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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 RESPONDENT

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

QUESTIONS PRESENTED

I

Whether customary law controls the delimitation of the oceanic boundary between New Togo and New Ghana.

II

Whether New Togo's delimitation line represents the natural prolongation of New Togo's land territory.

III

Whether the equidistance/special circumstances rule requires New Togo's delimitation line.

Whether New Ghana's equidistant line is constructed correctly.

### SUMMARY OF ARGUMENT

#### I

Customary law controls the continental shelf delimitation between New Togo and New Ghana. The 1958 Geneva Convention on the Continental Shelf is inapplicable in the dispute because New Togo is not a party to the Convention and because New Togo has not acquiesced to the Convention's delimitation provisions. Furthermore, the Convention's delimitation provisions are not rules of customary law. Customary law requires the delimitation of the continental shelf between New Togo and New Ghana to comply with equitable principles and to effect the natural prolongation of each state's land territory beneath the sea.

#### II

The doctrine of natural prolongation is a fundamental rule of customary international law which states that a coastal State has exclusive sovereignty over the continental shelf area constituting the extension of a State's land territory beneath the sea. International case law, treaties, and unilateral declarations of States recognize the doctrine as a rule of customary law. New Togo's delimitation line represents the natural prolongation of New Togo's land territory beneath the sea. New Togo and New Benin share a single geological continental shelf because no significant geological feature exists on the shelf that disrupts the shelf's essential continuity. The ancient New Oti River bed does not define the natural prolongation of New Ghana's land territory because the ancient river bed is not a significant geological feature. Since New Togo

and New Ghana share the same geological continental shelf, extension of the states' political boundaries best reflects the natural prolongation of New Togo's and New Ghana's land territories beneath the sea. The practice of delimiting continental shelves by extending political boundaries is consistent with state practice.

The 1948 Treaty between France and the United Kingdom established the lateral boundary between New Togo and New Ghana. In 1948, the colonies that are now New Togo and New Ghana were entitled to three mile territorial seas. Since New Togo and New Ghana are bound by the 1948 Treaty, Keta Island is entitled to a three mile territorial sea. Furthermore, since the enclave around Keta Island delimits the lateral boundary between New Togo and New Ghana, extension of their sovereignty seaward to twelve miles does not affect the three mile enclave around Keta Island.

### III

Under customary law, construction of an equidistant line delimiting a continental shelf is appropriate only where all relevant circumstances indicate the resulting delimitation will be equitable. Equitable factors relevant to determining the appropriateness of an equidistant delimitation include the configuration of the parties' coasts, the presence of natural resources, the proportion between the shelf areas and the states' coastlines, and any other relevant circumstances affecting the delimitation. The distortion of New Ghana's equidistant line caused by Keta Island, the resources in Axim Block, and the relative length of New Togo's and New Ghana's coastlines illustrate the inequity of New Ghana's equidistant line. The equidistant line adversely affects New Togo's historic fishing rights and New Togo's rights in the thalweg. Therefore, New Ghana's delimitation must be rejected under customary law.

## IV

Even if construction of an equidistant line is the proper method of delimiting the continental shelf between New Togo and New Ghana, New Ghana's equidistant line is constructed incorrectly. Proper construction of an equidistant line must use New Lome' Rock as a base point. An equidistant line using New Lome' Rock as a base point also results in an inequitable delimitation. Therefore, the equidistance method of delimitation is inappropriate in the present case.

I. CUSTOMARY INTERNATIONAL LAW CONTROLS THE PRESENT DELIMITATION.

A. The 1958 Convention On The Continental Shelf Is Not Applicable.

Absent an agreement between States, customary international law controls in delimiting oceanic boundaries.<sup>1</sup> New Togo is not a party to the 1958 Convention on the Continental Shelf (Continental Shelf Convention). New Togo has not acquiesced to the Continental Shelf Convention or recognized the Convention as applicable to the delimitation of continental shelf areas. Furthermore, the delimitation provisions of the Convention are not rules of customary law.<sup>2</sup> Therefore, New Togo is not bound to the Continental Shelf Convention.<sup>3</sup>

B. Customary International Law Requires Delimitation Of Oceanic Boundaries To Conform With The Doctrine Of Natural Prolongation And With Equitable Principles.

