

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND COTE D'IVOIRE IN THE ATLANTIC OCEAN—LESSONS FROM ANOTHER MARITIME DELIMITATION CASE ARISING FROM THE AFRICAN REGION

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I. INTRODUCTION

Maritime delimitation issues are important in Africa because there is invariably a causal link between maritime boundary disputes and potentially valuable natural resources located in the disputed maritime area, which could provide much needed sources of wealth to the disputing party that eventually succeeds in establishing a legal claim to such territory.¹ Further, if such disputes are not settled by peaceful means they could escalate to serious conflicts between the disputing parties that may lead to loss of lives. The recent judgement by the International Tribunal for the Law of the Sea (ITLOS) Special Chamber on the Maritime Boundary delimitation between Ghana and Cote d'Ivoire is another example of peaceful settlement of maritime disputes and a contribution to the international jurisprudence on maritime boundary delimitations emerging from the African region.² This decision is particularly significant for the following reasons. First, it is the first maritime boundary delimitation case coming up before

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1. *E.g.*, TIM DANIEL, INTERNATIONAL MARITIME BOUNDARIES VOL. V. 3429-3437, 3605-3616 (David Colson & Robert Smith eds., 2005).

2. Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf [<https://perma.cc/K8D4-N8YM>] [hereinafter Ghana/Cote D'Ivoire]. Other decisions of international courts on maritime boundary delimitation issues between African States include: Continental Shelf (Tunisia v Libyan Arab Jamahiriya), Case No. 63, Judgment, 1982 I.C.J. Rep. 18 (Feb. 24); Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, 77 I.L.R 635 (1985); Arbitration of the Maritime Boundary (Guinea-Bissau/Sen.), Arbitration, 83 I.L.R. 1, 35-39, ¶¶ 61-68 (July 31, 1989) (the ICJ upheld the procedural validity of this award in Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53 (Nov. 12); The Land and Maritime Boundary Between Cameroon and Nigeria, (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303 (Oct. 10) and Maritime Delimitation in the Indian Ocean, (Somalia v. Kenya), Application Instituting Proceedings, (Aug. 28, 2014), <http://www.icj-cij.org/en/case/161> [<https://perma.cc/FAY9-CAAE>] (filed on the 28 August 2014 and ongoing before the ICJ).

the ITLOS that involves two African States.³ Second, it is the second maritime boundary delimitation case decided by the ITLOS since its establishment in 1996.⁴ Third, it is the second case to be decided by a Special Chamber established by the ITLOS at the request of Parties and the first of such Special Chambers to deal with maritime boundary delimitation.⁵ Fourth, it is the first maritime delimitation case in international jurisprudence involving the delimitation of the continental shelf beyond 200 nautical miles where one of the parties to the dispute had completed the procedure before the Commission on the Limits of the Continental Shelf (CLCS) and received the recommendations of the CLCS.⁶ Further, it is the first delimitation case before the ITLOS that involves a

3. Of course the Continental Shelf (Tunisia v Libyan Arab Jamahiriya), Case No. 63, Judgment, 1982 I.C.J. Rep. 18 (Feb. 24)(instituted before the ICJ in 1978), Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, 77 I.L.R 635 (1985) (brought before the Arbitral Tribunal in 1983) and the The Land and Maritime Boundary Between Cameroon and Nigeria, (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303 (Oct. 10) (instituted in 1994) were instituted before the ICJ long before the ITLOS was established.

4. The first case on maritime boundary delimitation was the Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal, (Bangl./Myan.), Case No. 16, Judgment of Mar. 14, 2012, 2012 ITLOS Rep. 4, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf [<https://perma.cc/A6NR-QTYC>] [hereinafter Bangladesh v. Myanmar].

5. The first special Chambers established at the request of the Parties by ITLOS is the Conservation and Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, (Chile/European Community), Case No. 7, Order of Dec. 20, 2000, 2000 ITLOS Rep. 148 <https://www.itlos.org/cases/list-of-cases/case-no-7/> [<https://perma.cc/V4QX-GKUF>], The representatives of the Republic of Ghana and the Republic of Côte d'Ivoire in Hamburg on 3 December 2014 had concluded a Special Agreement to submit the dispute concerning the delimitation of their maritime boundary in the Atlantic Ocean to a Special Chamber of the Tribunal to be formed pursuant to article 15, paragraph 2, of the ITLOS Statute. Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Special Agreement, Dec. 3, 2014 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/X001_special_agreement.pdf [<https://perma.cc/8XCK-SLD8>].

6. Ghana has completed the CLCS procedure and the CLCS had on the 5 September 2014 made its recommendations on the Ghanaian continental shelf beyond 200 nautical miles. See Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Ghana on 28 April, 2009, United Nations Convention on the Law of the Sea, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Ghana on 28 April 2009*, (Sept. 5, 2014), http://www.un.org/depts/los/clcs_new/submissions_files/gha26_09/2014_09_05_COM_sumRE_C_GHA.pdf [<https://perma.cc/MD2N-NHNB>]. Cote d'Ivoire, on the other hand, though it has made its submissions on its continental shelf beyond 200 nautical miles has not yet completed the CLCS procedure. U.N. Secretary-General, Receipt of the submission made by the Republic of Cote d'Ivoire to the Commission on the Limits of the Continental Shelf, CLCS.42.2009.LOS (May 13, 2009). http://www.un.org/depts/los/clcs_new/submissions_files/submission_civ_42_2009.htm [<https://perma.cc/2WC7-5YS4>].

producing oil and gas field, the Tweneboa, Enyenra and Ntomme (TEN) fields.

This article critically engages with certain lessons as regard maritime delimitation that may be discerned from the *Ghana v. Cote d'Ivoire* dispute, the decision of the ITLOS Special Chamber and the aftermath of this decision. This is particularly important because there are potentially other maritime delimitation disputes that could arise from the African region that could eventually result in international litigation, including the Somalia/Kenya dispute currently before the International Court of Justice.⁷ A 2007 Declaration by the Conference of African Ministers in Charge of Border Issues states that African States should “take the necessary steps to facilitate the process of delimitation and demarcation of African borders, including maritime boundaries, where such an exercise has not yet taken place.”⁸ This Declaration made pursuant to the Decision of the African

7. The Somalia/Kenya dispute is yet to be argued on the merits. The latest development in this case is the order of the ICJ dated 2 February, 2018 which authorised the submission of a Reply by Somalia by 18 June, 2018 and a Rejoinder by 18 December, 2018, <https://www.icj-cij.org/files/case-related/161/161-20180202-ORD-01-00-EN.pdf>. Other potential maritime dispute, for instance, is that between Angola, on the one hand, and Democratic Republic of the Congo (DRC) and Gabon, on the other hand. *See, e.g.*, U.N. Secretariat, Letter dated April 11, 2014 from the U.N. Secretariat addressed to the Ministry of Foreign Affairs, International Cooperation and Francophonie of the Democratic Republic of Congo, No. 130/093/2014 (April 11, 2014) and Permanent Mission of the Democratic Republic of the Congo, Letter dated Oct. 7, 2015 from the Permanent Mission of the Democratic Republic of Congo addressed to the U.N. Secretariat, No.132.61/RDCONU/A1/597/2015 (Oct. 7, 2015) by the DRC and Permanent Mission of the Gabonese Republic, Letter dated May 30, 2014 from the Permanent Mission of the Gabonese Republic addressed to the Secretary General of the United Nations, 00402/MRPG/NY-14 (May 30, 2014) by Gabon to the CLCS on the potential maritime delimitation disputes as regard the submission of Angola to the CLCS, http://www.un.org/depts/los/clcs_new/submissions_files/submission_ago_69_2013.htm [<https://perma.cc/3RFG-BHA8>]. Also, the potential maritime dispute between Gabon and Equatorial Guinea, which is reported to have been referred to the ICJ, but so far is yet to be officially included in the docket of the ICJ, *See* Mark Oloo, *Top Court Set to Arbitrate in Gabon, Equatorial Guinea Border Row*, STANDARD DIGITAL (Feb. 14, 2017), <https://www.standardmedia.co.ke/article/2001229384/top-court-set-to-arbitrate-in-gabon-equatorial-guinea-border-row> [<https://perma.cc/3CLW-FEZE>]. In addition, apart from that with Cote d'Ivoire, we see Ghana identified in its CLCS submission potential maritime delimitation issues between Ghana, on the one hand, and Benin, Togo and Nigeria, on the other hand. *See* United Nations Convention on the Law of the Sea, *supra* note 5, ¶ 7. On delimitation issues between South Africa and Namibia, on the one hand, and South Africa and Mozambique, on the other, see PATRICK H.H. VRANCKEN, *SOUTH AFRICA AND THE LAW OF THE SEA 195-204* (Martinus Nijhoff Publishers, 2011).

8. Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers In Charge of Border Issues Held in Addis Ababa (Ethiopia) On 7 June 2007, African Union, ¶ 5(a)(i) June 7, 2007, <http://www.peaceau.org/uploads/border-issues.pdf> [<https://perma.cc/5GLJ-D56S>] and Para.18 of the Decision on the Activities of the Peace and Security Council of the African Union and the State of Peace and

Union (AU) Assembly urged the AU Commission to pursue efforts at prevention of conflicts, by promoting peaceful delimitation and demarcation of such borders, including through the implementation of the AU Border Programme (AUBP), which was established in 2007 as an outcome of the decision of the Assembly.⁹ The AUBP, which has been described as “an epoch-making development in African international law and international relations” aims to finalise the delimitation of both land and maritime boundaries, as well as the demarcation of land boundaries,¹⁰ with a rather ambitious deadline to do so, initially set at 2012 then extended to 2017, but now further extended to 2022.¹¹ It has had rather limited success in settling maritime delimitation disputes amongst African States,¹² and appears to have been rather inconspicuous in its involvement in a number of maritime boundary dispute settlement processes in Africa, including that of *Ghana/Cote d’Ivoire*.

In January 2014, a major maritime strategy adopted by the AU, the 2050 Africa’s Integrated Maritime (AIM) Strategy, urged that the AU, through the AUBP, should make an assertive call for the peaceful settlement of existing maritime boundary issues.¹³ It however, failed to specifically deal with the critical need for African States to engage with third party arbitral/judicial dispute settlement as regards such maritime boundary issues if the efforts at negotiations and settlement amongst these States, with or without the involvement of the AUBP, fails.¹⁴ Subsequent to the 2014 Strategy, the AU in 2016 adopted a treaty, the African Charter on Maritime Security and Safety and Development in Africa (the Lomé Charter), yet to come into force, which requires States’ Parties shall “endeavour to delimit [their] respective maritime boundaries in conformity with provisions of relevant international instruments.”¹⁵ The treaty, again, does not

Security in Africa, Doc. Assembly/AU/3/(VIII), ¶ 18 (Jan. 29-30, 2007).

9. For more on the African Union Border Programme see GBENGA ODUNTAN, INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA 108-125 (2015).

10. *Id.* at 108

11. Declaration on the African Union Border Programme and Measures for its Consolidation, African Union, ¶ 3, October 6, 2016. <https://www.tralac.org/images/docs/10629/declaration-on-the-african-union-border-programme-and-measures-for-its-consolidation-6-october-2016.pdf> [perma.cc/R6HV-DB5N].

12. For instance, the AUBP has received requests by Comoros and Madagascar for assistance in the delimitation of their maritime borders. It has supported Benin and Togo in the delimitation of their maritime boundary. It is also involved in the current process of the delimitation of Lake Tanganyika amongst four Riparian States – Tanzania, DRC, Burundi and Zambia and facilitated the delimitation of Lake Malawi(Lake Nyasa) straddling between Malawi and Mozambique. See African Union Comm. On the Implementation of the African Union Border Programme (AUPB), Progress Report, ¶¶ 7, 8, 13, 17 (May 2018).

13. African Union, 2050 Africa’s Integrated Maritime Strategy (2050 AIM Strategy), ¶ 58, (Jan. 2014).

14. See Edwin Egede, *Institutional Gaps in the 2050 Africa’s Integrated Maritime Strategy*, 1 JOURNAL OF OCEAN LAW & GOVERNANCE IN AFRICA 10-15 (2016).

