

# The Tacit Agreement in Maritime Delimitation Law: A Constant Observed in the Ghana / Côte d'Ivoire Maritime Boundary Dispute in the Atlantic Ocean

Malangu Mposhy Daddy

Head of the Faculty of Law, University of Lubumbashi, Congo

**Abstract:** *The ultimate goal for any need for delimitation between two states is to achieve "a fair result". However, before getting there or to better achieve it a number of issues need to be resolved. In the case of Ghana / Côte d'Ivoire, the Special Chamber had to ascertain whether a tacit agreement had duly existed and whether it was based on the proper foundation of international maritime delimitation law, the tangible proof of an express will expressed by the two states.*

**Keywords:** Tacit Agreement, Maritime Delimitation, Frontier Dispute, Ghana / Côte d'Ivoire

## 1. Introduction

"The delimitation of maritime<sup>1</sup> areas is a sensitive issue"<sup>2</sup>. In its realization, "it is clear that the fundamental rules to a practical case of delimitation are not always precise and the result not always predictable"<sup>3</sup>. This is a geographical obviousness that "does not bend well to the beneficial effects of uniformity"<sup>4</sup>. It is also what justifies why "(...) in this field, although the key word in this matter is respect for equity, [that] there is no single method of delimitation"<sup>5</sup>. In reality, the logical consequence of applying a universally accepted method would also require "an abstract delimitation of equity, but each situation is made up of geographically, geologically, geomorphologically, politically, and economically each case difficult to transpose to another "<sup>6</sup>. To this same extent, the case becomes even more complex especially when one is in the presence of a concave or convex zone or combines such a coastal morphology. The aim is essentially to allow each State to have a secure control over the maritime territories situated in

front of its coast and in its lap<sup>7</sup>, in order to prevent it from being "practiced in front of its coasts and in its immediate proximity of rights that could undermine [its] development or jeopardize its security "<sup>8</sup>.

When it comes to getting their wishes to succeed in the maritime delimitation, the States Parties to a maritime delimitation dispute have a range of choice among the means of peaceful settlement of international disputes that exist. But for quite a recent time, for the most part, they agree to recover either to the jurisdiction of an ad hoc or permanent jurisdiction, after exhaustion of the possibilities offered in the phase of the negotiations<sup>9</sup>. Generally, it is considered to be the expression "of unmet difficulties (...) between the requesting State and the respondent, which makes it impossible to reach a compromise between two countries"<sup>10</sup>. At this stage, more often than not, the discussion arises "between advocates of the equidistance / relevant circumstances approach on the one hand and those of the relevant circumstances / equitable principles approach on the other. The heart of the debate lies [in] the representation that everyone has of the role of equity in the

<sup>1</sup> The maritime delimitation heard here consists of "drawing the exact line or exact lines of meeting places where the sovereign powers and rights are exercised respectively". See in Continental Shelf of the Aegean Sea, Judgment, ICJ Reports 19 78, p. 35, para. 85, see also North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 92 and Continental Shelf of the Aegean Sea, Judgment, ICJ Reports 19 78, p. 89, para. 77.

<sup>2</sup>T.I.D.M., Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar), arrêt, 2012, p.39, par.95.

<sup>3</sup>Kamga. M., *Délimitation maritime sur la côte Atlantique africaine*, Bruxelles, éd. Bruylant, 2006, p. 31.

<sup>4</sup>Lucchini. L. et M. Voelckel, *Droit de la mer, (Tome 2, vol. 1, Délimitation)*, Pédone, Paris, 1996, p. 242.

<sup>5</sup>Edynak. E., « L'exécution des décisions de la Cour internationale de justice en matière de délimitation maritime », *Les Annales de droit* [En ligne], 7 | 2013, mis en ligne le 03 mai 2018, consulté le 03 juin 2018. URL : <http://journals.openedition.org/add/801> ; DOI : 10.4000/add.801, Varia, pp. 62-92, p.63.

<sup>6</sup>Edynak. E., Op.cit., p.63.

<sup>7</sup>Voir. Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée Bissau, sentence arbitrale du 14 février 1985, p. 194, par. 124.

<sup>8</sup>Ibid., p. 194, par. 124.

<sup>9</sup>Voir. Vincent. P. *Droit de la mer*, Bruxelles, éd. Larcier, 2008, p. 162, Salmon. J., *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, p. 904. He defines negotiation as "the normal way of resolving international disputes. It consists of talks with a view to reaching a direct agreement between the parties to the dispute or to determine the procedure that the parties will follow by mutual agreement to resolve the dispute between them ", Article 33 of the Charter which puts it first and foremost obliging the parties "to resort to peaceful methods of settling international disputes, in the first place negotiation". See also Part XV of the 1982 Montego Bay Convention and its Annexes V to VIII.

<sup>10</sup>Kamto. « Sur quelques questions techniques liées à la détermination du tracé d'une frontière maritime » in, *L'évolution et l'état actuel du droit international de la mer. Mélanges de droit de la mer offerts à Daniel Vignes*, Bruxelles, éd Bruylant, 2009, pp. 481-505, p. 486

delimitation operation<sup>11</sup>. The case Ghana / Ivory Coast is not left on this fact. The base going from geographical fact to the presence of oil wells through the "behaviors" of the parties.

