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IN THE INTERNATIONAL COURT OF JUSTICE

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February, 1981 Term

Between:

THE REPUBLIC OF NEW GHANA,

Applicant

and

THE REPUBLIC OF NEW TOGO,

Respondent

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MEMORIAL FOR THE APPLICANT

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JURISDICTION

Article 36 of the Statute of the International Court of Justice confers to the court jurisdiction over all cases that parties to a dispute submit to it. The parties to the present dispute submit to the Court's jurisdiction pursuant to Article 40 of the statute.

STATEMENT OF FACTS

The parties of this dispute have agreed to the facts as presented in the compromis.

QUESTIONS PRESENTED

I.

WHETHER CONSTRUCTION OF AN EQUIDISTANT LINE IS THE PROPER METHOD OF DELIMITING THE CONTINENTAL SHELVES BETWEEN NEW GHANA AND NEW TOGO.

II.

WHETHER PROPER APPLICATION OF THE NATURAL PROLONGATION THEORY OF DELIMITATION SUPPORTS NEW GHANA'S PROPOSED BOUNDARY.

III.

WHETHER NEW TOGO'S BOUNDARY PROPOSAL MISAPPLIES THE NATURAL PROLONGATION STANDARD AND IS INEQUITABLE.

SUMMARY OF ARGUMENT

I.

Developments over the past twenty years have elevated the equidistance method of delimitation to a rule of customary international law. The International Court of Justice, therefore, may apply the equidistance rule to determine the proper continental shelf boundary between New Ghana and New Togo. New Ghana presents for acceptance by the Court a boundary that is a correctly constructed equidistant line, one that properly uses the coasts of Keta Island, New Ghana, and New Togo as basepoints, but ignores New Lome Rock for purposes of delimitation. Only application of the equidistance principle in this case satisfies the ultimate goal of delimitation, which is the establishment of an equitable boundary. The equidistant line is equitable in the instant case because it reflects all relevant geographical features and other circumstances without undue distortion. Also, only the equidistant line guarantees to New Ghana the areas that New Togo has admitted, by acquiescence, to be within the rightful control of New Ghana.

II.

If the Court rejects the applicability of the equidistance rule in favor of the theory of natural prolongation that New Togo presents, the boundary New Ghana proposes remains the equitable and proper delimitation and should prevail. The New Ghana boundary approximates the existing natural boundary created by the ancient New Oti River Bed. The Court should consider the ancient river bed as relevant to a delimitation based upon natural prolongation for two reasons. First, the river bed is a significant discontinuity in the geomorphology of the continental shelf, thereby constituting a natural delineation of the shelf boundary. Second, the river bed represents the natural extension of the New

Ghana - New Togo land boundary. Thus, if the court adopts the natural prolongation theory, the resulting boundary would coincide with the ancient river bed. The Court should recognize that New Ghana's proposed boundary and not New Togo's line more closely follows a relevant natural boundary, and therefore should adopt New Ghana's equidistant line.

### III.

While New Togo claims to have applied the natural prolongation method, New Togo's proposed boundary reflects only political, not natural features, and therefore is improper. New Togo's boundary improperly incorporates the thalweg line. New Togo also incorrectly attempts to use the New Togo - New Benin treaty against New Ghana. This treaty does not bind New Ghana and cannot affect any boundary between Applicant and Respondent.

I. CONSTRUCTION OF AN EQUIDISTANT LINE IS THE PROPER METHOD OF DELIMITING THE CONTINENTAL SHELVES BETWEEN NEW GHANA AND NEW TOGO.

A. The Equidistance Method Of Delimitation Is A Rule of Customary International Law.

The International Court of Justice (I.C.J.) must apply the rules of customary international law to determine the proper continental shelf boundary between New Ghana and New Togo because New Togo is not a party to the 1958 Convention on the Continental Shelf.<sup>1</sup> Since its codification in the 1958 Geneva Convention on the Continental Shelf,<sup>2</sup> the equidistance method of delimitation has attained the status of customary international law. In 1969, the minority in the North Sea Continental Shelf Cases held that the equidistance rule was a doctrine of customary international law.<sup>3</sup> Since 1969, numerous agreements between States delimiting continental shelves have recognized the equidistance rule.<sup>4</sup>

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1. North Sea Continental Shelf Cases, [1969] I.C.J. 3 para. 83 [hereinafter cited as North Sea Cases]; Statute of the I.C.J., art. 38(1)(b), 59 Stat. 1055, T.S. 933, 3 Bevans 1179 [hereinafter cited as Stat. of I.C.J.].

2. 1958 Convention on the Continental Shelf, art 6(2), UN Doc. A/Conf. 13/L. 55 [hereinafter cited as Continental].

3. North Sea Cases, para. 247 (Judge ad hoc Sorensen).

4. Agreement on Continental Shelf Boundary, February 20, 1970, Italy-Yugoslavia, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Sea [hereinafter cited as Limits], No. 9, 1-7 (1970); Agreement on Continental Shelf Boundary, June 14, 1974, Norway-U.K., Denmark-U.K., Netherlands-U.K., Limits, No. 10, 1-24; Agreement on Continental Shelf Boundary, May 27, 1970, Norway-Soviet Union, Limits, No. 17, 1-5; Agreement on Continental Shelf Boundary, July 6, 1976, Iran-Saudi Arabia, Limits, No. 24, 1-4; Agreement on Continental Shelf Boundary, July 9, 1970, Iran-Gartar, Limits, No. 25, 1-5; Agreement on Continental Shelf Boundary, Aug. 11, 1973, Mexico-U.S., Limits, No. 45, 1-2; Agreement on Continental Shelf Boundary, Oct. 19, 1973, Finland-Soviet Union, Limits, No. 56, 1-4; Agreement on Continental Shelf Boundary, Sept. 12, 1974, Canada-St. Pierre & Miquelon, Limits, No. 57, 1-6; Agreement on Territorial Sea Boundary, Nov. 11, 1974, Indonesia-Singapore, Limits, No. 60, 1-5; Agreement on Continental Boundary, Aug. 25, 1975, India-Indonesia, Limits, No. 62, 1-4; Agreement on Continental Shelf Boundary, Nov. 25, 1975, German Democratic Republic-Poland, Limits, No. 65, 1-6; Agreement on Continental Shelf Boundary, Aug. 4, 1976, Canada-Greenland, Limits, No. 72, 1-9; Agreement on Continental Shelf Boundary and Joint Development Zone, Sept. 2, 1977, Japan-Korea, Limits, No. 75, 1-33.