Customary law requires the application of the same principles in the delimitation of continental shelves, territorial seas, and exclusive fishery zones.<sup>4</sup> To decide which circumstances are relevant and to determine the proper application of equitable principles in a boundary dispute, the International Court of Justice (I.C.J.) should consider international conventions, international custom, general principles of law, judicial decisions, and

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1. North Sea Continental Shelf Cases, [1969] I.C.J. 3, para. 83 [hereinafter cited as North Sea Cases]; Delimitation of the Continental Shelf Decision of 30 June 1977 (United Kingdom v. France), 18 Int'l Legal Materials 399, para. 62 (1977) [hereinafter cited as French-U.K. Arbitration].

2. North Sea Cases, supra note 1, paras. 63, 69.

3. North Sea Cases, supra note 1, para. 83.

4. French-U.K. Arbitration, supra note 1, para. 96; D. Bowett, The Legal Regime of Islands In International Law 188 (1979) [hereinafter cited as Bowett]. Compare Draft Convention (Informal Text) of the United Nations Third Conference on the Law of the Sea art. 74, Doc. A./CONF. 62/WP. 10/Rev. 3 (22 Sept. 1980) [hereinafter cited as Draft Convention] with Draft Convention art. 83, supra.

writings of international legal scholars.<sup>5</sup> These sources affirm that under customary law, equitable principles govern the delimitation of a continental shelf to effect the natural prolongation of the land territory.<sup>6</sup>

II. NEW TOGO'S DELIMITATION LINE REPRESENTS THE NATURAL PROLONGATION OF NEW TOGO'S LAND TERRITORY.

A. The Doctrine Of Natural Prolongation Is A Fundamental Rule Of Customary International Law.

1. International judicial decisions support New Togo's sovereignty over the natural prolongation of New Togo's land territory.

The doctrine of natural prolongation recognizes a coastal State's sovereignty over the extension of the State's land territory beneath the sea.<sup>7</sup> The North Sea Continental Shelf Cases (North Sea Cases)<sup>8</sup> and the France-United Kingdom Continental Shelf Arbitration (French-U.K. Arbitration)<sup>9</sup> are the major continental shelf disputes that have been adjudicated by international courts.<sup>10</sup>

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5. Statute of the International Court of Justice art. 38, 59 Stat. 1055, T.S. 993 [hereinafter cited as I.C.J. Statute].

6. North Sea Cases, supra note 1, para. 85(c); French-U.K. Arbitration, supra note 1, para. 79; Draft Convention art. 76, supra note 3; Pres. Proc. No. 2667, 3 C.F.R. 39, 40 (1945) [hereinafter cited as Truman Proclamation]; Bowett, supra note 4, at 161; Goldie, The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands, 4 Neth. Y.B. Int'l L. 237, 251 (1973); Note, Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Material Continental Shelf, 17 Va. J. Int'l L. 77, 80 (1976) [hereinafter cited as Delimitation of Continental Shelf].

7. Z. Slouka, International Custom and the Continental Shelf 20-23 (1968) [hereinafter cited as Slouka]; Brown, The Anglo-French Continental Shelf Case, 16 San Diego L. Rev. 461, 473-74 (1979) [hereinafter cited as Brown]; Delimitation of Continental Shelf, supra note 6, at 78-79.