It is therefore the case that in this case the Special Chamber had first had to exhaust the question of the tacit agreement based on petroleum practice which it surely considered to have "a determining role for the establishment of maritime borders"<sup>12</sup> to be carried out. It should be remembered that the 1969 Convention on the Law of Treaties only recognizes the written nature of an international treaty. However, this prediction also does not state that "verbal or tacit agreements have legal force and are governed by rules constituting the law of treaties, but obviously not the same as those reflected in the 1969 CVDT"<sup>13</sup>. It is, we may believe, a form of agreement which, we may believe, is "the parallel universe of the law of treaties, dominated by the unspoken, by the will not expressed by words but no less tangible and effective"<sup>14</sup>, "as well as creating rights and obligations between subjects of international law. "For, notwithstanding the evidential virtues of writing [and even] if no law prescribes a special form for conventions between States (...), it is nonetheless contrary to international practice to verbally contract commitments (...)"<sup>15</sup>. "Especially [that] in this case, the existence of a verbal agreement should result from formal stipulations and that one could not, without serious harm to the security and ease of international relations, deduce from the simple declaration that 'we are ready to grant a concession'<sup>16</sup>.

It is this evidence which would assure the Special Chamber as to "whether the Parties had already determined by agreement the course of their maritime boundary in the territorial sea, in the exclusive economic zone and on the continental shelf, both below 200 nautical miles (...)" . It is, in fact, this precise aspect that challenges the present reflection. In other words, it will not be the purpose here to decide on the chosen method or to criticize the reasons which led to the choice of lines adopted by the judge and consequently it will not be in the representation that each of the Parties the dispute has projected the role of equity in the delimitation between them. But, it will rather be in the sense of reading in the judgment the measure that the judge had to use to the tacit Agreement. Clearly, it will be a question of whether the Chamber has remained stuck in the traditional principles of the existing case-law or whether the tacit Agreement prevailed by one of the parties has received

special treatment to advance the approach of the law of the land delimitation applicable in this case?

The interest of this is governed by the form of an international commitment. "It should be noted that this is not an area in which international law imposes strict or special rules. Whether a statement is oral or written, there is no essential difference, because such statements made in particular circumstances may constitute commitments in international law without necessarily having to be in writing. The form is not decisive"<sup>17</sup>. Thus, as "(...) the law does not prescribe a particular form, the parties are free to choose the one that pleases them, provided that their intention comes out clearly"<sup>18</sup>. The gathering of evidence for a successful outcome requires first situating the historical facts (I) and the claims of the parties (II) in the first step. After this phase, it will then be appropriate to focus on the Principle of Maritime Delimitation by Agreement (III), which will focus on the scope of the Tentative Maritime Delimitation Agreement (IV). It is only then that an appreciation of the issue of the Tacit Agreement between Ghana and Côte d'Ivoire (V) may be possible in order to get a closer look at what formed the position of the Special Chamber on the divergence of perception as to the existence or otherwise of the tacit Agreement between the Parties (VI) in order to outline the conclusion to be drawn.

### I. History of the dispute and compromise

It was in the sixties that these two States became independent and later became Parties to the United Nations Convention on the Law of the Sea of 1982. With regard to ratification of the said Convention, the first, Ghana did so on 7 June 1983, while for the latter; Côte d'Ivoire was on 26 March 1984. For them, this Convention entered into force on 16 November 1994.

Indeed, "geographically, Ghana and Côte d'Ivoire are West African states, neighbors and riparians of the Atlantic Ocean located in the Gulf of Guinea. Ghana has a land border with Togo to the east, Burkina Faso to the north and Côte d'Ivoire to the west. Côte d'Ivoire shares a land border with Liberia and Guinea in the west, Mali and Burkina Faso in the north and Ghana in the east. There are no islands in the area to be delimited. It is "situated on the northwestern part of the Gulf of Guinea" between the 3rd degree and the 7 ° degree 30 ° of western longitude the Ivory Coast is limited to the east by Ghana and Liberia to the west, with a coastline that is low everywhere. Its seafront has a regular curve between its two neighboring rivers, Tanoe to the east and Cavaily to the west.

With regard to the facts, it should be noted in a condensed manner that everything started with the letter of 21 November 2014, in which the delegate of the Republic of Ghana transmitted to the President of the International Tribunal for the Law of the Sea his notification accompanied by the the conclusions and the reasons on which it is based.

<sup>11</sup>Cazala Julien., « Retour sur les méthodes de délimitation juridictionnelle d'espaces maritimes mises en œuvre dans quelques affaires récentes » in, *Annuaire français de droit international*, volume 54, 2008. pp. 411-427, p.412.

<sup>12</sup>This position was taken in the Land and Maritime Boundary between Cameroon and Nigeria (Cameroun c. Nigéria; Guinéeéquatoriale (intervenant), arrêt, C. I. J. Recueil 2002, p. 447, par. 303.

<sup>13</sup>Distefano. G., « L'accord tacite ou l'univers parallèle du droit des traités » in, *QIL-QDI*, zoom-in (2015), pp. 17-37, p. 18.

<sup>14</sup>Distefano. G., *Op.cit.*, p. 17.

<sup>15</sup>R. S. A., Arbitrage entre l'Allemagne et le Royaume-Uni, concernant l'île de Lamu, 17 August 1889 – 17 août 1889, *VOLUME XXVIII* pp. 237-248, p.243.

<sup>16</sup>Distefano. G., *Ibid.*, p. 18.

<sup>17</sup>*Affaire des Essais nucléaires (Nouvelle Zélande c. France)*, C.I.J., Arrêt du 20 décembre 1974.p.473, par. 48.

<sup>18</sup>Affaire du temple de PréahVihear (Cambodge c. Thaïlande), Exceptions préliminaires, Arrêt du 26 mai 1961: C. I. J. Recueil 1961, p.31.

