the Ghanaian Energy Secretariat, February 1992; see note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

already accepted in practice and principle".[307] The object of this proposal was in no way simply to clarify certain technical details of the course of an already existing boundary,[308] but to delimit the maritime boundary by way of a negotiated agreement. It is interesting to note that the Ghanaian proposal also makes no mention of any "oil line" as a basis for discussions on the maritime delimitation.

4.13 Ghana has never replied to this Ivorian note verbale, sent in response to the Ghanaian proposal, and thus its claim that "Côte d'Ivoire never attempted to revive Ghana's invitation and set a new date for the meeting of the Joint Commission"[309] is entirely arbitrary. It is difficult to see how "a lack of interest"[310] on the part of Côte d'Ivoire concerning the question of delimitation of its maritime boundary with Ghana can be deduced from the note verbale of April 1992, when it recalls the proposal made by Côte d'Ivoire in 1988 and underlines that the latter "is pleased to note the favourable disposition of the Ghanaian Government" *[translation by the Registry]*"[311] which was now willing to take an interest in the maritime boundary delimitation. At the time no drilling activity was going on in the disputed area,[312] as it appears that the planned Ghanaian drilling in the area had been abandoned,[313] thus rendering the matter of settling the dispute less urgent and may explain why Côte d'Ivoire's note verbale remained unanswered. On the other hand, this episode shows that it is not correct to maintain, as Ghana does, that the Ivorian proposal of 1988 was an objection which Côte d'Ivoire never mentioned again until 2009.[314] As soon as the Ghanaian request was received in 1992, Côte d'Ivoire immediately repeated its interest in delimiting the maritime boundary, mentioned the boundary it had proposed in 1988, and deduced all

[307] RG, Vol. I, para. 2.50.

[308] RG, Vol. I, para. 2.50.

[309] RG, Vol. I, para. 2.53.

[310] RG, Vol. I, para. 2.54.

[311] Note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

[312] CMCI, Vol. I, paras 2.90-2.91.

[313] CMCI, Vol. I, paras 2.42-2.45.

[314] RG, Vol. I, paras 2.42-2.43.

possible inferences from it by insisting that both States refrain from "all drilling operations and work" in the disputed area.[315]

C. 1992 - 2007: The crisis period in Côte d'Ivoire

4.14 In its Reply, Ghana reproaches Côte d'Ivoire for its silence concerning the development of the Parties' activities during the period from 1992 to 2007.[316]

4.15 This allegation is false. First, Ghana's activities in the disputed area during this period were on a very small-scale; at all events, it started to develop them at the moment when Côte d'Ivoire's internal problems prevented it from fully exercising its sovereignty (1.). Second, a bilateral meeting of the Parties was the occasion to note once again, during this period, the lack of an agreement on the maritime boundary delimitation (2.).

1. The impact of the Ivorian crises

4.16 Following the death of President Houphouët-Boigny in 1993, Côte d'Ivoire sunk into a period of internal crisis, the effect of which was to weaken the country for a sustained period. During this crisis period, the highly complex internal Ivorian political situation was a significant factor affecting the State's ability to focus on its oil and boundary policies, since priority had to be given to more pressing concerns.[317]

4.17 Côte d'Ivoire has already explained in its Counter-Memorial that during this period it was plunged into a time of internal instability: it had suffered a military coup in 1999, disputed and violent elections in 2000, an attempted coup d'état in 2002 and the subsequent formation of a rebel movement in the north of the country, which had in

[315] Telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16; note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112. The matter of the maritime boundary was mentioned again later, notably in 1997 (see *infra*, paras 4.20-4.22).

[316] RG, Vol. I, paras 2.58 *et seq*.

[317] CMCI, Vol. I, paras 2.8-2.20.

fact divided the country into two.[318] As the internal conflicts deflected Côte d'Ivoire's attention from the question of the maritime boundary, the meetings between Côte d'Ivoire and Ghana on this matter had practically ceased. On the other hand, during this period, Ghana hosted a series of meetings between the various parties to the Ivorian conflict, which culminated in the signing of three peace agreements.[319] In these circumstances, Ghana was particularly aware of the extent of the crisis in Côte d'Ivoire. It was during this turbulent period, and in spite of Ivorian opposition to any drilling works in the disputed area, as stated in 1992,[320] that Ghana carried out two drilling operations there in 1999 and 2002, respectively, in the Tano West field.[321]

4.18 During this period of internal conflict and in spite of the lack of any solution to the maritime dispute and the absence even of any discussion of the question, whilst Ghana was exhibiting its good offices *vis-à-vis* Côte d'Ivoire under the mandate of the ECOWAS, with a view to resolving the Ivorian conflict, and against the background of a test of strength temporarily unfavourable to Côte d'Ivoire, Ghana chose to develop its initial drilling operations and step up its oil activities in the disputed area without the agreement of its neighbour.

4.19 Despite these periods of internal troubles, as shown in the Counter-Memorial and the present Rejoinder, Côte d'Ivoire did moreover not fail to react on repeated occasions to Ghana's displays of unilateralism in the disputed area when it was in a position to do so.[322]

[318] CMCI, Vol. I, paras 2.10-2.13.

[319] CMCI, Vol. I, para. 2.17. Accra peace agreements, 29 September 2002 (Accra 1), 7 March 2003 (Accra 2), 30 July 2004 (Accra 3). However, these agreements did not actually manage to establish peace. It was only in 2008 that the country recovered a certain degree of stability.

[320] Note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

[321] State of activities in the oil blocks granted by Ghana in the disputed area, 27 February 2015, CMCI, Vol. IV, Annex 83.

[322] CMCI, Vol. I, paras 4.16, 4.23-4.24; see also *infra,* para. 4.45.

2. The 1997 meeting

4.20 Ghana's assertion that a delimitation agreement existed between the Parties culminates in its mentioning a meeting in 1997 between the Ivorian and Ghanaian technical teams involved in a natural gas sales project between Côte d'Ivoire and Ghana, during which the teams agreed to ask their respective governments to revive the "Ivoiro-Ghanaian Commission on the border problems", which the technical teams also called, in another part of the document, the "Ivoiro-Ghanaian Commission on the demarcation of the common maritime border".[323] Ghana takes that to be proof that "the Parties had already agreed on their common maritime boundary" since "reference is made to 'demarcation' … as opposed to 'delimitation'".[324]

4.21 Contrary to Ghana's extrapolations, there is no reason to read more than there is into this document, that is, an agreement between the technical teams with a view to proposing to the Ivorian and Ghanaian governments that negotiations be resumed in order to settle their maritime boundary dispute.[325] The minutes of this meeting, moreover, contrary to Ghana's conclusions, shed light far more on the evident lack of an agreement or *modus vivendi* between the Parties than the existence of one. Following a more in-depth study than that carried out by Ghana, it shows simply that the term "demarcation" was used inadvertently instead of the term "delimitation", which reflects the meaning of the text more appropriately. Other passages in the document confirm this interpretation, starting with the introduction, which confirms that the boundary question was the subject of a dispute since it uses the expression "border problem".

4.22 It has been established that an agreement on a maritime boundary cannot easily be presumed[326] and that a technical team tasked with discussing plans for the sale of

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[323] Republic of Ghana and Republic of Côte d'Ivoire, *Natural Gas Purchase and Sale between the Republic of Ghana and the Republic of Cote d'Ivoire, Minutes of the Meeting Held Between the Ghana and Cote d'Ivoire Technical Working Teams* (2 December 1997), RG, Vol. III, Annex 114.

[324] RG, Vol. I, para. 2.54.

[325] *Infra*, para. 4.26; Republic of Ghana and Republic of Côte d'Ivoire, *Natural Gas Purchase and Sale between the Republic of Ghana and the Republic of Cote d'Ivoire, Minutes of the Meeting Held Between the Ghana and Cote d'Ivoire Technical Working Teams* (2 December 1997), RG, Vol. III, Annex 114.

[326] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253; see also *Maritime delimitation in the*

natural gas with a neighbouring State cannot of course engage the State at international level or create any understanding about an issue as important as the delimitation of the boundary.

D. 2008 to 2014: The resumption of negotiations on delimitation

4.23 It is surprising but revealing to note that Ghana's Reply fails to deal with the period 2008-2014 in its statements concerning the alleged tacit agreement.[327] The reason for this is simple: the most recent period is also the most awkward for Ghana and the most relevant in the present case.

4.24 In particular, Ghana fails to mention in its Reply the meetings held between the two Heads of State of the two countries who, in November 2009, together expressed the wish to see the boundary dispute settled. The joint communiqué published following the visit of the Ivorian President to Ghana in November 2009 confirms the absence of any agreement in the clearest terms possible: " [t]he two leaders indicated that the land borders were delimited whereas the discussions on the delimitation of the maritime border had been started by the two countries. They exhorted the competent jurisdictions of the two countries to continue their discussions for a rapid conclusion" *[translation by the Registry]*.[328] The two Heads of State repeated this view at their meeting in Geneva in May 2015, in the presence of the former Secretary-General of the United Nations, Mr Kofi Annan. The joint communiqué published following that meeting states that "[t]he delimitation of the maritime boundary remains an aim of the Parties" *[translation by the Registry]*.[329] Ghana makes no mention at all of these

Black Sea (Romania v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 95.

[327] RG, Vol. I, Chapter 2.

[328] Joint communiqué issued following the official visit to Ghana of His Excellency Mr Laurent Gbagbo, President of the Republic of Côte d'Ivoire, 3-4 November 2009, para. 8, CMCI, Vol. III, Annex 34.

[329] Joint communiqué issued following the meeting between the President of the Republic of Côte d'Ivoire, the President of the Republic of Ghana and His Excellency Mr Kofi Annan, Geneva, 11 May 2015, RCI, Vol. III, Annex 201.

meetings, either in its report submitted to the Special Chamber concerning the steps taken to implement the provisional measures,[330] its Memorial or its Reply.[331]

4.25 More generally, the period from 2008 to 2014 was marked by an attempt on the part of Ghana to impose a *fait accompli* by stepping up its oil activities in the disputed area, whilst endeavouring to stall the negotiations.

4.26 Ghana claims that Côte d'Ivoire abruptly changed its attitude when oil was discovered in Ghanaian waters.[332] As already mentioned in its Counter-Memorial,[333] Côte d'Ivoire recalls that it was Ghana which took the initiative to resume the negotiations and create the Ivorian-Ghanaian Joint Maritime Boundary Delimitation Commission. In its letter of 20 August 2007 inviting Côte d'Ivoire to establish a bilateral structure in order to start negotiations on the maritime boundary delimitation,[334] the Ghanaian Minister of Foreign Affairs in effect proposed "deliberat[ing] on the delimitation", not on the "demarcation" of the boundary. In taking this initiative, Ghana cannot, moreover, affirm, as it does in its Reply,[335] that an agreement on the delimitation of the maritime boundary existed in 1997. This initiative establishes the contrary.

4.27 Ghana is attempting to twist the content of the Ivorian proposal put forward with a view to the second meeting of the Joint Commission. It gives 23 February 2009 as the critical date as from which Côte d'Ivoire tried to call into question a tacit agreement on the maritime boundary, which had allegedly been in existence for more than half a century.[336] As is clear from the Counter-Memorial, a study of the meetings shows that this was not the case.[337]

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[330] Ghana's report on the steps taken to implement the provisional measures, 25 May 2015, CMCI, Vol. IV, Annex 53.

[331] RG, Vol. I, Chapter 2.

[332] RG, Vol. I, para. 5.21.

[333] CMCI, Vol. I, paras 2.46, 2.52, 2.92.

[334] Note verbale no. LE/TL/2 from the Ministry of Foreign Affairs of Ghana to the Embassy of Côte d'Ivoire in Accra, 20 August 2007, CMCI, Vol. III, Annex 25.

[335] RG, Vol. I, para. 2.54.

[336] RG, Vol. I, para. 2.12.

[337] CMCI, Vol. I, para. 2.55.

4.28 The first meeting of the Joint Commission, held on 16 and 17 July 2008, allowed the two Parties to determine the scope of the discussions, confirming that it was indeed a matter of delimiting by negotiated agreement the maritime boundary between the two States.[338] In this regard, Ghana's presentation leaves no room for doubt. In its opening statement, the Ghanaian Party declared that, in order for Ghana to be able to file its submission with the Commission on the Limits of the Continental Shelf within the time-limit, "the Ghana/Côte d'Ivoire International Maritime Boundary needs to be delimited."[339] The Ghanaian Party added: "[in the] name of the Government of Ghana, we wish to thank the Ivorian Government for according us this unique opportunity to fraternize with you with a view to reaching lasting agreements on our common maritime boundary."[340] These words clearly disprove the Ghanaian contention that a tacit agreement establishing a maritime boundary had existed for a great many years.

4.29 The Ghanaian boundary proposal formulated during this meeting, following the western limit of the Ghanaian concessions, was drawn up as nothing more than a simple proposal to feed the negotiations, not the description of a pre-existing agreement which was merely to be acknowledged and put in writing. That it is a simple proposal is confirmed by the fact that Ghana then listed three reasons as to why it felt that this course should be followed, none of these reasons referring to the existence of a tacit delimitation agreement.[341] Finally, the fact that Côte d'Ivoire took note of the Ghanaian proposal and that it was agreed that it would take time to analyse and respond to it before a second meeting of the Joint Commission[342] confirms - if confirmation

[338] Minutes of the maiden meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary, 16 and 17 July 2008, CMCI, Vol. III, Annex 29.

[339] Opening statement of Ghana, maiden meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary, 16 and 17 July, CMCI, Vol. III, Annex 28.

[340] Opening statement of Ghana, maiden meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary, 16 and 17 July 2008, CMCI, Vol. III, Annex 28. Similarly, the Ghanaian Party also declared that "there are 338 International Maritime Boundaries out of which only 168 have signed agreements. By initiating these discussions today, we have before us an oppotunity to be part of history"; "any agreements reached here would have to be approved by the Legislature and/or the Executive of both countries."

[341] Opening statement of Ghana, maiden meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary, 16 and 17 July 2008, CMCI, Vol. III, Annex 28.

[342] Minutes of the maiden meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary, 16 and 17 July 2008, CMCI, Vol. III, Annex 29.

were needed - that Ghana's proposal is simply what it is, that is, a mere proposal to be submitted for discussion during negotiations.

4.30 At the moment when Ghana formulated its proposal during the maiden meeting of the Joint Commission in 2008, it could not have been unaware of the position which Côte d'Ivoire had defended as early as 1988, which was founded not on the use of equidistance and even less on the limits of the oil concessions. Ghana is now trying to impose *ex post* the idea of an alleged tacit agreement on a "customary equidistance line" in order to re-write the history of the relations between the two neighbouring States. In actual fact, it was only with a view to the fifth meeting of the Joint Commission that Ghana for the first time used the expression "tacit agreement" in its response of 31 August 2011[343] to Côte d'Ivoire's proposals. Without basing this assertion on any established arguments, Ghana concludes that "the long standing relationship in the oil practice between our two countries constitutes tacit agreement".[344] Ghana had never used this argument before.[345] Mentioning it in 2011 follows the large-scale investment it had made in the disputed area between 2009 and 2011 and the need to ensure that it enjoyed a certain degree of legal security. This led to Côte d'Ivoire's almost immediately warning the oil operators acting, with Ghana's authorization, in the disputed area.[346]

4.31 These warnings were the logical continuation of the position consistently maintained by Côte d'Ivoire, which, as from 2009, even before Ghana had introduced the concept of a tacit agreement, had affirmed that "[the proposed course] used by the oil exploration companies operating in Ivorian territorial waters is meant to avoid any border disputes and is not supported by any official agreement between our two countries after bilateral negotiations for the demarcation of the maritime border

[343] Ghana Boundary Commission, *Response to Côte d'Ivoire's proposals towards the 5th Côte d'Ivoire/Ghana maritime boundary delimitation meeting*, 31 August 2011, CMCI, Vol. III, Annex 39; see also CMCI, Vol. I, para. 4.23.

[344] Ghana Boundary Commission, Response to Côte d'Ivoire's proposals towards the 5th Côte d'Ivoire/Ghana maritime boundary delimitation meeting, 31 August 2011, CMCI, Vol. III, Annex 39, p. 7.

[345] Until this abrupt change of attitude, Ghana was defending, in the negotiations, a strict equidistance line, calling upon the Parties' oil activities in support, without equating them with a tacit agreement.

[346] Communiqué from the Director of Mines, Petroleum and Energy to the oil operators in the Ivorian offshore, 26 September 2011, CMCI, Vol. IV, Annex 71.

between Côte d'Ivoire and Ghana as recommended in Articles 15, 74 and 83 of the Montego Bay Convention."[347]

4.32 During the aftermath of the negotiations, Ghana stuck rigidly to its position in order to safeguard its oil activities, but did not, as it claims, "consistently [seek] to identify areas of agreement and make progress where possible … and … [seek] to understand and engage with Côte d'Ivoire's various positions."[348] There is no need to revisit the details of the negotiations, which were already the subject of a detailed presentation in the Ivorian Counter-Memorial.[349] It is enough to recall that it was during these negotiations, which were suspended for two years in 2010-2011 owing to the internal Ivorian conflict, that Ghana filed a declaration in application of article 298 of UNCLOS, excluding the dispute-settlement procedures provided for by the Convention in matters of maritime delimitation,[350] and demonstrated the inflexibility of its attitude, before abruptly putting a stop to the negotiations unexpectedly and unilaterally.

II. Côte d'Ivoire's cautious approach in oil-related matters

4.33 Côte d'Ivoire's cautious attitude in oil-related matters confirms the absence of any agreement on the maritime boundary between the Parties, as their bilateral dealings had already established.

4.34 According to Ghana, "the practice of each Party has been consistent and respectful of the other's, in full knowledge of and reliance upon mutual respect of a recognized and agreed boundary".[351] A close study of the documents submitted to the Chamber shows, on the contrary, Côte d'Ivoire's cautious approach driven as always by a concern not

[347] Communication from the Ivorian Party, 2nd meeting of the Ivorian-Ghanaian Joint Commission for the Delimitation of the Maritime Boundary 23 February 2009, CMCI, Vol. III, Annex 30. See also CMCI, Vol. I, para. 2.55.

[348] RG, Vol. I, para. 1.7.

[349] CMCI, Vol. I, paras 2.48-2.82.

[350] Ghana, Declaration under article 298 of UNCLOS, 16 December 2009, CMCI Vol. III, Annex 35.

[351] RG, Vol. I, para. 1.5.

to endanger the reaching of a fair delimitation agreement with Ghana. The cautious character of this approach is clear both from Côte d'Ivoire's legislative and contractual activities with its oil companies (A.) and from its attitude towards the oil activities carried out by Ghana in the disputed area (B.).

