

LAW OF THE SEA | 23 SEPTEMBER 2017

Dear all,

The special Chamber of the International Tribunal for the Law of the Sea (ITLOS), a United Nations entity, rendered its decision in the case concerning the delimitation of the maritime boundary between Côte d'Ivoire and Ghana in the Atlantic Ocean on Saturday 23 September 2017. [Click here to view the decision.](#)

This case was referred to the Special Chamber by both parties. Ghana claimed that the line used for 50 years to separate the respective oil concessions of Côte d'Ivoire and Ghana was a maritime boundary. Ghana's position was based on the existence of a tacit agreement, and in the alternative, on the existence of a *modus vivendi* which it requested the Chamber to retain as relevant circumstance for the adjustment of the provisional equidistance line.

Côte d'Ivoire contested this argumentation and asked for the drawing of the maritime boundary along an alternate line increasing its maritime area according to the bisector method.

The Special Chamber rejected the lines proposed by both Côte d'Ivoire and Ghana and laid out a new boundary line according to the commonly accepted delimitation method of equidistance / relevant circumstances. This decision is particularly interesting in many respects:

- **Regarding the absence of tacit agreement**, the Chamber conducted a thorough analysis of Ghana's documentary evidence (national legislation, oil concession maps, bilateral exchanges between the Parties, content of the bilateral negotiations on delimitation of the maritime boundary, positions taken by the Parties before international institutions, etc.), in order to reject the existence of a tacit agreement. The judges make an interesting observation on the influence of oil practice on the process of maritime delimitation: "*States often offer and award oil concessions in an area yet to be delimited. It is not unusual for States to align their concession blocks with those of their neighbouring States so that no areas of overlap arise. They obviously do so for different reasons, but not least out of caution and prudence to avoid any conflict and to maintain friendly relations with their neighbours. To equate oil concessions limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence*" (§225).

- **Regarding the choice of the equidistance / relevant circumstances method**, the Chamber reiterates the position taken by ITLOS in the Bay of Bengal (Bangladesh v. Myanmar) decision that the case law is "in principle" favorable to the equidistance / relevant circumstances method and that the bisector method is used only when there are special circumstances. It maintains that in the present case, such circumstances were not met and that the equidistance / relevant circumstances method should therefore be applied. This position renders henceforth any other delimitation method subsidiary to the equidistance / relevant circumstances method.

- **As regards the absence of relevant circumstances to justify the adjustment of the provisional equidistance line**, the Chamber clarified the case law on *modus vivendi*. Ghana wished to see the State's oil practice (the *modus vivendi*) recognized as a relevant circumstance. One of the reasons for this rejection is particularly interesting, as the Chamber states that Ghana's argument on *modus vivendi* "*appears to be an attempt to revive a tacit maritime boundary that was rejected by the Special Chamber by circumventing*

the high standard of proof required for the existence of a tacit agreement” and that accepting the Parties’ oil practice as a relevant circumstance “would, in effect, undermine its earlier finding on the existence of a tacit agreement” (§478).

The Special Chamber, however, did not accept Ghana's international responsibility insofar as its oil activities in the area claimed by both parties were conducted in good faith.

The lessons learned from the Côte d'Ivoire / Ghana decision will be discussed in detail at the conference on December 7-8 in Paris, on the theme "Delimiting maritime boundaries: the new challenges". **[Click here](#) to register for this workshop and view the detailed programme.**

With my best regards,

Michel Pitron.