Both legal opinion<sup>5</sup> and scholarly works<sup>6</sup> recognize that the equidistance method of delimitation is a rule of customary international law. The inclusion of the equidistance principle in Article 83 of the 1980 Draft Convention on the Law of the Sea<sup>7</sup> (Draft Convention) demonstrates the continued acceptance of the equidistance method of delimitation.

B. New Ghana's Proposed Boundary Is A Correctly Constructed Equidistant Line.

1. New Ghana's line is equidistant from all proper coastal points.

In 1978 New Ghana enacted the New Ghana Resources Act, which established its eastern offshore boundary as "an equidistant line between the habitable land territories of New Ghana and New Togo." For a boundary to be a true equidistant line, every point along the entire line must be equidistant from two points, one point on each coast, while turning points must be equidistant from three points, two along one coast and one along the other coast.<sup>8</sup> The line that New Ghana proposes is constructed with reference to the coasts of Keta Island, New Ghana, and New Togo, thereby resulting in a boundary equidistant from all the habitable land territories of the Applicant and Respondent. New Ghana correctly avoids using the uninhabitable New Lome Rock as a basepoint in this delimitation.

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5. Decision by the Court of Arbitration established by the United Kingdom of Great Britain and Northern Ireland and the French Republic on Delimitation of the Continental Shelf (30 June 1977) (Judge Briggs, separate opinion) [hereinafter cited as U.K./France Arbitration].

6. E. Brown, The Legal Regime of Hydrospace 61-62 (1971) [hereinafter cited as Hydrospace]; Amin, Customary Rules of the Continental Shelf: The Gulf States Practice, 11 Journal of Maritime Law and Commerce 509, 525 (1980) [hereinafter cited as Amin]; Note, Continental Shelf Convention, Cal. W. Int'l L. J. 66 n.23 (1970).

7. Third United Nations Conference on the Law of the Sea Draft Convention (Informal Text), UN Doc. A./Conf. 62/WP. 10/ Rev. 3 (22 Sept. 1980), art. 83 [hereinafter cited as Draft Convention].

8. Limits, supra note 7, No. 67.

2. Keta Island is a proper basepoint for constructing the equidistant continental shelf boundary between New Ghana and New Togo.

While the 1958 Geneva Convention on the Continental Shelf contains no special rules relating to the effect of islands on continental shelf delimitations,<sup>9</sup> legal scholars recognize that an island's size, position, and economy are determinative criteria in assessing whether a particular island should be taken into account in delimiting the continental shelf.<sup>10</sup> Keta Island is a significant land-mass of approximately sixty square miles having a population of 100,000 people, and a permanent bridge connection with the New Ghana coast. Beach resorts help Keta Island sustain an independent economic life. The island also is an important contributor to New Ghana's national economy. State practice supports measuring an equidistant line from and giving full effect to an island lying within territorial waters.<sup>11</sup> The Organization for African Unity (OAU) has declared that delimitation of areas that include islands should be accomplished through equitable principles that take into account the island's size, population, contiguity with the mainland, and geologic configuration.<sup>12</sup> Consideration of all these factors in the context of this case justifies the measurement of the equidistant line from points on Keta Island.

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9. Ely, Seabed Boundaries Between Coastal States, 6 Int'l Lawyer 218, 222 (1972) [hereinafter cited as Ely]. See UN Doc., A/Conf. 13/C.4/L.25/Rev. 1 (Italian proposal specific to islands rejected); Un. Doc., A/Conf. 13/C.4/L.60 (Iranian proposal rejected).

10. Ely, supra note 9, at 225. See also UN Doc. A/Conf. 62/C/L. 62 Rev. 1, proposal by Algeria, Dahomey, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia. Cf. UN Doc. A/AC 138/SC 11/L. 41, proposal by Kenya, Madagascar, Tunisia.

11. Agreement on Maritime Boundary, October 29, 1968, German Democratic Republic-Poland, Limits, supra note 7, No. 65 (island of Griefswalder Oie).

12. "Declaration of the OAU of 1974 on the Issue of Law of the Sea," reprinted in S. Oda, The International Law of the Ocean Development § III. A.4, p. 1(1980).

3. New Lome Rock is not a proper basepoint for constructing the equidistant line.

International jurists and scholars agree that small islets and rocks should be ignored for the purpose of boundary delimitations because these features may have a distorting effect and produce inequitable delimitations.<sup>13</sup> New Lome Rock is a one acre, uninhabitable rock devoid of an independent economic life, located twenty-five miles from New Togo's coast. Article 121(2) of the Draft Convention stipulates that rocks which are either uninhabitable or unable to support an independent economy should be denied a continental shelf.<sup>14</sup> Also, small islets that are greater than twenty-four miles from their coastal state should not be used for purposes of delimitation.<sup>15</sup> The court in the U.K./France Arbitration emphasized that the relationship between an islet and its coastal state was an important factor in establishing basepoints for boundary delimitations.<sup>16</sup> Unlike Keta Island, New Lome Rock has no permanent ties to the coast, and is farther than twenty-four miles from its coastal state. Relative to New Lome's size, location and importance, use of New Lome as a basepoint would cause a gross distortion and would undermine the significance of New Ghana's interests in that portion of the Atlantic Ocean. Therefore, New Ghana correctly has avoided using New Lome Rock as a basepoint for constructing the equidistant line.<sup>17</sup>

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13. North Sea Cases, supra note 1, paras. 13, 57; D. Bowett, The Legal Regime of Islands in International Law 15-17, 167 (1979) [hereinafter cited as Bowett] (citing UN Doc. A/Conf. 13/C. A/L. 25 Rev. 1); Ely, supra note 9, at 224, 227-28; Goldie, The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands, 4 Neth. Y.B. Int'l L. 261 (1973).

