
BEFORE THE
INTERNATIONAL COURT OF JUSTICE

TEAM NO. 3

THE REPUBLIC OF NEW GHANA,

Applicant

v.

THE REPUBLIC OF NEW TOGO,

Respondent

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.	iv
STATEMENT OF FACTS.	v
QUESTIONS PRESENTED	vi
SUMMARY OF ARGUMENT	vii
ARGUMENT AND AUTHORITIES	
I. USE OF THE EQUIDISTANCE LINE TO DELIMIT THE LATERAL BOUNDARY BETWEEN THE CONTINENTAL SHELVES OF NEW GHANA AND NEW TOGO IS NOT OBLIGATORY UNDER INTER- NATIONAL LAW.	1
II. EVEN IF THE EQUIDISTANCE METHOD IS APPLICABLE, SPECIAL CIRCUMSTANCES EXIST WHICH JUSTIFY ITS ABANDONMENT	10
A. <u>Keta Island Is A Special Circumstance Which Justifies Deviation From The Use Of The Equidistance Method</u>	10
B. <u>The Presence Of New Lome Rock Constitutes A Special Circumstance.</u>	12
C. <u>The Presence of Mineral Resources In The Delimitation Area Is A Special Circumstance</u>	13
D. <u>The Continental Shelf Boundary Agreement Between New Togo And New Benin Constitutes A Special Circumstance.</u>	13
III. NEW TOGO HAS NOT ACQUIESCED IN THE EQUIDISTANT LINE	14
IV. THE EQUITABLE PRINCIPLES OF NATURAL PROLONGA- TION, PROPORTIONALITY, AND HISTORIC TITLE SHOULD BE USED IN DETERMINING THE CONTINENTAL SHELF BOUNDARY BETWEEN NEW TOGO AND NEW GHANA	15
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
<u>Treaties and Other International Agreements</u>	
Agreement Concerning the Delimitation of the Submarine Areas, October 24, 1968, Saudi Arabia-Iran, 696 U.N.T.S. 189	11
Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 4761, T.I.A.S. No. 5578, 499 U.N.T.S. 311	1,3,10,16
Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205	5, 13
Statute of the International Court of Justice, June 26, 1945, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052	1,2
<u>United Nations Materials</u>	
Commentary of the Continental Shelf Committee, U.N. Doc. A/CONF.13/C.4/SR.32 (1958)	11
Draft Convention on the Law of the Sea, U.N.Doc. A/CONF.62/ WP.10/Rev.3/Add.1 (1980)	5,9
Report of the International Law Commission, 8 U.N. Doc. GAOR, Supp. (No. 9) 13, U.N. Doc. A/2456 (1953)	11
Revised Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/ Rev.1/Part II (1976)	9
Single Negotiating Text, 70 U.N. Doc. A/CONF.62/WP.8/ Part III (1975)	8
Yearbook of International Law Commission (1953)	4
<u>International Court of Justice Cases</u>	
Fisheries Jurisdiction Case, United Kingdom v. Iceland, [1974] I.C.J. 3	20
North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands, [1969] I.C.J. 3	2,3,4,5,6,7,8,13, 14,15,16,17,18,19
<u>Other International Cases</u>	
Grisbadarna Case, Norway v. Sweden, [1916] 1 Hague Ct. Rep. (Scott) 121 (1909)	19,20

	Page
United Kingdom v. France, Delimitation of the Continental Shelf, Court of Arbitration Decision, June 30, 1977, <u>reprinted in</u> S. Oda, The International Law of the Ocean Development, Basic Documents (Supp. Oct. 1978)	11,12,16,17,18

Treatises

Y. Blum, Historic Titles in International Law (1965)	19
J. Gamble & E. Miles eds., Law of the Sea: Conference Outcomes and Problems of Implementation (1977)	4,7,8

Journals and Periodicals

Cheng, <u>Justice and Equity in International Law</u> , 8 Current Legal Prob. 185 (1955)	16
Karl, <u>Islands and the Delimitation of the Continental Shelf: A Framework for Analysis</u> , 71 A.J.I.L. 642 (1977)	11