8. North Sea Cases, supra note 1.

9. French-U.K. Arbitration, supra note 1.

10. Brown, supra note 7, at 463-64.

In the North Sea Cases, the I.C.J. held that the doctrine of natural prolongation was the fundamental rule of customary international law relating to continental shelf delimitation.<sup>11</sup> The court in the French-U.K. Arbitration affirmed the doctrine as a fundamental rule of customary international law.<sup>12</sup> Thus, international case law supports New Togo's assertion of sovereignty over the natural prolongation of New Togo's land territory beneath the sea.

2. Unilateral declarations by coastal States recognize the doctrine of natural prolongation.

The doctrine of natural prolongation first emerged in 1945 in the Truman Proclamation.<sup>13</sup> Through the Truman Proclamation, the United States asserted sovereignty over the continental shelf appertaining to the United States coast.<sup>14</sup> By 1950 the doctrine of natural prolongation was a rule of customary law.<sup>15</sup> Current state practice affirms the doctrine as customary law.<sup>16</sup>

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11. North Sea Cases, supra note 1, para. 19.

12. French-U.K. Arbitration, supra note 1, para. 77; Brown, supra note 7, at 479.

13. Truman Proclamation, supra note 6, at 40.

14. North Sea Cases, supra note 1, para. 86; Truman Proclamation, supra note 6, at 40; U.N. Conference on the Law of the Sea, 6 Official Records 3, 11 Doc. A./CONF. 13/18 (1958); Slouka, supra note 7, at 43; Brown, supra note 7, at 473.

15. U.N. Secretariat, Memorandum on the Regime of the High Seas, Doc. A./CN. 4/32 (14 July 1950) 95, 100; Summary Records of 67th Meeting, [1950] 1 Y.B. Int'l L. Comm'n 218 A.CN.4/SER.A/1950; Slouka, supra note 7, at 22-23, 44; Douglas, Conflicting Claims to Oil and Natural Gas Resources Off the Eastern Coast of Canada, 18 Atla. L. Rev. 54, 59-60 (1980); Lauterpacht, Sovereignty Over Submarine Areas, 27 Brit. Y.B. Int'l L. 376, 393 (1950).

16. Brown, supra note 7, at 473.

3. International treaties reflect that the doctrine of natural prolongation is customary international law.

In the North Sea Cases, the I.C.J. held that Article One of the Continental Shelf Convention<sup>17</sup> was a rule of customary international law.<sup>18</sup> Article One of the Continental Shelf Convention recognized the doctrine of natural prolongation by defining the continental shelf as the subsea area adjacent to a State's land territory.<sup>19</sup> The Third United Nations Conference on the Law of the Sea (UNCLOS) has recognized that developments in the law of the sea since 1958 require an updated convention on the law of the sea.<sup>20</sup> The UNCLOS Draft Convention on the Law of the Sea (Draft Convention) defines the continental shelf as the submarine area throughout the natural prolongation of a coastal states land territory.<sup>21</sup> While the concepts of "adjacency" and "natural prolongation" are not identical, both concepts reflect a doctrine of customary law that recognizes a coastal State's sovereignty over the extension of the State's land territory beneath the sea.<sup>22</sup> Therefore, both Article One of the Continental Shelf Convention and current trends in the law of the sea as reflected in the Draft Convention support New Togo's claims to the natural prolongation of New Togo's land territory.

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17. Convention on the Continental Shelf art. 1, Done April 29, 1958, 499 U.N.T.S. 311, 312 [hereinafter cited as Continental Shelf Convention].

18. North Sea Cases, supra note 1, para. 63.

19. Continental Shelf Convention art. 1, supra note 17.

20. Draft Convention Preamble, supra note 4.

21. Id. art 7.

22. North Sea Cases, supra note 1, para. 43; Summary Records of the 8th Session, 359th meeting [1956] 1 Y.B. Int'l L. Comm'n 145-46 A/CN.4/SER. 359/1956; R. Arnand, Legal Regime of the Sea-Bed and the Developing Countries 55-57 (1976); Slouka, supra note 7, at 108.