14. Draft Convention art. 121(2), supra note 7.

15. Bowett, supra note 13, at 15-17.

16. U.K./France Arbitration, supra note 5, para. 130.

17. See Bahrain/Saudi Arabia Boundary Agreement, reprinted in United Nations Legislative Series (UNLS) UN 1974 (ST/LEG/SER. B/16 409); Iran/Saudi Arabia UNLS) UN 1976 (ST/LEG/SER. D/18 403) (treaties ignoring small islets in delimiting boundaries). See generally Bowett, supra note 13, at 176-77.

C. Application Of The Equidistance Principle Produces The Only Equitable Delimitation.

The ultimate goal of any delimitation is the production of an equitable division of the continental shelf.<sup>18</sup> The equidistance method should not be regarded as an independent method of delimitation, but rather as a way to achieve an equitable result.<sup>19</sup> Whether a particular delimitation is equitable depends upon the geographical circumstances and special features affecting a particular boundary.<sup>20</sup> The Court should adopt New Ghana's proposed boundary because the equidistant line produces an equitable delimitation in this case.

1. The equidistant line reflects all relevant geographical features and other circumstances without undue distortion.

In determining the proper continental shelf boundary between New Ghana and New Togo, the Court need only ensure that the delimitation reflects all relevant features, without producing an inequitable distortion.<sup>21</sup> The relevant geographical features and other circumstances in the instant case are Keta Island, Axim Block region, and New Ghana's roadstead. The equidistant line reflects these features in an equitable manner. The equidistant line disregards New Lome Rock because the Rock is an irrelevant geographical feature in this delimitation.

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18. U.K./France Arbitration, supra note 5, paras. 65, 70.

19. Id. para. 70.

20. Id. para. 97.

21. Id. para. 247.

- a. Keta Island is a relevant geographical feature.
  - i) The island does not inequitably distort the equidistant line.

Although the eastward projection of Keta Island deflects the equidistant line southeastward, the resulting distortion is not so pronounced as to be inequitable. Therefore, the distortion does not justify rejection of the equidistance method of delimitation. In contrast to cases involving islands that materially affected the equidistant line,<sup>22</sup> Keta Island has not deflected the equidistant line considerably more to the southeast than would be the case if the Court measured the equidistant line only from the New Ghana mainland. The New Ghana coast features a prominent protrusion southwest of Keta Island. The use of this protrusion as a basepoint, with total disregard of Keta Island, produces an equidistant line significantly eastward of the proposed New Togo line, but less than fifty nautical miles from the proposed New Ghana boundary.<sup>23</sup> Thus, the projection of Keta Island does not constitute a material distortion because a comparable equidistant line results upon disregard of the island.

- ii) The proportionality theory confirms that Keta Island does not inequitably distort the equidistant line.

Application of the concept of proportionality leads to the conclusion that an equidistant delimitation is equitable. While the factor of proportionality may appear as the ratio of areas of continental shelf and lengths of the respective coastlines,<sup>24</sup> the factor more often reflects the equitable or inequitable effects of geological features upon an equidistant line.<sup>25</sup> Thus, proportionality is relevant only in deciding whether Keta Island has an unjust distorting effect

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22. E.g., U.K./France Arbitration, supra note 5 (distortion from Scilly Isles off English mainland).

23. See Appendix A.

24. North Sea Cases, supra note 1, para. 98.

25. U.K./France Arbitration, supra note 8, para. 100.

on the proposed boundary. Keta Island does not produce an inequitable distortion, and the Court should give it full effect in this delimitation.

iii) New Togo's enclave around Keta Island must be rejected.

New Togo proposes to curve the boundary line around the eastern shore of Keta Island, thereby producing an enclave. This solution is unacceptable because it denies Keta Island full effect in the delimitation. The enclave solution itself is extremely novel.<sup>26</sup> Furthermore, the Court in the U.K./France Arbitration contemplated the possibility of a reduced effect of islands only in situations where islands were situated outside the territorial sea of the mainland.<sup>27</sup>

iv) Keta Island is entitled to a continental shelf and a twelve mile territorial sea.

New Togo's line denies Keta Island the full territorial sea and continental shelf to which it is entitled. Customary international law recognizes that a naturally formed island is entitled to a continental shelf and territorial sea equal to those claimed by the coastal state.<sup>28</sup> Both the Applicant and Respondent have claimed twelve mile territorial seas, a distance supported by a large number of African States.<sup>29</sup> Therefore, Keta Island is entitled to a

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26. Bowett, supra note 13, at 229.

27. U.K./France Arbitration, supra note 5, para. 251.

28. 1958 Convention on the Territorial Sea and Contiguous Zone Art. 10(2). UN Doc. A/Conf. 13/L.52 [hereinafter cited as TSCZ]; Draft Convention art. 121, supra note 7; see Continental art. (1)(a), supra note 2.

29. N. Rembe, Africa and the International Law of the Sea Appendix IV (1979) [hereinafter cited as Rembe]. Among the African nations claiming 12 mile territorial seas are Egypt, Ethiopia, Kenya, Liberia, Libya, Mauritius, Mazambique, Sudan, Togo, Zaire, and Equitorial Guinea. See also "Conclusions of the African States Regional Seminar on the Law of the Sea, YAOUNDE, 1972" cited in Rembe, supra at 215.

continental shelf and the same twelve mile territorial sea that New Togo and New Ghana have established. However, the island's northeastern shore is entitled only to a six mile territorial sea because of its close proximity to the New Togo coastline.<sup>30</sup> When the shores of opposite states are within twenty-four nautical miles, their respective territorial waters must be delimited by the median point between the shores.<sup>31</sup> New Ghana's equidistant line properly takes this factor into account.

- b. New Lome Rock is not a relevant geographical feature in this delimitation.