Other Materials

Truman Proclamation, Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-48 Comp.) <u>reprinted in</u> [1951] 1 U.N. Leg. Ser., Laws and Regulations on the Regime of the High Seas 38	15
--	----

STATEMENT OF JURISDICTION

Pursuant to Article 36, paragraph 2 of the Statute of the International Court of Justice, the Government of the Republic of New Ghana and the Government of the Republic of New Togo have agreed to submit to the jurisdiction of the International Court of Justice in order to reconcile their differences in this case. Both parties accept the judgment of the International Court of Justice as final. The International Court of Justice shall resolve the controversy in accordance with paragraph 1 of Article 38 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The Parties have agreed to the statement of facts which has been filed before this Court.

QUESTIONS PRESENTED

- I. Whether the use of the equidistance line to delimit the lateral boundary between the continental shelves of New Ghana and New Togo is obligatory under international law?
- II. Whether special circumstances exist which justify the abandonment of the equidistance method?
- III. Whether New Togo has acquiesced in the equidistant line?
- IV. Whether the equitable principles of natural prolongation, proportionality, and historic title should be used in determining the continental shelf boundary between New Togo and New Ghana?

SUMMARY OF ARGUMENT

I.

The equidistance method of delimitation is not a mandatory rule of international law. Since New Togo has never ratified the 1958 Convention on the Continental Shelf, the equidistance rule of Article 6 is unenforceable against Respondent as a contractual obligation. Neither does that rule constitute a general principle of law within the meaning of the Statute of the International Court of Justice. The rule of equidistance neither represented existing law when adopted in the Convention, nor has evolved subsequently into customary law through the usage of states. The equidistant line is therefore not obligatory in the instant case.

II.

Even if the equidistance rule is applicable as binding international law, special circumstances exist which justify another boundary line. Keta Island, New Lome Rock, the presence of mineral resources, and the New Togo-New Benin agreement constitute special circumstances which cause a substantial diminution of the continental shelf area which otherwise would accrue to Respondent. To redress this inequitable result, the equidistance principle must be abandoned.

III.

New Togo's conduct regarding the roadstead and mineral resource exploitation by New Ghana does not constitute acquiescence in an equidistant boundary.

IV.

Delimitation of the disputed continental shelf between Applicant and Respondent must be effected in accordance with equitable principles of positive law. The shelf area apportioned to each Party should represent the natural prolongation of its land territory and also should reflect a reasonable proportionality to the length of its coastline. Only a southerly extension of the Parties' land boundary will implement these principles and respect the historic fishing rights of Respondent.

ARGUMENT AND AUTHORITIES

I. USE OF THE EQUIDISTANCE LINE TO DELIMIT THE LATERAL BOUNDARY BETWEEN THE CONTINENTAL SHELVES OF NEW GHANA AND NEW TOGO IS NOT OBLIGATORY UNDER INTERNATIONAL LAW.

The use of the equidistance method is inapplicable in the delimitation of the continental shelf between New Ghana and New Togo. No authority among the sources of law enumerated in Article 38(1) of the Statute of the Court mandates application of that formula between the Parties.¹ As proposed by Applicant, mechanical use of equidistance would effect an unjust derogation of those rights vested in Respondent by operation of positive law. The principle of coastal state sovereignty over a continental shelf constituting the natural prolongation of its land territory requires that boundaries between adjacent States recognize all relevant circumstances in each case, particularly historic practice of the Parties and specific coastal features in the disputed area. The equidistance line, the sole basis of Applicant's claim, reflects none of these considerations and therefore must be rejected.

Since New Togo has not ratified the 1958 Convention on the Continental Shelf² (Geneva Convention) which espouses the equidistance principle, it is unenforceable as a contractual obligation against New Togo. The doctrine of pacta sunt servanda is premised on a State's manifestation of consent to be bound, which is affirmed formally in

¹Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, T.S. No. 993, 3 Bevens 1153, 1976 Y.B.U.N. 1052, [hereinafter cited as ICJ Statute].

²Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578 [hereinafter cited as Geneva Convention].

the national decision to sign and ratify. Despite participation in its drafting, New Togo has refused to ratify the Geneva Convention, an abstention which only may be regarded as explicit rejection of the equidistance method of delimitation.

