

**1981 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION**

JUDGES' BENCH MEMORANDUM

Not to be seen by student participants

c 1980 ASIL, ASILS

1981 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION
JUDGES BENCH MEMORANDUM

THE REPUBLIC OF NEW GHANA

V.

THE REPUBLIC OF NEW TOGO

I. Introduction

It is the purpose of this bench memorandum to familiarize the judges in the 1981 Philip C. Jessup International Law Moot Court Competition with the issues likely to be raised by this year's case. No attempt is made to resolve the issues, nor is there an attempt to identify more than the prime sources of law on the subject.

The instant problem involves a dispute between two countries over the location of the boundary dividing their continental shelves. The International Court of Justice (ICJ) is called upon to identify the legal principles applicable to the resolution of the boundary dispute and to actually delimit the boundary between these states. All coastal states have jurisdiction over the living and non living resources of their continental shelves. The continental shelf regime begins at the limit of the territorial sea (12 miles for the parties to this case) and extends seaward at least to the limit of the geologic continental shelf, if not somewhat further. The exact limit of the continental shelf regime is not settled at this time.

Public international law applicable to continental shelf boundary delimitations does not require the rigorous application of any specific system of delimitation. Although the principle of equidistance is arguably a preferred

method of delimitation, substantial support can be found for the consideration of large numbers of factors which should be balanced in the course of developing the appropriate line. The main arguments will focus on the balancing of the relevant factors and the appropriateness of the equidistance principle in the instant case.

The delimitation issues raised by this problem have been the subject of two major international adjudications, The North Sea Cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands, [1969] ICJ Rep. 3), and the Anglo-French Arbitration (The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977 reprinted in 18 I.L.M. 398 (1979)). The North Sea Cases required the ICJ to identify the principles of law to be used in the delimitation of continental shelf boundaries in the North Sea. That decision is summarized at 63 A.J.I.L. 591 (1979). The Anglo-French Arbitration required the arbitrators to actually delimit the boundary between France and the United Kingdom in the English Channel and the Atlantic Ocean to the west. The arbitrators' statement of the law generally conformed to the opinion in the North Sea Cases. Their contribution related to the methods used to produce an actual boundary line. That arbitral decision is summarized in D. Colson, The United Kingdom-France Continental Shelf Arbitration, 72 A.J.I.L. 95 (1978). These principles were also applied in a series of controversies involving the coastal states of the United States. See, J. Charney, The Delimitation of Lateral Seward Boundaries in a Domestic Context, 75 A.J.I.L. ____ (1981).

In addition to the cases on the subject, the Convention on the Continental Shelf (15 U.S.T. 471, TIAS No. 5578, 499 UNTS 311 (Into force June 10, 1964), the most recent text produced by the on going Third United Nations Conference on the Law of the Sea (UNCLOS III) (Draft Convention on the Law of the Sea (Informal

Text), U.N. Doc. A/Conf. 62/WP. 10/Rev. 3 (August 2, 1980)) and international practice are principal sources of law on this subject.

This memorandum discusses the issues raised by this problem in four parts: (1) The preliminary procedural issues, (2) the location of the territorial sea boundary between the parties, (3) the location of the continental shelf boundary between the parties and (4) the propriety of provisional measures.

II. Preliminary Procedural Issues

The jurisdiction of the ICJ extends to "all cases which the parties refer to it . . ." (ICJ Statute Art. 36.1). The sources of law which the Court is obligated to apply is set out in Article 38 of the ICJ statute:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

While there are differences of opinion, one generally accepted statement describing the emergence of customary international law was made by Judge Manley Hudson:

"[T]he emergence of a principle or rule of customary international law would seem to require presence of the following elements:

- "(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- "(b) continuation or repetition of the practice over a considerable period of time;

- "(c) conception that the practice is required by, or consistent with, prevailing international law; and
- "(d) general acquiescence in the practice by other States."

(March 3, 1950, ILC Yearbook 1950 II, 24, 26.)

The *compromis* contains a consent by both parties to the jurisdiction of the ICJ and the Court is competent to decide the issues between these states. There is one question which might arise as a preliminary matter or in the course of the discussion of the delimitation question. New Togo might argue that a decision in the instant case could have an impact on the continental shelf rights of New Benin and Nigeria or could so limit the size of the New Togo continental shelf that the boundary agreement between New Togo and New Benin would become inequitable. They might go further and argue that the geographical context of this boundary issue requires the joinder of all states in the region due to the concave nature of the coastline; New Benin and Nigeria ought to be required to join the litigation before the case proceeds. New Ghana may rebut those arguments by relying on the *compromis* as a waiver of any such objection. Furthermore, the Court's decision would only be binding on the parties to the case and would certainly not bind New Benin and Nigeria (ICJ Statute Art. 59). The problem with this position is that a decision favoring New Ghana may have the net effect of leaving a very small area of continental shelf to New Togo. See the area north of the dotted line and west of the dashed New Togo-New Benin line on Map III.