The Court of Arbitration noted in the U.K./France Arbitration that an island's economic impact on the coastal state is an important factor in determining an equitable boundary.<sup>32</sup> New Lome Rock has no economic significance to New Togo. While the area around the rock is used by coastal ethnic groups, who pursue private activities for their own exclusive benefit, the ethnic groups do not make any actual use of the rock.

New Togo cannot establish New Lome Rock as a relevant geographical feature by claiming an interest in the fishing conducted near New Lome Rock, because a State may not assert for itself the historic activities of private individuals.<sup>33</sup> The coastal ethnic groups who fish the waters off the rock are not acting under license or authority from New Togo, nor are they New Togo's citizens. A State may only acquire rights through people who are representing

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30. Bowett, supra note 26, at 16-18.

31. TSCZ art. 12 supra note 28. Cf. Draft Convention art. 15, supra note 7.

32. U.K./France Arbitration, supra note 5, para. 197-98.

33. Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles, and Sources of Law, 33 Brit. Y.B. Int'l 47-49 (1953) [hereinafter cited as Fitzmaurice].

it in some official capacity.<sup>34</sup> New Togo has no official interest in the New Lome fishing activity. While New Togo clearly has sovereign rights over the rock itself, use of New Lome Rock for delimitation purposes would be inequitable.

- c. Axim Block is a relevant feature because New Togo has recognized New Ghana's rights in the area.

When a State asserts a continuous, public claim of sovereignty over a portion of the ocean floor, and this assertion is not contested, the claim gives rise to a legal title.<sup>35</sup> The opposing state has acquiesced by failing to protest effectively.<sup>36</sup> Once acquiescence has conferred title, the acquiescing State may not renounce its actions.<sup>37</sup>

Although New Togo now proposes to exclude Axim Block from New Ghana's control, New Togo's failure to effectively challenge New Ghana's activity in the Axim Block region was an acquiescence which conferred on the Applicant a binding legal title to the area. This title will be given full legal effect only by use of the equidistant line.

- i) New Ghana's creation of Axim Block was an assertion of rights.

A State asserts rights over a region when it exercises "a display of authority."<sup>38</sup> New Ghana's continuous exploration of Axim Block since

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34. Id.

35. Johnson, Acquisitive Prescription in International Law, 30 Brit. Y.B. Int'l 353 (1950) [hereinafter cited as Johnson].

36. Fitzmaurice, supra note 33, at 28.

37. Id. at 27-33; Cf. Fisheries Jurisdiction Case (United Kingdom v. Iceland) [1974] I.C.J. 3 [hereinafter cited as Fisheries case]; see also Case Concerning Right of Passage Over Indian Territory (Merits) (Portugal v. India) [1760] I.C.J. 6.

38. Lauterpact, Sovereignty Over Submarine Area, 33 Brit. Y.B. Int'l Law 416 (1953) [hereinafter cited as Lauterpact]. Cf. Legal Status of Eastern Greenland P.C. I J. [1933] Series A/B, No. 53.

1973, coupled with the drilling activities it has recently begun constituted open and deliberate assertions that the entire area was within New Ghana's sovereignty. New Ghana's activities within the area were conducted effectively and publicly. In the absence of protest from New Togo, these assertions must be given legal effect.<sup>39</sup> Since the Respondent's proposal would deny New Ghana's title to the eastern sector of Axim Block, only New Ghana's proposal properly delimits the area.

- ii) New Togo's failure to raise timely objection to New Ghana's research was an acquiescence which must be given legal effect.

In order to have binding effect, an acquiescence need not last for a long period of time,<sup>40</sup> or consist of any positive act.<sup>41</sup> It may be inferred merely from a failure to act upon knowledge of assertive behavior by another State.<sup>42</sup> New Togo's failure to protest in any manner New Ghana's exploration and drilling in Axim Block was irrevocable acquiescence to New Ghana's sovereignty over the area.

Newspaper accounts are a proper source for determining a government's official position,<sup>43</sup> and in the present case indicate that New Ghana's activities in Axim Block were officially lauded by New Togo functionaries. Reports which appeared in New Togo newspapers between 1973 and 1978 quoting New Togo officials as supportive of New Ghana's activities in Axim Block were never challenged, and their veracity must be assumed. Expressions by New Togo officials that New Ghana's efforts would be beneficial are tantamount to its approval of the Applicant's

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39. Johnson, supra note 35, at 353; Fisheries, supra note 37, at para 63.

40. Lauterpact, supra note 38, at 392.

41. Johnson, supra note 35, at 350.

42. Johnson, supra note 35, at 353.

43. M. Akehurst, A Modern Introduction to International Law 32 (3d ed. 1977) [hereinafter cited as Akehurst].

presence in the region, and these expressions manifest New Togo's recognition of New Ghana's sovereignty in Axim Block. New Togo's acquiescence must be considered when fashioning the boundary between the parties to this action.

iii) New Togo's acquiescence gives New Ghana a prescriptive right to Axim Block.

Because Axim Block is within the continental shelf off the African coast,<sup>44</sup> exploration and exploitation could only be legally conducted by one state.<sup>45</sup> New Ghana's assertion of rights to the area and New Togo's acquiescence in those assertions has given New Ghana legal title which can be based on any one of three alternative theories. These theories include the creation of title based on prescription, occupation, and exercise of continental shelf rights.

Prescription is based upon an assertion adverse to another State's claim, coupled with an inadequate protest by the adverse State which amounts to acquiescence.<sup>46</sup> The theory of prescription was fully developed in the Island of Palmas Case,<sup>47</sup> in which the Permanent Court of Justice awarded an island to the Netherlands despite the adverse claims of the United States.<sup>48</sup> This finding was based on the Netherlands's continuous sovereignty over the island, and the United States' failure to mount an effective protest.

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44. Continental art. 1, supra note 2; see also North Sea Cases, supra note 1, para. 247 (declaring Continental art. 1 binding customary law); M. McDougal & W. Burke, The Public Order of the Oceans 713 (1962) [hereinafter cited as McDougal]. See generally Nordquist, The Legal Status of Articles 1-3 of Continental Shelf Convention According to North Sea Cases, 1 Cal. W. L. Rev. 60-78 (1970).