A. The Ivorian oil-related legislative and contractual activities

4.35 Côte d'Ivoire has consistently maintained that there was no correlation between the eastern limit of its oil blocks and its maritime boundary with Ghana. This position became clear through the legislative and contractual practice it has followed with the oil companies to which it has granted oil concessions more or less close to the western limit of the Ghanaian oil blocks.

4.36 These factors have been developed at length in the Counter-Memorial;[352] it is enough to recall the main points here:

- The adoption from the 1970s of legislation refusing to grant primacy to the equidistance method for maritime delimitation, and specifying that the coordinates of the eastern limits of the oil blocks granted in the border area are given solely as an indication and in no way reflect the limits of Côte d'Ivoire's jurisdiction. These legal texts include in particular:
    - The Presidential Decree of 1970;[353]
    - The Presidential Decree of 1975;[354]
    - The Law of 1977;[355]

[352] CMCI, Vol. I, paras 2.96-2.113.

[353] Decree n° 70-618 granting an oil exploration licence to the companies ESSO, SHELL and ERAP, 14 October 1970, CMCI, Vol. IV, Annex 59.

[354] Decree n° 75-769 renewing oil exploration licence no. 1, 29 October 1975, CMCI, Vol. IV, Annex 61.

[355] Law no. 77-926 concerning delimitation of the marine areas under the national jurisdiction of the Republic of Côte d'Ivoire, 17 November 1977, CMCI, Vol. III, Annex 2.

- The gradual introduction of a safeguard clause in the Ivorian oil contracts as from 1975, specifying that the coordinates of the limits of the oil concessions located in the border area are given as an indication and do not reflect the limits of the jurisdiction of the State.[356] This clause was even to be included in the Ivorian standard oil-production sharing contracts as from 1990,[357] the 1993 standard contract specifying that this reservation was "to be added if the block in question was located at the extreme west [or] east of Côte d'Ivoire".[358]

4.37 Ghana criticizes Côte d'Ivoire for its silence about its oil activity between 1992 and 2007.[359]Apart from the fact that, for a certain number of years, Côte d'Ivoire was prey to the serious internal conflicts described above[360] (and in the Counter-Memorial),[361] Côte d'Ivoire did not consider it useful to mention these facts because (i) they do not concern the disputed area, and (ii) they prove nothing about the alleged tacit agreement or possible acquiescence on the part of Côte d'Ivoire *vis-à-vis* the alleged "customary line of equidistance", especially since they were covered by the afore-mentioned caveat.[362]

4.38 For example, Ghana reproaches Côte d'Ivoire for omitting to mention "the drilling by UMIC of up to seven wells in that area [i.e., Ivorian block CI-01] between 1997 and 1998",[363] one of the activities which, according to Ghana, indicates that "the customary equidistance line was treated by Côte d'Ivoire as the international boundary between the two States."[364] However, it takes care not to recall that this block is not located in

[356] CMCI, Vol. I, para. 2.109; see also oil-production sharing contract concluded between the Republic of Côte d'Ivoire and the companies Agip S.A., Getty Oil Company (Ivory Coast), Hispanica de Petroleos (Hispanoil) S.A., Philips Petroleum Company Ivory Coast, 14 January 1975, CMCI, Vol. IV, Annex 60; see also oil sharing contract between the Republic of Côte d'Ivoire and Vanco, 20 April 1999, CMCI, Vol. IV, Annex 68.

[357] CMCI, Vol. I, paras 2.107-2.108.

[358] Standard oil-production sharing contract prepared by the Republic of Côte d'Ivoire, 1993, CMCI, Vol. IV, Annex 64.

[359] RG, Vol. I, paras 2.58 *et seq*.

[360] *Supra,* paras 4.16-4.19.

[361] CMCI, Vol. I, paras 2.8-2.25.

[362] *Supra*, para. 4.36.

[363] RG, Vol. I, para. 2.70.

[364] RG, Vol. I, para. 2.61.

the disputed area but to the west of the limits of the Ghanaian concessions,[365] an area over which Ivorian sovereignty has never been contested. The legitimacy of the Parties' oil activities outside the disputed area has never been contested.

4.39 Ghana also reproaches Côte d'Ivoire for its silence about its "sustained efforts to develop its oil industry, which were enhanced from 1992 onwards."[366] This assertion is doubly surprising. First, because it is obvious that the existence of a dispute concerning delimitation does not constitute an obstacle to the development by one State of legitimate activities in areas not the subject of concurrent claims. Second, because Côte d'Ivoire has, however, already stated its wish "to modernize the Ivorian oil regime so as to attract investors and foreign oil companies again",[367] a wish which was in particular manifested by the adoption of two new standard oil-production sharing contracts[368] containing the safeguard clause eliminating any possibility of the eastern limit of the Ivorian oil blocks being assimilated with the maritime boundary. The effect of the safeguard clause prevents oil-related issues from being arbitrarily confused with boundary issues.

B. Oil activities in the disputed area

4.40 The year 2009 was a watershed in Ghana's development of its oil activities in the disputed area.[369] Before that date, very few invasive activities had been carried out in the area (*1.*), a situation which changed radically as from 2009 (*2.*).

[365] IHS Energy Group, Côte d'Ivoire (December 2014), MG, Vol. II, Annex M48.

[366] RG, Vol. I, para. 2.62.

[367] CMCI, Vol. I, para. 2.107.

[368] CMCI, Vol. I, paras 2.107-2.108.

[369] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures,* Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire, 27 February 2015, para. 10; see also Pleadings of Côte d'Ivoire of 30 March 2015. The conditions set for the prescription of provisional measures, ITLOS/PV. 15/C23/Corr.1, pp. 9 *et seq*.

1. Before 2009

4.41 Before that date, which is both when Ghana stepped up its oil activities in the disputed area and the two Parties repeated their willingness to reach a consensual agreement on the delimitation and also the moment when Ghana put up a barrier in the form of the declaration of an exception allowed under article 298 of the Montego Bay Convention,[370] Côte d'Ivoire's silence is explained by the few activities in the disputed area, the *status quo* interrupted by Ghana when it stepped up its drilling operations in the area in spite of Côte d'Ivoire's repeated opposition, and when the two States had just established the Ivoiro-Ghanaian Joint Commission on Delimitation of the Maritime Boundary on a proposal from Ghana.[371] This silence is also explained by the internal Ivorian crises which lasted for some fifteen years.

4.42 In fact, Ghana had only carried out four drilling operations in the disputed area before 2009, namely in 1989, 1999, 2002 and 2008 in the Tano West field.[372] Between 1988 and 2009, Côte d'Ivoire objected on several occasions to any development of invasive activities on the part of Ghana in the disputed area. In the absence of any invasive activities in the area, it was unnecessary for Côte d'Ivoire to formulate any objections, and the Chamber will note that there was no need to react earlier.

4.43 In no way could the fact that a form of cooperation might have existed between the two Parties as concerns non-invasive activities, in particular as concerns seismic issues, justify Ghana's argument whereby Côte d'Ivoire, by way of this cooperation, "repeatedly recognized the customary equidistance line as the maritime boundary between the two States."[373]

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[370] *Infra*, para. 4.49.

[371] Note verbale no. LE/TL/2 from the Ministry of Foreign Affairs of Ghana to the Embassy of Côte d'Ivoire in Accra, 20 August 2007, CMCI, Vol. III, Annex 25.

[372] State of activities in the oil blocks granted by Ghana in the disputed area, 27 February 2015, CMCI, Vol. IV, Annex 83; see also IHS Energy Group, Ghana Coastal Zone (December 2014), MG, Vol. II, Annex M49.

[373] RG, Vol. I, para. 2.103.

2. From 2009

4.44 The year 2009 marked a stepping up of Ghana's oil activities, including drilling, in the disputed area. This development follows the discovery of oil showings in 2007 in the Jubilee field,[374] then in the TEN field in March 2009.[375] Whilst only four drilling operations were carried out in the area before 2009, no fewer than 34 were performed between 2009 and 2014.[376]

4.45 Côte d'Ivoire has already explained that it did not fail to protest against these new developments, in particular within the Ivoiro-Ghanaian Joint Commission,[377] and by writing directly to the oil companies operating under Ghana's control in the disputed area, including Tullow, in order to ask them to suspend their activities in the disputed area.[378] The companies in question immediately consulted the Ghanaian authorities about the Ivorian warning. Faced with the concerns expressed, for example, by the Tullow company on receipt of this letter,[379] Ghana moreover rightly recalled that the maritime boundary had not been delimited:

> as regards the maritime boundary, as you are aware*, it has always been publicly known that the Republic of Ghana and the Republic of Cote d'Ivoire have not yet delimited their maritime boundary.* It is also publicly known that in recent years the two Governments have met in an *effort to negotiate their maritime boundary in accordance with international law.* Those negotiations remain ongoing.[380]

4.46 The Ivorian reaction in the light of the increased drilling activities in the disputed area carried out under Ghana's control also confirms that Côte d'Ivoire's opposition to the *fait accompli* which Ghana had sought to impose is repeated over time, particularly

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[374] CMCI, Vol. I, para. 2.92; see also CMCI, Vol. IV, Annexes 73 and 74.

[375] CMCI, Vol. I, paras 2.94-2.95.

[376] CMCI, Vol. I, paras 2.94-2.95; see also CMCI, Vol. II, sketch maps 2.2 and 2.3; see also MG, Vol. II, Annex M49.

[377] CMCI, Vol. I, paras 4.23-4.24.

[378] Communiqué from the Director of Hydrocarbons to the oil operators in the Ivorian offshore, 26 September 2011, CMCI, Vol. IV, Annex 71. These events occurred during relative political stability, before and after the crisis of November 2010 to May 2011.

[379] Letter from Tullow to Ghana, 14 October 2011, CMCI, Vol. IV, Annex 77.

[380] Letter from the Ministry of Energy of Ghana to Tullow, 19 October 2011, CMCI, Vol. IV, Annex 78, emphasis added.

whenever the prospect of Ghanaian drilling operations being performed presents itself.[381]

4.47 At all events, the simultaneous occurrence of certain events during 2009 is at the very least worrying and suggests that Ghana was deliberately playing a game of appearances,[382] confirming the Ghanaian strategy of shielding itself from the Ivorian protests in order to expand its oil activities, and strengthen the *fait accompli* in the disputed area.

4.48 First, the stepping up of the Ghanaian drilling activities in the disputed area occurred in parallel with the bilateral negotiations on the issue of maritime delimitation held in the Joint Commission. Whilst seeking, via the negotiations, to project a peaceful image of openness, good faith and respect for international law, Ghana in actual fact initiated and used these negotiations as a means of enabling it to continue expanding its activities and attempt to impose the western limit of the Ghanaian oil blocks on Côte d'Ivoire as the maritime boundary.[383] This strategy is very clear when Ghana's inflexible attitude during the six years of negotiations in the Joint Commission is examined, which was entirely unchanging and offered no alternative proposal to the western limit of the Ghanaian oil blocks, suddenly presented as being the result of a tacit agreement.[384]

4.49 Second, at the same time as oil activities in the disputed area were being stepped up and despite the ongoing negotiations, Ghana filed its exception declaration in application of article 298 of the Convention with the United Nations in December

[381] See also Côte d'Ivoire's request to Ghana in 1992 that the two countries "refrain from all drilling in the area whose status remains to be determined", telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16; note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112; see also Communication from the Ivorian Party, Second meeting of the Joint Ivoiro-Ghanaian Commission on the Demarcation of the Maritime Border between Côte d'Ivoire and Ghana, 23 February 2009, p. 3, CMCI, Vol. III, Annex 30.

[382] See also *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures,* Verbatim reports of the public hearings held on 29 and 30 March, pleading of Me Pitron, 30 March 2015, ITLOS/PV.15/C23/Corr.1, p. 13.

[383] CMCI, Vol. I, paras 2.48-2.74.

[384] *Ibid*.

2009.[385] This action occurred only a few weeks after the joint declaration of the two Heads of State exhorted "the competent jurisdictions of the two countries to continue their discussions for a rapid conclusion"[386] of an agreement on their common maritime boundary. Ghana thus sought to shield itself from the Ivorian reaction which it knew would be unavoidable. This declaration clearly shows that Ghana was anticipating the possible legal consequences of its actions in the disputed area, which blatantly contradicts the Ghanaian concept of an alleged tacit agreement.

4.50 These revealing chronological coincidences show Ghana's calculating and expectant behaviour with a view to achieving its strategy of establishing a *fait accompli*. As Chapter 5 of this Rejoinder will demonstrate, these facts are far from the standards required of a tacit agreement or a *modus vivendi* or for creating an estoppel situation *vis-à-vis* Côte d'Ivoire.

III. The evidence provided by Ghana does not support its arguments

4.51 As shown above, the Parties' oil activities are not relevant to the delimitation of their maritime boundary. The other evidence provided by Ghana also does not support its contention, whether this be cartographic evidence (A.) or the Parties' submissions to the CLCS in 2009 (B.).

A. The cartographic evidence

4.52 Ghana's Reply does not contain any convincing argument in response to Côte d'Ivoire's analysis of the use and probative value of the cartographic evidence (maps, sketch maps and other graphics or material) in the context of judicial proceedings. It is established practice that tribunals exercise great caution when using maps which

[385] Ghana, Declaration under article 298 of UNCLOS, 16 December 2009, CMCI, Vol. III, Annex 35.

[386] Joint communiqué issued following the official visit to Ghana of His Excellency Mr Laurent Gbagbo, President of the Republic of Côte d'Ivoire, 3-4 November 2009, CMCI., Vol. III, Annex 34.

parties may submit to them, often using them only as non-authoritative material in order to corroborate arguments obtained in some other way.[387]

4.53 Ghana is doing exactly the opposite in the present case. A notion such as this of maps and graphics is erroneous and incompatible with States' practice and case law. In the instant case, it is impossible to assess the probative value of each item of cartographic evidence submitted or produced by Côte d'Ivoire without taking account of (i) the bilateral context, that is that the boundary was still to be defined by agreement between the Parties, (ii) Côte d'Ivoire's choice of adopting a reserved attitude pending a final agreement and so as not to provoke an open conflict, (iii) Côte d'Ivoire's difficulties in reacting during the periods of internal political crisis, and (iv) the presence of the caveat which was brought up at regular intervals by way of the Ivorian declarations and the safeguard clause. That is the general context in which any behaviour of Côte d'Ivoire – including the issuance of maps - should be situated.

4.54 It should immediately be underlined that Ghana has not presented any official political maps showing an international maritime boundary. All the cartographic evidence submitted by Ghana in support of its claim that a tacit agreement exists are oil concession charts, that is, the line they show is limited to the description of a single activity. Maps attached to a concession contract of which they form part or the provisions of which they illustrate are covered by a double caveat. First, the only value they have is to illustrate the scope covered by the provisions of the contract, which are authoritative. Second, they are if necessary covered by the safeguard clause in the contract or by the provision having an equivalent effect in the relevant decree governing its application. This is the case, for example, of the map shown in figure 2.13 of Ghana's Reply.[388]

4.55 A study of the cartographic resources recently submitted by Ghana in its Reply shows clearly their lack of relevance[389] for the same reasons as those explained by Côte

[387] CMCI, Vol. I, paras 4.83-4.91.

[388] MG, Figure 3.22, *Sedimentary Block Onshore and Offshore*, *Block CI-100* in Republic of Côte d'Ivoire, *Hydrocarbon Production Sharing Contract with PETROCI and YAM's PETROLEUM, Block CI-100,* 23 January 2006, p. 74; MG, Vol. II, Annex M11 and Vol. V, Annex 41; RG, Vol. I, p. 46 and Vol. II, Figure 2.13.

[389] RG, Vol. II, Annexes M63, M64, M65, M66.

d'Ivoire in its Counter-Memorial.[390] Generally speaking, in case law, maps accompanying an official document which they illustrate take precedence over maps produced alone, unless they show the official position of an organ of the State authorized to engage the latter.

4.56 In short, of the 66 items of cartographic material submitted by Ghana, only three mention an international boundary.[391] Two of them are from the oil companies bound contractually to Ghana[392] and hence are irrelevant to the question of delimitation since their authors have no authority in the matter of boundary delimitation. Only one item of this cartographic evidence stems from the Ivorian authorities.[393] However, this map, published by the Directorate-General of Hydrocarbons of Côte d'Ivoire in 1976, which mentions "*frontière*" ["border"] in the legend, was produced one year after Côte d'Ivoire recalled by decree and by an oil contract that the limit shown as a "border" *["frontière"]* on this map "[could] not … be regarded as being [the limit of] the national jurisdiction boundaries of Côte d'Ivoire";[394] and one year before Côte d'Ivoire recalled by promulgation of a law that its maritime boundaries had not yet been delimited.[395] Therefore, this single map has no probative value for delimiting maritime boundaries.

4.57 Of the other 63 items of cartographic evidence furnished by Ghana, if the limit of the concessions is mentioned at all, it is only as a limit *per se* and not as an international

[390] CMCI, Vol. I, paras 4.92-4.110.

[391] Ministry of Economy and Finance, Secretary of State of Mines, Hydrocarbon Directorate of the Republic of Côte d'Ivoire, *Permis de Recherche d'Hydrocarbures* (SRG/893) [Hydrocarbons Exploration Permit] (Côte d'Ivoire) reprinted by Ghana Geological Survey (23 March 1976, Ghana), MG, Vol. II, Annex M2; Tullow Oil plc, Ghana - Overview (October 2013), MG, Vol. II, Annex M62; South Cape Three Points Block, Ghana Offshore in Letter from James B. Jennings, Hunt Overseas Operating Company, to Minister of Mines and Energy, Republic of Ghana (14 July 1998), RG, Vol. II, Annex M64.

[392] Tullow Oil plc, *Ghana - Overview (October 2013),* reading "international boundary" along the line claimed by Ghana, MG, Vol. II, Annex M62; and *South Cape Three Points Block, Ghana Offshore* in *Letter* from James B. Jennings, Hunt Overseas Operating Company, to the Minister of Mines and Energy, Republic of Ghana (14 July 1998), stating *"Ghana / Côte d'Ivoire Border"* in the legend to designate the line claimed by Ghana, RG, Vol. II, Annex M64.

[393] MG, Vol. II, Annex M2 (Ivorian Ministry of Economy, 1976); see also CMCI, Vol. I, para. 4.100.

[394] Oil-production sharing contract concluded between the Republic of Côte d'Ivoire and Agip S.A., Getty Oil Company (Côte d'Ivoire), Hispanica De Petroleos (Hispanoil) S.A., Philips Petroleum Company Ivory Coast, on 14 January 1975, p. 72, CMCI, Vol. IV, Annex 60; Decree no. 75-769, regarding second renewal of exploration licence no. 1, 29 October 1975, CMCI, Vol. IV, Annex 61.