15. Art.13. The Lomé Charter requires that the treaty would come into force 30 days after

provide much details on how the States' Parties should go about this, neither does it make specific reference to the AUBP. So far, amongst the majority of African States, as we would see from the *Ghana/Cote d'Ivoire* situation, it would appear that there is a preference by African States for bilateral negotiations amongst themselves on maritime delimitation disputes, without involving the AUBP, and when these negotiations fail these parties have had recourse to the third-party dispute settlement mechanisms available under the United Nations Convention on the Law of the Sea (UNCLOS) 82.

This article would start with providing a background to the maritime delimitation dispute between Ghana/Cote d'Ivoire to put the dispute and the decision of the Chamber in perspective. It then progresses to analyse the decision of the Chamber, focusing on the aspects of the decision on tacit agreement, estoppel and delimitation methodology. Thereafter, it explores some key issues arising in the aftermath of the decision and then concludes with some closing remarks.

II. BACKGROUND

Ghana and Cote d'Ivoire are adjacent coastal States located in the West African region along the Gulf of Guinea and bordering the Atlantic Ocean. The maritime delimitation dispute between these two neighbouring States appears to be accentuated by the large amount of hydrocarbons that had been discovered in the relevant areas.¹⁶ In 2007 the Jubilee field was discovered by Ghana and subsequently, in 2009, it discovered the TEN oil fields about 3 nautical miles east of Jubilee oil field, both being developed on behalf of Ghana by Tullow Oil Company and its joint venture partners.¹⁷ It is curious to note that both Parties in the course of the extensive pre-litigation negotiations did not at any point make representations to the AU nor involve the AUBP in the exchange and negotiation process.¹⁸ This is interesting considering that both Parties were part of a 2009 Pan-African Conference organized by the AU on Maritime Boundaries and the

the 15th instrument of ratification (see Art.50(1)). As at 8 August 2018, though 35 States have signed the treaty, only one State(Togo), has ratified it. African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) art. 13, 50(1), Oct. 15, 2016, https://au.int/sites/default/files/treaties/33128-sl-african_charter_on_maritime_security_and_safety_and_development_in_africa_lome_charter.pdf [perma.cc/7JUF-D66T] [hereinafter Lomé Charter].

16. See MARK OSA IGIEHON, *THE BAKASSI DISPUTE AND THE INTERNATIONAL COURT OF JUSTICE: CONTINUING CHALLENGES* 140-141 (Edwin E. Egede & Mark Osa Igiehon eds. 2017).

17. See *West Africa*, TULLOW OIL, <https://www.tulloil.com/operations/west-africa> [https://perma.cc/RGZ3-QZJM].

18. See *Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire)*, Case No. 23, Judgment of Sept. 23, 2017, ¶¶ 164-192 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf [https://perma.cc/K8D4-N8YM].

Continental Shelf for the implementation of the AUBP which held in Ghana.¹⁹ The conclusions of this Conference, while acknowledging the significant progress made by member States of the AU in the delimitation of their maritime boundaries and also their efforts in determining the outer limits of their outer continental shelves, urged those who had not done so to expedite the delimitation of their maritime boundaries in order to meet the deadline set by the AU to do so.²⁰ The probable reason for the non-involvement of the AUBP could be because of the application of the principles of subsidiarity and complementarity by the African Union.²¹ For instance, one of the decisions of the Assembly of the AU had stressed on the need to “ensure smooth division of labour on the basis of the principles of subsidiarity and complementarity among all stakeholders.”²²

Although, there is no clear definition of the principles of subsidiarity and complementarity in the AU context, what is clear is that it depicts the notion that issues should be dealt with at the national or Regional Economic Communities (RECs) level and only escalated to the AU institutions if it is not feasible or possible to deal with such at the national or RECs level.²³ The Declaration on the AUBP by the Ministers responsible for border issues acknowledged the

19. The Pan African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border Programme, *Conclusions*, ¶ 2, (Nov. 9-10, 2009). The following AU member States attended: Algeria, Benin, Cameroon, Congo, Cote d’Ivoire, DRC, Djibouti, Ethiopia, Gabon, Ghana, Kenya, Malawi, Mauritius, Mozambique, Namibia, Nigeria, SADR, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, the Gambia, Togo, Tunisia and Uganda.

20. *Id.* ¶ 7.

21. It should be noted that the African Union Commission in its Strategic Plan 2014-2017 emphasises that it would be guided by, amongst other principles, the principle of subsidiarity and complementarity with other Organs, Member States and Regional Economic Communities (RECs). African Union Commission, Strategic Plan 2014-2017, ¶ 325, (June 2013), https://au.int/sites/default/files/pages/32028-file-the_au_commission_strategic_plan_2014-2017.pdf [perma.cc/TA5K-J6AX]. The Lomé Charter without defining complementarity, in a rather prolix manner defines subsidiarity as ‘the principle that seeks to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority.’ Lomé Charter, *supra* note 15, at art. I.

22. Decision on the Report of the Commission on Development of the African Union Agenda 2063 and the Report of the Ministerial Follow-up Committee on the Bahr Dar Retreat, ¶ 14, Assembly/AU/Dec.565 (XXIV), (January 30-31, 2015).

23. RECs include the Economic Community of West African States(ECOWAS) in Western Africa; the Arab Maghreb Union(AMU/UMA) and the Community of Sahel-Saharan States(CENSAD) in Northern Africa; the East African Community(EAC) and the Intergovernmental Authority on Development(IGAD) in Eastern Africa; the Southern African Development Community(SADC) in Southern Africa; the Common Market for Easter and Southern Africa(COMESA) in South eastern Africa and the Economic Community of Central African States (ECCAS) in Central Africa OFFICE OF THE SPECIAL ADVISOR ON AFRICA, *The Regional Economic Communities (RECs) of the African Union*, <http://www.un.org/en/africa/osaa/peace/recs.shtml> [http://perma.cc/K4JV-3VQ7].

importance of respecting the principles of subsidiarity and complementarity and encouraged this in the implementation of the AUBP to avoid duplication of efforts.²⁴ Clearly, the Ghana and Cote d'Ivoire were of the view that the whole process of seeking to delimit their maritime boundaries could be dealt with at the national level without the necessity of involving the AUBP. Perhaps the Parties had hoped that a bilateral approach to negotiations would be swifter and less complicated.

At a point when the Parties in the dispute under analysis could not agree on the delimitation methodology of the disputed maritime areas they progressed to adjudication. According to the President of Ghana, the resort to judicial settlement had as its "primary objective and interest" the need to "secure legal certainty" of the maritime boundaries, thereby, bringing "finality to a dispute with a valued neighbour."²⁵ While, the pioneering Organisation of African Unity (OAU) resolution on border disputes, including maritime boundary disputes, indicated a preference for African States to settle such disputes by "peaceful means and within a strictly African framework"²⁶ and the 1974 Declaration of the OAU on the Issues of the Law of the Sea evinced the need "to establish such regional institutions as may be necessary and to settle disputes between [African States] in accordance with regional arrangements,"²⁷ it must be noted that up to date no regional dispute settlement mechanism has been established in Africa that has the remit to adjudicate on maritime boundary disputes amongst African States.²⁸ Even if such regional dispute mechanism is eventually established it would merely be one of the options in the settlement of their maritime boundary disputes available to African States Parties to UNCLOS 82 under Part XV.²⁹

24. Declaration on the African Union Border Programme and Measures for its Consolidation, African Union, ¶ 10, October 6, 2016.

25. Nana Addo Dankwa Akufo-Addo, President, Ghana, address at a ceremony in honour of Ghana's Maritime Boundary Dispute Legal Team (Oct. 20, 2017) (transcript available in the Presidency Republic of Ghana Speeches), <http://presidency.gov.gh/2018/index.php/briefing-room/speeches/423-address-by-the-president-nana-addo-dankwa-akufo-addo-at-a-cermony-in-honour-of-ghanas-maritime-boundary-dispute-legal-team> [perma.cc/38UU-D3LG].

26. Preamble 5 of the OAU Resolution on Border disputes among African States, AHG/Res.16(I), adopted by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo from 17 to 21 July 1964.

27. Declaration of the Organization of African Unity on the issues of Law of the Sea, ¶ 11, Doc. A/CONF.62/33 (1974).

28. One of the authors to this article, in line with wide range of choices available to States Parties involved in maritime disputes, had argued for an African regional dispute settlement mechanism (in form of a Chamber in the merged African Court of Justice and African Court of Human and Peoples' Rights being dedicated to dealing with Law of the Sea issues). See Egede, *supra* note 14, at 10-15.

29. See United Nations Convention on the Law of the Sea, art. 280, 282, Dec.10, 1982, 1833 U.N.T.S. 397. Para. 7(iv) of the Conclusions of the 2009 Pan-African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border

In the *Ghana/Cote d'Ivoire* situation, since both States were Parties to the UNCLOS 82 and had both not filed declarations indicating choice of procedure under Articles 287 and 298, Ghana initiated these proceedings against the Republic of Côte d'Ivoire on 22 September 2014, under annex VII.³⁰ This recourse to arbitration under annex VII by Ghana was however superseded by a resort to ITLOS after both Parties negotiated and cooperatively entered into a Special Agreement and Notification dated 3 December 2014, with the Minutes of the Consultation annexed to the Agreement.³¹ Under this Special Agreement the entire dispute was transferred to a Special Chamber of the ITLOS established in accordance with Article 15(2) of the Statute of the Tribunal, comprising of five judges, three permanent ITLOS judges and two judges ad hoc appointed by each of the Parties.³² Ghana requested the Special Chamber to delimit, in accordance with the principles and rules set forth in United Nations Convention on the Law of the Sea (UNCLOS 82) and international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to both Parties in the Atlantic Ocean, including the continental shelf beyond 200 nautical miles. It further requested a determination of the precise geographical coordinates of this single maritime boundary in the Atlantic Ocean.³³

Programme appeared to acknowledge this by stating that 'in cases of border disputes, Member States should explore all options as provided by UNCLOS, other organs of the UN, including recourse to African legal processes and conflict resolution mechanisms.' The Pan African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border Programme, *Conclusions*, ¶ 7(iv), (Nov. 9-10, 2009).

30. Ghana previously had filed a declaration dated 15th December 2009 indicating that it did not accept the procedures under Art.287 of the UNCLOS 82(i.e. ITLOS, ICJ, Arbitral Tribunal under Annex VII and Special Arbitral Tribunal under Annex VIII) as regard disputes indicated in Art.298(1), including maritime delimitation disputes. This declaration was withdrawn in September 2014. See UNITED NATIONS, Settlement of Disputes Mechanism, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm [<https://perma.cc/J2N7-NTEK>].

31. Note that nothing in the Part XV dispute settlement provisions of UNCLOS 82 prevents disputing states parties from agreeing to submit to the ITLOS a dispute concerning the interpretation or application of the Convention otherwise excluded from the Tribunal's jurisdiction by way of Art.297 or a Declaration filed. See United Nations Convention on the Law of the Sea, art. 299, Dec. 10, 1982, 1833 U.N.T.S. 397.

32. Permanent Judges were Judge Boualem BOUGUETAIA, as President of the Special Chamber; Judge Rudiger WOLFRUM, Judge Jin-Hyun PAIK, while the Judges ad hoc were Mr Thomas MENSAH(Ghana), a former judge of ITLOS (1996-2005) and Judge Ronny ABRAHAM (Cote d'Ivoire), a serving member of the International Court of Justice(ICJ)(2005 to date). Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Minutes of Consultations, Dec. 3, 2014 [<https://perma.cc/4AL4-2EQX>] [hereinafter *Ghana/Cote D'Ivoire Minutes*].

33. See Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, ¶ 2, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf [<https://perma.cc/K8D4-N8YM>].