45. Continental art. 2(1), (2) supra note 2.

46. Johnson, supra note 35, at 353-4.

47. (1928) Reports of Int'l Arbitral Awards 831 (vol. II), cited in Johnson, supra note 35, at 342; cf. Legal Status of Eastern Greenland P.C. I J. [1933].

48. Id.

If New Togo believed it had jurisdiction over the Axim Block area, it had a duty to protest New Ghana's adverse exercise of sovereignty.<sup>49</sup> Instead, New Togo praised New Ghana's actions continuously for five years. This was a clear acquiescence by New Togo.

New Togo cannot excuse its acquiescence by claiming continental shelf rights over Axim Block. Despite article 2(1) of the 1958 Convention on the Continental Shelf,<sup>50</sup> regional custom, which is binding upon New Togo,<sup>51</sup> dictates that a State actively assert its continental shelf rights. If New Togo believed it had rights to Axim Block, a respect for regional custom would have compelled New Togo to assert these rights by aggressively conducting its own research operations. The OAU has urged its members to exploit actively their continental shelf rights, and many States have taken steps to safeguard these rights.<sup>52</sup> Although a coastal state has discretion to allow other nations to conduct research within the continental shelf,<sup>53</sup> coastal states have refused virtually every request for consent.<sup>54</sup> New Togo's failure to take any actions against New Ghana's adverse claims was an acquiescence giving New Ghana a prescriptive title to Axim Block. The equidistant line gives proper effect to this title.

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49. Lauterpact, supra note 38, at 396.

50. Continental art. 2(1), supra note 2.

51. Asylum Case (Columbia v. Peru) [1950] I.C.J. 266.

52. Rembe, supra note 29, at 105. See UN Doc. A/Conf. 62/C. 2/L 25; UN Doc. A/Conf., 62/C 2/L 42.

53. Draft Convention art. 246 supra note 7; see also L. Henkin, R. Pugh, O. Schater, H. Smith, International Law 408 (1980) [hereinafter cited as Pugh].

54. Pugh, supra note 53, at 364.

- iv) In the alternative, New Togo's acquiescence gave New Ghana an occupational right to Axim Block.

If the court decides that the Axim Block was res nullius at the time New Ghana commenced exploration, then New Ghana may claim title based on an occupational theory.<sup>55</sup> When a State exercises effective control over an unclaimed area of the seabed, coupled with an unopposed exploration and mining operation, the State may claim legal title based on this occupation.<sup>56</sup> New Ghana's activities in Axim Block were uninterrupted between 1973 and 1980, and New Togo made no attempt to challenge this preeminence. In fact, at the time this protest was filed with the court, New Togo had still failed to take any assertive actions of its own in Axim Block. It has merely contracted with a firm to begin drilling sometime in the future. Therefore, New Ghana has legal title to Axim Block based on an occupational theory, which may be given effect only through New Ghana's equidistant line.

New Ghana's title to Axim Block may also be based upon a third theory. If New Togo never believed it had any right to Axim Block, New Ghana's activity merely was an assertion of its own continental shelf rights<sup>57</sup> in conformity with regional and general custom.<sup>58</sup> New Togo cannot claim title to a seabed area it considered New Ghana's unless it manifested some form of assertive behavior.<sup>59</sup> New Togo has manifested only acquiescence.

Under the prescriptive, occupational, or continental shelf theories, New Ghana has title to Axim Block and the equidistant line properly reflects this fact.

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55. Hydrospace, supra note 6, at 83; see also Akehurst, supra note 43, at 141-42.

56. Hydrospace, supra note 6, at 85; see Johnson, supra note 35, at 353.

57. Continental art. (2)(1), supra note 2.

58. See § I.C. 1. c. iii), supra.

59. Johnson, supra note 35, at 353.

d. New Ghana's roadstead is an important circumstance.

i) The roadstead is within New Ghana's territorial sea.

Because an equitable boundary must give full effect to a State's territorial waters,<sup>60</sup> the roadstead must be included within New Ghana's boundary. The roadstead is four nautical miles south of Keta Island, well within the twelve mile territorial sea which the island's southeastern shore possesses.<sup>61</sup>

In the alternative, even if Keta Island was limited to the three mile territorial waters it had in 1948, the roadstead would still be within New Ghana's territorial sea. A roadstead is considered to be the territorial sea of the State which operates it.<sup>62</sup> Furthermore, channel buoys which lead from a coastal State's waters to a roadstead should extend the territorial sea up to and including the roadstead.<sup>63</sup> In this case, the channel buoys extend from the New Oti River eastward through the navigable channel between Keta Island and New Togo, then south to the roadstead. These buoys are sufficient to extend New Ghana's sovereignty to the facility and surrounding area.

In either case, the roadstead is fully within New Ghana's jurisdiction. Only the equidistant line properly apportions this area to New Ghana.

ii) New Togo has acquiesced in New Ghana's rights to the roadstead.

Even if the roadstead is not within New Ghana's territorial sea, any delimitation must apportion the facility to New Ghana because New Togo has

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60. See TSCZ art. 12, supra note 28; Bowett, supra note 26, at 16-18.

61. See § I.C. 1.a. iv), supra.

62. TSCZ art. 9, supra note 28; see also McDougal, supra note 44, at 424.

63. McDougal, supra note 44, at 424; see UN Conference on the Law of the Sea 3 Official Records para. 14, 142 U.N. Doc. A/Conf. 13.

acquiesced in the Applicant's sovereignty over the entire roadstead area.<sup>64</sup> New Ghana has fully asserted its claims to the roadstead and accompanying channel region. It has used the facility continuously for twenty-three years, and has filed nautical charts showing the position of the channel buoys and the roadstead area as required under international law.<sup>65</sup>

New Togo has never objected to the roadstead in any way, despite the fact that roadsteads contain the territorial sea of the State which operates it.<sup>66</sup> In the past twenty years, New Togo has only used the facility on three occasions, and only after first obtaining permission from New Ghana. In accordance with customary law, New Togo's failure to protest was an acquiescence in New Ghana's actions, which must be given legal effect.<sup>67</sup> Only the equidistant line properly apportions the roadstead to New Ghana.

iii) New Ghana maintains the roadstead for its economic benefit.