[395] Law no. 77-926 on the delimitation of marine areas under the national juridiction of the Republic of Côte d'Ivoire, 17 November 1977, CMCI, Vol. III, Annex 2; see also CMCI, Vol. I, paras 4.60-4.61.

boundary. None of the legends on any of these maps establishes that this line would correspond to a maritime boundary. Although some maps show an oil concession line with the words "Côte d'Ivoire" **or** "Ghana"[396] either side of the line claimed by Ghana, nothing indicates that this line represents an international maritime border. The name of the State shown on either side of this line refers to the State which granted the concessions, not to an area formally under its sovereignty. Moreover, only two maps mention "Ghana" **and** "Côte d'Ivoire", at sea.[397] Nevertheless, these words are meaningless since this cartographic evidence is produced by entities which have no authority in matters of maritime boundary delimitation. The first is an oil company whose map Ghana produces twice,[398] and the second is an entity attached to the Oil Ministry, the Ghana Geological Survey.[399] Finally, 22 of these maps,[400] one of which has been prepared by the Ghanaian Oil Ministry,[401] originate from entities which spontaneously declared that they have no authority in matters of boundary delimitation, often stating this on the maps themselves. Generally, the documents accompanying some of these maps provide no indication as to the location of the maritime boundary between the two States.

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[396] The maps mentioning Côte d'Ivoire **or** Ghana either side of the line claimed by Ghana are the maps MG, Vol. II, M5, M6, M10, M11, M23 and M26.

[397] The three maps mentioning Côte d'Ivoire **and** Ghana either side of the line claimed by Ghana are the Ghana Geological Survey maps, *Ghanaian oil concessions, Offshore & Onshore, (SRG/827A)* (1975, Ghana), MG, Vol. II, Annex M22; Dana Petroleum plc, Offshore Ghana, Tano Basin, 1997 Proposed Seismic Programme (1997, Ghana), MG, Vol. II, Annex M60 (black-and-white version) and RG, Vol. II, Annex M63 (colour version of the same map).

[398] Dana Petroleum plc, Offshore Ghana, Tano Basin, 1997 Proposed Seismic Programme (1997, Ghana), MG, Vol. II, Annex M60 (black-and-white version) and RG, Vol. II, Annex M63 (colour version of the same map).

[399] Ghana Geological Survey, *Ghanaian oil concessions, Offshore & Onshore, (SRG/827A)* (1975, Ghana), MG, Vol. II, Annex M22.

[400] This is the cartographic material produced by the privately-owned companies Petroconsultants (MG, Vol. II, Annexes M36, M37, M38, M39, M40, M41, M42, M43, M44, M45); IHS (MG, Vol. II, Annexes M46, M47, M48, M49, the last two dated December 2014 indicating "there is no ratified international maritime border treaty between Côte d'Ivoire and Ghana"); and of the American Association of Petroleum Geologists (MG, Vol. II, Annexes M50, M51, M53, M54, M55, M57, M59) the introduction to the bulletins of which states that "the international boundaries illustrated in the figures should not be considered as an official source for the limits of any country depicted", J. B. Hartman & T. L. Walker, Oil and Gas Developments in Central and Southern Africa in 1987, *The American Association of Petroleum Geologists Bulletin*, Vol. 72, No. 10B (October 1988), p. 196, MG, Vol. IX, Annex 99.

[401] Ministry of Fuel and Power of the Republic of Ghana, *Republic of Ghana Non-Exclusive Seismic Survey by Geophysical Service Inc.* (June 1982, Ghana), stating "this map is not an authority on the delineation of international boundaries", MG, Vol. II, Annex M24.

4.58 Furthermore, in this context, the fact that such an approximate line is found on maps relating to oil concessions and activities is hardly surprising. On the other hand, what is surprising is Ghana's attempt to pass off the western limit of its concessions as something which it is not, by giving it a status which manifestly has no basis at all in an agreement between the Parties. This is contrary to international law, which provides that maritime delimitation cannot result from the unilateral act of a State.[402]

4.59 In its Reply,[403] Ghana expands at some length on the notion whereby PETROCI, the Ivorian national oil company, is an organ of the Ivorian State which, by the activities it has carried out, has delimited the national maritime boundaries by publishing various oil concession maps.

4.60 Côte d'Ivoire has already refuted this argument in its Counter-Memorial[404] and does not consider it necessary to expand on this point any further. Nothing in the laws establishing PETROCI grants the company any public authority enabling it to delimit Côte d'Ivoire's maritime boundaries.[405]

4.61 Clearly, PETROCI has always been a commercial entity with its own legal personality, independent of the Ivorian State. Nothing in its statutes or Ivorian legislation invests it with the power to engage Côte d'Ivoire in the matter of establishing maritime boundaries. Its object and activities are strictly limited to commercial fields. Its structure and method of operation show that its legal personality is separate from that of the State. International courts and tribunals have adjudicated on this issue in cases concerning entities similar to PETROCI, and have declared that they are *not* emanations of the State. In the case of *Ulysseas, Inc.* v. *Republic of Ecuador,* the

[402] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*), *Judgment, I.C.J. Reports 1982*, p. 69, para. 92.

[403] RG, Vol. I, paras 2.96-2.101.

[404] CMCI, Vol. I, para. 4.104.

[405] Law no. 97-520 of 4 September 1997 provides in article 29 that, if the State"entrusts a publicly funded company with a public service mission, an agreement defining the mission conceded, its scope, conditions and methods of its execution and remuneration is compulsorily concluded between the State and that company" *[translation by the Registry]*, RCI, Vol. III, Annex 188.

tribunal declared that these entities "enjoy separate legal personality" and "have their own assets and resources to meet their liabilities".[406]

4.62 The fact that PETROCI has sometimes prepared maps showing the location of oil concessions by way of illustration cannot lead to the conclusion that PETROCI has been able to delimit boundaries. These maps were quite simply tools to be used for its commercial activities. Thus, the maps produced by PETROCI in no way show Côte d'Ivoire's official position with respect to the delimitation of a maritime boundary.

B. The Parties' submissions to the CLCS in 2009

4.63 In its Reply, Ghana maintains that the submissions which the Parties filed with the CLCS in 2009 are evidence of their tacit delimitation agreement,[407] for the reasons that:

- The eastern limit of the continental shelf claimed by Côte d'Ivoire and the western limit of that claimed by Ghana "are the same" and "aligned with a customary equidistance line";[408]
- The Parties cooperated in order to obtain the seismic data necessary for preparing their submissions;[409]
- The no-objection agreement concluded under the aegis of the ECOWAS was necessary in the absence of any formal delimitation agreement but is not evidence of the existence of a dispute on the location of the border, which is

[406] *Ulysseas, Inc.* v. *Republic of Ecuador*, UNCITRAL, Final award of 12 June 2012, para. 127. See also *Mr. Kristian Almås et al.,* v. *The Republic of Poland*, UNCITRAL, Final award of 27 June 2016, para. 209 (deciding that the entity in question "is not a State organ under the domestic law of Poland [because] [i]t has separate legal personality and exercises operational autonomy").

[407] RG, Vol. I, para. 4.2.

[408] RG, Vol. I, para. 4.3.

[409] RG, Vol. I, para. 4.14.

confirmed by the words "absence of dispute" in the Parties' respective submissions.

4.64 This contention does not stand up to analysis.

4.65 *First,* as Ghana admits,[410] delineation is an operation distinct from delimitation, such that the first is performed without prejudice to the second, in accordance with article 76, paragraph 10, of the Convention and article 9 of its Annex II. In application of this principle, the rules of procedure of the CLCS require that, in the face of a dispute relating to delimitation of the continental shelf, the Commission shall be assured by the State making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation.[411]

4.66 In the present case, each of the Parties has expressly declared to the CLCS that it had "overlapping maritime claims with adjacent States in the region" and filed its submission under the aegis of the above principle, both including in their (initial and amended) submissions the following paragraph:

> *Further, in accordance with paragraph 2(b) of Annex I to the Rules of Procedure, [Côte d'Ivoire/Ghana] wishes to inform the Commission that in its view,* the consideration of this submission will not prejudice matters relating to the determination of boundaries *between [Côte d'Ivoire/Ghana] and [the Republic of Ghana/the Republic of Côte d'Ivoire, the Federal Republic of Nigeria and the Republic of Togo]*".[412]

4.67 This component of their submissions is the result of an agreement concluded under the aegis of the CLCS, according to which:

> issues of *the limit of opposite/adjacent boundaries shall continue to be discussed* in a spirit of cooperation to arrive at a definite delimitation even after the presentation of the

[410] MG, Vol. I, para. 6.21.

[411] Rules of Procedure of the Commission on the Limits of the Continental Shelf, Annex I, paragraph 2(b).

[412] *Submission by the Government of Côte d'Ivoire for the Establishment of the Outer Limits of the Continental shelf of Côte d'Ivoire pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive summary*, 8 May 2009, CMCI, Vol. VI, Annex 175; Summary of the amended submission of Côte d'Ivoire concerning the extension of its continental shelf beyond 200 nautical miles (in French and English), 24 March 2016, CMCI, Vol. VI, Annex 179; Republic of Ghana, *Submission to the CLCS* (28 April 2009), MG, Vol. VI, Annex 74; *Revised Executive Summary of the Submission by the Government of the Republic of Ghana for the Establishment of the Outer Limits of the Continental Shelf of Ghana*, Accra, 21 August 2013, MG, Vol. VI, Annex 78 (emphasis added).

> preliminary information/submission. Member States would therefore write "no-objection" Note to the submission of their neighbouring States.[413]

4.68 This decision of the States and the way in which their submissions to the CLCS is formulated would appear entirely superfluous if a boundary had been agreed on, even tacitly.

4.69 Thus, without contradicting itself, Ghana cannot today claim that the content of these submissions is evidence of the existence of an agreed maritime boundary. The fact that the Parties used the same research vessel to obtain the seismic data enabling these submissions to be prepared cannot render them more relevant to the matter in hand.

4.70 Similarly, Côte d'Ivoire's filing an amended submission with the CLCS for the extension of its continental shelf cannot be considered indicative of a change in attitude as concerns the maritime delimitation. Contrary to what Ghana maintains, neither in its Counter-Memorial nor in its Rejoinder, is Côte d'Ivoire in any way invoking this amended submission in support of its arguments concerning the delimitation of the maritime boundary between Côte d'Ivoire and Ghana. It is doing so solely in order to provide proof of its entitlement to the continental shelf beyond 200 nautical miles and the extent thereof.[414]

4.71 *Second,* Ghana's contention that the submissions which the Parties filed with the CLCS in May 2009 are evidence of the existence of a tacit maritime boundary beyond 200 nautical miles is in any case contradicted by the time-line. At that date, Côte d'Ivoire had repeated scarcely three months earlier,[415] during the bilateral negotiations with Ghana, its refusal to accept equidistance or adopt the limit of the Ghanaian oil concessions as the maritime boundary.

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[413] Minutes of the expert meeting of some member States of ECOWAS on the outer limits of the continental shelf, Accra, 25-26 February 2009, p. 6, CMCI Vol. III, Annex 31, emphasis added.

[414] CMCI, Vol. I, paras 8.14-8.20; see also *supra*, para. 3.55.

[415] Communication from the Ivorian Party, Second meeting of the Joint Ivoiro-Ghanaian Commission on the Demarcation of the Maritime Border between Côte d'Ivoire and Ghana, 23 February 2009, CMCI, Vol. III, Annex 30.

Conclusion

4.72 For decades, and above all since 1988, the Parties' behaviour has shown clearly that their views on their maritime boundary differ.[416] The two States have in turn proposed discussing the delimitation of their common maritime boundary, which blatantly confirms that, in their eyes, such a boundary has not yet been fixed. At all events, the Ivorian proposals and declarations made between 1988 and 1992 clearly confirm that Côte d'Ivoire has never considered that the international maritime boundary could follow the western limit of the Ghanaian oil blocks or that of the Ivorian concessions.

4.73 The two meetings between the Parties' Heads of State in 2009 and 2015 and the resulting joint communiqués expressly confirm the existence of a maritime boundary dispute[417] and the desire of the Heads of States to delimit the boundary by way of agreement.

4.74 The negotiations within the Joint Commission between 2008 and 2014 are evidence of the existence of a boundary dispute, the resolution of which was the objective of the Joint Commission. The official title of the Joint Commission confirms unequivocally that its mandate concerns the boundary delimitation. It was during those negotiations, conducted with a view to delimiting the maritime boundary by way of an agreement, that Ghana for the first time put forward its argument on the basis of equidistance and then mentioned a so-called tacit agreement.[418]

4.75 As shown in the Counter-Memorial,[419] and as will be confirmed in the following chapter, these factors demonstrate that no such tacit agreement exists, nor does any *modus vivendi* between the Parties as concerns delimitation of the maritime boundary, no more than does an estoppel situation.

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[416] *Supra*, paras 4.9-4.32.

[417] *Supra*, para. 4.24.

[418] *Supra*, para. 4.30.

[419] CMCI, Vol. I, Chapter 4.

CHAPTER 5

IN LAW: NEITHER A TACIT AGREEMENT, *MODUS VIVENDI* NOR ESTOPPEL

5.1 At the cost of a distorted interpretation of the facts, the actual content of which was recalled in the preceding chapter, Ghana maintains in its Reply that the western limit of its oil concessions amounts to a tacit agreement.[420] In addition, it now mentions in its Reply a further ground: that of a *modus vivendi* likely to adjust the strict equidistance line to Ghana's advantage.[421] Finally, for good measure, it claims that an estoppel situation exists.[422]

5.2 Ghana's Reply is muddled on several counts.

5.3 *First,* although Ghana's Reply has the merit of explaining that the principal basis on which its claim rests is the contention that a tacit agreement exists, it attempts to use other legal grounds. Although it speaks ironically of the alternative delimitation methods proposed by Côte d'Ivoire (that is, a main proposal and an alternative),[423] Ghana itself does not desist from adopting such an approach in basing its claim of an alleged "customary line" on a tacit agreement, alternatively on a *modus vivendi*, and, for good measure, on the theory of estoppel. As Côte d'Ivoire has already underlined in its Counter-Memorial, these arguments of Ghana are intermingled in a confused manner[424] without justifying the line it is claiming.

5.4 *Moreover*, this is particularly striking when the question is raised as to the alleged delimitation agreement between the Parties, whose existence Ghana is claiming without any basis at all. It is noted that Ghana invokes a multitude of "agreements" without really knowing which one to pick:

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[420] RG, Vol. I, para. 2.115.

[421] RG, Vol. I, para. 3.78.

[422] RG, Vol. I, paras 2.119 *et seq*.

[423] RG, Vol. I, paras 3.7-3.8.

[424] CMCI, Vol. I, paras 3.6-3.17.

- Agreement on a delimitation method;[425]

- Agreement on an alleged "customary line";[426]

- Agreement on the extension of this alleged line beyond 200 nautical miles;[427]

- Agreement on the use of obsolete maps;[428] and

- Agreement on the coordinates of the endpoint of the land boundary, boundary post 55.

5.5 Ghana's Reply provides remarkable examples of combinations of these different "agreements":

- for example, paragraph 1.6 mentions an "agreed equidistance *method*"; some paragraphs later (1.14) a "tacit agreement between the Parties that respected the customary equidistance *boundary*"[429] is mentioned; and

- in paragraph 1.21, Ghana similarly confuses the issue: "(a) … both States have accepted the general and well-established *principle* of equidistance …; (b) … the principle of equidistance should and does specifically apply to the delimitation of [both States'] common maritime boundary; and (c) … *the equidistance boundary should follow a specific course".*[430]

5.6 Moreover, Ghana qualifies the same facts - here the Parties' oil activities - both as a tacit agreement and as a *modus vivendi*. According to Ghana, they are both supposed to derive from Côte d'Ivoire's alleged acquiescence to the course of the boundary.[431]

5.7 Faced with these attempts to confuse the issue, it is necessary to return to essentials and for Côte d'Ivoire to draw the attention of the Special Chamber to the relevant

[425] CMCI, Vol. I, paras 3.11-3.17.

[426] *Ibid*.

[427] RG, Vol. I, paras 1.14, 4.2, 4.4., 4.34, 4.38.

[428] RG, Vol. I, paras 1.13, 1.16, 3.28.

[429] RG, Vol. I, paras 1.6-1.14, emphasis added.

[430] RG, Vol. I, para. 1.21, emphasis added.

[431] RG, Vol. I, para. 3.91.

aspects of the matter alone. First, a study of the facts in the previous chapter underlines the absence of any agreement or converging position between the Parties as regards the delimitation of their maritime boundary (I). What is more, there are no relevant circumstances deriving from the Parties' conduct which would argue in favour of adjustment of a provisional equidistance line in the sense Ghana demands (II). Finally, Côte d'Ivoire's conduct has not placed it in an estoppel situation *vis-à-vis* Ghana as regards the question of the boundary (III).

I. The absence of an agreement, tacit or otherwise, between the Parties on the issue of maritime delimitation

5.8 Ghana's arguments are based on a selective accumulation of factors which it takes pains to present as an abundance of contentions. On the other hand, it deliberately fails to mention Côte d'Ivoire's most pertinent actions. A full and honest representation of these actions clearly shows the absence of any agreement between the Parties as to their maritime boundary.

5.9 The mere existence of the Ivorian attitudes which have been clearly and repeatedly voiced is sufficient to eliminate any presumption of acquiescence by Côte d'Ivoire to the attitude Ghana is currently displaying. Côte d'Ivoire's behaviour, as detailed below and identified in the previous chapter, helps individually and collectively to dispel the idea that any delimitation (or delimitation method) were made by way of an agreement, even a tacit one:

(i) The joint declarations by the two Heads of State in order to speed up the negotiations;[432]

[432] Joint communiqué issued following the official visit to Ghana of His Excellency Mr Laurent Gbagbo, President of the Republic of Côte d'Ivoire, 3-4 November 2009, CMCI, Vol. III, Annex 34; Joint communiqué issued following the meeting between the President of the Republic of Côte d'Ivoire, the President of the Republic of Ghana and His Excellency Mr Kofi Annan, Geneva, 11 May 2015, RCI, Vol. III, Annex 201.