It is curious to note, though the ITLOS has established a standing Chamber for Maritime Delimitation Disputes,³⁴ the Parties chose to utilise the Special Chamber provision, whereby an ad hoc Chamber is established at the request of the Parties to deal with the particular dispute and composed of judges determined by the Tribunal with the approval of the parties.³⁵ It could be said that the flexibility of the Special Chamber, which gives the Parties some control in the setting up of the Chamber and the composition of the judges, would be preferred by Parties that have an inclination towards a more arbitral, rather than a permanent court, type approach to dispute settlement, but yet still enjoying some of the advantages of the latter.³⁶ As Judge Wolfrum points out:

[i]n the ad hoc chamber system [of the ITLOS], the parties can enjoy all the benefits of ordinary arbitration, without having to bear the expenses of the chamber. There is also the added advantage that a judgment given by an ad hoc chamber, like the one given by any other special chamber, is considered to have been rendered by the full Tribunal.³⁷

Indeed, it would be fascinating to see if other African States having maritime boundary delimitation disputes in future would display a preference for the use of the ITLOS Special Chamber dispute settlement mechanism. Interestingly, only a handful of African States that have filed choice of procedure declarations under Article 287 of UNCLOS. Most of these States, namely Angola, Cape Verde, Democratic Republic of Congo, Madagascar, Tunisia and Tanzania, have indicated a preference for the ITLOS as their first choice.³⁸ Some others like Equatorial Guinea and Gabon specifically made no choice under article 287. Algeria explicitly indicates that it does not consider itself bound by the provisions of article 287, paragraph 1 (b), of the [said Convention] dealing with the submission of disputes to the International Court of Justice and declared that, in order for a dispute to be submitted to the International Court of Justice, prior agreement between all the Parties concerned would be necessary in each case. Guinea-Bissau rejected the ICJ jurisdiction for any type of disputes. Cape Verde,

34. Other such Chambers established by the ITLOS are Chamber of Summary Procedure, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes. *See Chambers*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/the-tribunal/chambers/> [<https://perma.cc/H4WS-THNB>].

35. Int'l Tribunal of Law of the Sea [ITLOS], *Statute of the International Tribunal for the Law of the Sea*, art. 15(2).

36. See generally Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 831-54 (Oct. 1987).

37. GOVERNING OCEAN RESOURCES – NEW CHALLENGES AND EMERGING REGIMES: A TRIBUTE TO JUDGE CHOON-HO PARK 283 (Jon M. Van Dyke, Sheery P. Broder, Seokwoo Lee and Jin-Hyun Paik eds., 2013).

38. Twelve African States have made choice of procedure declarations as at 25 July 2018. Settlement of Disputes Mechanism, UNITED NATIONS, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm [<https://perma.cc/J2N7-NTEK>].

on the other hand, chose the ICJ as its second choice. While Egypt chose the arbitral tribunal constituted in accordance with Annex VII as its first choice and Tunisia goes for this procedure as the second choice. For all other African States that have not made formal declarations the Annex VII procedure, of course, would be deemed to be applicable.³⁹

It is interesting to note that the process in the *Ghana/Cote d'Ivoire* case from the initiation of the case to the final decision at the Special Chamber was relatively speedy as compared to similar cases before the full ICJ.⁴⁰ It is important to note that the ICJ also has provisions to establish ad hoc chambers and from experience cases before such ad hoc chambers before the ICJ have also been decided relatively quickly.⁴¹ Of course, the authors are not unaware that there are other variables to be considered, such as the length of litigation in international courts, the number of cases in the Courts' docket (a busier court may take longer to deliver decisions) and the number of contested interim issues raised in a case (such as preliminary objections and request for provisional measures, etc) and the length of time it would take the Parties to file their memorials, counter-

39. United Nations Convention on the Law of the Sea, art. 287(3), Dec.10, 1982, 1833 U.N.T.S. 397.

40. In the *Ghana v. Cote d'Ivoire* case the Special Chamber was established by ITLOS Order of 12 January 2015 *Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire)*, Case No. 23, Order of Jan. 12, 2015, and incidental proceedings began with a request for provisional measures by Cote d'Ivoire on 27 February, 2015, *Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire)*, Case No. 2, Request for Provisional Measures of Feb. 27, 2015, and the final judgement on the merits of the case was delivered on 23 September 2017, in less than 3 years *Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire)*, Case No. 23, Judgment of Sept. 23, 2017. The ICJ cases on the other hand dragging for an average of 5-8 years [See for instance, *Tunisia v. Libya (1978-1982)* and *Cameroon v. Nigeria (1994-2002)*]. The case between *Somalia v. Kenya* was instituted on the 28 August 2014 and there is still no indication on when the final judgement would be delivered. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Case No. 161, Application Instituting Proceedings of August 28, 2014.

41. The first *ad hoc* chamber was formed in 1982 in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, Order, 1982 I.C.J. Rep. 3 (Jan. 20), between Canada and the United States, and the second in 1985 in the case concerning the *Frontier Dispute (Burk. Faso/Mali)*, Order, 1985 I.C.J. Rep. 6 (April 3), between Burkina Faso and the Republic of Mali. The third was set up in March 1987 in *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, Order, 1987 I.C.J. Rep. 3 (Mar. 2) between the United States of America and Italy, and the fourth was formed in May 1987 in the *The Land, Island, and Maritime Frontier Dispute (El. Sal./Hond.)*, Order, 1987 I.C.J. Rep. 10 (May 8), between El Salvador and Honduras. 2002 saw the formation of the fifth, to deal with the *Frontier Dispute (Benin/Niger)* case, and the sixth, to hear the *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) The Land, Island, and Maritime Frontier Dispute (El. Sal./Hond.)*, Judgment, 2003 I.C.J. Rep. 392 (Dec. 18).

memorials, rejoinders, counter-rejoinders and other court documents.⁴² However, it would appear that the utilisation of ad hoc chambers of either the ITLOS or ICJ may be a quicker option to settlement of maritime delimitation disputes which African States may seek to explore. On another note, what may be observed in the litigation strategy of the Parties in the *Ghana v. Cote d'Ivoire* case, which further contributed to the relatively speedy determination of the case, was what appeared to be a minimisation of the number of preliminary proceedings that would have unnecessarily prolonged the case.⁴³ The only preliminary proceeding in this case was the request by Cote d'Ivoire to the Special Chamber to prescribe provisional measures under Article 290 of UNCLOS 82 requiring Ghana to:

- take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area;
- refrain from granting any new permit for oil exploration and exploitation in the disputed area;
- take all steps necessary to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area from being used in any way whatsoever to the detriment of Côte d'Ivoire;
- generally, to take all necessary steps to preserve the continental shelf, its superjacent waters and its subsoil; and
- desist and refrain from any unilateral action entailing a risk of prejudice to the rights of Côte d'Ivoire and any unilateral action that might lead to aggravating the dispute.

Provisional measures, which are binding orders for which non-compliance can lead to state responsibility, may be prescribed under UNCLOS 82 either to preserve the rights of the parties or to prevent serious harm to the marine environment pending the final decision of the dispute.⁴⁴ Over the years international jurisprudence, has identified that provisional measures would be prescribed when the Court or Tribunal is satisfied by a prima facie showing of jurisdiction over the matter; that the rights of the party seeking the measures, without of course going into the merits on the arguments of both sides, are plausible (the so-called plausibility test) and that there is an urgency to grant the measures because of the real and imminent risk that irreparable prejudice could be caused to the rights in dispute before the final decision.⁴⁵ Furthermore, the

42. See generally OSA IGIEHON, *supra* note 16, at 4-24.

43. See Minutes Annexed to the Special Agreement Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/X001_1_Ghana-Cote_d_Ivoire_PV_consultations_E_final.pdf [<https://perma.cc/D5KF-ZQ23>] where the Parties agreed that if any objection was raised on the jurisdiction of the Chamber or the issue of admissibility would be dealt with, not separately, but together with the merits.

44. United Nations Convention on the Law of the Sea, art. 290(1), Dec.10, 1982, 1833 U.N.T.S. 397.

45. *La Grande* (Ger. v. U.S.), Judgment, 2001, I.C.J. Rep. 466 (June 27).

Court or Tribunal is expected to weigh and balance the respective rights of the parties based on their arguments.⁴⁶ In the current case under analysis although the Chamber, based on the agreement of both parties, was satisfied that it had prima facie jurisdiction and the rights which Cote d'Ivoire claimed were plausible,⁴⁷ it was not prepared to grant the latter State all the provisional measures it had requested. First, the Chamber was not convinced, based on the evidence, that an order stopping ongoing drilling activities would actually protect the marine environment, but rather it felt that granting such order could actually cause harm to the marine environment.⁴⁸ Further, it was of the view that prescribing a provisional order that includes the suspension of ongoing exploration or exploitation activities would have resulted in huge financial loss for Ghana, which on the balance would cause prejudice to its rights and impose an undue burden on it.⁴⁹ Eventually, the Chamber, acting under the ITLOS Rules, unanimously prescribed certain provisional measures, some of which were at variance with what was actually requested by Cote d'Ivoire, directing Ghana to take the following necessary steps:

- to ensure that no new drilling either by it or entities under its control took place in the disputed area;
- to prevent information from past, ongoing or future exploration activities conducted by it or under its authorisation as regard the disputed area (not already in the public domain) from being used in any way to the detriment of Cote d'Ivoire;⁵⁰
- to carry out strict and continuous monitoring of all activities by it or under its authorisation in the disputed area to ensure the prevention of serious harm to the marine environment.

Furthermore, the provisional measures prescribed by the Chamber required both parties to take all necessary steps to prevent serious harm to the marine

46. For an excellent analysis of the Chamber's Order of 25 April 2015 and international jurisprudence on provisional measures see Yoshifumi Tanaka, *Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Cote d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS*, 46 OCEAN DEVELOPMENT & INTERNATIONAL LAW (2015).

47. *Id.* ¶¶ 34-38, 58.

48. *Id.* ¶¶ 99, 101. *See id.* ¶ 67. Further, the Court held that Cote d'Ivoire had not adduced sufficient evidence in support of its allegations that the ongoing activities of Ghana in the disputed area was such as to create an imminent risk of serious harm to the marine environment. *See id.* ¶ 67.

49. *Id.* ¶¶ 99, 100.

50. *See id.* ¶ 95. Ghana had given an undertaking that it was in a position to give Cote d'Ivoire exclusive access to confidential information about the natural resources in the disputed Continental Shelf if ordered to do so at the conclusion of the Case which was placed on record by the Chamber because it was of the view that the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Cote d'Ivoire if the Chambers in its decision on the merits eventually found that the latter State had rights to all or any part of the disputed area.

environment, including the continental shelf and the superjacent waters in the disputed area, and to cooperate in order to achieve this. In addition, it prescribed an omnibus order requiring the parties to pursue cooperation and to refrain from any unilateral action that would aggravate the dispute. Also, it decided that both parties should submit an initial report of compliance with the implementation of the provisional measures not later than a specified date and submit further reports subsequently at such date that the President of the Chamber may request such information.⁵¹

An interesting point from the *Ghana v. Cote d'Ivoire* case is what appeared to be a cooperative approach adopted by the parties in their litigation strategy, as reflected in the successful negotiation of a Special Agreement amongst themselves, which led to the transferring of the case from the annex VII arbitration proceeding to the ITLOS Special Chamber. It must be noted that the ability of the parties in this case to transfer from annex VII arbitration to the ITLOS Special Chamber is an affirmation of the core essence of the dispute settlement provisions of UNCLOS 82, in that it provides a multiplicity of dispute settlement mechanisms, thus giving parties to disputes arising under the Convention flexibility and a wide-range of choices.⁵² Although, some concerns have been expressed by well-meaning international lawyers that such proliferation of international courts and tribunals could lead to the fragmentation of international law of the sea, there is no concrete empirical evidence in support of this.⁵³ According to Charney:

[w]e should celebrate the increased number of forums for third-party settlement found in the Convention and other international agreements because it means that international third-party settlement procedures, especially adjudication and arbitration, are becoming more acceptable. This development will promote the evolution of public international law and its broader acceptance by the public as a true system of law.⁵⁴

51. *Id.* ¶ 108.

52. One of the authors to this article, in line with wide range of choices available to States Parties involved in maritime disputes, had argued for an African regional dispute settlement mechanism (in form of a Chamber in the merged African Court of Justice and African Court of Human and Peoples' Rights being dedicated to dealing with Law of the Sea issues). Egede, *supra* note 14, at 10-15.