Any boundary agreement must preserve New Ghana's right to the roadstead because the facility is vital to the Applicant's mining industry. The economic consequences of any delimitation are an important consideration in the division of a continental shelf.<sup>68</sup> New Ghana's success as a mineral exporter is dependent upon its ability to ship its hard minerals to foreign ports swiftly and safely, and the roadstead facilitates this operation.

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64. See § I.C. 1.c. supra (discussing assertion-acquiescence).

65. TSCZ, art. 9 supra note 28.

66. Id. See also McDougal, supra note 44, at 424.

67. Fitzmaurice, supra note 33, at 28.

68. Brown, The Anglo-French Continental Shelf Case, 16 San Diego L. Rev. 498 (1979) [hereinafter cited as Brown].

If New Togo's boundary is allowed to cut off New Ghana's right to the roadstead and surrounding waters, the Applicant's economy will be vulnerable to the independent actions of the New Togo government. A state has the right to exercise complete sovereignty within its territorial waters.<sup>69</sup> If New Togo extended its territorial sea beyond the roadstead, it could impede New Ghana's ships by imposition of New Togo custom laws, or by a complete ban on foreign shipping, justified under the guise of insuring its own health and safety.<sup>70</sup> New Ghana ships would also be subject to various taxes and periodic inspections.<sup>71</sup> These problems have already arisen from the extension of territorial seas, by some African nations to distances of up to two hundred nautical miles.<sup>72</sup> Only the equidistant line protects New Ghana's rightful claim to the roadstead, and its ability to keep the facility open to its ships.

2. The equidistant line is the only delimitation method that fairly balances the legitimate interests of both parties.

An equitable delimitation is distinct from an apportionment of just and

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69. Colombos, International Law of the Sea § 97 at 88-9 (6th ed. 1967) Draft Convention art. 2, supra note 7; Rembe, supra note 29, at 86; see also TSCZ art. 14, supra note 28.

70. G.A. Res. 2625 (XXV) of 1970, (principle 1). TSCZ art. 16 supra note 28; Draft Convention, art. 19 supra note 7. Le Superbo Case No. 48 21 J.D.I. (Clunet) 202 (1893) cited in Simonds, Cases on the Law of the Sea vol. 3 (1980) at 31). Various states have declared extensive rights over their territorial seas. See, e.g. Grenada Act. No. 17 of 1978 cited in M. Nordquist, S. Lay and K. Simmonds, Developments in the Law of the Sea vol. 7 at 31 1980 [hereinafter cited as Developments]; Law on the Somali Territorial Sea and Ports. Law No. 37 at 10 Sept. 1972, cited in Developments, supra at 56. See generally, McDougal, supra note 44, at 180-181 notes 18-22. U.S. Executive Order No. 10173. Cf. Corfu Channel Case, Judgment of April 9, 1949 [1949] I.C.J. Rep. 4.

71. Id.

72. Rembe, supra note 29, at 92. These nations include Benin (200), Gabon (170), Ghana (150), Senegal (150), Somalia (200). UNCLOS III has not agreed on a limit to the length of territorial waters. Major Issues of the Law of the Sea 28-32 (D. Larson ed. 1976).

equal shares of the undivided continental shelf.<sup>73</sup> Equity is not equivalent to equality.<sup>74</sup> Delimitation is not concerned with allocating equitable shares of any known resources.<sup>75</sup> Furthermore, the phenomena of any possible common deposits does not require adjustment of a boundary.<sup>76</sup> The existence of any deposits does not constitute a special circumstance entitling a coastal state to demand a deviation from the equidistant line.<sup>77</sup> Therefore, the presence of hydrocarbons in Axim Block should not affect the determination whether the boundary that New Ghana proposes is equitable.

II. EVEN IF THE COURT APPLIES THE NATURAL PROLONGATION THEORY OF DELIMITATION, NEW GHANA'S PROPOSED BOUNDARY IS THE MOST EQUITABLE DELIMITATION BECAUSE IT APPROXIMATES AN EXISTING NATURAL BOUNDARY.

In 1979 New Togo adopted a domestic statute that unilaterally established a boundary line reflecting what New Togo claims is the natural prolongation of its land territory. The utility of the natural prolongation method in lateral boundary delimitations is doubtful because a continuous continental shelf of adjacent States fails to suggest a clear delineation of limits on the basis of geological evidence of a natural boundary.<sup>78</sup> The majority of African states have advocated the abandonment of the natural prolongation theory,<sup>79</sup> and Article

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73. U.K./France Arbitration, supra note 5, para. 78.

74. Id. para. 249.

75. Id. para. 78.

76. Bowett, supra note 13, at 323 n.22.

77. Brown, supra note 68, at 461, 522.

78. U.K./France Arbitration, supra note 5, paras. 79, 191, 194; Bowett, supra note 13, at 156, 162, 210, 331; Brown, supra note 62, at 479-81.

79. Rembe, supra note 26, at 200.

83 of the Draft Convention<sup>80</sup> drops the reference to natural prolongation that the I.C.J. made in the North Sea Continental Shelf Cases.<sup>81</sup> If the Court rejects the applicability of the equidistance rule in favor of natural prolongation, the boundary New Ghana proposes remains the equitable and proper delimitation and should prevail.

A. The Ancient New Oti River Bed Is A Significant Break In This Continental Shelf.

Under the theory of natural prolongation, effect must be given to any natural boundary that constitutes a significant discontinuity in the geomorphology of the continental shelf.<sup>82</sup> Many shelf features are the direct analogues of surface features.<sup>83</sup> In the instant case, geologists and geomorphologists have established that the African shoreline has receded as a result of rising sea levels over the past 2,500 years. At low sea levels, the New Oti River followed a course running southeasterly from the vicinity of the present river bed.