(ii) The repeated official reminder that the disputed area has not yet been the subject of a definitive delimitation agreement and a call to refrain from all drilling activities in that area;[433]

(iii) The repeated invitations to negotiate and participate in negotiations in the context of the Joint Commissions – the express mandate of one of which is to delimit the maritime boundary;

(iv) The unilateral halt to negotiations on the part of Ghana and its initiating arbitration proceedings with a view to proceeding with the delimitation, not the demarcation,[434] of the maritime boundary;

(v) The numerous proposals for solutions different from the course of the line claimed by Ghana;[435]

(vi) The repeated refusal to equate the western limit of the Ghanaian oil concessions with an international boundary;[436]

(vii) The consistent Ivorian practice of mentioning in its domestic decrees the illustrative nature of the points located near the disputed area[437] and the Ivorian law which specifies explicitly that maritime boundaries must be delimited by way of agreement in accordance with equitable principles;[438]

(viii) The existence of a safeguard clause in the Ivorian standard oil contracts and those concerning blocks neighbouring the disputed area.[439]

5.10 Ghana's arguments are thus doomed to failure. First, from the aspect of probative value, the behaviour of which Ghana is seeking to take advantage to defend its contention that a tacit agreement exists is similar to that invoked by Bangladesh before

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[433] Telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16; note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112; Communication from the Ivorian Party, Second meeting of the Joint Ivoiro-Ghanaian Commission on the Demarcation of the Maritime Border between Côte d'Ivoire and Ghana, 23 February 2009, CMCI, Vol. III, Annex 30.

[434] *Supra*, paras 1.2-1.3, 4.26.

[435] *Supra*, para. 1.9; CMCI, Vol. I, paras 2.52-2.74.

[436] *Supra*, paras 4.9-4.32, 4.36, 4.45-4.46; CMCI, Vol. I, paras 4.23-4.24.

[437] *Supra*, para. 4.36; CMCI, Vol. I, paras 2.96-2.113.

[438] Law no. 77-926 on the delimitation of marine areas under the national jurisdiction of the Republic of Côte d'Ivoire, 17 November 1977, article 8, CMCI, Vol. III, Annex 2.

[439] *Supra*, para. 4.36; CMCI, Vol. I, paras 2.100-2.109.

ITLOS and thrown out by the Tribunal in the *Bangladesh/Myanmar* case. As proof of the alleged tacit agreement, Bangladesh had submitted the shipping permits requested and granted between the Parties, produced fishermen's sworn statements making reference to patrol activities of the national navy and coastguard service and had submitted charts showing the alleged boundary.[440] Similarly, in the present case Ghana has submitted requested and granted shipping permits, sworn statements made by oil company representatives and employees, and maps showing the alleged boundary line. The Tribunal rejected the behaviour invoked by Bangladesh on the ground that it "f[ell] short of proving the existence of a tacit or *de facto* boundary agreement".[441] The behaviour Ghana is invoking in the present case is no more relevant than that of Bangladesh.

5.11 In order to substantiate its conclusion that no tacit agreement existed between Bangladesh and Myanmar as concerns the delimitation of their maritime boundary, the Tribunal further based itself on the fact that Myanmar had reminded Bangladesh on several occasions that the boundary had not been delimited and had called for all the different aspects of the matter to be settled in a single document.[442] This situation is similar to the case now being submitted to the Special Chamber: it must be underlined that, in response to certain unilateral acts on the part of Ghana in the disputed area, Côte d'Ivoire has reminded it on several occasions that the maritime boundary has not been delimited and further invited Ghana to negotiate with a view to concluding a delimitation agreement.[443]

5.12 The international jurisprudence, in particular that invoked by Ghana, unanimously affirms that the probative threshold required for establishing the existence of a

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[440] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, paras 101-104 and 106.

[441] *Ibid.*, para. 118.

[442] *Ibid.*, para. 116.

[443] Telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16; note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112; Communication from the Ivorian Party, Second meeting of the Joint Ivoiro-Ghanaian Commission on the Demarcation of the Maritime Border between Côte d'Ivoire and Ghana, 23 February 2009, CMCI, Vol. III, Annex 30; see also Philippe Gautier, "Conduite, accord tacite et délimitation maritime", in *Droit des frontières internationales - The Law of International Borders*, Journées franco-allemandes, Société française pour le droit international, Paris, Pedone, 2016, p. 155 (third bullet point).

delimitation by way of agreement is very high. In the *Tunisia/Libya* case, in which the ICJ was asked to determine the principles and rules of international law applicable to the delimitation and the manner in which they apply in the case of which it had been seized, the Court held a line equating to a *modus vivendi* to be a "circumstance … highly relevant to the determination of the method of delimitation" of the maritime boundary between the Parties in the first section adjacent the territorial sea.[444] However, it identified such a *modus vivendi* as an important factor in the selection of the delimitation method only by taking account of the protracted practice going back many years to the colonial period, pre-dating the time when the Parties gained independence.[445] Furthermore, the two Parties had publicly acknowledged that their practice had followed this line, which was readily presented as a maritime boundary: "Both Parties during the oral proceedings recognized that a *de facto* compromise or provisional solution had been achieved by means of the buffer zone, which operated for a long time without incident and without protest from any side."[446] In contrast, the oil activities which Ghana is taking as a basis occurred within a far shorter period. As has been shown, far from maintaining silence, as the French authorities in charge of Tunisia's foreign policy did, Côte d'Ivoire has never accepted the western limit of the Ghanaian oil concessions which its neighbour was attempting to impose on it by way of a *fait accompli* and has not failed to demonstrate this stance whenever possible, and its reaction was in response to the most intrusive acts on the part of Ghana. Aside from these protestations, Côte d'Ivoire has clearly never envisaged the western limit of the Ghanaian concessions as a possible basis for negotiation, as the successive Ivorian delimitation proposals show.

5.13 In *Gulf of Maine*, the Court refused to identify the existence of an agreement on the method of delimitation along the median line, stressing that the Parties had voiced conflicting claims resulting in overlapping areas.[447] Each Party was aware of the other's claims, and although they were not sufficient to establish the existence of an

[444] *Continental Shelf (Tunisie/Libyan Arab Jamahiriya) Judgment, I.C.J., Reports 1982,* p. 83, para. 117.

[445] *Ibid.,* p. 70, para. 93, and p. 84, para. 119. The Court took this factor as a basis for refusing the application of estoppel in *Gulf of Maine* (*I.C.J. Reports 1984*, p. 310, para. 150).

[446] *Ibid.*, p. 70, para. 94. See also para. 95 and p. 84, para. 118.

[447] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246, at p. 306, para. 134 and p. 311, para. 153.

agreement on the delimitation method, by giving effect to a divergence, it did underline the need for delimitation by an - in this case, non-existent - agreement. Therefore, the Court noted that it was "impossible to conclude from the conduct of the Parties that there is a binding legal obligation, in their bilateral relations, to make use of a particular method for delimiting their respective maritime jurisdictions."[448] This is also the case in the present instance, overlapping claims having been established at least since the Ivorian reaction to the Ghanaian proposal of 1992 with a view to initiating maritime delimitation negotiations.[449] The Court also took the proposal to negotiate sent by one of the Parties to the other[450] as the basis for its refusal to identify the existence of an agreement on the delimitation method. In the present case, each of the Parties in turn proposed to the other initiating negotiations with a view to delimiting the maritime boundary by agreement, and many negotiations did in effect take place. Lastly, the attention paid by the Court, in its 1984 judgment, to the refusal expressed by one Party to the delimitation method desired by the other, and to the lack of importance of the non-intrusive activities such as seismic missions in its determination of the lack of any agreement between the Parties as to the choice of delimitation method[451] should be underlined. These same circumstances are even more preponderant in the present case.

5.14 Moreover, the factors put forward by Ghana in support of its claim that an agreement exists should be further assessed against the yardstick of the judgment handed down by the ICJ in *Peru* v. *Chile*. To date, this judgment constitutes one of the rare examples of acceptance by an international court or tribunal of the existence of a tacit agreement in this field.[452] The Court accepted the existence of a tacit agreement only insofar as it was confirmed by a subsequent written agreement, which is an important indication of the very high threshold needed as concerns the administration of proof. In many

[448] *Ibid.,* p. 312, para. 154.

[449] Telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16; note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

[450] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 306, para. 133.

[451] *Ibid.*, pp. 306-307, para. 136.

[452] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 38, paras 90-91; see also *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, paras 306-307.

respects, the Court's consideration of this point is a step opposite to that of Ghana in the present case. In view of the particular importance attached to the boundary delimitation operation and closely following the principle whereby a tacit agreement cannot be assumed to exist, the Court is following a specific approach which Ghana does not adopt in the present instance. Thus, in *Peru* v. *Chile*, the study of the 1954 agreement, which mentions the boundary for a particular end,[453] is supplemented with a study of other activities constituting as many factors of the Parties' practice. These are in particular the proclamations of 1947 and the Santiago declaration of 1952,[454] as well as the Parties' practice during the 1950s.[455] A study of the Parties' practice in other areas of activity enables the general nature of the boundary mentioned in the 1954 agreement to be confirmed and its scope to be clarified.

5.15 Ghana's position contradicts this approach of the ICJ. Its tenet is based almost entirely on the oil activities alone, as though this were the sole criterion to be taken into account for the maritime delimitation, contrary to the well-established jurisprudence and practice which consider oil activities as only one of many factors.[456] Such an approach necessarily leads to an image of the facts which is highly selective and excessively distorted. By following this approach and reducing everything to a question of oil activities, Ghana is failing to appreciate the true value of Côte d'Ivoire's basic position and reserved conduct, which is reflected in its behaviour that also affects other fields.[457] In so doing, Ghana cannot attain the threshold demanded by jurisprudence to prove the existence of a tacit agreement.

5.16 In *Libya/Malta*, the Court had refused to confirm the existence of such an agreement, judging the behaviour similar to that in the present case to be inadequate in that it was far from displaying great coherence in the long term. This behaviour included a delimitation proposal from Malta, followed by a counter-proposal from Libya after

[453] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014,* p. 38, para. 91.

[454] *Ibid*., p. 41, para. 102.

[455] *Ibid*., p. 42, para. 103.

[456] See, for example: *Arbitral Award in the Case concerning the Delimitation of Maritime Areas between Canada and France (Saint-Pierre-et-Miquelon) of 10 June 1992, RIAA,* Vol. XXI, pp. 265-341, at pp. 295-296, paras 89-91, in which the Arbitral Tribunal refused to give importance to the oil concessions granted by the Parties.

[457] In particular, as seen in the previous chapter, the bilateral exchanges and negotitations on the maritime boundary delimitation.

eight years of silence, and the Parties' oil-related practice around the median line, which for that reason, according to Malta, was to be considered "highly relevant".[458]

5.17 In the present case, the various proposals made by Côte d'Ivoire since 1988 concerning the delimitation method and the course of the maritime boundary are evidence of the lack of a tacit agreement and confirm that Côte d'Ivoire has never envisaged using equidistance or adopting the limit of the oil concessions as solutions likely to lead to an equitable maritime delimitation. What is more, since 1990 at least, Côte d'Ivoire has been implementing oil practice which includes a safeguard clause in its relevant standard contracts.[459] This conduct is more than adequate to invalidate the claimed practice of the Parties over more than half a century as alleged by Ghana. Neither the course of the maritime boundary nor the choice of delimitation method has thus been the subject of an agreement in any form whatsoever between the Parties.

5.18 It thus appears clear that the threshold of proof defined by international case law in order to attest to the existence of a maritime delimitation agreement[460] is far from being reached in the present case. Contrary to what is demanded by this consistent case law, the evidence submitted by Ghana to this end is in fact far from convincing.[461]

II. The Parties' oil activities do not constitute a relevant circumstance to be taken into account for the purposes of delimitation

[458] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 28-29, paras 24-25.

[459] *Supra*, para. 4.36.

[460] See in particular: *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act*, phase II, 26 March 2002, para. 3.5; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guineu intervening), Judgment, I.C.J. Reports 2002,* p. 303, at p. 447, para. 304; *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253; *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68*, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* para. 95.

[461] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253: "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed."

5.19 Realising the weakness of its arguments as concerns a tacit agreement, Ghana believes it has found a convenient substitute in the form of a *modus vivendi*, a basis which it introduces only in its Reply. Against the yardstick of international jurisprudence, Côte d'Ivoire considers that the Parties' conduct, including in oil-related matters, is not evidence of a *modus vivendi* or of a *de facto* line likely to constitute a relevant circumstance leading to adjustment of a provisional equidistance line in the sense requested by Ghana. The evidence submitted by Ghana fails to alter this finding.

5.20 Owing to its distorted interpretation of the jurisprudence, Ghana considers that a *modus vivendi* could be acknowledged and considered a relevant circumstance for the delimitation of the maritime boundary, given that the two States had granted oil concessions along a given line.[462] Again, according to Ghana, this is the standard applied in the judgment in *Tunisia/Libya,*[463] and which it alleges all subsequent judgments have adopted.[464]

5.21 Ghana's position, therefore, amounts to assimilating the *modus vivendi*, a relevant circumstance, with the oil practice (howbeit limited, since this practice would concern only the granting of concessions) of the two States either side of a single line.

5.22 This position is contrary to the jurisprudence, which systematically refuses to consider oil practice as a relevant circumstance. Moreover, Ghana does not seek to define the *modus vivendi* in its Reply. It contents itself with referring - in vain - to all the decisions which, directly or indirectly, envisaged the relevance of the Parties' oil activities to maritime delimitation,[465] activities which it now qualifies as a *modus vivendi.* The majority of the decisions invoked by Ghana do not actually treat *modus vivendi* as a relevant circumstance. Indeed,

[462] RG, Vol. I, paras 3.80-3.81.

[463] RG, Vol. I, para. 3.80.

[464] RG, Vol. I, paras 3.84-3.85, 3.88.

[465] RG, Vol. I, paras 3.85-3.88.

- the *Libya/Malta*, *Cameroon* v. *Nigeria*, *Guinea* v. *Guinea-Bissau* cases and the *Maritime delimitation between Canada and France,*[466] concern oil practice from the angle of a tacit agreement;

- the *Newfoundland* v. *Nova Scotia* case, analysed at greater length in Chapter 2 of this Rejoinder, also did not deal with the *modus vivendi* but with the location of the oil and gas resources;[467]

- the *Maritime Delimitation in the Black Sea* case was misinterpreted by Ghana. Contrary to what Ghana maintains, the Court did not conclude that "access to natural resources could be a relevant circumstance when the conduct of the parties relating to the resources demonstrates the existence of a tacit agreement or *modus vivendi* in relation to the location of the maritime boundary."[468] In fact, it reached the opposite conclusion whereby "[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance."[469]

5.23 Thus Ghana's strategy consists in obtaining via the *modus vivendi* something which it does not manage to prove as concerns a tacit agreement. Ghana could not, by calling on the abovementioned jurisprudence, bypass the very high level of proof announced by the ICJ in *Nicaragua* v. *Honduras*, which was reaffirmed in *Peru* v. *Chile*: "[t]he establishment of a permanent maritime boundary is a matter of grave importance".[470]

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[466] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 13, at p. 28-29, paras 24-25*; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equitorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 447, para. 303; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA*, Vol. XIX, p. 175, para. 66; *Arbitral Award in the Case concerning the Delimitation of Maritime Areas between Canada and France of 10 June 1992, RIAA,* Vol. XXI, pp. 295-296, paras 89-91.

[467] *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas,* Award of the Tribunal in the second phase, Ottawa, 26 March 2002, p. 61, para. 3.21. See *supra*, paras 2.72-2.73.

[468] RG, vol. I, para. 3.78.

[469] *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 125, para. 198 (citing Judgment of 11 April 2006, *Barbados* v. *Trinidad and Tobago*, *RIAA,* vol. XXVII, p. 214, para. 241).

[470] *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253; *Maritime Dispute (Peru* v. *Chile*), *Judgment, I.C.J. Reports 2014*, p. 3, at p. 38, para. 91.

Ghana does not manage to demonstrate why it would be more appropriate to delimit the maritime boundary according to its claims based on the concept of *modus vivendi* as a "relevant circumstance" than on the alleged existence of an earlier agreement on the location of the boundary or on the choice of delimitation method to be used. Given the serious implications for the sovereignty of the States, the ICJ demanded "irrefutable proof" in the case of an alleged tacit agreement. Applying a lower threshold of proof to prove the existence of a *modus vivendi* would weaken the analyses made by international courts and tribunals as regards the question of tacit agreements and deprive them of any sense. At all events, there is quite simply no proof of the existence of a *modus vivendi*, whatever its precise definition may be, as a relevant circumstance based on the Parties' conduct between Ghana and Côte d'Ivoire, no more than there is proof of the existence of a tacit agreement on delimitation or choice of delimitation method.

5.24 In general, international jurisprudence does not accept oil activities as relevant circumstances.[471] Only three decisions are pertinent here: *Tunisia/Libya* (the only case in which a *modus vivendi* was recognized); the *Gulf of Maine* case; and *Guyana/Suriname*. The latter two cases made reference to the *Tunisia/Libya* judgment, without, however, acknowledging the existence of a *modus vivendi* or a *de facto* line which might constitute a relevant circumstance for the purposes of delimitation.

5.25 In *Tunisia/Libya*, the Court recognized that a line coinciding with "the line perpendicular to the Coast at the frontier point which had in the past been observed as a *de facto* maritime limit"[472] constituted a *modus vivendi.* This line had been proposed as a delimitation line by the Italian authorities at the beginning of the 20th century, and formalized by the same authorities in the instructions which mention the "maritime

[471] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246, pp. 303-304, paras 126 *et seq.; Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 75, paras 82 *et seq.*; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinee intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 447, para. 304; *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, pp. 1-144, at pp. 90-91, para. 323 (pre-existing agreement), pp. 105-108, paras 379-390 (activities *stricto sensu*); *Maritime delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* pp. 123-125, paras 189-197; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 705, para. 220.

[472] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 18, at p. 71, para. 96.

boundary",[473] without the French authorities contesting the use of this line as a maritime boundary.[474] When they gained independence, the sovereign States did not question this line and granted concessions either side of it.[475]

5.26 The Court, which was not charged with delimiting the boundary between the Parties but only with setting out the principles, methods and circumstances to be taken into account for the delimitation operation, considered that this line constituted both "a relevant circumstance [for determining the delimitation method]"[476] and "a historical justification for the choice of the method for the delimitation".[477] Far from being the simple line separating the oil concessions described by Ghana in its Reply,[478] the Court considered that a *de facto* maritime boundary, which had not been called into question at the time when the States in question gained independence and along which concessions had indeed been granted, constituted a *modus vivendi*. It is indeed this line which is "neither arbitrary nor without precedent in the relations between the two States"[479] which constituted a *modus vivendi* according to the Court. Thus, contrary to Ghana's hasty conclusion whereby "the practice of the Parties establishes, at the very least, a *modus vivendi* that constitutes a relevant circumstance to be taken into account",[480] it must be observed that the only case in which a *modus vivendi* was acknowledged[481] in the matter of a maritime delimitation required a very high level of proof.