53. See Alan Boyle, *Dispute settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 37-54 (1997); THOMAS A MENSAH, THE ROLE OF PEACEFUL SETTLEMENT IN CONTEMPORARY OCEAN POLICY AND LAW IN ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 92 (Davor Vidas & Willy Ostreng eds., 1999) and Thomas A Mensah, *The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea*, 2 MAX PLANCK YEARBOOK OF THE UNITED NATIONS LAW 323 (1998).

54. Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*. 90 AMERICAN JOURNAL OF INTERNATIONAL

The actual panacea to any concern of fragmentation of international law is certainly not to artificially limit the range of choices available to States, but rather to take concrete steps to ensure that judges appointed to the various international courts or tribunals or arbitral bodies are persons socialised to the specific areas of international law that such court, tribunal or arbitral body has jurisdiction over.⁵⁵ In view of the rather technical and specialised nature of the law of the sea, such judges should not just be generalist in international law, but should be acknowledged law of the sea experts. This could be seen in the range of judges appointed for the Special Chamber, including the judges ad hoc, who are acknowledged experts on the law of the sea.⁵⁶ Although, technically the common law doctrine of judicial precedent is not meant to apply in international courts and tribunals,⁵⁷ we see, for instance in the *Ghana v. Cote d'Ivoire Case*, that these socialised judges are actually guided by relevant decisions of other international courts, tribunals and arbitral bodies, and in appropriate cases distinguish why they would not be guided by such previous decisions.⁵⁸ According to Judge Treves, in his declaration in *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*:

The framers of the Convention [UNCLOS 82] would seem not to have been concerned about the danger of fragmentation that decisions on the same body of law by different courts and tribunals might entail, a danger that some, but certainly not all, scholars and practitioners consider grave. In order to avert such danger and to prove that the possibility of decisions by different courts and tribunals on the same law may be a source of richness and not of contradiction, all courts and tribunals called to decide on the interpretation and application of the Convention, including its provisions on delimitation, should, in my view, consider themselves as parts of a collective interpretative endeavour, in which, while keeping in mind the need to ensure consistency and coherence, each contributes its grain of wisdom and its particular outlook. The coexistence of a

LAW 73-74 (1996).

55. See JEAN D'ASPREMONT, THE PROFESSIONALISATION OF INTERNATIONAL LAW, INTERNATIONAL LAW AS A PROFESSION 33-36 (Jean D'Aspremont, Tarcisio Gazzini, Andre Nollkaemper and Wouter Werner eds., 2017).

56. Ghana/Cote D'Ivoire Minutes, *supra* note 32 (includes composition of the Chamber). See also Arts. 2(1) and 15(1) of the Statute of the ITLOS.

57. See for instance Art. 33(2) of the Statute of the ITLOS.

58. Also, we see other International Courts and Tribunals referring to the decisions of the ITLOS. For instance, in the recent decision of the ICJ on provisional measures in the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Order, 2017 I.C.J. Rep. 152 ¶ 6 (April 19) (separate opinion by Tomka, J.) we see Judge Tomka in his separate declaration relying on the ITLOS Special Chamber decision in the *Ghana v. Cote d'Ivoire case on provisional measures*.

jurisprudence on delimitation of the International Court of Justice with awards of arbitration tribunals augurs well.⁵⁹

Another key point that would be considered here is the issue of the critical date in the dispute under analysis. Despite the evident role played by the discovery in the disputed areas of huge reserves of hydrocarbons, the exact critical date when the maritime delimitation dispute arose between these two States is unclear. While Ghana identified February 2009 as the critical date, Cote d'Ivoire disagreed and pointed out that the date chosen by Ghana was a date the Ghanaian government considered favourable to it and the critical date should either be 1988 (which it suggested as the critical date in its rejoinder) or any other dates such as 1992, 2011 or even 2014 (when the case was submitted by Ghana to arbitration).⁶⁰ This issue was not given much attention by the Special Chamber. Without referring to any previous international jurisprudence the Chamber determined that the notion of the critical date in the case was irrelevant since the activities of both parties in the disputed maritime area had not changed over the years.⁶¹ The Chamber took the position that it could determine the case without having to make an emphatic decision on the critical date.⁶² This is interesting as the issue of the critical date is meant to have the huge evidentiary value of assisting an International Court or Tribunal in determining what activities of the parties may no longer affect the disputed territorial issue at stake and thus should not be relied upon.⁶³ According to the ICJ in the *Territorial and Maritime Dispute Case* the critical date is important for the following reasons:

In the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités* and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purposes of assessing the value of *effectivités*.⁶⁴

Furthermore, in this ICJ decision, the Court cited its earlier decision in *Pulau Ligitan and Pulau Sipadan Case*, which pointed out that activities after the

59. Bangl./Myan, *supra* note 4, ¶ 2.

60. *Id.* ¶¶ 203, 208.

61. *Id.* ¶ 210.

62. *Id.* ¶ 208.

63. *See generally*, L.F.E. Goldie, *The Critical Date*, 12 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 1251-84 (1968).

64. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶117 (Oct. 8) [hereinafter *Nicar. v. Hond.*].

critical date would have evidentiary value if ‘such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.’⁶⁵ Although, the Chamber in the *Ghana v. Cote d’Ivoire Case* was not inclined to specifically identify a critical date for the purposes of the dispute, as pointed out earlier, because it was of the view that subsequent activities of the parties were a continuation of the previous ones, Ghana had raised concerns as regard the 2016 chart prepared by Cote d’Ivoire. It, in essence, challenged the evidentiary value of such chart because it was “developed subsequent to the commencement of, and entirely for the purposes of” the case.”⁶⁶ Cote d’Ivoire, on the other hand, denied this and alleged that “the process of producing” the 2016 chart had actually begun in March 2014.⁶⁷ Whilst the Chamber acknowledged that the 2016 chart was of recent origin, and took the view that the chart was prepared “on the basis of topographical surveys of the entire Côte d’Ivoire coast at the end of 2014,” thus containing more recent data, it declined to utilise the chart solely on the technical ground that a similar topographical survey was not carried out on the Ghanaian side.⁶⁸ It is argued that the Chamber could have made a determination on the critical date with a view to determining whether the 2016 chart should be excluded on this basis, rather than on this technical point. Arguably this chart could not be said to be a continuation of previous ones and was undertaken for the purpose of improving the legal position of one of the parties. However, the Chamber relying on the technical point mentioned earlier declined to rely on the 2016 chart, but rather utilised two older charts, BA1383 and SHOM 7786.⁶⁹ This approach of the Chamber was criticised by Oude Elferink, who points out that the “Chamber does not state any authority for its approach to the use of the charts.”⁷⁰ It would appear that this faulty technical approach of the Chamber to the 2016 chart enabled it to side-step making a definitive finding on the arguments raised by Ghana on the critical date.⁷¹ It could be argued that though the Chamber declined to make a finding on the critical date, its extensive consideration of the evidence of the parties of activities prior to the initial submission of the dispute for Annex VII arbitration by Ghana would appear to suggest by implication that it regarded the date of the initial submission of the dispute as the relevant critical date when the dispute between the parties had undoubtedly crystallized.⁷² If this

65. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. Rep. 682, ¶ 135 (Dec. 17) [hereinafter Indon./Malay.].

66. Ghana/Cote D’Ivoire, *supra* note 2, ¶¶ 332, 338.

67. *Id.* ¶¶ 338, 341.

68. *Id.* ¶¶ 339, 341-43.

69. *Id.* ¶ 341.

70. Alex Oude Elferink, *Maritime Delimitation in Ghana/Cote d’Ivoire: Predictability . . . with an Occasional Glitch*, THE JCLOS BLOG (Feb. 6, 2018), <http://site.uit.no/jclos/2018/02/06/maritime-delimitation-in-ghana-cote-divoire-predictability-with-an-occasional-glitch/> [<https://perma.cc/66NV-TSLE>].

71. Ghana/Cote D’Ivoire, *supra* note 2, ¶ 341.

72. The initial date of submission of the dispute for the Annex VII Arbitration was 22

is accepted as the critical date, it could be argued that the 2016 chart, which it acknowledged was prepared at the end of 2014, could have been excluded on the ground that it was prepared after the critical date.

III. DECISION OF ITLOS SPECIAL CHAMBER

After taking arguments from both parties, the Chamber delivered its decision on the merits on the 23rd of September 2017. This decision covered a number of significant matters, however, this section would be limited to exploring the issues of tacit agreement, estoppel and the method of delimitation of the maritime boundary between the parties.⁷³

A. Tacit Agreement

In the absence of an explicit formal delimitation agreement between the parties, Ghana argued that there was a tacit agreement between the parties arising over five decades (from 1957 to 2009) that recognised and respected a maritime boundary following an equidistance line, which it constantly referred to in the cause of its arguments as a “customary equidistance boundary.”⁷⁴ As far as it was concerned the case before the Chamber was primarily to affirm the customary equidistance boundary between the parties, established by extensive evidence over the years in form of concession agreements and other oil practices, presidential decrees, legislation, correspondence, maps, public statements, representations to international organisations and oil companies. It also requested in the alternative for the Chamber to proceed to the delimitation of the maritime boundary between the parties if it found that there was no tacit agreement. Cote d’Ivoire, on the other hand, of course vehemently disagreed that the case before the Chamber was to affirm a customary equidistance boundary and that there was any tacit agreement between the parties on the maritime boundary.⁷⁵ The Chamber found, in the light of the constituting Special Agreement concluded by the parties, the dispute was actually concerning the delimitation of the maritime boundary between the parties, with regard to the territorial sea, exclusive

September 2014.

73. This article would not engage with the issue of international responsibility of Ghana. *See* Ghana/Cote D’Ivoire, *supra* note 2, ¶¶ 541-659, where the Chamber found that none of the activities of Ghana engages its international responsibility.

74. *Id.* ¶ 102. *See* Article 15 and Common Articles 74(1) & (2) and 83(1) & (2) of UNCLOS 82. According to Judge Torres Bernárdez in his dissenting opinion in *Nicar. v. Hond.*, *supra* note 64, at 799, ¶ 60: ‘Agreements are in fact the method most favoured by the Convention for delimiting the maritime areas recognized in international law and, consequently, for a delimitation of the three areas (territorial sea, exclusive economic zone and continental shelf) by means of a single line, as was requested of the Court by the Parties. The other rule-making parts of the relevant articles of the Convention on the Law of the Sea are only intended to be applied in the event of a lack of agreement between the States concerned.’

75. Ghana/Cote D’Ivoire, *supra* note 2, ¶¶ 68-71, 100-06.

economic zone and the continental shelf and was not to affirm the customary equidistance boundary, as argued by Ghana.⁷⁶

On the issue of the tacit agreement, the Chamber explored the evidence and arguments of the parties, as well as international jurisprudence on tacit agreement.⁷⁷ Relying on certain ICJ judgments relevant to tacit agreements in maritime delimitation cases,⁷⁸ the Chamber found that the evidence adduced by Ghana was not compelling enough to establish such tacit agreement. It is curious to note that the Chamber did not refer, on this issue, to the first delimitation case before the ITLOS, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v. Myanmar)*, where the Tribunal had also decided relying on the ICJ *Nicaragua v. Honduras* decision that the evidence presented by Bangladesh fell short of “proving the existence of a tacit or *de facto* boundary agreement concerning the territorial sea”⁷⁹ It is not clear if this was deliberate or merely an oversight. In the *Bangladesh v. Myanmar* case, Judge Lucky, in his dissenting opinion, applying the same rigorous burden of proof, as enunciated by the *Nicaragua v. Honduras Case*, arrived at a different decision from the majority. As far as he was concerned Bangladesh had satisfied the burden of proof.⁸⁰ He appears to have based his decision on three key grounds. First, because the affidavit evidence adduced by Bangladesh in support of its arguments, as the party with the burden to prove such agreement, was not contradicted by Myanmar.⁸¹ Second, that in determining whether the rigorous standard of proof had been met to establish tacit agreement, such determination should be based on evidence adduced, which should be considered conjunctively and not be based merely on the submission of counsel not grounded on adduced evidence, no matter how brilliant such submission is.⁸² This point is not convincing as the majority decision actually considered the evidence adduced by Bangladesh, as the State making the assertion. It would appear that the actual variance between the majority decision and Judge Lucky was mainly based on the weight they gave to the evidence adduced. While Judge Lucky was of the view that the evidence provided by Bangladesh sufficed to establish a tacit agreement, the majority after evaluating the affidavit evidences provided by Bangladesh was simply not

76. *Id.* ¶ 74.