The river bed constitutes a significant break in the continental shelf and provides a natural boundary that is far eastward from New Togo's delimitation. The significance of the break should be determined not independently, but rather in relation to the rest of the continental shelf. For example, the Hurd Deep in the English Channel is part of an entire zone of faults extending for a distance of eighty nautical miles.<sup>84</sup> The Court in the U.K./France Arbitration found that

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80. Draft Convention, supra note 7, art. 83.

81. North Sea Cases, supra note 1, para. 101(c)(1).

82. U.K./France Arbitration, supra note 5, para. 106.

83. Note, Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf, 17 Va. J. of Int'l L. 77, 92 (1976) [hereinafter cited as U. Va. Journal].

84. Brown, supra note 62, at 478.

the Hurd Deep faults did not disrupt the essential unity of the continental shelf, and regarded them as minor features compared to the Norwegian Trough in the North Sea.<sup>85</sup> In contrast to the Hurd Deep Fault Zone, the ancient river bed in the instant case is not a mere component of an entire fault zone, but instead is the lone significant geological discontinuity in this entire continental shelf area. A boundary drawn along the axis of the river bed leaves to both States those parts of the continental shelf that constitute the natural prolongation of their land territory.

B. The Ancient New Oti River Bed Is A Proper Extension Of An Existing Land Feature.

In situations where the features of the continental shelf are part of a larger feature that extends landward into the adjacent landmass, the rationale of natural prolongation suggests the extension of the onshore geological boundary to the shelf.<sup>86</sup> If the continental shelf were emergent land, history might have established political boundaries by using the natural features of the shelf surface.<sup>87</sup> The New Oti River Bed represents the historical dividing line between the land territories of New Ghana and New Togo. The political boundary formed by the New Oti River is directly continuous with the shelf feature of the ancient river bed. Therefore, if the Court adopts the natural prolongation theory, the resulting boundary would coincide not with that proposed by New Togo, but rather with the shelf feature of the ancient river bed. If the Court rejects the geological significance of the ancient river bed, the Court must reject the entire criterion of natural prolongation.

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85. U.K./France Arbitration, supra note 5, paras. 107-109.

86. U. Va. Journal, supra note 68, at 93.

87. Id.

III. NEW TOGO'S BOUNDARY PROPOSAL MISAPPLIES THE NATURAL PROLONGATION STANDARD AND IS INEQUITABLE.

A. New Togo's Proposed Boundary Represents The Extension Of A Political Boundary.

1. The boundary is essentially a line drawn perpendicular to the coast at the political boundary terminus.

New Togo claims to have applied the natural prolongation method of delimitation, but instead has drawn a line perpendicular to the coast at the point where the land frontier meets the sea. The latter method of delimitation reflects political, not natural, features. The perpendicular line method carried little support in the International Law Commission<sup>88</sup> and among individual states.<sup>89</sup> Because New Togo's proposed boundary totally disregards the course of the ancient river bed, the line is not a true natural prolongation. Proper use of the criterion of natural prolongation would result in a delimitation extending southeastward from the African coast.

2. The Respondent's thalweg line is incorrectly drawn, and inappropriate in the present circumstances.

New Togo's reliance on a thalweg to a point three nautical miles east of Keta Island is a misapplication of recognized principles of delimitation. A median line is the correct method of delimiting a continental shelf in a channel between the opposite shores of disputing States.<sup>90</sup> Because Keta Island is opposite the coast of New Togo, New Ghana's equidistant line is the appropriate method of delimiting the channel between itself and the Respondent.

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88. Report of the Int'l Law Comm'n to the Gen. Assembly, UN Doc. A/2456 (1953), reprinted in [1953] 2 Y.B. Int'l L. Comm'n 200, UN Doc. A/CN. 4/Ser. A/1953/Add. 1.

89. Note, Boundary Delimitation in the Economic Zone: The Gulf of Maine Dispute, 30 Maine L. Rev. 207, 212 n.21 (1979).

90. Amin, supra note 6, at 52.

Even if the thalweg doctrine is applicable in this dispute, the thalweg must be defined in accordance with the definition set forth in the 1948 treaty between the United Kingdom and France. The treaty terms, which both parties have agreed to be bound by, must be interpreted by their plain meaning.<sup>91</sup> In that document, the dividing line is described as running down the middle of the navigable channel of the New Oti River. This is the most commonly accepted thalweg definition.<sup>92</sup> Therefore, a thalweg delimitation in the channel between New Ghana and New Togo must run down the navigable channel created by the New Oti River Bed. Although the Respondent claims to have used a thalweg, the line does not follow the River bed and is inaccurate.

B. The New Togo - New Benin Treaty Does Not Bind New Ghana And Cannot Affect Any Boundary Between The Applicant And Respondent.

1. A bilateral treaty cannot create rights and obligations for a nonparty without its consent.

Article 34 of the Vienna Convention on the Law of Treaties of 1969 codifies the principle, "pacta tertiis nec nacent nec prosunt," that is, treaties can neither create rights nor obligations for third parties unless they voluntarily consent.<sup>93</sup> New Ghana was not a party to the treaty between New Togo and New Benin, and has not consented to be bound by it, either expressly or by implication. On the contrary, the Applicant has actively opposed the division created by this bilateral agreement, both by passage of its domestic laws, and throughout the dispute now before this Court. Therefore, New Ghana cannot be bound by boundaries established in the New Togo-New Benin accord.

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91. Vienna Convention on the Law of Treaties, UN Doc. A/Conf. 39/27 (1969), 63 A.J. 1 L. 875 (1969) art. 31(1).

92. Bowett, supra note 13 at 61; Pugh, supra note 53, at 294.

93. Vienna Convention on the Law of Treaties, UN Doc. A/Conf. 39/27 (1969), 63 A.J.I.L. 875 (1969) art. 34; see also Ellios, The Modern Law of Treaties 59 (1974); Free Zones Case [1932] P.C. I.J. Series A/B no. 46.

2. The treaty is not binding under international law.

a. The treaty was not filed with the United Nations Secretariat.