5.27 In the present case, no *de facto* line which the Parties would have allowed to be established as a maritime boundary or which would constitute a relevant circumstance has emerged. Such an eventuality would have clashed head-on with the Ivorian conduct. This is not only due to the fact that there was evidently no prior agreement

[473] *Ibid.*, p. 70, para. 93.

[474] *Ibid.*, p. 70, para. 95.

[475] *Ibid.*, p. 71, para. 96.

[476] *Ibid.*, p. 93, para. 133 B. 4).

[477] *Ibid.*, p. 71, para. 95.

[478] RG, Vol. I, para. 3.80.

[479] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 84, para. 119.

[480] RG, Vol. I, para. 3.81.

[481] RG, Vol. I, para. 3.84.

on a *de facto* line between the colonial powers or at the beginning of the post-colonial period. The Ivorian protestations against Ghana's invasive activities in the disputed area, the proposed negotiations with a view to delimiting the maritime boundary, the various Ivorian boundary proposals following a different course as well as the creation of Ivorian blocks in the disputed area as from 2011 should also be recalled. Ghana is thus mistaken when, even without seeking to prove it, it advances that "the evidence of both a tacit agreement and a *modus vivendi based on that agreement* is much stronger in this case than in *Tunisia* v. *Libya.*"[482]

5.28 It should be noted that the *modus vivendi* line which the Court identified in *Tunisia/Libya* was not identified in the context of the application of the three-stage method, which, in any case, only came about far more recently. This line was invoked as a "circumstance … highly relevant to the determination of the method of delimitation".[483] In this judgment, the only example to date of the admission of the existence of a *modus vivendi* in a maritime delimitation matter, the line was not identified as a relevant circumstance for the purposes of adjusting a provisional equidistance line, as Ghana is today claiming. Ghana's calling upon this judgment is based on an analysis taken out of context.

5.29 Moreover, in that case, the Court had admitted the existence of a *modus vivendi* solely insofar as it consisted of the Parties' activities in various fields, such as oil concessions, fishing or police patrols.[484] This is clearly not the case in the present instance, since Ghana is basing its *modus vivendi* claim exclusively on the oil concessions and activities.[485] Jurisprudence has since largely confirmed that the Parties' oil activities, in particular the oil concessions, do not in and of themselves constitute a circumstance relevant to maritime delimitation, unless they establish an agreement,[486] a possibility

[482] RG, Vol. I, para. 3.91, emphasis added. This unexpected development, establishing a *modus vivendi* on the basis of a tacit agreement, eloquently illustrates Ghana's conjectures.

[483] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 84, para. 117.

[484] *Ibid.*, p. 70, para. 93 and p. 84, para. 117.

[485] RG, Vol. I, paras 3.80-3.93.

[486] *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau (Decision of 14 February 1985), RIAA*, Vol. XIX, pp. 149-196, at p. 175, para. 66; *Arbitral Award in the Case concerning the Delimitation of Maritime Areas between Canada and France of 10 June 1992, RIAA*, Vol. XXI, pp. 265-341, at pp. 295-296, paras 90-91, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 447-448, para. 304.

which was eliminated above.[487] Ghana is seeking to minimize this jurisprudence by consistently invoking the inadequacy of the facts.[488] Côte d'Ivoire's broader outlook, in particular its repeated protestations against the Ghanaian policy of *fait accompli*,[489] is, however, sufficient to rule out any idea of an agreement in matters of delimitation. In accordance with established jurisprudence,[490] the Parties' oil concessions and activities in the present case, therefore, cannot constitute a relevant circumstance for the purposes of delimitation. Furthermore, they could also not reflect a *modus vivendi* in view of the prevailing circumstances, in particular the repeated Ivorian protestations concerning the question of delimitation.

5.30 The study of case law following the judgment in the *Tunisia/Libya* case confirms this analysis.

5.31 In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* the Chamber of the Court refused to take account of the *modus vivendi* invoked by Canada on the basis of the coincidence alone of the limits of the two States' oil concessions. To that end, the Chamber recalled the wording of the above-mentioned *Tunisia/Libya* judgment, considering that, although the Court had taken account of the States' granting of oil concessions along a given line, "it took *special* account of the conduct of the Powers formerly responsible for the external affairs of Tunisia - France - and of Tripolitania - Italy -, which it found amounted to a *modus vivendi*, and which the two States continued to respect when, after becoming independent, they began to grant

[487] *Supra*, para. 5.17. See also CMCI, Chapter 4.

[488] RG, Vol. I, paras 3.85-3.86.

[489] Telegram from the Ivorian Ministry of Foreign Affairs to the Ambassador of Côte d'Ivoire in Accra, 1 April 1992, CMCI, Vol. III, Annex 16, recalled in a note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112: Côte d'Ivoire asks that "the two countries refrain from all drilling in the area whose status remains to be determined"; Communication from the Ivorian Party, Second meeting of the Joint Ivoiro-Ghanaian Commission on the Demarcation of the Maritime Border between Côte d'Ivoire and Ghana, 23 February 2009, CMCI, Vol. III, Annex 30: "[this proposed layout] used by the oil exploration companies operating in Ivorian territorial waters is meant to avoid any border disputes and is not supported by any official agreement between our two countries after bilateral negotiations for the demarcation of the maritime border between Côte d'Ivoire and Ghana as recommended in Articles 15, 74 and 83 of the Montego Bay Convention"; see also *supra*, para. 5.9, and Chapter 4.

[490] S*upra*, note 486, and *infra*, paras 5.31-5.32.

petroleum concessions."[491] It is for that reason, not, as Ghana maintains "because unlike Tunisia *v*. Libya, the United States and Canada's concessions overlapped and did not align with one another",[492] that the Chamber of the Court refused to recognize the existence of a *modus vivendi* in the *Gulf of Maine* case. Similarly, in *Libya/Malta*, the Court again referred to the situation of the *de facto* line which had it identified in *Tunisia/Libya* in order to reject the existence of such a line in the case it was then examining.[493]

5.32 In the *Guyana/Suriname* case, the Arbitral Tribunal refused to acknowledge any *modus vivendi* between the Parties and thus to consider their oil activities as a relevant circumstance for the purposes of delimitation:

> Having carefully examined the practice of the Parties with regard to oil concessions and oil wells, the Tribunal has found no evidence of any agreement between the Parties regarding such practice. The Tribunal takes the view that the oil practice of the Parties cannot be taken into account in the delimitation of the maritime boundary in this case.[494]

5.33 None of the factual evidence presented by Ghana in support of its position is likely to fuel the contention that a *modus vivendi* or *de facto* line arising from the Parties' conduct and constituting a relevant circumstance for the adjustment of a provisional equidistance line exists. A study of the case law confirms that the Parties' conduct, as reduced by Ghana to their oil and oil activities alone, cannot be a relevant circumstance for the purpose of adjusting a provisional equidistance line unless it is a component of an agreement, for which the standard of proof is very high. In the present case, this standard is far from being reached.

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[491] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 310, para. 150, emphasis added; see also CMCI, Vol. I, para. 4.38.

[492] RG, Vol. I, para. 3.85.

[493] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 28, para. 24.

[494] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA*, Vol. XXX, p. 108, para. 390.

III. The absence of an estoppel situation preventing Côte d'Ivoire from contesting the line claimed by Ghana

5.34 Côte d'Ivoire, in its Counter-Memorial, was able to demonstrate the absence of any estoppel situation in the present case as well as Ghana's muddled and erroneous attitude in this respect.[495] In this regard, Ghana's Reply has not provided any credible factors in response. As this Rejoinder shows, estoppel in the present case is an important factor in the engagement of Ghana's responsibility, as will be further developed in the following chapter.[496] Ghana is confusing tacit agreement, *modus vivendi* and estoppel, to which it resorts in its Reply as justification for its oil activities and to give them an air of legality. None of this can conceal the fact that the legal standards are not met in the present case.

5.35 The Ivorian attitude to estoppel was developed at length in the Counter-Memorial; at this stage, it is sufficient to summarize the main arguments. Côte d'Ivoire has clearly never made representations or given Ghana any assurances in which it could have placed its trust or adopted behaviour which would have been detrimental to it. On the contrary, Côte d'Ivoire has repeatedly acted in a way which confirms that it never considered the western limit of the Ghanaian oil concessions as an international boundary and which also contests Ghana's highly intrusive activities in the disputed area. This behaviour on the part of the Ivorian Party includes, *inter alia*, the points listed in paragraph 5.9 *supra*.

5.36 In addition to these points which are elaborated in the Counter-Memorial and repeated in this Rejoinder, some factors must now be noted. Ghana maintains that Côte d'Ivoire cannot today call into question what it claims to be the boundary owing to the so-called protracted silence on the part of Côte d'Ivoire.[497] Assuming that such a silence had existed, *quod non*, it could not have constituted the unambiguous and clear representation required for giving rise to a situation of estoppel. Such a possibility conflicts with the fact that Ghana was the first to take the initiative to occupy the

[495] CMCI, Vol. I, Chapter 5.

[496] RG, Vol. I, Chapter 5.

[497] MG, Vol. I, para. 1.37.

disputed area and that its behaviour can best be characterized by a series of unilateral steps taken in order to impose a *fait accompli*. Ghana's initial conduct which led to its occupation of the disputed area preceded the alleged Ivorian silence. Since this is chronologically impossible, Ghana could not take as its basis an alleged Ivorian silence in the sense of a representation likely to give rise to estoppel.

5.37 Furthermore, as explained in the Counter-Memorial and repeated in the preceding chapter,[498] between 1993 and 2009, Côte d'Ivoire experienced serious socio-political problems, in particular serious internal conflicts, which drew Côte d'Ivoire's attention towards its own internal difficulties. Ghana was fully aware of this situation since, for several years, it played the role of mediator. Thus it cannot now in good faith declare that Côte d'Ivoire's alleged silence gave it assurance of any kind.

5.38 In these conditions, Ghana's behaviour in the disputed area is based not on its confidence in the alleged assurances or inaction on the part of Côte d'Ivoire, but rather on a deliberate strategy to pull the rug from under its neighbour's feet. The only remaining option for Côte d'Ivoire was the peaceful one of refusal by diplomatic channels, something which it did not fail to do when circumstances called for it and enabled it to do. The warning given to the Ghanaian operators in the disputed area in September 2011 is a good illustration of this. In that respect, jurisprudence has refused to allow that an estoppel situation exists when the party against which the estoppel is invoked does not have reasonably efficient means for opposing a situation imposed unilaterally.[499] So as not to hamper the economic development of the two States or compromise the definitive settlement of the dispute, Côte d'Ivoire did not suspend its cooperation with Ghana. Far from giving rise to an estoppel situation, these circumstances, on the contrary, display all the signs of a boundary dispute which was well-known to the Parties. As Côte d'Ivoire has already underlined in its Counter-Memorial, by occupying the disputed area and making contested investments there,

[498] CMCI, Vol. I, paras 2.3-2.25; see also *supra*, paras 4.16-4.19.

[499] *Case concerning the Payment of Various Serbian Loans issued in France, PCIJ, Series A,* n° 20, p. 39. The Court thus explained its refusal to allow an estoppel situation against the bondholders: "It does not even appear that the bondholders could have effectively asserted their rights earlier than they did."

Ghana deliberately took a risk of which it and the oil companies with which it was dealing were fully aware at all times.

5.39 Finally, Ghana sets great store by the two Parties' mutual requests for authorization with respect to exploration missions. Case law has refused to accept an estoppel situation concerning facts which bear a certain degree of similarity to the present case. In the *Gulf of Maine* case, whilst acknowledging that the United States' attitude with respect to Canada was "unclear and perhaps ambiguous", the ICJ refused to class as estoppel the situation in which Canada had clearly notified the United States of its boundary claims by official diplomatic channels and had started to grant oil concessions in the disputed area.[500] Similarly, in *Barbados* v. *Trinidad and Tobago*, the Arbitral Tribunal considered that "[s]eismic surveys sporadically authorised, oil concessions in the area and patrolling, while relevant do not offer sufficient evidence to establish estoppel or acquiescence".[501] The activities which Ghana is invoking in support of its claims include the same actions as those of Barbados, which are cited above and were thrown out by the Arbitral Tribunal.

5.40 The present case is not characteristic of estoppel, which cannot be raised as a plea against Côte d'Ivoire.

Conclusion

5.41 The analysis in the present chapter confirms that Ghana's claims in its Memorial and Reply do not stand up to legal examination. Indeed, there is no tacit agreement, *modus vivendi* or estoppel situation as concerns the alleged customary equidistance line which Ghana is claiming. In these three respects, Ghana's claims clash with Côte d'Ivoire's

[500] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246, at p. 308, paras 140-142. See also *The M/V "Norstar" case, ITLOS, Judgment, Provisional Measures*, 4 November 2016, paras 306-308, where the Tribunal considered that the fact that Panama had not submitted proceedings to the Tribunal within the time-limit announced to Italy did not constitute an estoppel situation excluding such action from being taken subsequently.

[501] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA,* Vol. XXVII, pp. 147-251, at p. 241, para. 363.

conduct over a protracted period which contradicts any consideration of the existence of an "oil line" serving as a maritime boundary between the Parties.

5.42 The fact that Côte d'Ivoire has never accepted or recognized the existence of a maritime boundary and its active seeking of a definitive settlement of the dispute contrast with Ghana's inflexible unilateral attitude contrary to the provisions of UNCLOS and relevant case law. By pursuing its objective of confronting its neighbour with a *fait accompli* as concerns its oil-related activity, Ghana has permanently and irreversibly modified the maritime environment in general and the continental shelf in particular, thus engaging its international responsibility.

PART 3

GHANA'S RESPONSIBILITY

CHAPTER 6

GHANA'S RESPONSIBILTY FOR INTERNATIONALLY WRONGUL ACTS

6.1 In its Reply, Ghana contests the engagement of its international responsibility for the oil activities which it has carried out in the disputed area before its delimitation. In its Counter-Memorial, Côte d'Ivoire had invoked three main counts of responsibility: violation of its sovereign rights; violation of the obligations set out in article 83, paragraph 3, of UNCLOS; and violation of the Order of 25 April 2015 for the prescription of provisional measures. As concerns the first two counts, Ghana's defence is legal in nature: it considers that international law does not allow its responsibility to be engaged, owing to a lack of specific rules in that respect; for the third and final count, it contests that Côte d'Ivoire's accusations are based on fact. Ghana is mistaken as concerns the law and is distorting the facts.

6.2 In this chapter, Côte d'Ivoire will show that, contrary to the allegations of the Ghanaian Party, it has engaged, and continues to engage, its responsibility for the activities carried out in the disputed area (**I.**). Furthermore, Ghana's attitude is incompatible with the requirements of article 83, paragraph 3, of UNCLOS (**II.**) and with that of the Order of the Special Chamber of 25 April 2015 prescribing provisional measures (**III.**). In the last section, Côte d'Ivoire will return to the question of reparations due to it as a result of these internationally wrongful acts (**IV.**).

I. The principle of responsibility being engaged for unilateral acts carried out in maritime areas awaiting delimitation

6.3 Ghana is attempting to exonerate itself of all responsibility by advancing an erroneous interpretation of the scant jurisprudence available on this topic (A.) and, against all reason, intoning the refrain that a tacit agreement exists by means of which Côte d'Ivoire is supposed to have acquiesced to its actions (B.).

A. The obligation to refrain from all unilateral actions in violation of the sovereign rights of the coastal State in a disputed maritime area

6.4 Although the Parties disagree as to the consequences of the fundamental principles applying in this matter, there are nevertheless certain points of agreement between them in this respect, as Ghana's Reply clearly shows:

> Côte d'Ivoire appears to advance the following line of argument: *First*, that the sovereignty of a State entails exclusive sovereign rights over the State's territory. *Second*, that a judicial determination of a disputed boundary is declarative, not constitutive. And *third*, that, therefore, if the Special Chamber declares the boundary between Côte d'Ivoire and Ghana to lie in such a way as to include within the territory of Côte d'Ivoire any area in which Ghana had been conducting petroleum operations, Ghana will *ipso facto* have violated Côte d'Ivoire's sovereign rights and will be liable to compensate Côte d'Ivoire. … *The first proposition, as a general principle, is not disputed. Under general international law and the cited provisions of UNCLOS, a State has sovereignty and sovereign rights over its territory; these include exclusive rights to exploit the natural resources of the territorial sea, over which it has sovereignty, and to do so on its continental shelf, over which it has sovereign rights.* This straightforward position is reflected in paragraph 61 of the Order of 25 April 2015. *The second proposition is also uncontroversial as a general principle, in the sense that a disputed maritime area is not to be treated as terra nullius until a tribunal rules on the location of the maritime boundary*.[502]

6.5 Ghana is thus in agreement with the three fundamental proposals on which Côte d'Ivoire is basing its request:

- *ratione legis*: the scope of the delimitation is declarative, not constitutive;

[502] RG, Vol. I, paras 5.8-5.9, footnote omitted - emphasis added.

- *ratione materiae*: sovereign rights over maritime spaces are exclusive exploration and exploitation rights;

- *ratione loci* and *ratione temporis*: these sovereign rights are exercised over maritime spaces awaiting delimitation (that is, before delimitation has definitively been achieved on the basis of a judicial decision or agreement).

6.6 However, Ghana has not drawn any inference from these incontestable principles. Thus it does not accept that the activities it has carried out in the disputed area - which it wrongly describes as taking place "over many decades"[503] – constitute violations of Côte d'Ivoire's sovereign rights,[504] despite the fact that they were performed in areas which the Chamber will have acknowledged as belonging to Côte d'Ivoire.

6.7 The only argument which Ghana calls upon in justification of what very much amounts to a *non sequitur* in its reasoning is the following: "If this [Côte d'Ivoire's third basic proposition] were correct, then one would expect to see international courts and tribunals finding such violations in every boundary case in which such activities have been undertaken, yet none has ever done so."[505] In short, Ghana's sole argument insists on the absence of any precedent for the Ivorian position.

6.8 Ghana, however, is mistaken as concerns the legal system: international law does not operate according to the principle of an obligatory precedent. Moreover, in international law in general, and in the law governing maritime delimitation in particular, judges and arbiters are often called upon to clarify the interpretation of UNCLOS or the scope of customary international law. There are always decisions which give the impression of being leading ones.[506] Moreover, judges cannot make a

[503] Côte d'Ivoire will return to this characteristic tendency of Ghana to extend the time period over which it carried out its activities in the disputed area; see *infra*, paras 6.18-6.20.

[504] See in this respect RG, Vol. I, para. 5.10: "But neither of these propositions supports the far-reaching conclusion that Côte d'Ivoire seeks to draw, namely that Ghana's operations over many decades in the now disputed area have, all along, been violating Côte d'Ivoire's rights. If this were correct, and Articles 77, 81 and 193 of UNCLOS are automatically violated by any State which conducts activities in a disputed maritime area".