On 19 September 2014, Ghana sent it to the Republic of Côte d'Ivoire to introduce arbitral proceedings under Annex VII of the United Nations Convention on the Law of the Sea concerning "The dispute concerning the delimitation of the maritime boundary between Ghana and Côte d'Ivoire". In its statement of reasons, it requested ITLOS to "determine, in accordance with the principles and rules of the Convention and international law, the full course of the single maritime boundary separating all maritime areas returning to Ghana and the Côte d'Ivoire". Ivory in the Atlantic Ocean including the part of the continental shelf beyond 200 nautical miles'. In addition, Ghana had also asked the Tribunal "to determine the precise geographic coordinates of the single maritime boundary in the Atlantic Ocean".

Following the President of the Tribunal's consultations with the representatives of Ghana and Côte d'Ivoire on 2 and 3 December 2014 in Hamburg, the two States concluded a compromise on 3 December 2014 "in order to submit to a Special Chamber of the Tribunal established pursuant to Article 15, paragraph 2, of the Statute "their dispute. After submission to the Registry of the original settlement agreement, on the same day, on 12 January 2015 by order, the Tribunal made the decision "to grant the request of Ghana and Côte d'Ivoire to that a Special Chamber be set up to deal with the dispute concerning the delimitation of their maritime boundary in the Atlantic Ocean"<sup>19</sup>. On 14 January 2015, the Registrar of ITLOS had taken care to notify by letter the date of the submission of the case to the Secretary-General of the United Nations. By note verbale of 16 January 2015, it also notified the two opposing States in this dispute according to the wishes of Article 24 (3) of the Statute. At their convenience, 3 December 2014 was considered to be the date of commencement of the proceedings before the Special Chamber. To better fit into the purpose of this reflection, it is better to make sure of the demands of the Parties which clearly circumscribe the elements of this conflict. These contradictory claims make it appear that the question of the existence or otherwise of the delimitation agreement centers on the essence of the vision of the delimitation expected by one or the other Party.

## II. Claims of the parties to the dispute

According to Ghana, they, together with Côte d'Ivoire, had "mutually recognized, accepted and respected a maritime boundary based on equidistance in the territorial sea, in the EEZ and on the continental shelf within 200 nautical miles". In this case, he argued that "the maritime boundary on the continental shelf beyond 200 nautical miles extends along the same azimuth and up to the limit of national jurisdiction, the equidistance boundary falling below 200 nautical miles". Thus, "under international law, the estoppel rule prevents Côte d'Ivoire, because of the positions it has taken and to which Ghana has relied, to challenge the accepted maritime boundary". For Ghana, in essence it is not a matter of maritime delimitation, but more exactly of a request in recognition of the existence of a frontier. Adding that "[i]t is only in the alternative (...) that Ghana requests the Chamber

to proceed with the delimitation of the maritime boundary"<sup>20</sup>.

It is in this instance that it takes "the terminal point of the terrestrial boundary as the starting point of the accepted maritime boundary. It is located at Boundary Marker No. 55. "In accordance with the agreement reached by the Parties in December 2013, Boundary Marker No. 55 has the following geographic coordinates: 05 ° 05 '28.4" N latitude and 03 ° 06 '21.8 "west longitude". As such, for him "the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean begins at marker No. 55, joined, at the outer limit of the territorial sea, the customary boundary based on the equidistance and mutually accepted by the Parties, then follows the course of the accepted boundary to 200 nautical miles. Beyond 200 nautical miles, the boundary extends along the same azimuth to the limit of national jurisdiction.

With regard to this incise of Ghana, Côte d'Ivoire, it is noted in the Special Chamber that this is "an abrupt redefinition of the dispute, no longer talking about the delimitation of the maritime boundary with the Côte d'Ivoire, but the "demarcation" of it, hoping to convince the House that the border has already been defined by agreement of the Parties. For her, therefore, "the Chamber could only do" a real delineation of solving the problem of overlapping claims by drawing a line of separation between the maritime areas concerned ". In so doing, she considered that "Ghana's conduct in the disputed area of the continental shelf was contrary to international law, the Convention and the Provisional Order Order of 25 April 2015"<sup>21</sup>. Basically Côte d'Ivoire invited the Special Chamber to "reject all claims and claims of Ghana and to say and judge that the single maritime boundary between Ghana and Côte d'Ivoire follows the 168.7 azimuth line. ° from point 55 and extending to the outer limit of the Ivorian continental shelf ". Thus, to consider and "to hold that the activities unilaterally undertaken by Ghana in the Ivorian maritime area, as defined by the Chamber, constitute a violation of the exclusive sovereign rights of Côte d'Ivoire on its continental shelf (...)

## III. From the Principle of Maritime Delimitation by Agreement

In the law of maritime delimitation the principle is that all delimitation must be effected by agreement. This is an existing principle "from the beginning" of an "opinio juris" on which States had agreed that even the ICJ had recognized in its 1969 judgment also of a principle which falls under "customary law", which is "of general application" and "valid (...) with respect to all the States" whatever the kind of maritime delimitation to be operated. In the United Nations Convention on the Law of the Sea of 29 April 1958 this principle was based on Article 12 (1) with regard to the contiguous zone. He stated that "when the coasts of two States meet or are bordering on each other, none of these States is entitled, in the absence of an agreement to the contrary between them, to extend its territorial sea beyond the median line. (...)"