The ICJ Statute does permit a non party to seek intervention (ICJ Statute Art. 52). Neither the ICJ Statute nor the Court Rules, however, address the compulsory joinder of parties, and there is precious little other international law on the subject. In the Case of the Monetary Gold Removal from Rome, 1943 ICJ Rep. 1954, p. 19 at 32, the ICJ did refuse to adjudicate a claim where it was found that the legal interest of the state not a party to the case was "the very subject matter of the decision." Further support for this principle might be drawn from general

principles of law since it probably can be established that every domestic judicial system has some form of compulsory joinder of parties.

On the other hand, the liberal application of compulsory joinder of parties in international litigation may substantially limit the cases that may be adjudicated. Unlike domestic litigation, jurisdiction over a party is only obtainable with that party's consent. Boundary adjudications such as the instant case will usually have some connection with non party states located in the relevant geographical area. The net effect of such a compulsory joinder rule might be to preclude international adjudication of these matters. Even domestic court rules restrict the use of compulsory joinder of parties when its application will preclude litigation. See, United States Federal Rule of Civil Procedure 19(b).

III. The Boundary in the Territorial Sea

Before the continental shelf boundary can be delimited the Court will probably need to locate the boundary between the disputing states at the limit of the territorial sea since the regime of the continental shelf begins at the seaward limit of the territorial sea. Both states claim twelve mile territorial seas. While some countries still maintain that the maximum permissible breadth of the territorial sea is three miles, customary international law probably permits claims up to twelve miles. Since both countries claim the same distance the legality of those claims is unlikely to be in dispute.

A. The 1948 Agreement

The location of the boundary line through the territorial sea is in dispute. States may enter into agreements establishing their mutual boundaries in the territorial sea and the 1948 boundary agreement between France and Great Britain may constitute such an agreement.

While the compromis establishes that the agreement is binding on the parties to this case, a question arises as to its territorial coverage. The agreement

clearly establishes a boundary in the New Oti River based upon the doctrine of the thalweg. It is an ambulatory boundary which follows the middle of the main navigable channel of the river. Arguably, the agreement bound the parties and their successors to a specific line seaward of the mouth of the river. What is the geographic location of the boundary south of the point where the river meets the main coastline north of Keta Island? The agreement is ambiguous. The text states that the line proceeds "south to the Atlantic Ocean." Does that phrase establish the direction that the boundary is to take as one proceeds down the New Oti River or does it establish the direction that a boundary seaward of the mouth of the river takes until the Atlantic Ocean is reached. Arguably, the New Oti River does not open into the Atlantic Ocean. Rather, it opens into the bay or a strait created by Keta Island. The Atlantic Ocean may not be reached until one is south of the Island.

International agreements may be interpreted in light of the object and purpose of the agreement and the circumstances surrounding its negotiation. The record shows that the agreement arose out of a dispute over fishing and navigation in the New Oti River. There is no indication that areas seaward of the river were considered. Thus, it can be argued that the boundary agreement should have application only in the River. On the other hand, it is clear that navigation is difficult in the area beyond the mouth of the River. Subsequent practice (another appropriate source for interpreting international agreements) has seen the utilization of the navigable channel north of Keta Island. One object of the agreement may have been to facilitate navigation through the River and beyond it until the open waters of the Atlantic Ocean were reached. If so, support is given to the application of the 1948 Agreement beyond the River mouth.

If the agreement is to apply beyond the River mouth, a question arises as to how the agreement is to be applied. Little or no support can be found for the

ation of the thalweg doctrine to areas beyond river mouths. This doctrine was created for use in the enclosed waters of rivers and perhaps lakes. On the other hand, the water area north of Keta Island is somewhat enclosed and is of limited navigability. In the absence of a navigation route from the river to the Atlantic Ocean the export and import trade of both countries might be frustrated. If performance under a treaty is to be considered in interpreting this treaty, the marking of the navigation route by New Ghana might support the view that the thalweg is to be used in the bay north of Keta Island. The application of the thalweg principle to the area north of Keta Island would cause the boundary to be drawn close to the northern shore of Keta Island until the eastern tip of the island is reached.