[505] RG, Vol. I, para. 5.10.

[506] See for example V. Lowe and A. Tzanakopoulos, "The Development of the Law of the Sea by the International Court of Justice", in C. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford University Press, 2013, pp. 177-196; T. Scovazzi, "Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea", *in International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, Springer, 2013, pp. 299-309.

pronouncement *ultra petita* on claims which the Parties have not submitted to them. Insofar as no international court or tribunal has been called upon to make a judgment on the matter, there is no precedent; but that does not mean that a judge seized of such a matter can refuse to adjudge it on the pretext of the absence or obscurity of the law. In the present case, the engagement of Ghana's responsibility is well and truly part of Côte d'Ivoire's *petitum*.

6.9 For the rest, this area of jurisprudence is far from being entirely undeveloped in this respect, as Côte d'Ivoire already demonstrated in its Counter-Memorial. By way of response, Ghana puts forward erroneous, partial or biased interpretations of the case law cited by Côte d'Ivoire in support of its legal position. In the following paragraphs, each of Ghana's interpretations will be responded to in turn.

6.10 First, as concerns the judgment of the ICJ in the *North Sea Continental Shelf* cases, Ghana considers that it lacks relevance to the question of responsibility for wrongful acts in non-delimited maritime areas[507] because the Court did not make an express pronouncement on that aspect. There is nothing surprising in the fact that, in 1969, the Court did not go any further in its analysis of the Parties' obligations during the period pending delimitation, in any case no further than affirming the existence *ipso facto* of an entitlement to the continental shelf.[508] It was not concerned with the unilateral acts of one of the Parties in the area of overlapping claims or entitlements, both because the Parties had not submitted this matter to it for examination and because, in fact, Denmark and the Netherlands had displayed restraint in their activities and, as regards Germany's opposition, had undertaken to respect a moratorium on oil activities there until the Court had rendered its decision.[509]

[507] RG, Vol. I, para. 5.11.

[508] There is, moreover, no opposition between the Ivorian and Ghanaian contentions on this point (see *supra*, para. 6.5).

[509] See Alex G. Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?* Cambridge University Press, 2014, pp. 198-211 (the author presents a detailed summary of the archive documents of the negotiations between the three Parties). See also: The British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas*, 2016, p. 72, para. 253 (available online at: http://www.biicl.org/undelimited-maritime-area).

6.11 Similarly, Ghana's interpretation in *Guyana* v. *Suriname* is partial, biased and lacking logic. In that case, it considers that "the tribunal was exclusively concerned with the applicability of the rules on the use of force to disputed territory, and the admissibility of claims arising out of such incidents."[510] This interpretation of Ghana's implies that, in a maritime delimitation case, the responsibility of one party would be likely to be engaged simply for violation of the rules concerning the use of force, whilst any responsibility would be ruled out in case of violation of the sovereign rights of the State, which, however, are entirely dependent on the interpretation and application of the Convention.

6.12 Moreover, it is quite simply wrong to claim that the Tribunal in *Guyana* v. *Suriname* had made a pronouncement exclusively on the threat of the use of force as a fact giving rise to its responsibility. On the contrary, Chapters VII (Guyana's Third Submission) and VIII (Guyana's fourth submission and Suriname's submissions 2.C and 2.D) of the Decision respond to the Parties' conclusions as concerns the engagement of their responsibility, first, for acts in which force was used and second for unilateral activities in the disputed area. These two aspects are permanently combined in the Tribunal's reasoning - the former, moreover, originating from the latter.

6.13 More specifically, as concerns responsibility for unilateral exploration activities carried out in the disputed area, the Tribunal first considered that, in the circumstances of the case, the responsibility of those performing the seismic activities was not engaged, particularly since the two Parties had undertaken them without any objections being raised by the other Party.[511] On the other hand, as concerns the invasive exploration activities - which in that case consisted of the drilling of a single well -, the Tribunal, without any ambiguity, considered that Guyana had violated UNCLOS.[512]

6.14 The final judicial decision whose contribution and import Ghana is endeavouring to minimize in the present case is the 2012 judgment of the ICJ in *Nicaragua* v.

[510] RG, Vol. I, para. 5.13.

[511] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, pp. 1-144, at p. 137, para. 481.

[512] *Ibid*., p. 136, para. 477.

Colombia, considering that the Court "ha[s] not treated maritime boundary awards as rendering the parties liable for activities in the area when it was disputed."[513] In actual fact, the ICJ's reasoning in principle gainsays Ghana's position and shows, *a contrario*, that, had the circumstances been different, Colombia's contested activities could have engaged its responsibility.[514] These activities exclusively involved fishing in the disputed area for which damage is, on the one hand, particularly difficult to quantify and, on the other, in most cases not irreversible. And in that case, Nicaragua had not provided the slightest proof of damage suffered, for which reason the request for compensation was rejected.[515]

6.15 Finally, Côte d'Ivoire notes that, in its judgment of 12 July 2016 in the case involving the Philippines and China, the Arbitral Tribunal considered that the latter's activities in and on the maritime areas and formations also claimed by the Philippines engaged its international responsibility.[516] The Tribunal first noted that these areas and formations fell under the sovereign, and hence exclusive, rights of the Philippines,[517] and this conclusion formed the basis for the engagement of China's responsibility.[518]

6.16 Finally, that Chamber also considered, *prima facie*, that the activities for the exploration and exploitation of the continental shelf were also governed by the sovereign, and hence exclusive, rights of the States.[519] The logical corollary to this affirmation is that unilateral activities which violate these sovereign rights - that is, in the present case, Ghana's exploration and exploitation activities undertaken without Côte d'Ivoire's consent - engage Ghana's responsibility.

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[513] RG, Vol. I, para. 5.18.

[514] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 718, para. 250.

[515] See also, in the same vein, *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, pp. 1-144, at p. 128, para. 452.

[516] *Arbitral Award in the matter of the South China Sea Arbitration, between the Republic of the Philippines and the People's Republic of China, PCA Case N° 2013-19*, pp. 261-286, paras 649-716; *ibid.* pp. 399-437, paras 994-1110.

[517] *Ibid*., para. 697.

[518] *Ibid*., para. 698.

[519] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, Order, ITLOS 2015,* para. 94.

6.17 It is thus clear that, contrary to Ghana's affirmations, international jurisprudence recognizes the principle whereby unilateral activities carried out or authorized by a coastal State in a contested marine area, under certain circumstances, engage the responsibility of those performing them when they violate the sovereign rights of another State. Such is the case of activities carried out in spite of the objections of the other State concerned, in an area which comes under the sovereign rights of that State, and the extent of which has been definitively established by the judgment or award relating to the delimitation.

B. The refrain of acquiescence cannot prevent responsibility from being engaged

6.18 Furthermore, the main argument which Ghana is employing in order to evade its responsibility is of a factual, not a legal, nature. Substantially, it wrongly maintains that, before 2009, Côte d'Ivoire had not claimed any maritime rights in the disputed areas. Nothing is further from the truth: Côte d'Ivoire had been exercising its sovereign rights in the maritime border area since 1988, the date when the Parties, for the first time in their bilateral relations, had addressed the question of maritime delimitation.[520] When it started its invasive activities in the disputed area the following year, Ghana was thus perfectly aware of these claims.

6.19 Ghana further maintains that, contrary to all evidence, Côte d'Ivoire had consented to Ghana's undertaking these activities. This is even one of Ghana's preferred means of defence, which consists in denying that the activities it carried out in the disputed area were unilateral activities. But this argument is merely an age-old formulation alleging that the two States had for the longest time been in agreement on their common border, and it must be rejected.[521] Not without cynicism, Ghana moreover considers that "Ghanaian activity in the relevant area is the *status quo*",[522] forgetting that it stepped up its activities at the peak of the negotiation process on the maritime boundary,

[520] CMCI, paras 2.33-2.37; *supra*, paras 4.9-4.10.

[521] *Supra*, paras 5.8-5.42.

[522] RG, para. 5.40, underlined in the original.

despite Côte d'Ivoire's protestations and immune to any jurisdictional solution thanks to its declaration under article 298 of the Convention, conveniently submitted on 15 September 2009.[523]

6.20 And, equally cynically, Ghana alleges that Côte d'Ivoire's referral to the Chamber for the prescription of provisional measures, and the Order of 25 April 2015, constitute a violation of its rights and would be liable to engage Côte d'Ivoire's international responsibility.[524] This must be the first time that a State has ventured to propose that an order for the prescription of provisional measures is the cause of engagement of responsibility for internationally wrongful acts!

[523] Ghana, Declaration under article 298 of UNCLOS, 22 September 2014, CMCI Vol. III, Annex 51. See also CMCI, Vol. I, para. 2.60.

[524] RG, Vol. I, para. 5.30.

II. The violation of article 83, paragraph 3, of UNCLOS by Ghana's invasive activities carried out in spite of Côte d'Ivoire's opposition

A. The scope of article 83, paragraph 3, of the Convention

6.21 Ghana's Reply shows a glimpse of another important point on which the Parties agree as to the interpretation of article 83, paragraph 3, of UNCLOS. In its Counter-Memorial, Côte d'Ivoire had maintained that it could be violated by unilateral exploration activities, whether they be invasive or merely seismic.[525] Ghana agrees with this expressly in its Reply.[526]

6.22 This converging interpretation dispenses with the need for Côte d'Ivoire to dwell on the interpretation of paragraph 3 of article 83 of UNCLOS. Certainly, international courts and tribunals have rarely had occasion to make a pronouncement on this point.[527] However, one of the reasons for the rarity of such an occurrence is that States generally refrain from undertaking exploration or exploitation activities there without the consent of the other State concerned. Apart from the example of Denmark and the Netherlands, before the ICJ was seized in the above-mentioned *North Sea Continental Shelf* cases[528] and those mentioned by Côte d'Ivoire in its Counter-Memorial,[529] the report of the British Institute of Comparative and International Law of 2016 contains numerous other examples of restraint exercised by States in disputed areas.[530]

6.23 This attitude of restraint as regards oil activities in maritime areas to be delimited can be characterized by three factors:

- First, the planned activities should be the subject of a prior notification;

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[525] CMCI, Vol. I, paras 9.45-9.46.

[526] RG, Vol. I, para. 5.38.

[527] The *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, pp. 1-144, is the sole notable exception.

[528] *Supra*, para. 6.10.

[529] CMCI, Vol. I, paras 9.46-9.48.

[530] The British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas*, 2016, pp. 40-116, paras 134-397.

- Second, in the absence of an agreement, the activities in question should be suspended;

- Third, the uncertainty as regards the exact scope of the respective claims does not interfere with the obligation to exercise restraint, respect for which is assessed against the impact which these unilateral activities have on the fate of the negotiations.[531]

B. Ghana's invasive activities in the disputed area carried out in spite of Côte d'Ivoire's opposition

6.24 Ghana's attitude was the very opposite of these principles: in general, it took care not to inform Côte d'Ivoire of its intention to carry out activities in the disputed area and clearly refused to suspend them despite Côte d'Ivoire's strong opposition and, for some of them, despite the provisional measures prescribed by the present Chamber.[532]

6.25 The new arguments which Ghana puts forward in its Reply as concerns cooperation between the two States in the matter of oil exploration can in no way prevent Ghana's responsibility from being engaged for the activities which it has carried out or authorized in the disputed area and which Côte d'Ivoire has strongly opposed throughout the negotiation process (and before).

6.26 In this respect, it is sufficient to note that Côte d'Ivoire has expressly reminded Ghana of its obligations to refrain from invasive activities in the area of overlapping entitlements. The 1992 note verbale from the Ministry of Foreign Affairs of Côte d'Ivoire to that of Ghana is clear on this point:

> The Ivorian Government … therefore hopes, that whilst awaiting the meeting of the Joint Border Redemarcation Commission, the two countries shall abstain from all operations or drilling works in the Zone whose status remains to be determined.[533]

[531] With which Ghana agrees: see *supra*, para. 6.21.

[532] *Infra*, paras 6.41-6.71.

[533] Note verbale from the Ministry of Foreign Affairs of the Republic of Côte d'Ivoire to the Ministry of Foreign Affairs of the Republic of Ghana, No. 2678/AE/AP/RM-13 (April 1992), RG, Vol. III, Annex 112.

6.27 Côte d'Ivoire could not make clearer its opposition to all drilling activities in the disputed area. Moreover, it repeated its opposition in the same terms when Ghana resumed drilling, essentially since 2009.[534] Côte d'Ivoire in effect again requested, in the second meeting of the Joint Commission, "[t]he suspension by Ghana of all unilateral exploration and evaluation activities until the final determination of the maritime limits between the two countries by means of consensus as requested for by correspondence forwarded to the Ghanaian Government in 1988 and 1992".[535] These requests were subsequently repeated but did not bring about any change in Ghana's attitude.[536]

6.28 In view of the fact that Ghana itself interprets paragraph 3 of article 83 of UNCLOS as prohibiting unilateral exploration activities likely to change the *status quo* in the area[537] and carried out despite the opposition of the other coastal State, in that they constitute an obstacle to the conclusion of an agreement on delimitation,[538] it could not contest that its own activities in the disputed area, consisting of multiple invasive operations undertaken despite Côte d'Ivoire's opposition, constitute violations of this provision.

6.29 Ghana advances the cooperation between the two national oil companies, PETROCI and GNPC, in order to evade this conclusion – and even going beyond its own argument on the alleged existence of a tacit agreement on the boundary.[539] However, contrary to Ghana's assertions, this cooperation was not based on the tacit recognition of a boundary, nor equated to acquiescence to invasive exploration activities, even less to the exploitation of resources in the disputed area.

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[534] The report of Mr Paul McDade of Tullow and its appendices show clearly that, for the TEN field, the well-drilling operations occurred between 2009 and 2015; see: Second Statement of Paul McDade on behalf of Tullow Oil plc (11 July 2016), p. 4, Appendix (A), RG, Vol. IV, Annex 166.

[535] Cote d'Ivoire - Ghana Joint Commission on the Delimiation of the Maritime Boundary: Minutes of the second meeting held in Accra, 26 February 2009, CMCI, Vol. III, Annex 32.

[536] CMCI, Vol. I, paras 5.13-5.25; paras 9.16-9.17.

[537] RG, Vol. I, para. 5.40.

[538] RG, Vol. I, para. 5.38. See also *supra*, para. 6.21.

[539] RG, Vol. I, paras 1.12, 2.8, 2.56, 2.59, 2.70, 2.71, 2.84, 2.85, 2.95-2.110, 5.2, 5.13, 5.16, 5.30.

6.30 It is clear from the documents which Ghana itself submitted during the present case that the cooperation between the national oil companies concerned seismic research, the joint development of certain Ivorian concessions, and the training of personnel. Ghana, moreover, agrees with this, according to the statements in its Reply as concerns the domains to which the cooperation it mentions relate.[540]

6.31 According to the documents which Ghana itself submitted in annex to its Reply, the cooperation between PETROCI and GNPC in seismic matters goes back to the 1990s. Several of the documents demonstrate PETROCI's willingness to share with GNPC seismic data concerning the fields located in some of the Ivorian oil concessions (very far from the border area, such as the *Espoir* field, or close to it, such as block CI-01).

6.32 Thus a mission report compiled by a GNPC employee and dating from 1991[541] demonstrates both the entire confidence which the PETROCI employees had in their Ghanaian colleagues and a certain ingenuity on the part of the GNPC employees in keeping the seismic data consulted in PETROCI's offices. It is on the basis of the information obtained in this way that GNPC decided to undertake development of the Ivorian *Espoir* field (to the southwest of Abidjan), as part of a joint venture,[542] just as any private investor could have done.

6.33 On several occasions, PETROCI showed its willingness to share with GNPC the seismic data concerning the blocks located in the border area, both onshore[543] and

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[540] RG, Vol. I, para. 2.108.

[541] A. Ofori Quaah, *Report on the Trip to Abidjan, Cote d'Ivoire, 2nd to 6th July 1991* (9 July 1991), RG, Vol. IV, Annex 115.

[542] Letter from Ben Dagadu, Ghana National Petroleum Corporation (GNPC), to Zati Deyoung, Société Nationale d'Operations Pétrolières de la Côte d'Ivoire (PETROCI) (7 July 1993), RG, Vol. IV, Annex 116; fax from Yougoubare Gilbert, Société Nationale d'Operations Pétrolières de la Côte d'Ivoire (PETROCI) to Ben Dagadu, Ghana National Petroleum Corporation (GNPC) (27 July 1993), RG, Vol. IV, Annex 117; fax from Société Nationale d'Operations Pétrolières de la Côte d'Ivoire (PETROCI) to Ghana National Petroleum Corporation (GNPC) (19 August 1993), RG, Vol. IV, Annex 119; memorandum from Mr. Ben Dagadu, Ghana National Petroleum Corporation (GNPC), to Chairman & AG Chief Executive (27 September 1993), RG, Vol. IV, Annex 120; letter from Tsatsu Tsikata, Ghana National Petroleum Corporation (GNPC), to H.E. Minister of Mines and Energy, Republic of Côte d'Ivoire (5 December 1994), RG, Vol. IV, Annex 121; letter from Tsatsu Tsikata, Ghana National Petroleum Corporation (GNPC), to the Minister of Mines & Energy, Republic of Côte d'Ivoire (19 December 1994), RG, Vol. IV, Annex 122.

[543] GNPC and PETROCI, *Report of the Meeting between PETROCI Delegation and GNPC* (28-29 August 1997), RG, Vol. IV, Annex 125.

offshore.[544] This cooperation sometimes took the form of memoranda of understanding (MoU) concluded between the two companies, generally for one year's duration, the purpose of which was greater cooperation in non-invasive activities, ranging from staff training[545] to the exchange of seismic data.[546] This form of collaboration and exchange of seismic data was also proposed by Ghana for the preparation of a file submitted to the CLCS.[547] What is more, although it was envisaged, this exchange of seismic data with a view to filing a submission with the CLCS does not appear to have occurred.

6.34 Nothing in these documents enables the conclusion to be drawn, as Ghana does, that its activities in the disputed area "[were] … undertaken with Côte d'Ivoire's full knowledge and cooperation."[548] As concerns exploration, the documents show PETROCI's willingness to share the seismic data with GNPC. On the other hand, they do not provide evidence of any communication of information by Ghana concerning its ongoing or future activities in the border area and even less of the sharing of seismic information which would have been gathered there.