Article 102 of the United Nations Charter requires member states to file all treaties with the Secretariat.<sup>94</sup> Failure to so file precludes recognition of the treaty by any organ of the United Nations,<sup>95</sup> including the International Court of Justice.<sup>96</sup> New Togo has not established in the record that it properly filed the New Benin treaty with the Secretariat. Therefore, the Respondent may not invoke the provisions of that treaty before this court in the present proceeding.

b. The treaty reflects neither regional nor general custom.

Even if a valid New Togo-New Benin treaty could bind a third party, the treaty is invalid because it is not based on either local or general custom and embodies inequitable principles. New Togo's treaty establishes boundaries based on the natural prolongation of political divisions. This method has no support either within the African community, or throughout the world at large.<sup>97</sup> The treaty ignores New Ghana's historical claims to the Axim Block and the roadstead, and contradicts the provisions of the 1958 Conventions and the Draft Composite. The New Togo treaty is therefore flawed from its inception. A treaty which is not based on the norm of general international law is void,<sup>98</sup> and therefore, the New Togo-New Benin Treaty cannot bind New Ghana.

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94. Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 art 102 [hereinafter cited as UN Charter].

95. Id.

96. UN Charter art. 102, supra note 95.

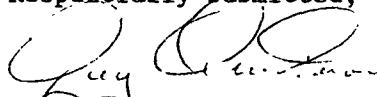
97. § III.A., supra.

98. H. Kelsen, Principles of International Law 48 (2d ed. 1966) 48.

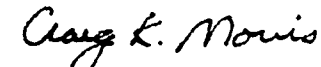
CONCLUSION

In accordance with the arguments and authorities herein presented, it is respectfully requested that this honorable Court declare that the oceanic boundary delimitation based upon an equidistant line and codified by New Ghana in 1978 is the proper application of all general and specific principles, rules and criteria relevant to the delimitation, and further, that New Ghana is entitled to exercise and enjoy absolute sovereign rights within the boundary.

Respectfully submitted,

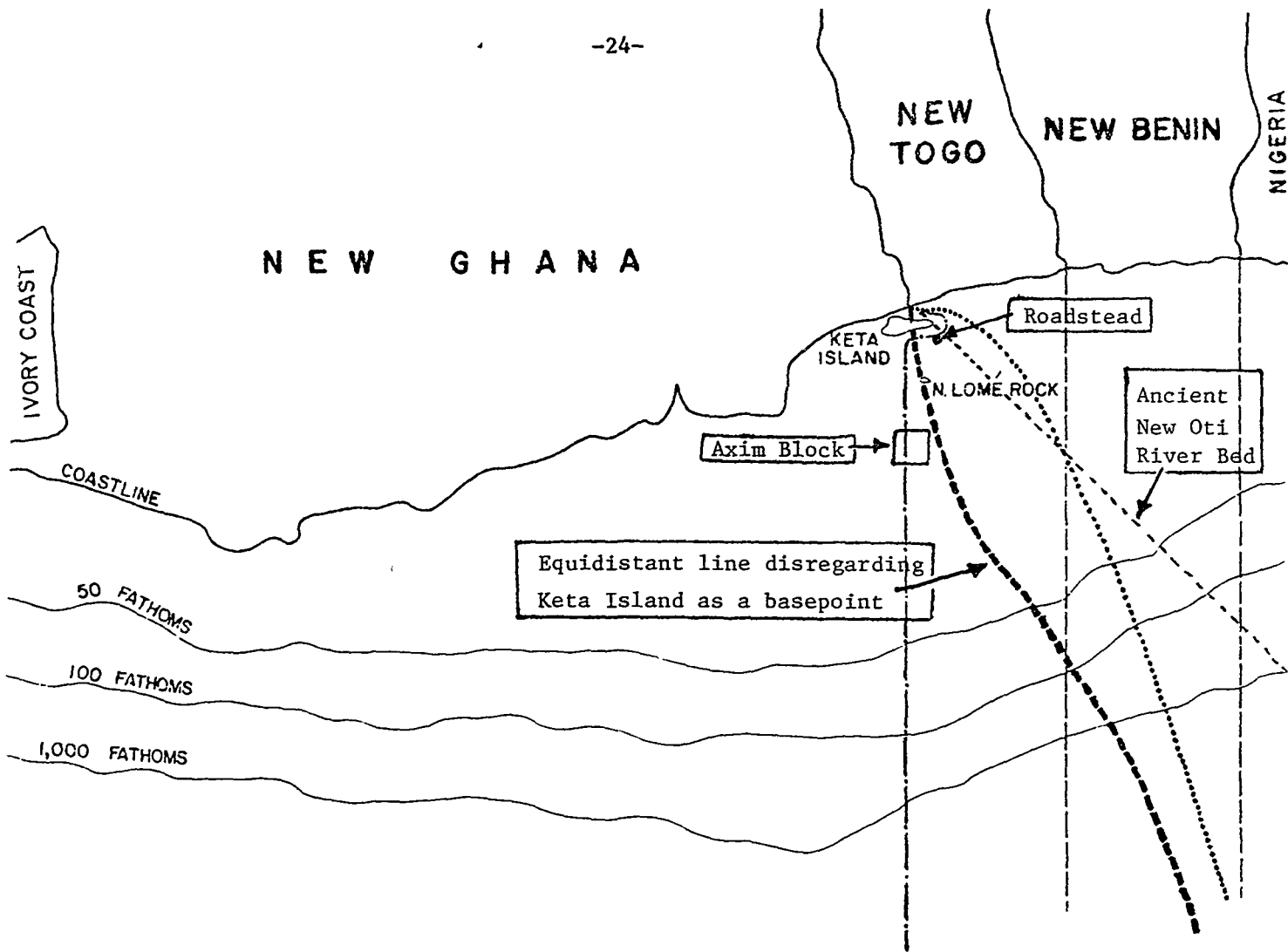


Guy Arcidiacono



Craig K. Morris

Agents for Republic of New Ghana



ATLANTIC OCEAN

# APPENDIX A



### LEGEND

- ..... 1978 Line in dispute issued by New Ghana
- . - . - . 1979 Line in dispute issued by New Togo
- - - - - New Benin Treaty Lines