77. *Id.* ¶¶ 107-228.

78. Such as *Nicar. v. Hond.*, *supra* note 64, at 659, ¶ 253; *Indon./Malay.*, *supra* note 65, at 625, ¶ 79 and *Maritime Dispute (Peru v. Chile)*, Judgment, 2014 I.C.J. Rep. 3, ¶ 111 (Jan. 27) [hereinafter *Peru v. Chile*].

79. *Bangl./Myan.*, *supra* note 4, ¶¶ 117, 118. Interestingly, as we would see subsequently in this article it referred to the first delimitation case in engaging with the other important issue of estoppel.

80. *See id.* at 235-92, especially 235 (dissenting opinion by Lucky, J.).

81. *Id.* at 242. Also, Judge ad hoc Bernárdez, in his dissenting opinion, in *Nicaragua v Honduras*, *supra* note 64, at 800-801, ¶ 65 appeared to accentuate his concern that the majority judgement did not give appropriate legal effect to the fact that, in its reply, Nicaragua did not contest nor qualify Honduras's assertion.

82. *Bangl./Myan.*, *supra* note 4, at 262, 265.

convinced the evidence was cogent and compelling enough to establish such tacit agreement.⁸³ Third, Judge Lucky took the view that there was a variance in the approaches of common law and civil law systems in engaging with the burden of proof, which he appeared to suggest influenced individual judges' determination on whether or not there was a tacit Agreement. He pointed out that in common law systems the standard of proof in civil cases is based on 'preponderance of evidence' or 'the balance of probabilities.' On the other hand, he pointed out that the burden of proof of civil law is more subjective and is "a matter for personal appreciation of the judge, or '*l'intime conviction du juge*' . . . if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met."⁸⁴ He went on to suggest, without really providing any concrete evidence in support, that the ICJ jurisprudence adopts a civil law approach that appears to have influenced its decision in most cases where it considered that inadequate evidence had been adduced to support the existence of a tacit Agreement.⁸⁵ Although, he did not explicitly say so, he appeared to imply that the majority in the *Bangladesh v. Myanmar* case adopted the civil law approach in evaluating the evidence and arriving at its conclusion that Bangladesh had not established that there was a tacit delimitation agreement in this particular case. The so-called common law/civil law distinction as regard considering the evidence is not convincing because a number of the international jurisprudence dealing with tacit agreements have had judges from both the common law and civil law systems arriving at the same outcome after evaluating the evidence on whether or not there was a tacit agreement. For instance, in *the Nicaragua v Honduras*, the majority decision, consisting of judges from both common and civil law jurisdictions held, after evaluating the evidence, that Honduras had not provided compelling evidence to establish a tacit delimitation agreement between it and Nicaragua.⁸⁶ However,

83. *Id.* ¶¶ 112-18 (majority opinion).

84. *Id.* at 242.

85. *Id.* It is important to note that Article 9 of the Statute of the ICJ requires that electors should ensure that those elected as judges not only possess the required qualifications, but also to ensure that the Court 'as a whole . . . [represents] the main forms of civilization and of the principal legal systems of the world', including the common law and civil law legal systems. See also similar provision in Article 2(2) of the Statute of the ITLOS which states: '[i]n the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.'

86. *Nicar. v. Hond.*, *supra* note 64, at 735, 737, ¶¶ 253, 258. For instances, Judges Higgins (UK), Koroma (Sierra Leone), Buergenthal (USA) and Keith (New Zealand), who were part of the majority decision were from common law jurisdictions. While Judge ad hoc Bernárdez (Spain) who dissented is from a civil law jurisdiction. Also, the same applies in *Peru v. Chile*, *supra* note 78, at 38-39, ¶ 91, where the majority held that the Chile had established a tacit agreement with Peru. Again, the same applies in *Bangl./Myan.*, *supra* note 4, at 41, ¶ 118 before the ITLOS Tribunal, the majority holding that Bangladesh had failed to establish such tacit agreement had a mix of judges from both common and civil law systems.

what cannot be disputed from surveying some of the International jurisprudence is that while the judges agree in principle that a stringent standard of proof is required to establish a tacit delimitation agreement, there is sometimes a variance in the outcomes by different judges evaluating the same set of evidence presented before the International Court/Tribunal or Arbitral body. For instance, Judge ad hoc Bernárdez in his dissenting opinion in the *Nicaragua v Honduras*, disagreeing with the conclusion of the majority decision rejecting the existence of a tacit agreement, stated as follows:

In any event, as far as I am concerned, I believe that the evidence submitted by Honduras, notably that concerning the oil and gas concessions and fisheries regulation and related activities, argues decisively in favour of the idea of the existence of a tacit agreement between the Parties on the “traditional” maritime boundary. The majority of the Court holds a different opinion, which I respect although I do not subscribe to it. It is a judge’s prerogative to weigh and take a position on the evidence presented by the Parties.⁸⁷

In *Peru v. Chile* the situation was even more complicated. Here the majority decision after evaluating the evidence concluded that there was a tacit agreement between the parties to the case, which from the evidence “starts at the intersection of the parallel of latitude passing through Boundary Marker No.1 with the low-water line, and continues for 80 nautical miles along that parallel . . .”⁸⁸ As far as the majority decision was concerned its task based on the tacit agreement was to delimit using the usual delimitation methodology from the endpoint of the agreed maritime boundary.⁸⁹ On the other hand, in a joint dissenting opinion, some of the judges, while generally agreeing with the majority, after evaluating the evidence concluded that such tacit agreement ‘clearly indicates that the seaward end of the boundary extends to 200 nautical miles’ and not 80 nautical miles, as indicated by the majority decision.⁹⁰ While Judge Sebutinde, in her separate dissenting opinion, concluded that no agreement, tacit or otherwise, could be inferred from the evidence submitted to the Court.⁹¹ As far as she was concerned, the evidence adduced before Court was not compelling enough to meet the high standard of proof required to establish such tacit agreement.⁹² In a criticism of the majority decision, Judge Sebutinde stated as follows:

I also find highly problematic the basis upon which the Court has arrived at its conclusion that the “agreed maritime boundary running along the parallel of latitude” extends up to a distance of 80 nautical miles out to

87. *Nicar. v. Hond.*, *supra* note 64, ¶ 65.

88. *Peru v. Chile*, *supra* note 78, at 65, ¶ 177.

89. *Id.* ¶ 183.

90. *Id.* at 125. *See* Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Judge ad hoc Orrego Vicuna, ¶¶ 2, 35.

91. *Id.* ¶ 2.

92. *Id.* ¶¶ 6, 7, 15.

sea. By the Court's own admission, all the practice involving accidents between the two Parties, including enforcement activities, was within about 60 nautical miles of their coasts and usually much closer. It was only starting in 1996 that arrests frequently occurred beyond 60 nautical miles. . . It is unclear to me how the Court's conclusion that the Parties could not be said to have tacitly agreed on a maritime boundary beyond 80 nautical miles can simply be turned into a legal finding that they have agreed on a boundary up to 80 nautical miles . . . In my view, this finding of the Court rests on dangerously weak and speculative grounds.⁹³

There is thus room to argue that the actual judicial application of the standard of proof for tacit delimitation agreements lacks coherence, could sometimes be subjective and rather problematic, especially in what may be considered as rather ambiguous tacit agreement cases, where the evidence could technically be interpreted for or against the finding on such agreement. This, however, was not a problem in the *Ghana v. Cote d'Ivoire* case where the Judges, including Judge ad hoc Mensah who was appointed by Ghana, were unanimous that the high threshold of proof of a tacit delimitation agreement had not been met.⁹⁴ Judge Mensah pointed out as follows:

While the facts and arguments adduced by Ghana, provide a plausible reason for Ghana to believe that the "customary equidistance" line has been accepted by Cote d'Ivoire as the boundary between the two States, Ghana has clearly not been able to prove that an agreement on this line exists between Ghana and Cote d'Ivoire. International Jurisprudence has constantly maintained that the threshold for the proof of an agreement on a maritime boundary is very high . . .⁹⁵

It can only be presumed that this particular case is one of the few in international jurisprudence where the evidence was unequivocal, and thus the judges were unanimous in their view that the high burden of proof to establish the existence of a tacit delimitation agreement had not been discharged. A key concern expressed by the Chamber, which appeared to have had a significant impact on the decision as regard this issue, was that evidence presented by Ghana was spatially limited as it related solely to the specific purpose of oil activities in the

93. *Id.* ¶¶ 13-14.

94. *Ghana/Cote D'Ivoire*, *supra* note 2, ¶ 228.

95. *Id.* ¶¶ 2-3. *See* Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_J230917_SOME_nshah_orig.pdf [<https://perma.cc/3RKX-GPL8>] (separate opinion by Mensah, J.); *See also* Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote D'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, ¶ 13, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_SepOp_Paik_orig.pdf [<https://perma.cc/8X9D-PE9Z>] (separate opinion by Paik, J.).

seabed and subsoil, and was inadequate to prove the existence of an all-purpose maritime boundary that should necessarily include superjacent water columns as well. The Chamber also indicated that the Parties had not been able to provide clear answers in response to its question on fisheries and other maritime activities, which in itself weakened the arguments that there was a tacit agreement and merely confirmed “the uncertainty as to the maritime boundary:” of the Parties.⁹⁶ From a review of the cases it would appear that the arguments on the existence of a tacit agreement is more likely to succeed if there is strong evidence, preferably some evidence in writing, notably in form of some sort of Agreement (falling short of a treaty as defined by the Vienna Convention on the Law of Treaties 1969) endorsed by both parties, which is accompanied by subsequent practice of the parties that demonstrates the existence of an all-purpose boundary evincing maritime activities not only in the seabed and subsoil, but also in the superjacent waters as well. On the other hand, on a more pragmatic note, it could be contended that arriving at a unanimous outcome on the evidence adduced to establish a tacit agreement is perhaps more probable in an International dispute settlement body with a small number of judges.⁹⁷

B. Estoppel

The Chamber also considered Ghana's arguments that Cote d'Ivoire was estopped by its acts from objecting to a maritime boundary based on the customary equidistance line that it sought to establish by alleging a tacit agreement between the Parties. Ghana had argued that there was clear, sustained and consistent conduct of Cote d'Ivoire recognising the customary equidistance line as the maritime boundary between the two Parties. Also, that Ghana had in good faith relied on such conduct to its detriment.⁹⁸ This was refuted by Cote d'Ivoire, which argued, first, that estoppel is a contested notion that is rarely applied in public international law; second, that international law does not include the concept of delimitation by estoppel; and third, that Ghana's argument on estoppel was intended to be as a substitute for that which it raised on tacit agreement, the existence of which it was unable to establish.⁹⁹ In the alternative, it argued that, even if estoppel is accepted in international law and could be invoked in this particular case, Ghana had failed to establish the cumulative conditions required for estoppel to apply.¹⁰⁰ From international jurisprudence it can be seen that the principle of estoppel has been raised by Parties from time to time. For instance, in *the Temple of Preah Vihear (Cambodia v. Thailand)*, the issue of its application, along with the related doctrines of acquiescence and

96. Ghana/Cote D'Ivoire, *supra* note 2, ¶¶ 226-28.

97. For the other cases evaluated above, where there were marginal dissenting opinions the judicial panel ranged from 15 to 22 judges. Bangladesh v. Myanmar had 22 judges on the Panel. While of course in Ghana/Cote d'Ivoire Minutes, *supra* note 32, there were only 5 judges.

98. Ghana/Cote D'Ivoire, *supra* note 2, ¶¶ 230-34.

99. *Id.* ¶ 235.