The mandatory quality of the rule of equidistance advanced by the applicant thus must find its source in the usage of nations or in those "general principles of law recognized by civilized nations."³ Both arguments were considered and rejected by the Court in the North Sea Continental Shelf Cases.⁴ In that case, Denmark and the Netherlands each sought an equidistance delimitation of its lateral boundary with the adjacent Federal Republic of Germany. Under this method, the continental shelf of Germany would have been narrowly confined within the intersecting boundaries of its neighbors because of its markedly concave coast. The question before the Court, which was essentially the same as in the instant case, was stated as follows: "What principles and rules of international law are applicable to the delimitation as between the parties of the continental shelf in the North Sea which appertain to each of them. . .?"⁵ The Court held that use of the equidistance principle was not obligatory and that delimitation therefore must be effected "by agreement in accordance with equitable principles."⁶ The legal analysis underlying that conclusion is determinative of New Ghana's claim in the instant case.

³ICJ Statute, supra note 1, art. 38, para. 1, subpara. 3.

⁴[1969] I.C.J. 3.

⁵Id. at 6.

⁶Id. at para. 101.

Initially, the Court noted the inapplicability of the equidistance principle as conventional law against Germany which, like New Togo, is a non-signatory of the 1958 Geneva accords. The Court next evaluated the Dutch-Danish argument for equidistance as a general principle of international law, "an a priori accompaniment of basic continental shelf doctrine."⁷ While affirming coastal State sovereignty over its adjacent continental shelf "existing ipso facto and ab initio by virtue of its sovereignty over the land,"⁸ the Court denied that any corollary of delimitation by the equidistance method existed as a necessary expression of the idea of adjacency. The general principle of coastal state sovereignty over its "adjacent" shelf imports nothing so specific as a lateral boundary 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."⁹

Having rejected equidistance as a general principle of law, the North Sea opinion then addressed the contention that such a boundary was obligatory under the accepted customary practice of nations. Two theories were advanced in support of this position, each indirectly relying on the expression of that rule in Article 6 of the Geneva Convention.¹⁰ The first argument of Denmark and the Netherlands posited the adoption of equidistance in Article 6 as evidence of a pre-existing international norm. In the alternative, it was argued

⁷Id. at para. 46.

⁸Id. at para. 19.

⁹Geneva Convention, supra note 1, art. 6, para. 2.

¹⁰[1969] I.C.J. 3, para. 37.

that "even if . . . no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice, . . . being now a rule of customary international law binding on all States."¹¹ Both theories were analyzed and ultimately rejected by the Court; its reasoning and conclusions are equally germane to the identical arguments of New Ghana in the present case.

Fundamental to the North Sea holding that equidistance delimitation was "at most de lege ferenda, and not at all de lege lata"¹² when adopted at Geneva were its reluctant and ambiguous origins in the preparatory work for the first United Nations Conference on the Law of the Sea (UNCLOS I). A Committee of Experts convened by the International Law Commission (ILC) in 1951 first proposed the equidistance method as one of five possible rules for the determination of territorial sea boundaries.¹³ The equidistance line was felt to have "somewhat more backing" among the experts; yet was submitted to the ILC with the caveat that "in a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiation."¹⁴

At the outset, it was suggested that the formula for delimitation of the territorial sea, typically three to twelve miles wide, should be applicable to the continental shelf.¹⁵ However, now it is widely

¹¹ Id. at para. 70.

¹² Id. at para. 62.

¹³ J. Gamble & E. Miles eds., *Law of the Sea: Conference Outcomes and Problems of Implementation* 184 (1977).

¹⁴ [1953] 2 Y. B. Int'l L. Comm'n 157.

¹⁵ Id. at 187, n. 11.

recognized that the greater breadth of continental shelf claims¹⁶ substantially magnifies the potential for distortion through the unqualified use of the equidistance method. The disproportionate influence of minor coastal features on a strict equidistance delimitation is particularly pronounced in the case of lateral boundaries between adjacent States, a fact well illustrated by New Ghana's proposed equidistance line. As the Court observed in its North Sea decision, it is this capacity of the rule to produce "results that appear on the face of them to be extraordinary, unnatural or unreasonable . . . which underlies the present proceedings."¹⁷

The North Sea decision also emphasized other aspects of the Geneva Convention which would tend to refute any implication that its delimitation provisions represented existing law. Of the treaties adopted at Geneva, only the Convention on the Territorial Sea and Contiguous Zone declared itself to be "generally declaratory of established principles of international law."¹⁸ The Continental Shelf Convention, on the other hand, not only avoided this inference in its preamble, but also provided for specific reservation to most of its provisions, including Article 6.