<sup>19</sup>T.I.D.M., Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan atlantique (Ghana/Côte d'Ivoire), 2017, arrêt, pars. 6 et 7, p. 10

<sup>20</sup>Ghana/Côte d'Ivoire, Op. cit., p.29, par 69.

<sup>21</sup>Ghana/Côte d'Ivoire, Op.cit., pp.30-31, pars. 71-72.

In the United Nations Convention on the Law of the Sea of 1982, the principle is reflected in Articles 74 and 82 as regards the delimitation of the EEZ and the shelf between States whose coasts are adjacent to or opposite one another. They stipulate that their delimitation "shall be effected by agreement in accordance with international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution (...)". Logically reading this principle through these two conventional sources<sup>22</sup> of the law of the sea, we can see that the negotiators of the 1982 Convention have been caught up in the innovative idea of simply abandoning the use of any practice maritime delimitation methods in order to consider only an accomplishment that is carried out "in accordance with international law" in order to "achieve a fair solution" as the focal point of any delimitation.

Technically, one would think that this prediction was limited to "stating a norm"<sup>23</sup>, which moreover does not even belong to the *ius cogens*<sup>24</sup>, leaving to States the great and good care "to give it a precise content"<sup>25</sup>. However, from an in-depth reading, it emerges from the economy of the articles of the CNDM of 1982 that referring to Article 38 of the Statute of the International Court of Justice, its drafters referred more or less in their minds something other than moving towards jurisprudence as "an auxiliary means of determining the law". It is in this instance that the "judicial *acquis*"<sup>26</sup> resulting from all the case law relating to maritime delimitation law has been able to compensate for the "delicate balance between equity and law"<sup>27</sup> in that, beyond To be considered only in terms of the "equitable solution" as the culmination of any delimitation, equity has, moreover, also enabled "States to have a clear idea of what they can or should accept in the world 'delimitation agreement"<sup>28</sup>.

From this evidence we will no longer be worried about the attitude that States will have to take once the maritime delimitation agreement is reached. Already that it weighs on them no constraint, they are simply invited to do freely. On this basis, therefore, they must consider equitably the orientation of the boundary lines which will delimit their territories in accordance with international law. Once done neither of the parties is allowed to challenge it on the sole ground that it no longer finds equitable. This is said

<sup>22</sup> With regard to sources in the law of the sea, Article 38 of the Statute of the International Court of Justice gives the full list. And between them no hierarchy is established.

<sup>23</sup> Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C. I.J. Recueil 1985, p.30, par. 28.

<sup>24</sup> Voir à ce sujet Weil. P., *Perspective du droit de la délimitation maritime*, Paris, Pédone, 1988, pp.120-121, *Caffish. L.*, « la délimitation des espaces marins entre Etats dont les côtes se font face ou sont adjacentes » in, *Traité du Nouveau droit de la mer*, Paris/Bruxelles, éd. Economica/Bruylant, 1985, p. 484, Voir aussi, *Délimitation maritime dans la région située entre le Groenland et Jan Mayen*, arrêt, C. I.J. Recueil 1993, Opinion individuelle du juge Oda, 1993, p. 109, par. 68.

<sup>25</sup> Jamahiriya arabe libyenne/Malte, Op.cit., p.30, par. 28.

<sup>26</sup> Bangladesh/Myanmar, Op.cit., par. 339.

<sup>27</sup> Pellet. A. et Samson. B., « la délimitation des espaces marins » in, *Traité de droit international de la mer*, éd. Pédone, 2017, pp.565-623, 577.

<sup>28</sup> Mühlendahl. P. V., *L'équidistance dans la délimitation des frontières maritimes*, Paris, éd. Pédone, 2016, p.176.

otherwise also when "a delimitation of the continental shelf which a State establishes unilaterally, without regard to the views of the other State or States concerned by the delimitation, is unenforceable against them in international law. The same principle also entails the application of the related rules providing for the obligation to negotiate with a view to the achievement of an agreement, and to negotiate in good faith, with the real intention of achieving a positive result ". From this it follows that in terms of maritime delimitation consensualism is a compulsory principle "between the States concerned" whatever the delimitation. It operates "either by the conclusion of a direct agreement, or possibly by a substitution route, but always having a consensual basis"<sup>29</sup>.

#### IV. from the Tacit Agreement to Maritime Delimitation Law

Quite the opposite of what has just been developed, it must be held that one can not speak of tacit agreement in delimitation law only in the absence of an obligation between the Parties conventional law. To make it operable, we must be confronted with a situation constituted by a set of factors, which could, apart from any formal act creating rules or establishing special relations of international law, be able to be at the same time origin of an obligation. It is a question of "an agreement which is deduced from a behavior and which does not result from an express meeting of wills"<sup>30</sup>.

From this, it is clear that when this question appears in the debate, it essentially arises to verify between the parties whether the conduct they observed "during a given period of their reports would not have led to the one of them an acquiescence in the application to the delimitation of a specific method advocated by the other Party, or a foreclosure as to the possibility of opposing it, or as to whether that conduct would not have taken place the effect of establishing around a line corresponding to such application a *modus vivendi* respected in fact "<sup>31</sup>. This, when the parties do not agree on the actual scope of the guidance lines and relevant circumstances to consider. In the entire history of delimitation law, there are only a few cases that inform the inclusion of the Tacit Agreement to guide the segments. Not because it is less important but more because in these, the parties have offered the judge substantial bases for their agreement. This is the case of Guyana / Suriname<sup>32</sup> and Peru / Chile<sup>33</sup>.