100. *Id.* ¶¶ 236-40.

estoppel engaged the attention of some of the Judges of the ICJ.¹⁰¹ For instance, Judge Alfaro, in his separate opinion, reviewing a number of cases of the Permanent Court of International Justice and Arbitral bodies, as well as scholarly contributions, though rather wary of adopting the designation ‘estoppel’, was clear that this principle, which was similar though not exactly the same as the ‘anglo-american’ concept of estoppel, applied in the international setting.¹⁰² He stated as follows:

[W]hen compared with definitions and comments contained in Anglo-American legal texts we cannot fail to recognize that while the principle . . . underlies the Anglo- Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classification; modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-saxon estoppel, while at the same time notions may be found in the latter that are manifestly extraneous to international practice and jurisprudence.¹⁰³

Judge Alfaro was of the opinion that the principle of ‘estoppel’ in the international sphere was not merely procedural, but rather of a substantive and fundamental character that it could on its own decide a matter in dispute. He also pointed out that the primary foundation of this principle is based on good faith prevailing in international relations “inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith.”¹⁰⁴ Also, Judge Fitzmaurice, preferring to designate estoppel as ‘preclusion’ and seeking to make a distinction between this principle and the similar principle of acquiescence, stated as follows:

The principle of preclusion is the nearest equivalent in the field of international law to the common-law rule of estoppel, though perhaps not applied under such strict limiting conditions (and it is certainly applied as a rule of substance and not merely as one of evidence or procedure). It is quite distinct theoretically from the notion of acquiescence. But

101. Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 12 (June 15) [hereinafter Cambodia v. Thai.].

102. *Id.* at 39. He appeared to regard estoppel, preclusion, foreclosure and acquiescence as synonymous terms or designations. See also THOMAS COTTER, *EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION: THE QUEST FOR DISTRIBUTIVE JUSTICE IN INTERNATIONAL LAW* 489 (2015), who distinguishing between estoppel and acquiescence points out that ‘[a]cquiescence . . . stands for the proposition of binding effects caused by passiveness and inaction with respect to claims by another subject of international law, which usually calls for protest in order to assert, preserve or safeguard rights and claims . . .’

103. Cambodia v. Thai., *supra* note 99, at 39-40.

104. *Id.* at 42.

acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect . . . ¹⁰⁵

He pointed out that the essential condition for using the principle of estoppel or preclusion is “that the party invoking the rule must have ‘relied upon’ the statements or conduct of the other party, either to its own detriment or to the other’s advantage.”¹⁰⁶ As regards maritime delimitation cases, we see that the Court indicated in the *North Sea Continental Shelf Cases* that estoppel could be applied in such cases in the international sphere. Here the Court pointed out that a non-party State to the 1958 Geneva Convention on the Continental Shelf would be precluded from denying the applicability of the Continental Shelf regime under the Convention if by reason of its past conduct, declarations etc. it had “clearly and consistently evinced acceptance of that régime” and if such conduct, declarations etc. had caused another State to “detrimentally to change position or suffer some prejudice.”¹⁰⁷ However, the principle of estoppel was not applicable in this particular case because no evidence was adduced in support of this. In another delimitation case, *the Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Canada v. United States of America)*, a case heavily relied upon by Ghana in putting forward its arguments on estoppel, the Chamber of the ICJ, in its response to Canada’s reliance on estoppel and acquiescence against the United States of America, pointed out the interesting similarity and difference between the two principles as follows:

[T]he concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the

105. *Id.* at 62.

106. *Id.* at 63. See dissenting Judgement of Wellington Koo, using the term ‘preclusion,’ while not averse to applying the principle in the international sphere, based on the evidence disagreed with Judge Fitzmaurice that it applied in this particular case. *Id.* at 97, ¶ 47 (dissenting opinion by Wellington Koo). See also *id.* at 130-31 (dissenting opinion by Sir Percy Spender).

107. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Norway)*, Judgement, 1969 I.C.J. 3, 26, ¶ 30 (Feb. 20). See separate opinion of Judge Padilla Nervo, who pointed out that estoppel did not apply in this present case because there was no proof that Denmark and Norway changed their position for the worse by relying on the acts of Germany. *Id.* at 96. Also Judge Ammoun was of the view that estoppel was one of the general principles of law accepted as part of international law and the conduct and intention of the party against whom it is relied on must be ‘ascertained by the manifestation of a definite expression of will, free of ambiguity.’ *Id.* at 120-121, ¶ 22.

substantive aspect of the same principle.¹⁰⁸

Relying on *the North Sea Continental Shelf Cases*, the Chamber of the ICJ in *the Gulf of Maine Case* held that since the evidence adduced by Canada on the conduct of the United States of America was not clear and consistent, an essential condition for establishing estoppel and acquiescence had not been satisfied.¹⁰⁹ The ITLOS in its first delimitation case, *Bangladesh v. Myanmar*, which was closely relied upon by the Chamber in the *Ghana v. Cote d'Ivoire case*, referring to the ICJ decisions in the *North Sea Continental Shelf Cases* and the *Gulf of Maine Case*, pointed out as follows:

[I]n international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation.¹¹⁰

As far as the ITLOS was concerned in this case Bangladesh had not produced sufficient evidence to discharge the burden of proof. Neither was the Tribunal convinced by the evidence that Myanmar's conduct had caused Bangladesh to change its position to its detriment or that it suffered some prejudice in reliance on such conduct.¹¹¹ Again, Judge Lucky, in his dissenting opinion, disagreed with the conclusion of the majority decision on the issue of estoppel, and took the view, that Bangladesh could rely successfully not only on the doctrine of estoppel but also acquiescence against Myanmar. As far as he was concerned, for acquiescence to apply a Party must overtly claim the relevant area as its own against all other parties who had failed to object.¹¹² He held that Bangladesh by its evidence had convinced him that it overtly claimed the relevant area for 34 years, yet Myanmar did not object.¹¹³ He further held, as pointed above, that Bangladesh had established through evidence the existence of a tacit agreement and that Myanmar had waived its right to deny the evidence which the former State had acted upon and relied on for 34 years, and was thus estopped from changing its position. He was of the firm view that such change of position would

108. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. 305, ¶ 130 (Jan. 20). Since the same facts in this case were relevant to the two principles it chose to consider the two 'as different aspects of one and the same institution.' It however pointed out somewhere else that 'the element of detriment or prejudice caused by a State's change of attitude,' is what distinguishes estoppel in the strict sense from acquiescence. *See id.* at 309, ¶ 145.

109. *Id.* ¶¶ 145, 148.

110. *Bangl./Myan., supra* note 4, ¶ 124.

111. *Id.* ¶ 125.

112. *Id.* at 267.

113. *Id.*

be detrimental to Bangladesh.¹¹⁴ What appears to come forth from the decision of the ITLOS here is that whenever a Party relies on the same evidence to establish both tacit agreement and estoppel its arguments on the latter would stand or fall depending on whether the Court or Tribunal is convinced that the evidence has established the former. Even, if a Party relies on completely different evidence the threshold of the burden of proof of estoppel, like that for establishing a tacit agreement, is quite high. It has been contended that the fact that, so far, none of the maritime delimitation judgements (at least not the majority decisions) has found the evidence adduced sufficient to 'dispose of delimitation and therefore [the] establishment of the boundary line' by estoppel or acquiescence provides evidence that such doctrines are applied stringently.¹¹⁵

Not surprisingly, the Chamber in *Ghana v. Cote d'Ivoire*, relying on the previous ITLOS decision in *Bangladesh v. Myanmar*, made short shrift of Ghana's arguments on estoppel since the facts and evidence it relied upon in support were basically the same as that hinged on for its contentions that there was a tacit delimitation agreement between the parties (which the Chamber had previously rejected). The Chamber stated in its judgement that "Cote d'Ivoire [had] not demonstrated, by its words, conduct or silence, that it agreed to the maritime boundary based on equidistance," appearing to suggest that the burden of proof lies with Cote d'Ivoire, whilst such burden of proof in actuality lay with Ghana.¹¹⁶ Presumably, this was a slip as the international jurisprudence on estoppel indicate clearly that the burden rests with the party asserting, in this case Ghana. As Ghana had, in the view of the Chamber, based on the evidence adduced, failed to establish that Cote d'Ivoire had made 'clear, sustained and consistent' representation, a crucial requirement for establishing estoppel, it did not feel the necessity, unlike the first ITLOS delimitation case, to make a determination on whether Ghana acted in good faith on such representation. Neither did it consider whether Ghana suffered any prejudice from such change of conduct.¹¹⁷

C. Delimitation Methodology: Predictability or Flexibility?

The Chamber, dealing with the request by both Parties to draw a single maritime boundary delimiting their territorial seas, exclusive economic zones and continental shelves within and beyond 200 nautical miles, rejected the argument of Cote d'Ivoire that the angle bisector methodology was applicable.¹¹⁸ As far as it was concerned, based on international jurisprudence, the equidistance/relevant circumstances methodology was the appropriate one, in this particular case, for

114. *Id.* at 267, 268.

115. See COTTER, *supra* note 102, at 490.

116. *Ghana/Cote D'Ivoire*, *supra* note 2, ¶ 224.

117. *Id.* at 75, ¶ 245. Contrast this with *Bangl./Myan.*, *supra* note 4, at 42, ¶ 125.

118. *Ghana/Cote D'Ivoire*, *supra* note 2, ¶ 254. Cote d'Ivoire had previously proposed that the maritime boundaries be delimited by using a so-called geographical meridian method, which it appeared to have abandoned in favour of the bisector approach.

the delimitation of the territorial sea, exclusive economic zone and continental shelf (both inner and outer).¹¹⁹ The Chamber pointed out that alternative methodologies, such as the bisector methodology, would only apply as an exception in narrow and peculiar situation (not applicable in the current case) where it is impossible or inappropriate to draw a provisional equidistance line.¹²⁰ Applying the three stage approach, the Chamber, after determining the provisional equidistance line and considering arguments of the Parties on some probable relevant circumstances, came to the conclusion that there were no relevant circumstances that would justify the adjustment of the provisional line, in this case.¹²¹ Furthermore, it found that the ratio of the length of the coastlines of each Party did not lead to any significant disproportion in the allocation of maritime areas to the Parties vis-à-vis the respective lengths of their relevant coasts.¹²²

The Chamber, in its unanimous decision, was clear that the law of maritime delimitation should possess a degree of predictability.¹²³ It stressed, relying on the first ITLOS delimitation case, *Bangladesh v. Myanmar*, and the decision of the Arbitral Tribunal in *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*,¹²⁴ that while the paramount consideration guiding a Court or Tribunal in a maritime delimitation case should be the goal of achieving an equitable result, additionally “transparency and predictability of the delimitation process as a whole” should be objectives to be taken into account.¹²⁵ This is in line with recent trends in international jurisprudence. It is interesting to explore the various previous decisions of the ITLOS judges in *Bangladesh v. Myanmar* on predictability versus flexibility in the application of the delimitation methodology, where most of the judges in the full ITLOS learned in favour of predictability in maritime delimitation methodology. The majority decision in this case pointed out that, “[a] method of delimitation suitable for general use would need to combine its constraints on subjectivity with the flexibility necessary to accommodate circumstances in a particular case that are relevant to maritime

119. *Id.* ¶¶ 323-24.

120. *Id.* ¶ 289.

121. *Id.* ¶ 480.

122. *Id.* ¶¶ 535-37.

123. Ghana/Cote D'Ivoire, *supra* note 2, at para. 281. *See, e.g.*, MALCOLM EVANS, THE OXFORD HANDBOOK OF THE LAW OF THE SEA 256-259 (Donald Rothwell, Alex Oude Elferink, Karen Scott & Tim Stephens eds., 2015) (discussing the equidistance or equitable principles debate). *See also* YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 196-209(2d ed., 2015); *see generally* YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION (2006)

124. In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Award, 2014 Perm. Ct. Arb. ¶ 339 (July 7), <https://www.pcacases.com/web/sendAttach/383> [<https://perma.cc/XWX5-AS63>].