Alternatively, the 1948 Agreement could be interpreted to establish a boundary line which runs south from the mouth of the River, through Keta Island until the Atlantic Ocean is reached. Since it would be stretching the agreement very far to suggest that such a line would transfer sovereignty over the eastern portion of Keta Island to New Togo, the boundary would have to be delimited only in the waters north and south of Keta Island out to the limit of the territorial sea either as of 1948 (three miles) or as of 1980 (12 miles). This might require some enclaving of Keta Island and its waters in favor of New Ghana. New Togo would then argue that the starting point for the continental shelf boundary is near the western end of Keta Island rather than at the eastern end favored by New Ghana.

B. No Agreement Outside of the New Oti River

It may be found that the 1948 Agreement does not apply beyond the mouth of the New Oti River north of Keta Island. There is no other international agreement on the subject binding on the parties. Consequently, resort must be had to general international law to locate the starting point.

A preliminary question to be raised at this point is the juridical status of the water area south of the mouth of the New Oti River and north of Keta Island. International law does not clearly establish whether that area is internal waters or territorial sea. Being outside of rivers and bays, the area is probably territorial sea out to the 12 mile limit. The argument can be made, however, that Keta Island is so closely aligned to the land domain that it should be viewed as a peninsula forming a bay to the north. If that bay were on the coast of one state, it would clearly be internal waters. (The Convention of the Territorial Sea and Contiguous Zone 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (into force September 10, 1964), Art. 7). The law applicable to bays formed by the shores of two or more states is less clear since the Convention does not apply to such cases and there are few international precedents. In all probability it will be considered territorial sea.

The designation of that area as internal waters or as territorial sea will determine which body of international boundary law is applicable. Both sets of rules use concepts of equity and other principles of fairness in light of the circumstances. The law applicable to internal waters, however, stresses the use of the thalweg principle in navigable waters. The law applicable to the territorial sea makes little or no use of that principle. In the territorial sea delimitations based on equidistance (or median) lines are more common.

The Convention on the Territorial Sea and the Contiguous Zone states a rule for delimiting boundaries through the territorial sea between opposite and adjacent states:

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the

territorial seas of the two States in a way which is at variance with this provision.

Since both states are not parties to this Convention it is not directly binding on them. An argument can be made, however, that it represents a codification of general international law. Its critics question the propriety of the apparent significance given to the use of the equidistance (median) line.

In the negotiations at the UNCLOS III there has been considerable controversy over the provision that would supplant the Convention text quoted above. The conflict is between those supporting the favored treatment of the equidistance principle and others seeking a provision that would stress equity and special circumstances.

If the Court determined that the embayment north of Keta Island is internal waters, the boundary would probably pass through that area on the thalweg and terminate at some point north of the eastern tip of the Island. If it were determined that the embayment is territorial sea and that no special circumstances or other equities existed, the median line might be used. As a consequence the line would terminate in the same area.

On the other hand, if the Court were to find the area to be territorial sea and that special circumstances or other equities existed, Keta Island might be enclaved and any of a number of lines might be constructed so that the terminal point of the territorial sea boundary would be found at a more western location (perhaps even as far west as the New Oti River and south of Keta Island. The history of the Territorial Sea Convention and general international law on the subject recognize that some islands due to their size, shape, location and impact on the boundary line may be so creative of inequities that they should be ignored or given substantially diminished influence. The location of Keta Island and the fact that it is an island can provide grounds for finding special circumstances. Keta Island is small compared to the bulk of the land occupied by New Togo. It severs

New Togo's access to the open ocean and it greatly expands the ocean frontage of New Ghana. On the other hand, it is a substantial island which is integrally related to the state of New Ghana. The Island should serve as a focus for arguments by both sides on the proper location of the terminal point for the territorial sea boundary, the delimitation of the continental shelf boundary.

Since the literature has placed no limit on the factors to be considered in a boundary delimitation, other factors may also be brought in by the parties to support their arguments. The discussion below on the continental shelf boundary will address the question whether there should be any limitation on the factors which are to be considered. Ultimately, the Court will have to establish the location of the territorial sea boundary between the states as it crosses the twelve mile territorial sea limit. That crossing point will normally be the starting point for the continental shelf delimitation which is the main object of the instant litigation.