6.35 With regard to drilling activities in particular, Ghana is even less able to argue that Côte d'Ivoire acquiesced to them in that it openly opposed these activities as soon as

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[544] GNPC and PETROCI, *Report on Meetings Between a Team from PETROCI Exploration Production S.A., Cote d'Ivoire, and GNPC Staff at Plot 83, Geological Laboratories Conference Room* (5-7 July 1999), RG, Vol. IV, Annex 129.

[545] Memorandum from Aphelia F. Akosah-Bempah, Ghana National Petroleum Corporation (GNPC), to PETROCI Staff on Exchange Programme (21 June 1996), RG, Vol. IV, Annex 124; fax from Sékou Toure, Société Nationale d'Operations Pétrolières de la Côte d'Ivoire (PETROCI), to William Agbesinyale, Ghana National Petroleum Corporation (GNPC) (16 June 1999), RG, Vol. IV, Annex 128; letter from H.E. Amon Tanoe Emmanuel, Ambassador of Côte d'Ivoire to Ghana, to Director of Operations, Ghana National Petroleum Corporation (GNPC) (2 December 2003), RG, Vol. IV, Annex 133; fax from Onezou Toussaint, Société Nationale d'Operations Pétrolières de la Côte d'Ivoire (PETROCI), to Ghana National Petroleum Corporation (GNPC) (18 November 2004), RG, Vol. IV, Annex 135; (Ghana National Petroleum Company (GNPC), "Report on Staff Exchange Programme-Second Group of PETROCI Staff, 19th May to 13th August, 1996" (1996), RG, Vol. IV, Annex 156; Ghana National Petroleum Corporation (GNPC), "Press Release: GNPC Visits La Cote d'Ivoire" (8 August 1997), RG, Vol. IV, Annex 157.

[546] Thus, the last Memorandum of understanding concluded between the two companies in 1999 provided: "To exchange technical information on La Cote d'Ivoire-Tano Basin which straddles both countries to the extent feasible to enhance the exploration and exploitation of this common basin. … (11) A Program of Co-operation in La Cote d'Ivoire-Tano Basin including:…(ii) Exchange of Technical Information; (iii) Joint Exploration activities" (*Memorandum of Understanding* between Société Nationale d'Operations Pétrolières de la Côte d'Ivoire Exploration Production S.A. (PETROCI E&P) and Ghana National Petroleum Corporation (GNPC) (2 August 1999) RG, Vol. IV, Annex 132.

[547] See exchange of emails between GNPC and PETROCI (16 October 2008-19 January 2009), 19 January 2009, RG, Vol. IV, Annex 141. See also RG, Vol. I, para. 4.14.

[548] RG, Vol. I, para. 1.10.

it became aware of them. Hence, Côte d'Ivoire is entitled to claim reparations for the damage resulting from Ghana's internationally wrongful acts.[549]

C. Ghana's attitude in the negotiations: hampering the conclusion of a delimitation agreement

6.36 In its Counter-Memorial,[550] Côte d'Ivoire noted the extent to which Ghana's activities in the disputed area, together with its inflexibility in the negotiations, hampered the conclusion of a delimitation agreement. The Ghanaian Party takes offence at this in its Reply,[551] but its exaggerated protestations cannot conceal the validity of Côte d'Ivoire's analysis; on the contrary they confirm it.

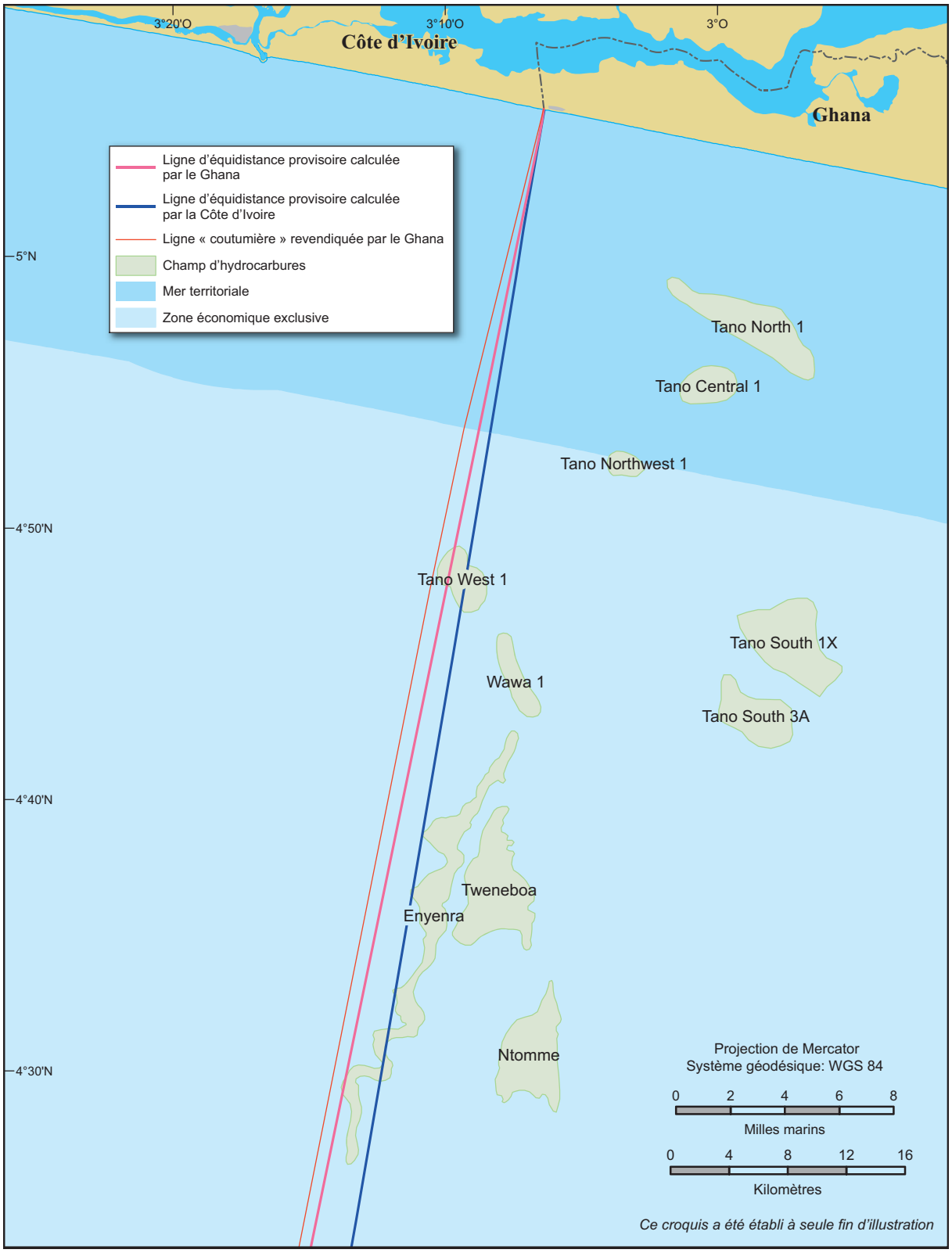
6.37 Three factors show without any doubt that Ghana never negotiated in good faith on the delimitation of its maritime boundary with Côte d'Ivoire:

1) During the negotiations, Ghana invariably stuck to its position, thus closing off any prospect of a negotiated solution;

[549] *Infra*, paras 6.66-6.71.

[550] CMCI, Vol. I, paras 9.40-9.57.

[551] RG, Vol. I, para. 5.32 *in fine*.



Sketch map D 6.1 The relationships between the provisional equidistance lines and the oil and gas fields

2) It also closed off the possibility of a judicial solution by filing the declaration under article 298 of UNCLOS; and

3) It undertook invasive activities likely to establish a *fait accompli*.

6.38 The obligation to negotiate in good faith is even more necessary when the deposit is shared ("straddles" the boundary). The International Court of Justice already noted in its 1969 judgment in the *North Sea Continental Shelf* cases:

> it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned.[552]

6.39 The Arbitral Tribunal formed to settle the dispute between Eritrea and Yemen also insisted on the obligation to negotiate, taking due account of the legitimate interests of the other party if an overlapping deposit was involved:

> The Tribunal is of the view that, having regard to the maritime boundary established by this Award, the Parties are bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie [in] its immediate vicinity.[553]

6.40 In the present case, the provisional lines of equidistance - whether it be the one identified by Côte d'Ivoire or the one identified by Ghana – straddle at least two of these deposits (Tano West and Enyenra), as is clearly shown in sketch map 7.8 of the Ivorian Counter-Memorial, reproduced [above]. Ghana in no way informed either Côte d'Ivoire or the Chamber of this overlapping configuration of the deposits which it started to exploit during this case; even less did it suggest a form of cooperation with a view to exploitation. Ghana remains entirely silent about this aspect in its Reply, as it did in its Memorial and during the negotiations.

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[552] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* pp. 51-52, para. 97.

[553] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA,* Vol. XXII, pp. 335-410, at pp. 355-356, paras 84-86, footnotes omitted.

III. Violation of the provisional measures

6.41 Ghana has violated the Order for the prescription of provisional measures delivered by the Special Chamber on at least two counts. *First,* Ghana has disregarded the provisional measure prohibiting it from performing any "new drilling", prescribed in paragraph 108, sub-paragraph (1)(a) of the Order of the Special Chamber of ITLOS of 25 April 2015.

6.42 Ghana's interpretation of the obligations imposed on it by this measure prescribed by the Order is highly restrictive, since it considers that it prohibits it solely from *drilling new wells:*

> In accordance with the Order, Ghana's operators have carried out completion work on wells already drilled, but have drilled no new wells.[554]

6.43 Paragraph 108(1)(a) of the Order does not state (as it could have done) that no new wells should be dug. The terms used are broader: "no new drilling" should be carried out.

6.44 During the pleadings in the prescription of provisional measures phase, Côte d'Ivoire defined drilling as follows:

> The drilling … crushes the rock by abrasive rotation of a drill bit at the tip of a drill string.[555]

[554] RG, Vol. I, para. 5.50. See also Witness Statement of Thomas Manu, Ghana National Petroleum Corporation (GNPC) (19 July 2016), RG, Vol. IV, Annex 168; Second Statement of Paul McDade on behalf of Tullow Oil plc (11 July 2016), RG, Vol. IV, Annex 166, of which Appendix C contains a letter from Mme M. Brew Appiah-Opong to the Managing Director of Tullow dated 11 June 2015; see also Ecofin, *Ghana: les différends frontaliers avec la Côte d'Ivoire affectent le développement du champ TEN*, 19 August 2016, RCI, Vol. III, Annex 195.

[555] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Verbatim Record of the oral proceedings of 29 and 30 March 2015, submission of Me Pitron,* 29 March 2015, ITLOS/PV.15/A23/1/Corr.1, p. 23.

6.45 Ghana did not contest the accuracy of this definition, which is, moreover, confirmed by general French[556] and English[557] dictionaries as well as by specialist oil industry glossaries.[558]

6.46 In order to understand a word as generic as "new", it is important to place it in the context of the Order in its entirety. Paragraphs 88 to 91 usefully shed light on the meaning which the Chamber intended to attribute to it:

> 88. *Considering* that … the Special Chamber is of the view that … the on-going exploration and exploitation activities conducted by Ghana in the disputed area will result *in a modification of the physical characteristics of the continental shelf*;
>
> 89. *Considering* that there is a risk of *irreparable prejudice* where, in particular, activities result in *significant and permanent modification of the physical character of the area in dispute* and where such modification cannot be fully compensated by financial reparations;
>
> 90. *Considering* that, whatever its nature, any compensation awarded would *never be able to restore* the *status quo ante* in respect of *the seabed* and subsoil;
>
> 91. *Considering* that this situation may affect the rights of Côte d'Ivoire in an *irreversible manner* if the Special Chamber were to find in its decision on the merits that all or any part of the area in dispute belongs to Côte d'Ivoire.[559]

6.47 The Chamber's prescription was thus based on the finding that "the on-going exploration and exploitation activities" result in "a modification of the physical characteristics of the continental shelf" (paragraph 88). The terms used are deliberately

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[556] "*Forage: 'action de forer'. Forer: 1. Percer au moyen d'un foret une masse dure (bois, métal, émail, etc.).* 2. *P. ext. Creuser le sol à l'aide de moyens mécaniques puissants afin de former une excavation, un puits, une galerie, etc."* (Centre National des Ressources Textuelles et Lexicales, Laboratoire ATILF, Portail Lexical, http://www.cnrtl.fr/portail/, last consulted: 21 October 2016).

[557] "Drilling: I. To pierce, bore, make a narrow hole. 1. *a. trans.* To pierce or bore a hole, passage, etc. in (anything); to perforate with or as with a drill or similar tool" (Oxford English Dictionary online).

[558] In French: "*Forage: Ensemble des opérations qui consistent à pénétrer dans le sous-sol à l'aide d'outils appropriés, soit pour des études géologiques, soit pour l'extraction de fluides contenus dans les terrains traversés. Au sens passif, on emploie ce terme pour désigner le trou résultant d'un forage, ou même pour un puits terminé"* (Total, Gloosary, available online: http://www.total.com/fr/lexique, last consulted: 21 October 2016).

In English: "Drilling: The using of a rig and crew for the drilling, suspension, completion, production testing, capping, plugging and abandoning, deepening, plugging back, sidetracking, redrilling or reconditioning of a well (except routine cleanout and pump or rod pulling operations) or the converting of a well to a source, injection, observation, or producing well, and including stratigraphic tests. Also includes any related environmental studies. Associated costs include completion costs but do not include equipping costs" (Colorado Oil and Gas Conservation Commission, *Glossary of Oil and Gas Terms*, available online: https://cogcc.state.co.us/COGIS_Help/glossary.htm, last consulted: 21 October 2016).

[559] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, ITLOS Order of 25 April 2015*, paras 81-91, emphasis added.

broad. The Chamber then employs equally broad terms to qualify the nature of the damage. It considers that these activities give rise to "irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute" (paragraph 89) and that the compensation "would never be able to restore the *status quo ante* in respect of the seabed and subsoil". It follows that mechanical operations which result in "a modification of the physical characteristics of the continental shelf" (paragraph 88) are prohibited by virtue of the Order. All drilling operations are included by definition. As concerns drilling already carried out, if it turns out that this occurred in a relevant area of Côte d'Ivoire, then its rights will have been irreversibly infringed.

6.48 The Chamber then explains the reason as to why it prescribed the measure provided for in 108(1)(a) rather than the measure Côte d'Ivoire requested ("that Ghana… take *all steps to suspend all oil exploration and exploitation operations* in the disputed area"):

> 99. *Considering* that, in the view of the Special Chamber, the suspension of ongoing activities conducted by Ghana *in respect of which drilling has already taken place* would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment resulting, in particular, from the deterioration of equipment;
>
> 100. *Considering* that, in the view of the Special Chamber, an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities *in respect of which drilling has already taken place*, would therefore cause prejudice to the rights claimed by Ghana and create an undue burden on it;
>
> 101. *Considering* that such an order could also cause harm to the marine environment;
>
> 102. *Considering*, on the other hand, that the Special Chamber considers it appropriate, in order to preserve the rights of Côte d'Ivoire, to order Ghana to take all the necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area.[560]

6.49 Paragraphs 99 to 102 of the Order thus make a distinction between the activities which can be performed on the basis of drilling already carried out by the date of the Order ("in respect of which drilling has *already* taken place") and those requiring the subsoil

[560] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, ITLOS Order of 25 April 2015*, paras 99-102.

to be drilled again ("no *new* drilling either by Ghana or under its control takes place in the disputed area"), terms which are repeated in paragraph 108(1)(a) of the operative part of the Order. The Chamber thus intended to protect both Côte d'Ivoire's sovereign rights over the continental shelf by prohibiting any new physical damage to the subsoil, and to avoid "considerable financial loss to Ghana" by allowing it to carry out activities on the basis of drilling operations already carried out, that is to say, on the basis of damage to the subsoil which had already been done by the date of the Order.

6.50 The most reasonable interpretation of paragraph 108(1)(a) of the Order, resulting from the literal explanation of its terms in the light of the Chamber's reasoning, leads to the observation that Ghana must ensure that no new drilling occurs in the disputed area, in the sense of any action consisting of crushing the rock, which was not ongoing as at 25 April 2015. This covers not only the drilling of new wells but also any drilling of a partially dug well which was not started before 25 April 2015 or was not ongoing at that critical date.

6.51 The official start of production of the TEN field, on 18 August 2016, "on budget and on time",[561] was marked by a ceremony attended by the President of Ghana and other high-level national dignitaries and TULLOW representatives. There was not long to wait for the fruits of its production since the Ghanaian authorities and Tullow representatives announced that in approximately one month,

> Ghana has raked in about 36 million dollars from oil produced from the TEN oilfields, barely six weeks after the commencement of commercial production. This is the indication from the Minister of Petroleum, Emmanuel Armah Kofi Buah. According to him, the oilfield has so far produced 800,000 barrels of oil since inauguration on August 18 this year.[562]

6.52 However, starting production from the TEN fields required drilling to be performed, which is clear from the statements of Mr Paul McDade, Director General of Tullow's

[561] PeaceFMonline, *Dispute With Ivory Coast Affected Oil Devt*, 22 August 2016, RCI, Vol. III, Annex 197; Ecofin, *Ghana: les différends frontaliers avec la Côte d'Ivoire affectent le développement du champ TEN*, 19 August 2016, RCI, Vol. III, Annex 195; B&FT Online, *Shell Gets First Ten Oil… as Production Begins,* 19 August 2016, RCI, Vol. III, Annex 196; Modern Ghana, *Ten Oil Field Can Transform Ghana – ACEP,* 22 August 2016, RCI, Vol. III, Annex 198.

[562] Citi Business News, *TEN fields accrues $36m within six weeks*, 4 October 2016, RCI, Vol. III, Annex 199.

operations,[563] and of Mr Thomas Manu, of GNPC[564], as well as from the documents which Ghana submitted to the Chamber on 14 October 2016.[565]

6.53 Thus Mr Paul McDade, Director General of Tullow's operations, announced that ten wells had been mothballed after the first exploration phase and had subsequently been completed to enable their output to start:

> Typically, TEN wells have been drilled in either one or two continuous operations to the depth required, made safe, and then temporarily suspended. A drilling unit with specialist equipment then returns to deepen the well and/or run a 'completion' … before the well is hooked up to the FPSO to allow the well to be operated. Following this sequence it was envisioned that the 10 First Oil Wells would be ready to produce hydrocarbons in mid-2016 when the FPSO was on station and hooked up to such wells. The Post First Oil Wells were expected to be completed by the end of 2018.[566]

6.54 On 18 August 2016, when the TEN field started output, the President of Ghana, Mr John Mahama, stated that:

> [t]hree more wells – made up of one producer and two water wells –are expected to be completed by September to bring the number to 11.[567]

6.55 The documents transmitted by Ghana on 14 October 2016 on the instruction of the President of the Chamber,[568] mention 496 days of drilling platform activities in the disputed area on the TEN field, of which 107 days, concerning eight of Tullow's 11 wells,[569] gave rise to a drilling report and the others to a completion report. None of

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[563] *Second Statement* of Paul McDade on behalf of Tullow Oil plc (11 July 2016), para. 5, RG, Vol. IV, Annex 166.