#### V. Assessment of the question of the tacit agreement between Ghana and Côte d'Ivoire

Between Ghana and Côte d'Ivoire it was obvious that there was no question about any agreement that would have been concluded either by them or by their respective<sup>34</sup> colonial

<sup>29</sup> Délimitation de la frontière maritime dans la région du golfe du Maine, arrêt, C.I.J. Recueil 1984, p. 50 par. 89

<sup>30</sup> Gauthier. P., *Conduite, accord et délimitation maritime* » in, *Droit des frontières internationales*, Paris, Pédone, 2016, p.71.

<sup>31</sup> Golfe du Maine, arrêt, *Ibid.*, pp. 61-62, par. 126.

<sup>32</sup> Guyana/Suriname p.77, par 282, p.78, par. 289, p. 83, par. 299, p. 85, par. Par. 306, p. 86, par. 306

<sup>33</sup> Pérou/Chili p.38, par. 90-91.

<sup>34</sup> Most of the cases of maritime delimitation solved in Africa were based essentially on the colonial treaty approach. This is



powers. Between them there was still less question of "arrangement of a practical nature". But one of the parties, Ghana, assumed the existence of a tacit agreement that was to form the basis of the equidistance line to extract coasts<sup>35</sup> to separate the two sovereignties, which Côte d'Ivoire contested.

To substantiate this argument, it was clear from Ghana that the two Parties agreed on the application of the "equidistance principle" as the equitable method of delimiting their maritime boundary and that the border they recognized and respected for more than five decades (from 1957 to 2009) followed the line "customary border based on equidistance" which began at the terminal point of the land border, at marker 55. In his opinion, this line reflected the "Tacit agreement" between the two parties, which justified the existence of a maritime boundary. That is why he supported the simplification of the workload of the Special Chamber in that it was sufficient "to confirm that the customary boundary based on equidistance is indeed the maritime boundary between the Parties"<sup>36</sup>. In fact, Ghana deduces from this reality the existence of an agreement that stems from a "pre-existing" maritime boundary, resulting from "mutual and constant recognition and acceptance" noted "for many decades" on the whole maritime area covered by the present proceedings, namely the territorial sea, the exclusive economic zone and the continental shelf, both within and beyond 200 nautical miles, as can be seen from the presented to the Special Chamber"<sup>37</sup>.

This conception of the frontier line had not, in fact, met the whole consideration of Côte d'Ivoire. Already at the grassroots level, it alleged the "absence of express or tacit agreement on the delimitation of the maritime boundary" and it was necessary for the Parties to proceed a second time to the delimitation of the latter. For Côte d'Ivoire, it is not possible to find in this testimony "the elements of a present and positive promise to make a concession whose essential conditions would be sufficiently determined"<sup>38</sup>. At the understanding of Côte d'Ivoire, the arguments put forward by Ghana are neither more nor less than a dilatory one "to try to establish the existence of a tacit agreement on a common maritime border" without consequent assizes in law. It demonstrates this by pointing out as evidence in support, "the official recognition by the two States of the absence of delimitation of a common maritime boundary and its systematic refusal to recognize the western boundary of Ghana's oil concessions as a frontier. It further alleges that it has consistently demonstrated its willingness to reach an

particularly the case Nigeria / Cameroon, Guinea / Guinea-Bissau, Guinea / Senegal

<sup>35</sup> The practice of maritime delimitation "shows that to date a considerable number of delimitations of continental shelves have been made by the application of either the equidistance method or, quite frequently, by some variant of this method". See *Arbitral Award in the Iroise Sea, 1977, United Kingdom / France*, p. 182, para. 85.

<sup>36</sup> *Ghana/Côte d'Ivoire, Op.cit.*, p. 35, par. 102.

<sup>37</sup> *Ibid.*, p.38, par.111.

<sup>38</sup> C.P.I.J. R. S. A., *Arbitrage entre l'Allemagne et le Royaume-Uni concernant l'île de Lamu 17 August 1889 – 17 août 1889* VOLUME XXVIII pp. 237-248, p. 243.

agreement on the maritime boundary between the Parties through negotiations and has regularly opposed the Ghanaian oil practice interfering with such an agreement"<sup>39</sup>.

To counter this position, Ghana, in addition to its first plea, referred to "the many pieces of evidence it has produced such as concession contracts, presidential decrees, laws, correspondence, maps, public statements, statements to international organizations and oil companies and the cooperation practice of the two states"<sup>40</sup>. To these, Côte d'Ivoire opposed a series of elements that showed his disagreement on the border. She drew particular attention to the Special Chamber's consideration of the two events that occurred in 1988 and 1992 and the negotiations that took place between the Parties from 2008 to 2014 to clearly demonstrate the absence of a tacit agreement between the two states.

## VI. Special Chamber's position on the difference of opinion as to the existence or otherwise of the tacit agreement between the Parties

At its base, the Special Chamber is in line with the constant jurisprudence of both the Court and the international courts, which in more than one case examined, have never given to the petroleum practice a particular treatment to the tacit agreement by compared to the oil practice. More radically, it has moreover considered that, except for the case where it is proved "the existence of an express or tacit agreement between the parties on the location of their respective oil concessions" which indicates "a consensus on the maritime areas to which they are entitled [because, indeed,] oil concessions and oil wells cannot in themselves be considered as relevant circumstances justifying the adjustment or displacement of the delimitation line"<sup>41</sup>. In particular, it held that "the existence of such an agreement must first be proven in order for the oil concessions to usefully support the evidence of the existence of a maritime boundary"<sup>42</sup>. In these types of circumstances, one cannot support a right to obtain for a route on the fact of any pre-existence.