[I]t is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;--whereas

¹⁶ See Draft Convention on the Law of the Sea, art. 76, U.N. Doc. A/CONF.62/WP.10/Rev. 3/Add. 1 (1980) [hereinafter cited as Draft Convention].

¹⁷ [1969] I.C.J. 3, para. 24.

¹⁸ Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, preamble.

this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor.¹⁹

The Court therefore declared that the equidistance method did not represent existing international law at the time it was incorporated into the Geneva Convention.²⁰

The Court then went on to analyze whether the provisions of Article 6 had crystallized into international law since the Geneva Convention. Customary law comes into existence only through state practice which is "both extensive and virtually uniform in the sense of the provision invoked," and which reflects "a general recognition that a rule of law or legal obligation is involved."²¹ In the North Sea cases, some fifteen instances of equidistance delimitation were before the Court in support of the Dutch-Danish position that the rules of Article 6 had become international law through usage by nations. Even had those instances comprised more than a very small proportion of the world's marine boundaries, the Court dismissed their precedential effect²²

In those delimitations, over half the parties involved were signatories to the Geneva Convention, thus bound by its provisions as

¹⁹[1969] I.C.J. 3, para. 63.

²⁰Id. at para. 69.

²¹Id. at para. 74.

²²Id. at para. 75.

a matter of contractual obligation.²³ The reasoning behind the others does not necessarily reflect recognition of the rule's obligatory nature. Many were motivated instead by the rule's certainty and ease of application. In addition, the analogy from these cases was substantially weakened due to the predominance of opposite State delimitations, a situation "sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries."²⁴

Little has changed in subsequent state practice that might alter the Court's conclusion. As of 1977, only about 20 percent of the world's approximately 300 potential territorial sea and continental shelf boundaries had been delimited, the other 79 percent are either under dispute, in the process of negotiation, or not being discussed.²⁵ A pattern of a consistent underlying principle is difficult to ascertain. Only 11 of the total of 46 are based primarily on the equidistance method, the remainder reflecting a variety of criteria, primarily equitable principles (17) or some combination of equidistance with other factors (9).²⁶ The marked distinction between boundaries of adjacent and opposite States persists. Whereas eight of 21 boundaries between opposite States rely primarily on the equidistance method, only three of 25 adjacent boundaries are so delimited.²⁷ Therefore, the Court's holding that the equidistance

²³Id. at para. 76.

²⁴Id. at para. 79.

²⁵J. Gamble & E. Miles, supra note 13, at 191.

²⁶Id.

²⁷Id.

principle is not a rule of customary international law²⁸ must still be applied.

As additional support for the nonobligatory nature of the equidistance principle, the proceedings of the third U.N. Conference on the Law of the Sea (UNCLOS III) manifest a trend strongly critical of the rule of equidistance. At the first session of the Conference, four proposals were formulated for delimitation of the continental shelf, two favoring equidistance and two emphasizing equitable principles and "all relevant circumstances."²⁹ At the second session, these formulations were reduced to a Single Negotiating Text, which provided that:

Article 70:

1. The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking into account all relevant circumstances.

2. . . .

3. Pending agreement, no State is entitled to extend its [continental shelf] beyond the median line or equidistance line.³⁰ [emphasis added]

The trend of the debate at the ensuing session was even more pronounced in favor of equitable considerations. A major change in this direction was the alteration of provisional arrangements provided in paragraph three above. Many delegates correctly had observed that the the provision favored the claims of a State insisting on a strict

²⁸ [1969] I.C.J. 3, para. 101.

²⁹ J. Gamble & E. Miles, supra note 13, at 195-96.