[564] Witness Statement of Thomas Manu, Ghana National Petroleum Corporation (GNPC) (19 July 2016), RG, Vol. IV, Annex 168.

[565] Letter from the Agent of Ghana to ITLOS, 14 October 2016, RCI, Vol. III, Annex 206.

[566] Second Statement of Paul McDade on behalf of Tullow Oil plc (11 July 2016), para. 5 (RG, Vol. IV, Annex 166).

[567] PeaceFMonline, *Dispute With Ivory Coast Affected Oil Devt*, 22 August 2016, RCI, Vol. III, Annex 197.

[568] Letter from the Agent of Ghana to ITLOS, 14 October 2016, RCI, Vol. III, Annex 206.

[569] On well **Nt04**, during the activity campaigns from 5 to 18 August 2015 and from 29 April to 3 May 2016; on well **En01** during the activity campaign from 6 May to 23 June 2015; on well **Nt07**, during the activity campaign from 13 July to 5 August 2015; on well **En06**, during the activity campaigns from 18 August to 13 September 2015 and from 12 August to 7 September 2016; on well **Nt03**, during the activity campaign from 13 September to 1 October 2015; on well **En03**, during the activity campaign from 2 November to 8 December 2015; on well **En08**, during the activity campaign from 27 March to 29 April 2016; on well **Nt01**, during the activity campaign from 23 May to 12 August 2016, Study of the activites of the West Leo and Stena DrillMax drilling rigs from 25 April 2015, RCI, Vol. III, Annex 207.

these campaigns was ongoing at the date of 25 April 2015. The only operations ongoing on the date when the Order was delivered (25 April 2015) were the completion operations being performed by the West Leo platform on well Nt02-GI, which started on 22 March 2015 and finished on 23 June 2015. The other operations described by the Reports communicated by Ghana were all started after 25 April 2015.

6.56 Ghana's drilling of well Nt07 illustrates particularly well its strategy *vis-à-vis* its Ivorian neighbour. This well was dug in two drilling campaigns.

6.57 The first was carried out hurriedly during the proceedings for the prescription of provisional measures, between 15 March[570] and a date before 25 April 2015, during which more than 2700 metres' depth of rock were crushed, whilst the Parties were exchanging written and oral arguments relating to the suspension of activities in the disputed area. However, Ghana did not record this substantial drilling operation in the data presented to the Chamber in the proceedings for the prescription of provisional measures. Tullow's Statement submitted by Ghana during the provisional measures stage, but after the digging of this well had been started, in effect mentioned only ten wells:

> [T]he TEN field had a very extensive appraisal program applied to it consisting of 10 wells plus 3 neighbouring prospect exploration wells.[571]

6.58 As concerns the date when these wells were drilled, Ghana did not hesitate to claim during the oral proceedings concerning the request for the prescription of provisional measures that "wells in the area now claimed by Côte d'Ivoire were drilled many years ago"[572] whilst, at the very moment these words were being uttered, the drill bit of the Stena DrillMax platform, on Ghana's instructions, was in the process of drilling the subsoil in the disputed area.

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[570] The drilling reports concerning this well produced by Ghana (reports G0001 to G0096) show that the "spud date", that is, the date when the drilling rig penetrated the subsoil for the first time, was 15 March 2015.

[571] Statement of Paul McDade, Chief Operating Officer of Tullow Oil plc, 18 March 2015, Ghana MC, Vol. III, "Petroleum Agreement between GNPC and Tullow, Sabre and Kosmos in respect of the Deepwater Tano Contract Area, 10 March 2006", Ghana MC, Vol. III, Annex S-TOL, para. 78.

[572] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, ITLOS Order 25 April 2015,* Verbatim Record of 29 and 30 March 2015, 30 March 2015, Agent of Ghana, ITLOS/PV.15/C23/4/Corr.1, p. 8.

6.59 And, until very recently, the announcements made by the Ghanaian officials were entirely in the same vein:

> Some ten wells have so far been drilled at the TEN fields, for oil production and water injection purposes, and according to the lead operator Tullow Oil, these are enough for start-up of production.[573]

6.60 Ghana itself has now revealed the weakness of these assertions by stating, following the enquiries made by Côte d'Ivoire in its Counter-Memorial as to the date when this well Nt07 was dug,[574] that it was not ten but "eleven wells [which] had been drilled by Tullow in the disputed area as of April 2015. … The eleventh well was, and is, intended to be used as a water injector well for improving production. That well, Nt07, had been both spudded and drilled to a very substantial depth."[575] The second drilling phase on this well started scarcely a few weeks after the Order had been delivered. During those weeks, nearly 1400 further metres' depth of rock were drilled, within a period of 24 days of continuous drilling[576] (from 13 July to 5 August 2015), as evidenced by the documents Ghana submitted on the instructions of the President of the Special Chamber.

6.61 The statements made by Mr McDade himself further confirm that this well:

- has been the object of drilling since 25 April 2015;[577]

[573] B&FT Online, *Our case going "pretty well"… as TEN readies for first oil*, 18 July 2016, RCI, Vol. III, Annex 194.

[574] CMCI, Vol. I, para. 9.67.

[575] RG, Vol. I, paras 5.51-5.52.

[576] The drilling reports produced by Ghana (G0001 to G0096) show that the well depth was 2740 metres on the first day of the campaign and 4136 metres on the 24th and last day of the drilling campaign, i.e., 1396 metres of rock drilled in 24 days; see Study of the operations of the West Leo and Stena DrillMax drilling rigs since 25 April 2015, RCI, Vol. III, Annex 207, Appendix 1.

[577] Second Statement of Paul McDade on behalf of Tullow Oil plc (11 July 2016), para. 9, RG, Vol. IV, Annex 166.

- with Ghana's express authorization, probably after Tullow, rightly, voiced its concerns as to the conformity of such an operation with the Order delivered by the Special Chamber; [578] and

- is not necessary for starting production from the field and thus for safeguarding Ghana's financial interests which the Chamber was seeking to preserve in its Order. Indeed, Mr McDade classifies this well as being among the "post first oil wells."[579]

6.62 One expression thus characterizes Ghana's operations in the disputed area: "business as usual" (or even "on budget and on time"). However, its implementation is scarcely compatible with the provisional measures prescribed by this Chamber.

6.63 Furthermore, Ghana has also disregarded its obligation to cooperate, prescribed as a provisional measure by the Special Chamber in paragraph 108, sub-paragraph (1)(e) of its Order of 25 April 2015. Within that context, and alerted by the publicly available information indicating that drilling operations were underway in the disputed area, the Agent of Côte d'Ivoire on three occasions[580] requested the Agent of Ghana to send information concerning the activities carried out in the disputed area, so as to have confirmation that they were in conformity with the Order of the Special Chamber.

6.64 However, Ghana continually refused to communicate to Côte d'Ivoire the documents concerning the activities it was carrying out in the disputed area, on the grounds that their communication was neither required nor "reasonably necessary".[581] This conduct *per se* is a patent violation of Ghana's obligation to cooperate awarded against it by the Special Chamber. Ghana agreed to furnish these documents only after the matter had

[578] *Second Statement* of Paul McDade on behalf of Tullow Oil plc (11 July 2016), RG, Vol. IV, Annex 166, Appendix C containing a letter from Mme M. Brew Appiah-Opong to the Managing Director of Tullow of 11 June 2015.

[579] *Second Statement* of Paul McDade on behalf of Tullow Oil plc (11 July 2016), para. 9, RG, Vol. IV, Annex 166.

[580] Letter no.°068 MPE/CAB from the Agent of Côte d'Ivoire to the Agent of Ghana, 27 July 2015, CMCI, Vol. IV, Annex 54; Minutes of the meeting between the two Agents of Côte d'Ivoire and Ghana, Accra, 10 September 2015, p.4, CMCI, Vol. IV, Annex 55; letter from the Agent of Côte d'Ivoire to the Agent of Ghana, 4 July 2016, RCI, Vol. III, Annex 202.

[581] CMCI, Vol. I, paras 9.71 - 9.73; RG, Vol. I, para. 5.56; letter from the Agent of Ghana to the Agent of Côte d'Ivoire, 25 August 2016, RCI, Vol. III, Annex 203.

been referred to the President of the Special Chamber by Côte d'Ivoire[582] and he had adopted a decision in this respect on 23 September 2016.[583] Ghana responded by communicating a series of documents on 14 October 2016,[584] which proves that Ghana could easily obtain the necessary documents and transmit them to Côte d'Ivoire.

6.65 It will further be noted that Ghana refrained from sending "the file which [it] had specifically requested the oil companies operating under its authority to compile in order to report on the steps they have taken to comply with the Order",[585] on the grounds that they could not "specifically request oil companies operating under its authority to submit files outlining the steps they take to comply with the Order."[586] However, in its letter of 4 May 2015 to the oil companies operating under its authority following the adoption of the Order, Ghana asked them to "keep adequate records of the steps that you take to comply with the Order."[587]

IV. Reparation for the damage suffered by Côte d'Ivoire

6.66 It is only in a second phase, when the geographical scope of the Parties' rights is known, on which, *inter alia*, the assessment of some of the damages depends, that Ghana's responsibility can usefully be engaged by reparation of the damage suffered by Côte d'Ivoire.[588] That being the case, it is necessary to return here briefly to the misunderstandings which Ghana upholds in its Reply.

[582] Letter from the Agent of Côte d'Ivoire to ITLOS, 29 August 2016, RCI, Vol. III, Annex 204.

[583] Decision of the President of the Special Chamber, 23 September 2016, RCI, Vol. III, Annex 205.

[584] Letter from the Agent of Ghana to ITLOS, 14 October 2016, RCI, Vol. III, Annex 206.

[585] Decision of the President of the Special Chamber, 23 September 2016, RCI, Vol. III, Annex 205.

[586] Letter from the Agent of Ghana to ITLOS, 14 October 2016, RCI, Vol. III, Annex 206.

[587] Report from Ghana on the follow-up to the implementation of provisional measures, 25 May 2015, Annex A, CMCI, Vol. IV, Annex 53.

[588] CMCI, Vol. I, paras 9.37-9.39 and 9.76.

6.67 First, Ghana denies the legal possibility that its responsibility might be engaged by an adequate form of reparation.[589] It is also worrying to see that Ghana, moreover, returns to one of the main arguments it invoked during the proceedings, as an indication of provisional measures serving to persuade the Chamber to allow it to undertake certain limited activities in the disputed area. As Judge *ad hoc* Mensah recalled in his separate opinion:

> in taking note of the assurance and undertaking of Ghana and placing it on record, the Special Chamber has underlined the fact that Ghana may be required to make appropriate reparations if, at the end of the case, the Special Chamber determines that any part of the disputed area pertains to Côte d'Ivoire and if it concludes that any rights of Côte d'Ivoire have been violated by the activities of Ghana in the area.[590]

6.68 As concerns the *reparatio in integrum* which, according to Côte d'Ivoire is the most appropriate for the exploration data concerning the Ivorian maritime space,[591] Ghana's argument is twofold. It concerns both the confidential nature of this information and the means by which it was obtained:

> The information is, by its nature, confidential commercial information gathered at great expense. … [T]he Special Chamber would need to ensure that Côte d'Ivoire was not unjustly enriched by receiving information for which it has not paid.[592]

6.69 This argument is also doubly invalid. First, Ghana recognizes the confidential nature of this information. Insofar as the "the rights of the coastal State over its continental shelf include … the exclusive right to access to information about the resources of the continental shelf",[593] it is illogical to consider that Côte d'Ivoire alone should not have access to it, whilst Ghana and the oil operators under its authority make full use of it. Furthermore, the commercial nature of this information cannot be raised against Côte d'Ivoire, in view of the fact that it was obtained in violation of its sovereign rights.

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[589] *Supra*, paras 6.3-6.17.

[590] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, ITLOS Order 25 April 2015, Separate opinion of Judge* ad hoc *Mensah*, para. 14.

[591] Côte d'Ivoire developed these points in its Counter-Memorial (CMCI, Vol. I, paras 9.27-9.32).

[592] RG, Vol. I, para. 5.26.

[593] *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, ITLOS Order 25 April 2015,* para. 94.

6.70 As concerns reparation by equivalence as a substitute for *restitutio in integrum,*[594] Ghana first questions the nature of damages reparable by this route.[595] For clarification, Côte d'Ivoire specifies that it is a matter not only of the product of the exploitation but also of the possible damage caused by Ghana to the rock and oil and gas fields, which can be determined only after an expert assessment has been carried out, in all likelihood in the form of an *in situ* inspection. This would therefore require a phase of negotiation between the Parties, but the Chamber should reserve the possibility of the case being re-submitted to it if these negotiations are inconclusive after a reasonable period of six months following the judgment on the merits.

6.71 However, Ghana considers that Côte d'Ivoire should compensate the damages caused to it by the prescription of provisional measures.[596] As Côte d'Ivoire has already put forward,[597] this claim has no legal basis. Apart from the abuse of right - a contention which Ghana does not envisage even rhetorically - Côte d'Ivoire's actions in defence of its sovereign rights, exercised through established judicial proceedings, cannot be considered violations of international law.

Conclusion

6.72 The Parties' written submissions put forward several important points of agreement on the law relating to the lawfulness of unilateral activities in an area awaiting delimitation: in particular, Ghana agrees that these activities violate the sovereign rights of Côte d'Ivoire, in as much as they are carried out in a geographical region belonging to the latter following a decision on the merits. However, and against all logic, Ghana contests the corollary principle whereby "[e]very internationally

[594] CMCI, Vol. I, paras 9.33-9.39.

[595] "It is not entirely clear from paragraphs 9.33 to 9.39 of the Counter-Memorial whether Côte d'Ivoire claims financial compensation purely for the loss of oil revenues from any part of the disputed area which the Special Chamber's Judgment may assign to it, or whether it also claims an additional element of compensation to take into account the fact that exploitation activities involve permanent change to the seabed and subsoil", RG, Vol. I, para. 5.28.

[596] RG, Vol. I, para. 5.30; see also para. 1.30.

[597] *Supra*, para. 6.20.

wrongful act of a State entails the international responsibility of that State."[598] This principle is, however, so well established that it does not require wider debate between the Parties. The lack of a legal precedent which explicitly applies it in the law of the sea is not in any case a hindrance to the Chamber's declaration in this respect.

6.73 In the present case, it is not contested that Ghana has undertaken intensive activities in the disputed area, in spite of Côte d'Ivoire's opposition. In as much as it becomes apparent that they have been performed in an area under the sovereign jurisdiction of Côte d'Ivoire, these activities engage Ghana's responsibility.

6.74 The Parties also agree that unilateral activities carried out in a disputed area may constitute a violation of article 83, paragraph 3, of UNCLOS, insofar as they compromise or hamper the conclusion of a definitive delimitation agreement. Ghana's policy in its dispute with Côte d'Ivoire has been one of a *fait accompli*: it is difficult to qualify otherwise the exploration and exploitation of the disputed area, during the period in which the boundary was being negotiated, exacerbated by its refusal to compromise in any way on the delimitation and eliminating the possibility of judicial recourse.

6.75 Finally, Ghana has interpreted its obligations under the Order for the prescription of provisional measures at the very least loosely. It has hence allowed itself to pursue drilling campaigns, which in actual fact violate the Order, constituting a separate count engaging its responsibility for a wrongful act.

6.76 The engagement of Ghana's responsibility, nevertheless, requires the damage suffered by Côte d'Ivoire to be assessed; this can best be done by negotiations between the Parties. But pending an agreement within the six months following the Chamber's judgment, it will be for the latter to revisit this aspect of the case.

[598] CDI, *Responsibility of a State for its internationally wrongful acts,* Resolution A/RES/56/83/ of the United Nations General Assembly of 12 December 2001, Article 1.

SUBMISSIONS

On the basis of the facts and law set forth in its Counter-Memorial and in this Rejoinder, the Republic of Côte d'Ivoire requests the Special Chamber to reject all Ghana's requests and claims, and:

(1) to declare and adjudge that the sole maritime boundary between Ghana and Côte d'Ivoire follows the 168.7° azimuth line, which starts at boundary post 55 and extends to the outer limit of the Ivorian continental shelf;

(2) to declare and adjudge that the activities undertaken unilaterally by Ghana in the Ivorian maritime area constitute a violation of:

(i) the exclusive sovereign rights of Côte d'Ivoire over its continental shelf, as delimited by this Chamber;

(ii) the obligation to negotiate in good faith, pursuant to article 83, paragraph 1, of UNCLOS and customary law;

(iii) the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by article 83, paragraph 3, of UNCLOS; and

(3) to declare and adjudge that Ghana has violated the provisional measures prescribed by this Chamber by its Order of 25 April 2015;

(4) and consequently:

(a) to declare and adjudge that Ghana is obliged to transmit to Côte d'Ivoire all the documents and data relating to the oil exploration and exploitation activities which it has undertaken, or which have been undertaken with its authorization, in the Ivorian maritime area, including the oil transport and development operations, including those listed in paragraphs 9.29 and 9.31 of Côte d'Ivoire's Counter-Memorial;

(b) to declare and adjudge that Ghana is obliged to ensure the non-disclosure, by itself and by its co-contractors, of the information mentioned in paragraph (4) (a) above;

(c) that Côte d'Ivoire is, moreover, entitled to receive compensation for the damages caused to it by Ghana's internationally wrongful acts; and

to invite the Parties to carry out negotiations in order to reach agreement on this point, and

to state that, if they fail to reach an agreement on the amount of this compensation within a period of six (6) months as from the date of the Order to be delivered by the Special Chamber, said Chamber will determine, at the request of either Party, the amount of this compensation on the basis of additional written documents dealing with this subject alone.

[Signature]

Adama Toungara, Minister of Oil and Energy of the Republic of Côte d'Ivoire,

Agent of the Republic of Côte d'Ivoire

14 November 2016

CERTIFICATION

I, the undersigned, Agent of Côte d'Ivoire in the case of the *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean,* in application of article 65, paragraph 1, of the Rules of the Tribunal, certify that the documents annexed to the Rejoinder of 14 November 2016 by the Republic of Côte d'Ivoire are copies in conformity with the originals.

[Signature]

Adama Toungara, Minister of Oil and Energy of the Republic of Côte d'Ivoire,

Agent of the Republic of Côte d'Ivoire

14 November 2016

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