125. *Id.*

delimitation.”¹²⁶ Also, Judges ad hoc Mensah and Oxman in their joint opinion this case accentuated that “the equidistance/relevant circumstances method of delimitation seeks to balance the need for objectivity and predictability with the need for sufficient flexibility to respond to circumstances relevant to a particular delimitation,” pointing out that maintaining such balance “requires that equidistance be qualified by relevant circumstances and that the scope of relevant circumstances be circumscribed.”¹²⁷ Furthermore, Judges Nelson, Chandrasekhara Rao and Cot in their joint declaration, pointing out the imprecision of the provisions of the UNCLOS on the delimitation of the EEZ and the continental shelf, acknowledged the efforts made by the international courts and tribunals over the years to seek to achieve predictability in the method of delimitation and stressed that the ITLOS “should welcome these developments and squarely embrace the methodology of maritime delimitation as it stands today, thus adding its contribution to the consolidation of the case law in this field”, as well as “firmly uphold the three step approach as it has been formulated over the years.”¹²⁸ Judge Ndiaye, in his separate opinion in this case, underscored that while the ultimate goal of the delimitation process was to achieve an equitable result there had to be some predictability and consistency in the delimitation methodology, because “the justice of which equity is an emanation is not abstract justice but justice according to the rule of law.”¹²⁹ Even though virtually all the judges in *Bangladesh v. Myanmar* were emphatic on the importance of predictability in the methodology of maritime delimitation in international cases,¹³⁰ it is interesting to note that Judge Lucky in his dissenting opinion appeared to take the view that under the relevant provisions of articles 74 and 83 of UNCLOS flexibility trumps predictability in maritime delimitation methodology. Disagreeing with the view of the majority on the applicability of the equidistance/relevant circumstances and agreeing with Bangladesh that the angle bisector approach was appropriate in this case, he pointed out as regards choice of delimitation methodology that “flexibility and discretion are left to the judges in the respective courts and tribunals.”¹³¹ He disagreed with the Counsel for Myanmar that equidistance/relevant circumstances method was a part of customary international law as reflected in the various decisions of the ICJ and arbitral tribunals, but rather insisted that such decisions were “on a case-by-case basis, [w]hile [the equidistance/relevant circumstance] may have been the most suitable method in some cases, it was not in others.”¹³² From a review of the judgements of the various judges in *Bangladesh v. Myanmar* and international jurisprudence the real essence of the debate on predictability versus flexibility in

126. *Bangl./Myan.*, *supra* note 4, at 65, ¶ 228.

127. *Id.* at 148, ¶ 4.

128. *Id.* at 134.

129. *Id.* at 174, ¶ 84.

130. *See also id.* at 136-40 (Declaration of Judge Wolfrum), 184-96 (Separate opinion of Judge Cot), 197-220 (Separate opinion of Judge Gao).

131. *Bangl./Myan.*, *supra* note 4, at 279-80.

132. *Id.* at 280.

delimitation methodology is as follows. Predictability, with room for flexibility in exceptional and justifiable situations (i.e. when the equidistance/relevant circumstances methodology would not achieve an equitable solution), on the one hand, and complete flexibility repudiating predictability, on the other hand. There is no indication in the African States practice that there is a uniformly adopted methodology on the delimitation in the absence of Agreement. During the UNCLOS III there were certain African States that leaned towards predictability by favouring the equidistance/relevant circumstances methodology for EEZ and CS, while others favoured a more flexible approach as regard the delimitation methodology.¹³³ For instance, Kenya and Tunisia had proposed during the UNCLOS III a draft article on the delimitation of the continental shelf or the exclusive economic zone stating as follows: “[t]he delimitation of the continental shelf or the exclusive economic zone between adjacent and/or opposite States must be done by agreement between them, in accordance with an equitable dividing line, the median or equidistance line not being necessarily the only method of delimitation.”¹³⁴ While others, such as Gambia and Guinea Bissau preferred that delimitation should be effected by utilizing “as a general principle, the median or equidistance line, taking into account any special circumstances when this is justified.”¹³⁵ Not surprisingly, the 1974 Organisation of African Unity Declaration on the Issues of the Law of the Sea, adopted at the onset of the UNCLOS III, while touching on the exclusive economic zone, did not engage with the issue of delimitation methodology.¹³⁶ More recent African instruments related to the African Seas, such as the 2050 Africa’s Integrated Maritime (AIM) Strategy¹³⁷ and the African Charter on Maritime Security and Safety and Development in Africa (the Lomé Charter),¹³⁸ while acknowledging the vital need

133. Gerard Tanja, *The Contribution of West African States to the Legal Development of Maritime Delimitation Law*, 4 LEIDEN JOURNAL OF INTERNATIONAL LAW 21, 25-31 (1991).

134. Third United Nations Conference on the Law of the Sea, *Kenya and Tunisia: draft article on the delimitation of the continental shelf or the exclusive economic zone*, ¶ 1, U.N. Doc. A/CONF.62/C.2/L.28 (July 30, 1974). See also Third United Nations Conference on the Law of the Sea, *Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire: draft articles on the exclusive economic zone*, art. 8, U.N. Doc. A/CONF.62/C.2/L.82 (Aug. 26, 1974) (which also insists on flexibility in terms of methodology).

135. See UN. Doc. NG7/2 (April 28, 1978) (cited in Tanja, *supra* note 133, at 28-29).

136. Third United Nations Conference on the Law of the Sea, *Declaration of the Organization of African Unity on the issues of the Law of the Sea*, U.N. Doc. A/CONF.62/33 (July 19, 1974).

137. 2050 Africa’s Integrated Maritime Strategy [AIM] (XII(j)), ¶ 59, at 22 (Jan. 27, 2014) (“Member States shall be encouraged to claim their respective maritime limits, including their extended continental shelf where applicable. Member States are further urged to accept and fulfill all those responsibilities that emanate from the establishment of maritime zones as foreseen by UNCLOS and the IMO SOLAS Convention.”).

138. African Charter on Maritime Security and Safety and Development in Africa [Lomé

for African States to delimit their maritime boundaries, in accordance with International Law, they also do not explicitly engage with the issue of delimitation methodology.

Although, the decision of the Chamber in *Ghana v. Cote d'Ivoire* leaned in favour of the need for predictability in the delimitation methodology,¹³⁹ there are some concerns about some aspects of its application of the delimitation process, notably its application of equidistance/relevant circumstances methodology to the territorial sea and its rather feeble justification for doing so.¹⁴⁰ While the Chamber acknowledged that different rules apply to the delimitation of the territorial sea, as distinct from that of the EEZ and CS, as well as the different nature of these spatial areas (the territorial sea entailing sovereignty while the other zones are merely functional),¹⁴¹ it went on to apply the delimitation methodology for the EEZ and CS to the territorial sea because it interpreted the submissions of both parties as permitting it to do so. It is not clear on what basis the Chamber arrived at this understanding, except that it merely noted that the Parties did not put forward comprehensive arguments concerning the delimitation of the territorial sea. The Chamber failed to provide any convincing legal authority to justify the deviation from the position of earlier jurisprudence, which indicate that the International Court or Tribunal should first address the delimitation of the territorial sea before progressing to delimit that of the EEZ and CS.¹⁴²

Charter] art. 13 (Oct. 15, 2016) (“Each State shall endeavour to delimit its respective maritime boundaries in conformity with provisions of relevant international instruments.”).

139. *Ghana/Cote d'Ivoire*, *supra* note 2, ¶¶ 289, 323-24.

140. *Id.* at 257-63.

141. *Id.* ¶¶ 260, 262.

142. *See* Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 2001, 40, 93, ¶ 174 (Mar. 16) (“Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the superjacent waters and air column. Therefore, when carrying out that part of its task, the Court has to apply first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary [for the EEZ and CS] that serves other purposes as well.”); *Bangl./Myan.*, *supra* note 4, ¶¶ 153-77; *Oude Elferink*, *supra* note 70 (who pointed out some concerns with the Chamber using the same delimitation methodology for the territorial sea and the maritime zones beyond; the Chamber’s preference to utilise two older charts rather than a more recent one, which appeared to be out of sync with the decision in *Guyana v. Suriname* (although it is important to note here that the Chamber did indicate it was declining to use the recent chart for the technical reason that it was based on topographical surveys of only the Cote d’Ivoire Coasts only. *See* ¶ 341 of the Judgment); its reasoning on the relevant coasts and relevant area and its approach to the handling of arguments concerning coastal concavity and convexity.). *See also* Massimo Lando, *Judicial Uncertainties Concerning Territorial Sea Delimitation Under Article 15 of the United Nations Convention on the Law of the Sea*, 66 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 589-623 (2017) (analysis of judicial uncertainties as regarding Art. 15 UNCLOS delimitation); Fakoyemi Olorundami, *Objectivity versus Subjectivity in the Context of the ICJ’s Three-stage*

Another interesting issue concerning delimitation in *Ghana v. Cote d'Ivoire*, which involved two parties that had made submissions to the CLCS, with one of the Parties, Ghana, having completed the submission procedure,¹⁴³ is how the Chamber treated the request of the Parties for delimiting the continental shelf beyond 200 nautical miles. The Chamber, in line with some recent international jurisprudence, after stressing that in law there is only one single continental shelf, rather than a distinction between inner and outer continental shelf,¹⁴⁴ held that it had the powers to delimit the continental shelf beyond 200 nautical miles. However, it pointed out that it would exercise such powers to delimit “only if such a continental shelf exists,”¹⁴⁵ and in this particular case, as far as the Chamber was concerned, “there is no doubt that a continental shelf beyond 200 nautical miles exists in respect of the two Parties.”¹⁴⁶ The Chamber did not explicitly engage with the issue of how to determine certainty as regarding the evidence of entitlement to an outer continental shelf. It has been bemoaned that the Chamber failed to seize the opportunity to offer new insights and thereby provide some clarity on the question of evidence of entitlement to the outer continental shelf.¹⁴⁷ However, from its decision the Chamber appeared to have been influenced in arriving at the conclusion of certainty of entitlement by both Parties based on the following grounds: First, the fact that Ghana had received its recommendation from the CLCS. Second, that Cote d'Ivoire had made a full submission to the CLCS, even though it was yet to receive the CLCS' recommendations. Third, that neither of the Parties had contested the entitlement of the other Party to a continental shelf beyond 200 nautical miles.¹⁴⁸ Nonetheless, this in itself does not provide any real clarity as to the admissibility of such outer delimitation claims before international tribunals in the absence of a recommendation by the CLCS.¹⁴⁹ It is, however, interesting to note that the ICJ

Methodology of Maritime Boundary Delimitation, 32 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 36-53 (2017) (for some subjectivity concerns in the application of the application of the equidistance/relevant circumstances methodology in delimitation of the EEZ and CS).

143. See Regarding Ghana Submission, *supra* note 6.

144. See *Arbitration between Barbados and Trinidad & Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them*, Hague Arb. Trib. U.N.R.I.A.A. Vol. XXVII, at 147-251 (Apr. 11, 2006); *Bangl./Myan.*, *supra* note 4; In the Matter of the Bay of Bengal Maritime Boundary Arbitration (*Bangl. v. India*), Award, 2014 Perm. Ct. Arb. (July 7).

145. *Ghana/Cote d'Ivoire*, *supra* note 2, ¶ 491.

146. *Id.* ¶ 496.

147. See Lan Nooc Nguyen, *UNCLOS Tribunals and the Development of the Outer Continental Shelf Regime*, 67 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 425-54 (2018).

148. See *Ghana/Cote D'Ivoire*, *supra* note 2, ¶¶ 494, 499-507.

149. See generally Giovanni Vega-Barbosa, *The Admissibility of Outer Continental Shelf Delimitation Claims Before the ICJ Absent a Recommendation by the CLCS*, 49 OCEAN DEVELOPMENT & INTERNATIONAL LAW 103-17 (2018) (interesting analysis of this issue); Nguyen,

in its decision on the preliminary objection of the respondent in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, another case from the African region, said as follows:

A lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations.¹⁵⁰

Whilst, the ICJ indicates here that international courts or tribunals may delimit outer continental shelf even before the CLCS has made recommendations to one of the Parties, there again is no real clarity as to when exactly would be 'appropriate circumstances'? Vega-Barbosa, whilst acknowledging, after an analysis of various international cases concluded there was no definite answer to this question. He however, proposes that the 'appropriate circumstances,' which would cause the ICJ or an international Tribunal to hear an outer continental shelf delimitation claim in the absence of a CLCS recommendation is where there is the 'absence of scientific uncertainty' or where there is an agreement of the Parties on the entitlement to outer continental shelf and the existence of overlapping entitlements.¹⁵¹ Unfortunately, the Chamber in the Ghana/Cote d'Ivoire case was not prepared to engage in a detailed analysis of this issue.