³⁰ Single Negotiating Text, art. 70, U.N. Doc. A/CONF.62/WP.8/Part III (1975).

equidistance boundary, encouraging it to avoid negotiation or arbitration. The article was amended in the Revised Single Negotiating Text, the substitute provision declaring that "[p]ending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1."³¹ [emphasis added]. Paragraph one of the RSNT is identical to that of the Single Negotiating Text quoted above.

The most recent draft convention of UNCLOS III provides:

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.
2. . . .
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transition period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.³²

As reflected in these most recent draft codifications, which represent a high consensus among nations of the world, the equidistance method has not attained the status of accepted international law.

In summary, the equidistance method should not be applied in the delimitation of the continental shelf boundary between New Togo

³¹Revised Single Negotiating Text, art. 71, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II (1976).

³²Draft Convention, supra note 16, art. 83.

and New Ghana. New Togo is not a party to the Geneva Convention and therefore is not contractually bound by the equidistance provisions of Article 6. Furthermore, the Court in the North Sea cases held that the equidistance principle is neither a general principle of international law nor customary international law, and its application is therefore not obligatory. Finally, state practice and the draft convention of UNCLOS III indicate that the equidistance principle has not attained the status of a rule of international law since the Geneva Convention was drafted.

II. EVEN IF THE EQUIDISTANCE METHOD IS APPLICABLE, SPECIAL CIRCUMSTANCES EXIST WHICH JUSTIFY ITS ABANDONMENT.

Article 6(2) of the Geneva Convention provides:

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.
[emphasis added]³³

Even were the equidistance principle applicable between the parties, numerous factors qualify as special circumstances which merit departure from the equidistance method.

A. Keta Island Is A Special Circumstance Which Justifies Deviation From The Use Of The Equidistance Method.

The presence of an island in an area of delimitation constitutes a classic instance of special circumstance which requires a departure

³³ Geneva Convention, supra note 2, art. 6, para. 2.

from the equidistance method.³⁴ The commentary of the International Law Commission accompanying the 1953 draft convention on the continental shelf states: "[p]rovisions must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or navigable channels."³⁵ The committee on the Continental Shelf of the first United Nations Conference on the Law of the Sea agreed that "[a]mong the special circumstances which might exist there was, for example, the presence of a small or large island in the area to be apportioned."³⁶ Numerous continental shelf boundary agreements between other parties acknowledge the existence of islands as a special circumstance.³⁷

The Anglo-French Continental Shelf Case,³⁸ before a special Court of Arbitration, dealt directly with the problem of islands in determining an equidistant boundary. As in the instant case, the presence of the English Channel Islands in close proximity to the French coast produced a disproportionately distorting effect on boundary delimitation. In holding that the islands constituted a special circumstance, the Court of Arbitration remarked:

³⁴Karl, Islands and the Delimitation of the Continental Shelf: A Framework for Analysis, 71 A.J.I.L. 642, 648 (1977).

³⁵Report of the International Law Commission, 8 U.N. Doc. GAOR, Supp. (No.9) 13, A/2456 (1953).

³⁶Commentary of the Continental Shelf Committee, U.N. Doc. A/CONF. 13/C.4/SR.32 (1958).

³⁷See, e.g. Agreement Concerning the Delimitation of the Submarine Areas, October 24, 1968, Saudi Arabia-Iran 696 U.N.T.S. 189.

³⁸The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Court of Arbitration Decision, June 30, 1977; reprinted in S. Oda, The International Law of the Ocean Development, Basic Documents (Supp. Oct. 1978) [hereinafter cited as Anglo-French Case].

The presence of these British islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of the continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, prima facie, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity.³⁹

The Court refused to draw an equidistant line despite the fact the Channel Islands were populous and of significant economic value to the United Kingdom. The Court appreciated the fact that another boundary would deprive the Channel Islands of their own continental shelf area, but in the last analysis gave greater weight to the inequitable results that would arise if an equidistance method were used.

Keta Island closely parallels the circumstances present in the Anglo-French case. Its presence causes a significant diminution of the continental shelf which otherwise would accrue to New Togo. This disproportionately distorting effect constitutes prima facie a special circumstance which justifies abandonment of an equidistant line.