In the *Grisbadarna* case cited in the *Gulf of Maine* case, the Court gives an important character to the conduct of a State which must, indeed, be "sufficiently clear"<sup>43</sup>, consistent and persistent to constitute acquiescence", especially when one finds in the part of a party an "uncertain character"<sup>44</sup> compared to the fact that one opposes him. Because to acquiesce in order to attach any role to it and to recognize it as having an effect in law, the Court generally relies on "express declarations (...) and on behavior that has lasted for a very long time, which is not the case in this case"<sup>45</sup>. Most importantly, in the practice of both States it must be possible 'to detect on one side or the other a type of behavior sufficiently clear to constitute either an acquiescence or a useful indication of the views of one of the Parties on an

<sup>39</sup> T.I.D.M., *Ghana/Côte d'Ivoire, Op.cit.*, pp. 35-36, par.103.

<sup>40</sup> *Ibid.*, par.105.

<sup>41</sup> *Cameroun/Nigéria, Op.cit.*, pp. 447-448, par. 304.

<sup>42</sup> *Ghana/Côte d'Ivoire, Op.cit.*, par. 119.

<sup>43</sup> *Golfe du Maine, Op.cit.*, p.319, par. 146.

<sup>44</sup> *Ibid.*, p.319, par. 146.

<sup>45</sup> *Ibid.*, p.310, par. 147.

equitable solution that differs significantly from the arguments put forward by the same party before the Court. The Court must therefore rule by applying the principles and rules of international law to the conclusions submitted to it<sup>46</sup>.

It is in this same context that in the case of Guyana / Suriname, it was considered that the behavior of States, in terms of oil and gas concessions so that it constitutes a relevant circumstance, it must "be deduced from cross-behaviors the two States parties to the dispute the constitution of a tacit agreement"<sup>47</sup>. Better still, the conduct should be "mutual, sustained, consistent, and unequivocal"<sup>48</sup>. Since this fact was not found, it was therefore justifiable that the Special Chamber had "doubts" to ascertain, in this case, that the practice relating to petroleum activities was sufficient to "establish the existence of a maritime boundary unique in the territorial sea, in the exclusive economic zone and on the continental shelf, both below and beyond 200 nautical miles"<sup>49</sup>. In fact, "the international jurisprudence on maritime delimitation [which] recognizes with the greatest reserve the relevance of State practice in the field of petroleum"<sup>50</sup>, especially if it is not followed by express agreement. This reality was palpable in Barbados / Trinidad and Tobago<sup>51</sup>.

It is for the same fact that in the case of a line to be deduced from an oil concession, not only that "it cannot be presumed" but also that we cannot rely on any signs or to symbolic inferences to conclude on a "mutual recognition of the customary boundary"<sup>52</sup>, the act to be tangible to the risk that this be constituted in the sum of "invasive activities"<sup>53</sup>. This is affirmed by the yardstick laid down by the Court in Nicaragua / Honduras, according to which: "the evidence of the existence of a tacit agreement must be convincing, the establishment of a permanent maritime boundary [being] a matter of great importance"<sup>54</sup>. This was even valid in the case of Bangladesh / Myanmar, where the Tribunal rejected "the evidence presented by Bangladesh because it did not prove the existence of a tacit agreement"<sup>55</sup>.

In the Libya / Malta case, the Court gave an overturning on this same fact by stating that "a delimitation must not be influenced by the relative economic situation of the two States concerned" which are concerned with a delimitation. These are "considerations" that are totally foreign to the intent underlying the applicable rules of international law. It is clear that neither the rules which determine the validity of

the legal title on the continental shelf nor those which relate to the delimitation between neighboring countries place any reference to the economic development considerations of the States<sup>56</sup> concerned to any delimitation.

As "the existence of oil concession lines between adjacent states is not in itself sufficient to demonstrate the existence of a maritime boundary (...)" and to avoid prejudging by thinking that it is a question of "An act of caution and precaution" or "an act of restraint aimed at avoiding a conflict with a neighbor", the acts of the negotiations are often a way out also to discover the depths of the actors' thoughts concerned with an argument. Using it allows, with some ease, to establish "a distinction between oil concessions and the international maritime boundary line separating the maritime areas to which they each had a right"<sup>57</sup>, the better the real scope of the desired line.

One can find in this case that the approach of the acts of the negotiations could prove that they were an additional proof to show that the petroleum practice had received no acquiescence. It is true that, apparently, the exhibits produced by Ghana prove an alignment of the oil concession blocks owned by each of the two parties, which demarcates the equidistance line supported by Ghana. In reading the behavior of each Party it is also found that each of them appeared to observe this "equidistance line" because of having confined their oil activities on either side of that line, especially "that neither the neither has attempted to carry out oil activities on the other side of [that] line" already that each of the Parties had to first ask for and obtain the "authorization" of the other before crossing it. Just by looking at this fact, one could well be in a bad way if one should ignore the line in question, so much that it releases "obviously a certain importance for the Parties for the needs of their petroleum activities"<sup>58</sup>.