B. New Togo's Line Represents The Natural Prolongation Of  
The Land Territories Of New Togo And New Ghana.

1. New Togo and New Ghana share a single continental shelf.

Adjacent States share a single continental shelf unless a physical feature disrupts the shelf's geological continuity.<sup>23</sup> In the French-U.K. Arbitration, the United Kingdom argued that their continental shelf beneath the English Channel extended to the Hurd Deep Fault Zone because the Fault Zone terminated the natural prolongation of the United Kingdom's land territory.<sup>24</sup> The Hurd Deep Fault Zone is two kilometers wide, 150 kilometers long, and 115 meters deep.<sup>25</sup> The court of arbitration rejected the United Kingdom's argument.<sup>26</sup> The court held that the Hurd Deep Fault Zone constituted only a minor discontinuity in the continental shelf and thus did not define the natural prolongation of the United Kingdom's land territory.<sup>27</sup> One commentator cited the Timor Trench as a geological feature defining the natural prolongation of two States' land territories.<sup>28</sup> The Timor Trench is a 2,000 meter deep trench dividing the continental shelves between Australia and Indonesia.<sup>29</sup> Since there is no evidence that the ancient New Oti River bed is a geological feature as deep or as wide as the Timor Trench or even the Hurd Deep Fault Zone, New Togo and New

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23. French-U.K. Arbitration, supra note 1, para. 106.

24. Id. para. 104.

25. Brown, supra note 7, at 466, 477-78.

26. French-U.K. Arbitration, supra note 1, para. 107.

27. Id.

28. Brown, supra note 7, at 477.

29. Id.

Ghana share a single continental shelf.<sup>30</sup> Therefore, the ancient New Oti River bed is not a significant break in the continuity of the continental shelf and does not define the natural prolongation of New Ghana's land territory.

2. The political boundary between New Togo and New Ghana defines the natural prolongation of those States' land territories.

Under customary international law, when two States share a single continental shelf, each State is entitled to the most natural prolongation of its land territory beneath the sea.<sup>31</sup> New Togo and New Ghana share a single continental shelf. New Togo's delimitation line defines the most natural prolongation of New Togo's land territory.

- a. Current state practice supports New Togo's boundary delimitation.

State practice, as evidenced by bilateral agreements between States,<sup>32</sup> is one criterion the I.C.J. should consider when determining the oceanic boundary between New Togo and New Ghana.<sup>33</sup> Current bilateral agreements confirm New Togo's method of delimitation. The agreements indicate that States recognize the natural extension of political boundaries as an equitable method of delimiting

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30. French-U.K. Arbitration, supra note 1, para. 106.

31. North Sea Cases, supra note 1, para. 43.

32. M. Akehurst, A Modern Introduction to International Law 32-33, 37 (3d ed. 1977) [hereinafter cited as Akehurst].

33. I.C.J. Statute art. 38, § 1 (1)(b), supra note 5.

oceanic boundaries.<sup>34</sup> Oceanic boundaries typically commence at the point at which a State's land boundary meets the coast,<sup>35</sup> then proceed along either a latitudinal line<sup>36</sup> or an azimuth.<sup>37</sup> When an oceanic boundary threatens to divide an island, States divert the delimitation line to circumvent the island, then continue the line in the previously established direction.<sup>38</sup> By extending seaward the political boundary between New Togo and New Ghana, deviating around only Keta Island, New Togo has delimited the maritime boundary between New Togo and New Ghana consistently with State practice.

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34. Agreement on Maritime Boundary, August 23, 1975, Columbia - Ecuador, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 69, 1-3 (1976); Agreement Delimiting Maritime Boundaries, June 4, 1975, Gambia - Senegal, reprinted in 8 New Directions in the Law of the Sea 104-05 (S. Lay, M. Nordquist & K. Simmonds eds. 1980) [hereinafter cited as Gambia-Senegal]; Treaty of the Rio de la Plata and its Maritime Limits, November 19, 1973, Argentina-Uruguay, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 64, 2-13 (1975); Exchange of Notes, April 26, 1960, Guinea-Bissau-Senegal, Journal Officiel de la Republique Francais (1980), reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, Limits of the Seas, No. 68, 1-4 (1976) [hereinafter cited as Guinea-Bissau-Senegal].