B. The Presence Of New Lome Rock Constitutes A Special Circumstance.

The presence of New Lome Rock within the area to be delimited constitutes a special circumstance. Neither party to the dispute questions that New Lome Rock is part of New Togo; yet, according to the equidistance method urged by New Ghana, the rock and its surrounding waters would be completely within the continental shelf area allotted to New Ghana. Thus, New Togo would be precluded from exercising the sovereign

³⁹Id. at para. 196.

Rights over New Lome Rock which it currently enjoys. It is a generally recognized principle that rocks have their own territorial sea.⁴⁰ Any delimitation of the continental shelf area must be drawn to allow the continuation of New Togo's sovereign rights over New Lome Rock and its territorial sea. An equidistant boundary unjustifiably interferes with New Togo's rights over New Lome Rock, and therefore must be abandoned.

C. The Presence Of Mineral Resources In The Delimitation Area Is A Special Circumstance.

Another factor to be taken into consideration in the delimitation of areas of continental shelf between adjacent States is the presence of mineral resources.⁴¹ Use of the equidistance method would operate unjustly to exclude New Togo from any exploitation of the areas. A line drawn on the basis of natural prolongation would accomplish an equitable end, and the disputed areas would be divided equally. At that point, New Ghana and New Togo could conclude agreements of joint exploitation as suggested by the International Court of Justice in the North Sea cases and as widely used in other regions of the world.⁴²

D. The Continental Shelf Boundary Agreement Between New Togo And New Benin Constitutes A Special Circumstance.

A final special circumstance supportive of New Togo's position is the existence of a treaty between New Benin and New Togo establishing their lateral marine boundaries. The International Court of Justice in the North Sea case stated that "any other continental shelf

⁴⁰Convention on the Territorial Sea and Contiguous Zone, supra note 18, art. 10.

⁴¹[1969] I.C.J. 3, para. 97.

⁴²Id.

delimitations between adjacent states in the same region"⁴³ must be considered in delimitation between other parties in the region. In that case, the Court reviewed all of the boundaries in the North Sea to determine if each country had a continental shelf area proportionate to its coastline.

In its agreement with New Benin, New Togo has followed a southerly line based on natural prolongation principles. Only by reference to this line can the Court determine if the continental shelf area allocated to New Togo under the New Ghana-New Togo boundary is equitable. With the New Togo-New Benin boundary in view, it can be seen that an equidistant boundary on New Togo's western frontier leaves New Togo a continental shelf area disproportionate to its coastline. To avoid this inequitable result, the Court must not apply the equidistance method.

III. NEW TOGO HAS NOT ACQUIESCED IN THE EQUIDISTANT LINE.

New Ghana claims that New Togo's past actions with regard to the roadstead and the mineral exploration indicate acquiescence on the part of New Togo and that New Togo thereby is estopped from disclaiming the equidistance line. New Togo's request for permission to use the roadstead illustrates New Togo's concern for peaceful co-existence and effective management of the roadstead facility. New Ghana's ready permission to New Togo, on the other hand, indicates New Ghana's belief that the area incorporated by the roadstead was not under New Ghana's exclusive control, but rather that New Togo had the right to share the roadstead usage. Nor can New Togo's conduct regarding the mineral exploration by New Ghana be said to support a claim of acquiescence on

⁴³Id. at para. 101.

the part of New Togo. The first official communication by the government of New Togo to New Ghana was one of protestation, hardly justifying a claim of acquiescence. At worst, New Togo's official silence before 1978 indicated a lack of complete initial understanding of the situation and a hopeful desire for cooperative exploitation of the mineral deposits.

The ICJ in the North Sea cases, faced with similar claims of acquiescence on the part of the Federal Republic of Germany by Denmark and the Netherlands, stated that "none of the elements invoked is decisive; each is ultimately negative or inconclusive; all are capable of varying interpretations or explanations."⁴⁴ Even if New Togo's actions do indicate acquiescence, such acquiescence is entirely irrelevant to the use of an equidistant line. Previous control by New Ghana might justify a line which allows continued control over part of the areas in question, but it does not dictate the use of an equidistant line.