IV. AFTERMATH OF DECISION ON MERITS—A JOINT COMMISSION TO IMPLEMENT?

The decision of the Chamber, which basically had the effect of ensuring that Ghana kept all its current oil and gas fields, was received with huge relief by Ghana, and Tullow has since resumed drilling of the wells on its behalf. It is projected that there would be full field development of around 24 wells in the Tweneboa-Enyenra-Ntomme (TEN) offshore fields consisting of 11 wells already drilled before the ITLOS provisional measures order, and an additional 13 more fields that would be developed after the decision on the merits. Furthermore, Tullow anticipates that the 2018 production from the Jubilee field would average 75,800 barrels of oil per day.¹⁵² A notable point is that immediately after the decision on the merits both Parties in a cooperative manner issued a joint statement accepting the decision. The joint statement stated: "Cote d'Ivoire and

supra note 144.

150. *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, Judgment, 2017 I.C.J. Rep. 2017, ¶ 94 (Feb. 2), <http://www.icj-cij.org/files/case-related/161/161-20170202-JUD-01-00-EN.pdf> [<https://perma.cc/RB6F-CKRG>].

151. Vega-Barbosa, *supra* note 141, at 112.

152. *Tullow's new rig heads to TEN fields to commence drilling of wells*, GHANAWEB (Feb. 22, 2018), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Tullow-s-new-rig-heads-to-TEN-fields-to-commence-drilling-of-wells-628356> [<https://perma.cc/ZZ8T-LVEF>].

Ghana seize the opportunity to reiterate the mutual commitment of the two countries to abide by the terms of this decision from the Special Chamber, and to fully collaborate for its implementation. Cote d'Ivoire and Ghana accept the decision, in accordance with the Statute of ITLOS.”¹⁵³ The statement also stressed their “strong will to work together to strengthen and intensify their brotherly relationships of cooperation and good neighbourliness.”¹⁵⁴

It should be noted that since the Chamber identified a starting point and base points for the provisional equidistance line which differed from those advanced by both Parties,¹⁵⁵ the final boundary line, as decided, is not fully consistent with that put forward by Ghana. Consequently, the final maritime boundary as determined by the Chamber's judgment would require careful implementation that could involve some adjustments of existing blocks for mineral resource activities as licenced by the Parties.¹⁵⁶ The two States have since entered into a Strategic Partnership Agreement covering a wide range of areas, including maritime cooperation, incorporating the implementation of the decision of the ITLOS Special Chamber; developing practical arrangements for the joint exploitation and management of transboundary oil and gas and other resources, as well as cooperation in development of their fishery resources and combating illegal fishing.¹⁵⁷ Based on this Strategic Partnership Agreement both States have set up a Joint Committee to fully implement the decision of the ITLOS Special Chamber.¹⁵⁸ According to the President of Ghana, the Joint Committee is “to

153. *Ghana: Ghana, Cote d'Ivoire 'accept' judgement of UN Tribunal on maritime dispute*, PANAPRESS (Sept. 23, 2017, 4:52:30 PM), <http://www.panapress.com/Ghana--Ghana,-Cote-d-ivoire--accept-judgement-of-UN-Tribunal-on-maritime-dispute--12-630525593-33-lang2-index.html> [<https://perma.cc/Q2QD-AZ2H>].

154. *Id.*

155. Ghana/Cote D'Ivoire, *supra* note 2, ¶¶ 355-56, 398-401.

156. See Pieter Bekker & Robert Van de Poll, *Ghana and Cote d'Ivoire receive a Strict-Equidistance Boundary*, 21 ASIL INSIGHTS (Oct. 13, 2017), <https://www.asil.org/insights/volume/21/issue/11/ghana-and-cote-divoire-receive-strict-equidistance-boundary> [<https://perma.cc/8R6C-ZUXF>].

157. See Article I(3) of the Strategic Partnership Agreement between the Government of the Republic of Ghana and the Government of the Republic of Cote D'Ivoire (adopted 17 October 2017, entered into force on the same day). Article VI of the Agreement states that it shall become effective upon execution. Other areas of Cooperation covered by the Agreement are defence and security (this appears to be broad enough to cover both maritime, including piracy and illicit bunkering, and terrestrial security issues)[Article I(1)]; Cocoa and Cashew Economy and other strategic crops [Article I(2)]; Mining, Energy and Environment[Article I(4)]; Transport[Article I(5)] and Economic Policies[Article I(6)].

158. The Joint Implementation Committee of the ITLOS Special Chamber judgment had its maiden meeting in Abidjan in May 2018. The Joint Committee which is jointly headed by Dr Yaw Osafo Maafo(Ghana), the Senior Minister, the supervisory Minister of all other government appointees of the Akufo-Addo administration, and Adama Tanagra(Cote d'Ivoire), the long standing negotiator and a close confidant of the President of the Republic of Cote d'Ivoire,

oversee the orderly execution of the judgement,”¹⁵⁹ This appears to be a continuation of the trend started by two other African States, Cameroon and Nigeria, who after the decision of the ICJ in a territorial and maritime dispute case, agreed to set up a mixed-commission to amicably implement the decision of the ICJ. The African Union, welcoming this approach to post-decision implementation in the Cameroon and Nigeria situation, described it as “a major event in the area of peaceful resolution of conflicts,” and pointed to it as “a source of inspiration for all African actors involved in conflicts.” It also called on the international community to recognise it as “a strong point worthy of praise and a significant contribution of Africa to safeguard world peace.”¹⁶⁰ There are however some important differences between the post-decision implementation state of affairs in Cameroon/Nigeria, on the one hand, and that of Ghana/Cote d’Ivoire, on the other. First, prior to the institution of the former case the situation was rather acrimonious between Cameroon and Nigeria. Even after the decision of the ICJ, the Nigerian government had initially indicated that they would not accept the ruling of the Court.¹⁶¹ This could be contrasted with the Ghana/Cote d’Ivoire situation where the Parties appear to have been more cooperative and harmonious in their engagement with the disputed issues, both prior to the case and even after the decision of the Chamber.¹⁶² Second, in the former case the Parties appear to have been propelled to adopt the mixed commission by the intervention of the United Nations (UN) and some big powers, notably the United

Alasanne Outtara, includes high level officers heading relevant Ministries, as well as a whole host of technical experts, some of who played a major role in the dispute settlement process. Under the Strategic Partnership Agreement the institutional framework consists of a Conference of Heads of States responsible for guiding and promoting the implementation of the common strategic policies as defined by the Agreement; a Joint Implementation and Monitoring Committee responsible for the implementation and monitoring of the decisions of the Conference; National Implementation and Monitoring Committee established by each country responsible for the preparation of the meetings of the Joint Committee and a Technical Committee established by each country responsible for the preparation of the meetings of the National Implementation Committee. See Art. II.

159. Nana Addo Dankwa Akufo-Addo, President, Ghana, address at a ceremony in honour of Ghana’s Maritime Boundary Dispute Legal Team (Oct. 20, 2017) (transcript available in the Presidency Republic of Ghana Speeches), <http://www.presidency.gov.gh/index.php/briefing-room/speeches/423-address-by-the-president-nana-addo-dankwa-akufo-addo-at-a-ceremony-in-honour-of-ghanas-maritime-boundary-dispute-legal-team> [https://perma.cc/D2N2-8CUV].

160. African Union Assembly Declaration of the Assembly of the African Union on the Peaceful Settlement of the Border Dispute between Cameroon and Nigeria: the Bakassi Case, AU Assemb. Dec.1(XXII) (Jan. 30-1, 2014), [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Decl%201%20\(XXII\)%20_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Decl%201%20(XXII)%20_E.pdf) [https://perma.cc/Y56A-ZCVA].

161. See ODUNTAN, *supra* note 9, at 220-27; OSA IGIHON, *supra* note 16, at 5-7.

162. See *supra* Part 2, providing the background of the case and *supra* note 92. See also Ghana/Cote D’Ivoire, *supra* note 2, ¶¶ 179-80 (The Judgment on merits referred to two joint statements issued by the Presidents of Ghana and Cote d’Ivoire in 2009 and 2015 emphasising their determination of the Parties to seek to arrive at a peaceful settlement of their maritime boundary).

States of America, France, Germany and the United Kingdom,¹⁶³ while in the latter case there is no indication of such third party involvement. Third, in the Cameroon/Nigeria case the UN was actively involved in the implementation process with the Special Representative of the Secretary-General chairing the mixed Commission, and the UN had a direct involvement in providing support to the Commission through its agencies, such as, the United Nations Office for West Africa and Sahel (UNOWAS). In the Ghana/Cote d'Ivoire situation, on the other hand, there is no indication that the UN would be directly involved, though nothing precludes the Parties from seeking indirect support from the UN in the course of the implementation. Fourth, the Green Tree Agreement between Cameroon and Nigeria that formed the legal basis for the mixed commission was rather limited in its focus, as it addressed only the specific issues directly arising from the Case.¹⁶⁴ The Strategic Partnership Agreement between Ghana and Cote d'Ivoire, on the other hand, as mentioned above, is quite broad, covering other strategic areas of cooperation going beyond the Case.¹⁶⁵ The latter format dealing with several and rather unrelated issues at the same time makes it a bit more intricate than that in the Cameroon/Nigeria situation. What would be rather interesting to see is if the trend of setting up mixed or joint commissions after the decision of an international Court or Tribunal on delimitation cases would persist in Africa, especially when the ICJ eventually makes a decision on the merits in the *Somalia v. Kenya* case.¹⁶⁶

V. CONCLUSION

The Ghana/Cote d'Ivoire decision on the merits is another interesting addition, emerging from the African region, to the maritime delimitation jurisprudence. The decision did not introduce any completely innovative addition to the law of maritime delimitation because, to a large extent, it merely affirmed

163. See Bayo Ojo, *Resolution of International Disputes through Preventive Diplomacy by United Nations: Case Study of the Cameroon v. Nigeria Case*, in OSA IGIEHON, *supra* note 16, at 44, 48-55.

164. See Agreement between the Republic of Cameroon and the Federal Republic of Nigeria concerning the modalities of withdrawal and transfer of authority in the Bakassi Peninsula (with annexes and summary of discussions), June 12, 2006, 2542 UNTS I-45354 (also known as The Green Tree Agreement).

165. See *Tullow's new rig heads to TEN fields to commence drilling of wells*, *supra* note 149.

166. See *supra* note 7. One of the authors of this article as a member of an ad hoc expert group established by the African Union Commission to advise on and put together draft annexes to the African Charter on Maritime Security, Safety and Development in Africa (Lomé Charter) had, in addition to proposing that an ad hoc Chamber dealing with law of the sea issues, including delimitation of maritime boundaries, be included in the merged African Court of Justice and African Court of Human and Peoples' Rights, suggested that there should be provision to encourage African States to utilize an ad hoc mixed or joint commission to implement delimitation decisions.

the growing trend in international jurisprudence towards applying the equidistance/relevant circumstances as the generally accepted method of delimitation of the EEZ and the CS, with alternative methodologies only applicable when it is impossible or inappropriate to draw a provisional equidistance line. However, there are certain important lessons that could be discerned from this case. First, it would appear that the adoption by the Parties to the case of a mostly cooperative rather than an antagonist approach to dispute settlement under Part XV of the UNCLOS, especially with the utilisation of the ITLOS ad hoc Special Chamber with a limited number of judges, including ad hoc judges chosen by both sides, appears to have contributed to the relatively speedy disposal of the case. Second, it affirms the difficulties Parties to a maritime boundary disputes generally face in establishing the existence of a tacit Agreement or proving the applicability of estoppel in such cases. Third, though as pointed out above, the decision was not particularly ground-breaking in its engagement with maritime boundary delimitation methodology, it is certainly a welcome addition to the burgeoning cases that affirms the equidistance relevant circumstances methodology as the generally acceptable one for EEZ and CS delimitation, along with the three-step approach, thus contributing to achieving predictability in the law of maritime delimitation. Fourth, the post-judgement implementation of the decision of the Special Chamber points to what appears to be an interesting emerging practice, amongst some Africa States that are parties to international cases, of establishing mixed or joint commissions consisting of members from both Parties to amicably work out the practical details as regard the implementation of the judgement on the merits.