However, taking the facts through their evolution, it turns out that in this situation this attitude does not know how to be taken into account and is therefore irrelevant since there is in the acts of the negotiations the clear evidence of disapproval made by Côte d'Ivoire, even if it seems "insufficient" in its consistency. For such cases, in law, the fact of existing already suffices amply to contain a contrary claim. In fact, the constant shows that when the question arises in the debate, these objections "must be taken into account for the purpose of assessing the practice related to the petroleum activities of the Parties to determine whether this practice demonstrates the existence of a tacit agreement or the formation of such an agreement". By taking such a precaution, the Special Chamber, through such a means, "adopts great caution as to a presumption of the agreement on delimitation" especially that no act that endorses the wishes of the Parties exists materially. Already the fact that the bilateral exchanges "took place is significant because it shows that the Parties have recognized the need to delimit the maritime boundary that separates them"<sup>59</sup>.

<sup>46</sup>Jamahiriyah arabe libyenne/Malte, Op.cit., p. 29, par.25.

<sup>47</sup>Voir. Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam, Sentence du 17 septembre 2007, pars 197, 216 et 230.

<sup>48</sup>Ibid., § 233.

<sup>49</sup>Ghana/Côte d'Ivoire, Ibid., par.149

<sup>50</sup>Guyane/Suriname, Op.cit., § 390

<sup>51</sup>Voir. *Arbitrage entre la Barbade et la République de Trinité-et-Tobago, relatif à la délimitation de la zone économique exclusive et du plateau continental entre ces deux pays, décision du 11 avril 2006, Recueil des sentences arbitrales, vol. XXVII, 2006, par. 107.*

<sup>52</sup>Ibid., par. 118.

<sup>53</sup>Ibid., par. 147.

<sup>54</sup>Ibid., par. 253, p. 735.

<sup>55</sup>C.I.J., Bangladesh/Myanmar, Op.cit., par.118, p. 45.

<sup>56</sup>Jamahiriyah arabe libyenne/Malte, Op.cit., p. 41, par. 50.

<sup>57</sup>Ghana/Côte d'Ivoire, Op.cit, p. 41, pars.120 et 122

<sup>58</sup>Ibid., p.46, par. 146.

<sup>59</sup>Ghana/Côte d'Ivoire, Op.cit, p.73, par.221.

In this particular case, "the subsequent bilateral negotiations within the Maritime Boundary Commission, that is, from 2008 to 2014, confirm that the Parties recognized the absence of maritime border between them"<sup>60</sup>. In addition, it is also in this interval that "Ghana presented for the first time its argument on the tacit agreement" for the first time without it received favorable feedback by the other Party. In this hypothesis, it is difficult to induce in the option of an existing border especially when one notes that in the two joint communiqués issued by the Presidents of Ghana and Côte d'Ivoire on November 4, 2009 and May 11, 2015 there is reference to the future conclusion of a maritime boundary agreement. Consequently, the fact that basically identical communiqués have been published on the same question is enough to ensure the absence of any such agreement between the two States on the delimitation of their maritime boundary in the territorial sea, in the exclusive economic zone and on the continental shelf, within and beyond 200 nautical miles<sup>61</sup>.

Secondly, "with regard to the bilateral negotiations held from 2008 to 2014, the Special Chamber, while noting in this respect that" it was during these meetings that the Parties engaged in a substantive debate on what should be to be the appropriate method for delimiting their maritime areas, "she also notes that" it was only in 2011 that Ghana presented for the first time its argument regarding the tacit agreement ". In fact, this is not enough to convince that "the purpose of the bilateral negotiations was simply to formalize a maritime boundary tacitly accepted by the Parties" p. 64, para.191. That, moreover, even in this period that the need for a tacit agreement was presented for the first time without receiving favorable feedback from the other Party.

## 2. Conclusion

In the case of the Ghana / Côte d'Ivoire delimitation, the Special Chamber has remained faithful to the legal constant, the "standard of proof" "required to characterize the existence of a tacit agreement to delimit a maritime boundary"<sup>62</sup>. It is indeed a charge that "is incumbent upon the State which invokes its existence"<sup>63</sup> already that "the conditions of its recognition are" strict "<sup>64</sup>and that the marks of proof must be" convincing ". Therefore, even though there may be tacit agreements as well, they should nevertheless be confirmed by a written act as was the case in the case of the Peru / Chile Maritime Dispute for that is really opposable. In this field, indeed, "the oil practice, however constant it may be, is not sufficient in itself to establish the existence of a tacit agreement on a maritime boundary", and even the time, long is it. "Consequently, demonstrating the existence of a long-standing oil practice or contiguous oil concessions is not enough to prove the existence of a maritime boundary"<sup>65</sup>. It is in this very sense that "the mere fact of using the term" maritime boundary "does not prove the existence of an" accepted "maritime

boundary more than a map in which a line is represented somehow "<sup>66</sup>.

On the question it may also be held that "(...) the evidence relating solely to the conduct of oil activities on the seabed and in their subsoil is of limited value in proving the existence of a general boundary which delimits not only the seabed and its subsoil but also the overlying water columns "<sup>67</sup>. Also, "given the general purpose of the maritime boundary [...], the evidence relating to [oil or even fishing] activities cannot, in it, is decisive with regard to the extent of this border"<sup>68</sup>. It is basically on the basis of the foregoing that the Special Chamber has concluded that there is no tacit agreement between the Parties which delimits their territorial sea, their exclusive economic zone and their continental shelf, both below and beyond the limit of 200 nautical miles "<sup>69</sup>. In sum, based on the same international jurisprudence, "which has always been very demanding in this area that the Special Chamber has considered that the oil activities deployed by each of the two states on both sides equidistance line could not be sufficient to prove the existence of a maritime boundary, all the more so since, in the present case, that boundary was intended to delimit not only the seabed and soils, but the overlying water columns "<sup>70</sup>. With such an orientation it made impossible to meet the argument of estoppel which was corroborated on the same foundations.