IV. Delimitation of the Continental Shelf Boundary

A. The Law

As in the case of the territorial sea boundary, a major subject of international dispute arises in regard to the conflict over the importance to be placed on the equidistance rule. The Convention on the Continental shelf to which only the Applicant is a party, has been considered to give a certain preference to the equidistance principle: It states:

Article 6

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

The most recent text produced by the UNCLOS III is seen by some as representing a more balanced approach:

Article 83
Delimitation of the continental shelf between States with
opposite or adjacent coasts

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.

The two international cases on the subject appear to treat equidistance only as one factor under general international law although they are somewhat vague:

55. In the light of this history, and of the record generally, it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and it really remained to the end, governed by two beliefs; -- namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference or arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, -- and in pursuance of the second that it introduced the exception in favour of "special circumstances." Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable.

56. In these circumstances, it seems to the Court that the inherent contention as now put forward by Denmark and the Netherlands inverts the true order of things in point of time and that, so far from an equidistance rule having been

generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter is rather a rationalization of the former -- an ex post facto construct directed to providing a logical juristic basis for a method of delimitation propounded largely for different reasons, cartographical and other. Given also that for the reasons already set out (paragraphs 40-46) the theory cannot be said to be endowed with any quality of logical necessity either, the Court is unable to accept it.

(The North Sea Continental Shelf Cases paras 55 and 56).

68. Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and "special circumstances" as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule. This being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of special circumstances. The fact that the rule is a single rule means that the question whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, proprio motu, take cognisance when applying Article 6.

69. It also follows that the relevance of "special circumstances" in the application of Article 6 does not depend on a claim to invoke special circumstances having been advanced by the interested States when ratifying or acceding to the Convention. That this is the legal position under Article 6 is fully recognized by the United Kingdom which concedes that the French Republic may put forward a claim to "special circumstances" in these proceedings, whether or not in 1965 it made a reservation with regard to those special circumstances. Clearly, this feature of Article 6 further underlines the full liberty of the Court in appreciating the geographical and other circumstances relevant to the determination of the continental shelf boundary, and at the same time reduces the possibility of any difference in the appreciation of these circumstances under Article 6 and customary law.

(The Anglo-French Arbitration paras 68 and 69).

None of these sources is binding on the parties to this case in their international relations. Only one state is a party to the Continental Shelf Convention. The UNCLOS III text is still under negotiation and has not come into

force for any country. Since the instant states were not parties to the two cases quoted above and there is no binding precedent in international law and particularly in the ICJ (see ICJ Statute Art. 59), these materials may only be used as sources in support of arguments as to the general international law on the subject.

B. The Facts

While the legal arguments over the relative status of equidistance, equity and special circumstances might not be resolved for a long time, it may not be necessary to clearly resolve this doctrinal issue in the instant case. This case presents special circumstances and equities which would probably justify a diversion from the equidistance line even under the strictest rule. Neither party advocates the use of the true equidistance line. New Togo's due south line clearly disregards it; New Ghana's equidistance line totally ignores the impact of New Lomé Rock.

The case really involves the reconciliation of a number of factors in order to produce the appropriate line. Three considerations must be taken into account as these factors are analyzed: (1) one must determine whether it is appropriate to consider the factor at all in the course of a continental shelf boundary delimitation, (2) one must determine which state is benefited by the factor and (3) one must determine what significance should be given to that factor relative to all the others.

Since this is in actuality a balancing exercise, a premium is placed upon good organization and the creative use of the multiple factors to establish the predominance of factors favoring the side making the argument.

Fifteen factors most likely to be argued are listed below with a brief discussion:

1. The Starting Point. The starting point for this delimitation at the limit of the territorial sea has been discussed above. The choice of the starting

point defines the nature of the dispute and the range of continental shelf boundary lines which might be considered seriously. If the starting point is at the eastern end of the Keta Island embayment, New Togo will have to sustain a heavy burden in order to establish a continental shelf boundary line west of New Lomé Rock. A starting point at the western end of the Island gives maximum weight to the Island to the benefit of New Ghana.

2. Equidistance - Neither party bases its position on a pure application of the equidistance principle. There is only one true equidistance line in the instant situation; it is a line which is constructed so that every point on the line is equally distant from the coastlines of both states. Roughly speaking, this line would proceed from the mouth of the New Oti River, through the middle of the embayment north of Keta Island, then it would swing south and then west to cross half way between New Lomé Rock and Keta Island; it would then proceed seaward in a southerly direction on an axis one half the way between New Lomé Rock and the mainland promontory 40 miles to the east. A party might argue that this line should be the starting point for any analysis of the problem and that modifications should be made to the line by eliminating or modifying the influence of particular geographical factors (such as the two islands in question). There is precedent for such modifications of the equidistance line in the Anglo-French Arbitration; there the equidistance line was modified through a manipulation of the Scilly Islands, small islands located some distance from the south western coast of England.