IV. THE EQUITABLE PRINCIPLES OF NATURAL PROLONGATION, PROPORTIONALITY, AND HISTORIC TITLE SHOULD BE USED IN DETERMINING THE CONTINENTAL SHELF BOUNDARY BETWEEN NEW TOGO AND NEW GHANA.

In its sole reference to the issue of delimitation, the Truman Proclamation of 1945 declared that boundaries in the continental shelf between the United States and its neighbors were to be determined "by agreement in accordance with equitable principles."⁴⁵ This fundamental precept of equitable principles is mirrored in the identical language

⁴⁴Id. at para. 30.

⁴⁵Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-48 Comp.) reprinted in [1951] 1 U.N. Leg. Ser., Laws and Regulations on the Regime of the High Seas 38.

of many subsequent national declarations, numerous bilateral agreements, the Geneva Convention, and in every stage of the evolving text at UNCLOS III. The equidistance formula here invoked by New Ghana was conceived at UNCLOS I, not as a substitute for those equitable principles, but rather as a means of implementing them "in the absence of special circumstances."⁴⁶ The Court in the Anglo-French case held that "the equidistance-special circumstances rule and the rules of customary law have the same object—delimitation of the boundary in accordance with equitable principles."⁴⁷ There exists no single method of delimitation applicable in all situations, but rather a number of possibilities, "[t]he appropriateness of [which] is a function or reflection of the geographical or other relevant circumstances of each particular case."⁴⁸

However, this implies no lack of positive law applicable between the parties. Despite reliance on a wide range of equitable principles in the North Sea cases, the Court in that case expressly disavowed any necessity of judgment ex aequo et bono,⁴⁹ submission to which requires consent of the Parties under Article 38(2) of the Statute of the Court. International law always has distinguished between holdings based on equity, or justice and fairness, and determinations ex aequo et bono "based on practical considerations and expediency, disregarding, if necessary, existing law and recognized rights."⁵⁰ In the present case,

⁴⁶ Geneva Convention, supra note 2, art. 6.

⁴⁷ Anglo-French Case, supra note 38, at para. 75.

⁴⁸ Id. at para. 97.

⁴⁹ [1969] I.C.J. 3, para. 88.

⁵⁰ Cheng, Justice and Equity in International Law, 8 Current Legal Prob. 185, 204 (1955).

far from requesting the abandonment of "existing law and recognized rights," New Togo seeks only the validation of a sovereign interest in its continental shelf vested under positive international law. As in the North Sea cases, "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles."⁵¹

Even the limited usage of states to date has revealed an extremely broad acceptance of certain pervasive legal principles. Foremost, and "[m]ore fundamental than the notion of proximity [upon which equidistance is based] appears to be the principle. . . of the natural prolongation or continuation of the land territory or domain. . . of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State."⁵² This concept of the continental shelf as "an extension of something already possessed"⁵³ dictates a delimitation which "leave[s] as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory. . . without encroachment on the natural prolongation of the land territory of the other."⁵⁴

In addition to "any relevant considerations of law and equity,"⁵⁵ the determination of what constitutes the natural prolongation of a

⁵¹[1969] I.C.J. 3, para. 85.

⁵²Id. at para. 43.

⁵³Id.

⁵⁴Id. at para. 101.

⁵⁵Anglo-French Case, supra note 3, at para. 194.

State involves factors of both geology and geography.⁵⁶ The former are of limited usefulness here, because the area under dispute contains no "major and persistent structural discontinuity of the seabed and subsoil of such a kind as to interrupt the essential geological continuity of the continental shelf."⁵⁷ The Anglo-French arbitration gave an example of this requisite discontinuity in the Norwegian Trough in the North Sea, though a similar fault in the English Channel's Hurd Deep was held to be an irrelevant factor in determining natural prolongation in that case.⁵⁸ There is no analogy to be drawn between reference to such major submarine depressions in delimitations between opposite States and the ancient New Oti riverbed in the instant case. The present fact of a dominant submarine feature is a consideration wholly distinct from mere evidence of an ancient riverbed, here insignificant but for the historical accident that its modern course served as a convenient demarcation between former colonies.