## References

- [1] R. S. A., Arbitrage entre l'Allemagne et le Royaume-Uni, concernant l'île de Lamu, 17 August 1889 – 17 août 1889, VOLUME XXVIII.
- [2] CIJ, Affaires du Plateau continental de la mer du Nord (République fédérale d'Allemagne/ Danemark; République fédérale d'Allemagne/Pays-Bas), arrêt du 20 février 2009, Recueil, 1969.
- [3] CIJ, Affaire du plateau continental (Jamahiriya arabe libyenne/Malte), arrêt du 3 juin 1985.
- [4] CIJ, Affaire de la délimitation du plateau continental entre le Royaume Uni, la république d'Irlande du Nord et la République française, Décision du 30 juin 1977
- [5] Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam, Sentence du 17 septembre 2007
- [6] CIJ, Affaire du temple du Préah-Vihéar (Cambodge/ Thaïlande), fond, arrêt du 15 juin 1962, Recueil 1962
- [7] TIDM, Différend relatif à la délimitation maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique, arrêt du 23 septembre 2017, Recueil 2017.
- [8] CIJ, Affaire des Essais nucléaires (Australie/France), arrêt du 20 décembre 1974, Recueil 1974

<sup>66</sup>Ibid., par.218.

<sup>67</sup>Ibid., par.226

<sup>68</sup>Voir. Différend maritime (Pérou c. Chili), arrêt, C.I.J. Recueil 2014, p. 45, par. 111

<sup>69</sup>Ibid., par.228.

<sup>70</sup>ValérieBoré EVENO. "The decision of the Special Chamber of the ITLOS in the dispute over the delimitation of the maritime boundary between Ghana and Côte d'Ivoire, Center for Maritime and Oceanic Law, EA No. 1165, online, accessed on April 13, 2018 at 12:40 pm

<sup>60</sup>Ibid., par.222

<sup>61</sup>Ibid., p. 63, par. 192.

<sup>62</sup>Ghana/Côte d'Ivoire, Op.cit, p.68, 206

<sup>63</sup>Ibid., p.68, par. 204

<sup>64</sup>Ibid., p. 68, par. 204

<sup>65</sup>Ibid., par. 215.

- [9] CIJ, Affaire du plateau continental de la mer Egée (Turquie/Grèce), arrêt du 19 décembre 1978, Recueil 1978
- [10] CIJ, RSA, Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau, Sentence arbitrale du 14 février 1985
- [11] CIJ, affaire de la délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark/Norvège), arrêt du 4 juin 1993, Recueil 1993.
- [12] CIJ, Oda, opinion dissidente jointe dans l'affaire relative du plateau continental Tunisie/Jamahiriya arabe libyenne, 1982.
- [13] CIJ, affaire de la frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant), arrêt du 10 octobre 2002
- [14] CIJ, RSA, Arbitrage entre la Barbade et la République de Trinité-et-Tobago, relatif à la délimitation de la zone économique exclusive et du plateau continental entre ces deux pays, R.S.A, Vol. XXVII, sentence arbitrale du 11 avril 2006, Recueil 2006.
- [15] CIJ, Affaire de la délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt du 12 octobre 198
- [16] TIDM, Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar) arrêt du 14 mars 2012
- [17] CIJ, RSA, Argentine/Chili, frontière case, R.S.A, volume XVI, Arrêt du 9 décembre 1966.
- [18] Cazala Julien., « Retour sur les méthodes de délimitation juridictionnelle d'espaces maritimes mises en œuvre dans quelques affaires récentes » in, *Annuaire français de droit international*, volume 54, 2008.
- [19] Caflish. L., « la délimitation des espaces marins entre Etats dont les côtes se font face ou sont adjacentes » in, *Traité du Nouveau droit de la mer*, Paris/Bruxelles, éd. Economica/Bruylant, 1985.
- [20] Distefano. G., « L'accord tacite ou l'univers parallèle du droit des traités » in, *QIL-QDI*, zoom-in (2015).
- [21] Edynak. E., « L'exécution des décisions de la Cour internationale de justice en matière de délimitation maritime », in, *Les Annales de droit*, [En ligne], 7 | 2013, mis en ligne le 03 mai 2018, consulté le 03 juin 2018. URL : <http://journals.openedition.org/add/801> ; DOI : 10.4000/add.801,Varia.
- [22] Gauthier. P., Conduite, accord et délimitation maritime » in, *Droit des frontières internationales*, Paris, Pédone, 2016.
- [23] Kamga. M., *Délimitation maritime sur la côte Atlantique africaine*, Bruxelles, éd. Bruylant, 2006.
- [24] Lucchini. L. et M. Voelckel, *Droit de la mer, (Tome 2, vol. 1, Délimitation)*, Pédone, Paris, 1996.
- [25] Mühlendahl. P. V., *L'équidistance dans la délimitation des frontières maritimes*, Paris, éd. Pédone, 2016.
- [26] Pellet. A. et Samson. B., « la délimitation des espaces marins » in, *Traité de droit international de la mer*, éd. Pédone, 2017.
- [27] Salmon. J., *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001.
- [28] Valérie Boré EVENO. « L'arrêt de la chambre spéciale su TIDM dans l'affaire du différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire, centre de droit maritime et océanique, EA n°1165, en ligne.
- [29] Vincent. P. *Droit de la mer*, Bruxelles, éd. Larcier, 2008.
- [30] Weil. P., *Perspective du droit de la délimitation maritime*, Paris, Pédone, 1988.