3. The Geographical Context - A very different perspective on the dispute is created depending on the geographical context in which the dispute is couched. Is it merely a bilateral issue such that the geographical context is the coastlines of the two countries and their land area? Is it a regional question such that the entire western shore of Africa is the relevant geographical context? A comparison of Maps I and II illustrates this point.

4. The Relative Lengths of the Coastlines - The decision in the North Sea Cases suggests that the relative lengths of the coastlines of the disputing states should be compared to the relative size of the offshore areas allocated to the states by the proposed boundaries. If the ratio of these two measurements is not roughly comparable, adjustments in the boundary line might be appropriate. The methods used to measure the coastlines and the offshore areas may be in dispute. Should the entire coastline of both states be considered or should only a portion of each be measured? How far seaward should the area measurements be made? What seabed areas to the east and the the west should be measured?

5. Keta Island - As discussed above, the influence of Keta Island on the boundary line can be substantial. Is it a special circumstance? Does it create inequities in light of the land mass of New Togo and New Ghana? Is it an island or really part of the mainland? Its geological origins, its geographical situation and its usage will be important factors. New Togo will argue that it should be ignored or be given little influence on the boundary location. New Ghana will argue the opposite. The concept of enclaving might be argued by New Togo. An artificial boundary line would be drawn around the Island in order to give it some territorial sea or even continental shelf. The main delimitation of the continental shelf line would be drawn independent of that enclave and the island. Reference might be made to the enclaving of the Channel Islands used in the Anglo-French Arbitration.

6. New Lomé Rock - as a bona fide island (above water at mean high tide) it would normally affect the delimitation of the continental shelf boundary line particularly if the equidistance line were to be used. New Ghana will certainly argue that its size, distance from shore, uninhabitability and separation from the mainland state, require the Court to give it little or no significance in the delimitation. They will compare it to the Scilly Islands situation in the Anglo-French Case which were discounted in the delimitation. New Togo will stress its

territorial jurisdiction and historical usage as well as the island's location directly south of the mainland of New Togo. Unlike Keta Island, New Lomé Rock does not cut off the open ocean access of a foreign state.

7. Roadstead - While the Roadstead does not establish territorial jurisdiction or the basis for a boundary delimitation, the historical existence of the New Ghana Roadstead may form a basis for argument that New Togo recognized the stronger ties which New Ghana had to that area. New Togo's use of the Roadstead, after seeking permission, may indicate an acceptance of New Ghana's predominant interest in that area. As a consequence, it can be argued that a boundary to the east of the Roadstead is more in keeping with historic usage and the conception that the area appertains to New Ghana.

8. Axim Block - The existence of hydrocarbons in this area is one of the primary causes of this litigation. The 1973 exploration under the auspices of New Ghana, the publicity given to that activity and the seeming acquiescence in that activity by New Togo might support New Ghana's argument. This activity did constitute an exercise of the coastal state's rights in the continental shelf. Whether the five year period between the commencement of the activities and the issuance of New Togo's protest could be sufficient to create prescriptive rights in the area in favor of New Ghana is questionable. The proximity of the Block to New Lomé Rock and its location on the New Togo side of the true equidistance line are arguments worthy of consideration. The Block lies directly south of the mouth of the New Oti River such that a due south line from the New Oti River would split the Block. While such a split might appear equitable, there is judicial language which favors preserving the unity of deposits.

9. The Salt Dome - The existence of a salt dome indicates that hydrocarbons might be present. The unity of deposits rule argues that the dome should be allocated to one state or another. On the other hand, it should not be assumed

that the role of the Court is to allocate resources in some fair way, the Court's obligation is to locate those portions of the continental shelf which appertain to the respective states parties. By concentrating on the role of the Court to "delimit" rather than to "allocate," the salt dome would be relegated to a position of minor importance.

10. Geology - In cases where the geological origins of the continental shelves adjacent to disputing states are significantly different, arguments can be made that the delimitation of the areas appertaining to the disputants should follow the geologic boundaries. In this case the geology of the land mass and the continental shelves of both states are identical. The ancient river bed of the New Oti River, however, provides a basis for argument that the river bed represents a significant geologic boundary which should form the basis for the delimitation. The ICJ in the North Sea Continental Shelf Case disregarded a far more significant depression, the Norwegian Trough, and the Anglo-French Arbitrators ignored another such depression in that case.