The geographical relationship of the Parties, on the other hand, suggests an equitable southerly boundary. Both land masses are approximately rectangular, each oriented on a north-south axis. Their fairly even coastlines are devoid of any unusual configuration or curvature in the disputed area. The land boundary separating the two states runs virtually due south over its entire length, and appears perpendicular to their coast at its sea terminus. Therefore, a direct

⁵⁶[1969] I.C.J. 3, para. 94.

⁵⁷Anglo-French Case, supra note 3, at para. 104.

⁵⁸Id. at para. 107.

southerly extension of their land boundary, allowing for the presence of Keta Island, is the most equitable line reflecting the natural prolongation of each state's land mass.

A second equitable consideration reinforcing this extension of the Parties' land boundary is the principle of proportionality. In the North Sea cases, the coastline of each of the parties was of approximately equal length, a situation the Court held to require a "reasonable degree of proportionality" in the shelf areas apportioned.⁵⁹ Although the coastline of New Ghana is some six times the length of New Togo's, this disparity would indicate a stricter adherence to the principle of proportionality to prevent an even greater diminution of the smaller State's already limited continental shelf. The only line which would avoid this inequitable result is the southerly boundary as indicated by the natural prolongation principle.

Historical fishing rights also have been recognized as not only relevant, but crucial, to marine delimitations. New Togo has acquired historic rights in the sedentary fisheries surrounding New Lome Rock through prolonged exploitation of the fisheries without opposition from New Ghana.⁶⁰

The Court of Arbitration acknowledged the relevance of historic fishing rights in marine delimitations in the Grisbadarna Case.⁶¹ In that case, the Court noted that "lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much

⁵⁹[1969] I.C.J. 3, para. 98.

⁶⁰Y. Blum, *Historic Titles in International Law* (1965).

⁶¹Norway v. Sweden, [1916] 1 Hague Ct. Rep. (Scott) 121 (1909).

larger extent, and by a much larger number of fishermen by the subjects of Sweden than by the subjects of Norway."⁶² Additionally, the Court took notice that the Swedes depended heavily on the lobster fisheries for their livelihood.⁶³ Holding that "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible,"⁶⁴ the Court drew a boundary line which accounted for Sweden's historic fishery rights.

The International Court of Justice considered historic fishing rights in the Fisheries Jurisdiction Case⁶⁵ between Great Britain and Iceland. The Court stated that "both states have an obligation to take full account of each other's rights"⁶⁶ in delimiting a maritime boundary. In that case, both Iceland and the United Kingdom had acquired historic rights in the boundary area. The Court held that Iceland was entitled to preferential treatment because of "the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development."⁶⁷

Similarly, the economy of New Togo depends heavily on its fishing industry located around New Lome Rock. These crucial interests must be protected. The equidistant line unjustly denies New Togo its

⁶²Id. at 130.

⁶³Id. at 130-131.

⁶⁴Id. at 130.

⁶⁵United Kingdom v. Iceland, [1974] I.C.J. 3.

⁶⁶Id. at para. 72.

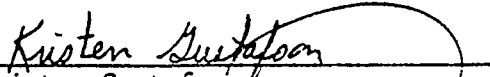
⁶⁷Id. at para. 79.

established historic rights and its primary source of livelihood.
Such an inequitable result is a violation of international law
and must be redressed by abandonment of the equidistance method.

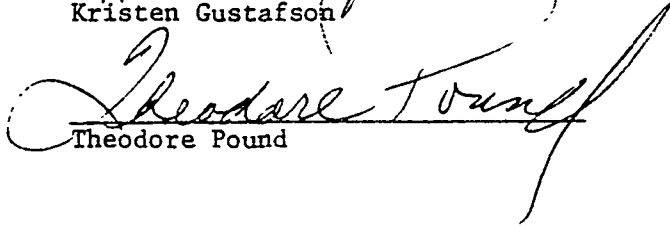
CONCLUSION

For the reasons stated above, it is respectfully requested that this honorable Court issue a declaration stating that the principles of natural prolongation and historic title be used in the delimitation of the continental shelf boundary between Applicant and Respondent.

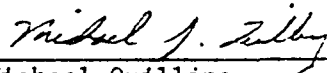
RESPECTFULLY SUBMITTED:




Kristen Gustafson



Theodore Pound



Michael Quilling



Al Smith