11. Natural Prolongation - The ancient river bed might form a better basis for argument by New Ghana that the bed represents the boundry of the natural prolongation of the land territoring of the disputants. Since the River is the political boundary on the land and the ancient river bed continues in the same general direction, it might be used as the basis for the continental shelf boundary. Viewed from that perspective it does represent the natural prolongation of the land territory.

New Togo would argue that the axis of the boundary between the two states is really in a north-south direction; the present river generally runs from north to the south. They may also point out that the coastlines of the states run in an east-west direction. Thus, the natural prolongation if the land domain viewed in the light of present day political boundaries and the current coastline mandates a

north-south boundary line drawn from the New Oti River mouth. New Ghana will maintain that this argument ignores the existence of Keta Island which is an appropriate source of New Ghanaan continental shelf rights in the area south and east of the Island.

12. Boundaries with Third states - New Togo may point out that its boundaries with New Benin represent a proper delimitation of New Benin's continental shelf boundaries which run in a north-south direction. Since New Benin and New Togo are similarly situated a similar north-south line should be drawn at the New Ghana boundary. Furthermore, the equities of the situation require such a north-south line if New Togo is not to be denied its equitable share of the adjacent continental shelf. (See the discussion on the joinder issue above at Section II.) New Togo might go further and point out the curvature in the coast east of New Benin which would indicate that the boundary should tend towards the west rather than towards the east as New Ghana argues. New Ghana may argue that the New Benin boundary is not binding on it and the Court should not even consider the existence of such a boundary. New Togo's mistakes ought not harm New Ghana. Furthermore, the curvature to the east has no relevance to the instant parties which have their own interest to address.

13. Economic Situation - The compromis establishes that New Togo is substantially poorer than New Ghana. The ICJ has indicated that there is no limit to the factors which could be relevant to a continental shelf boundary delimitation. Relative economic standing, however, has never been directly considered as a basis for delimitation. Arguably, New Togo's poverty is relevant. Access to Axim Block may enable New Togo to better its financial condition.

New Ghana may argue that both countries are poor and little significance should be given to the minor economic differences. It may argue that this factor ought never be considered in a boundary case. It has little relationship to the

geographical issues under consideration. Economic facts are transitory. What should the Court do if one year from now the relative economic situation of the two countries should change. Would it be a ground for a redelimitation?

14. Domestic Legislation - While domestic legislation normally has no international significance in a case such as this, an old boundary statute might support an argument based upon prescription or acquiescence. The instant statutes are too recent to be accorded such status, especially due to the timely responses by the adversaries.

15. Traditional Fishery - The traditional fishery by New Togo coastal ethnic groups in the waters adjacent to New Lomé Rock beyond the 12 mile limit may form the basis for an argument that the area should be considered to appertain to New Togo. If the case involved a delimitation of an exclusive fishing zone or an exclusive economic zone the fishery activities would clearly be relevant. On the other hand, the continental shelf delimitation only concerns resources of the continental shelf. Free swimming fish are not such resources; their use may be irrelevant to a continental shelf delimitation. The Convention on the Continental Shelf (Art. 2. 4) defines the resources of the continental shelf:

The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

While oystering is an exploitation of continental shelf resources, the harvest of free swimming fish is not.

On the other hand, it may be inappropriate to suggest that there might be two boundaries between states in the same area, one for the seabed and one for the suprajacent waters. Should both boundaries be delimited on the basis of the same factors and legal principles?

V. Provisional Measures

Paragraph 14 of the Compromis indicates that the dispute between the parties might come to a head after May 15, 1981. If the Court believes that it will not be able to render a final decision in this case by that date, it may be appropriate to consider whether provisional measures authorized by Article 41 of the ICJ Statute and Articles 73, 74 and 75 of the Rules of Court should be indicated. Recently, the Court had occasion to indicate provisional measures in the Iranian Hostages Case (Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) Request for Indication of Provisional Measures, Order, 15 December 1979, reprinted in 19 I.L.M. 139 (1980)).

The order described the function of provisional measures as follows (para. 36):

[T]he power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings. . .

If this test is met, it might be appropriate for the Court to indicate that the parties proceed on the basis of a provisional boundary line or that neither party takes actions in the disputed area.