35. See, e.g., Gambia-Senegal arts. 1, 2, supra note 34; Exchange of Notes, July 21, 1972, Brazil - Uruguay, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 73, at 1-2 (1973) [hereinafter cited as Brazil-Uruguay].

36. See, e.g., Gambia-Senegal art. 1, supra note 34.

37. See, e.g., Guinea-Bissau-Senegal, supra note 34, at 3-4.

38. See, e.g., Agreement on Continental Shelf Boundary, March 20, 1969 Abu Dhabi-Qatar reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, International Boundary Study, Series A, Limits in the Seas, No. 18, 1-2 (1970) [hereinafter cited as Abu Dhabi-Qatar]; Agreement on Continental Shelf Boundary, January 8, 1968, Italy-Yugoslavia, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, International Boundary Study, Series A, Limits in the Seas, No. 9, 1-3 (1970) [hereinafter cited as Italy-Yugoslavia].

- b. New Togo's boundary delimitation is consistent with current African boundary agreements and declarations.

New Togo's proposed oceanic boundary delimitation is consistent with other agreements between African States,<sup>39</sup> including New Togo and New Benin. In 1975, New Togo, New Benin, and Nigeria delimited the oceanic boundary between those States by extending seaward their mutual land boundaries. New Ghana has protested only New Togo's western boundary as codified by New Togo's 1979 domestic statute. New Ghana has never protested the New Togo - New Benin agreement embodied in the 1979 statute. Under customary international law, a State's failure to protest another State's act is a manifestation of acquiescence.<sup>40</sup> New Ghana, by its acquiescence, is bound to the New Togo - New Benin treaty. In addition to New Benin, New Togo and Nigeria, other African States have delimited their oceanic boundaries by extending their land boundaries.<sup>41</sup> Any line other than New Togo's proposed oceanic boundary is contrary to principles of peaceful relations embodied in the United Nations Charter<sup>42</sup> by threatening to upset the international order established by treaties in effect between neighboring African States.

C. The 1948 Treaty Between France And The United Kingdom Requires Adoption Of New Togo's Delimitation Line.

1. The plain meaning of the 1948 treaty requires the lateral boundary between New Togo and New Ghana to follow the thalweg to Keta Island.

New Togo and New Ghana are bound to the 1948 boundary treaty between France

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39. See text accompanying notes 34-38, supra.

40. Akehurst, supra note 32, at 36.

41. N. Rembe, Africa and the International Law of the Sea 106, 151-52 (1980) [hereinafter cited as Rembe]; see notes 34-38, supra.

42. U.N. Charter art. 1, § 1, Entered into Force, Oct. 24, 1975, 59 Stat. 1031, T.S. 933.

and the United Kingdom. A treaty should be interpreted in accordance with the plain meaning of the treaty's provisions.<sup>43</sup> The plain meaning of the 1948 Treaty evidences the parties intent to establish the entire lateral boundary between the States which are now parties to this dispute. The Treaty states that the lateral boundary between New Togo and New Ghana "runs in a southerly direction following the middle of the navigable channel of the New Oti River." The parties thus invoked the thalweg doctrine to establish the boundary. The thalweg doctrine provides that the most equitable division of fishing and navigation rights between States is a boundary along the waterway's navigable channel.<sup>44</sup> Therefore, by following the thalweg, New Togo's delimitation line complies with the 1948 treaty.

2. The three mile territorial sea recognized in 1948 requires the three mile enclave around Keta Island.

When France and the United Kingdom delimited the lateral boundary between the colonies which are now New Ghana and New Togo, France and the United Kingdom recognized three mile territorial seas around the colonies. Thus, New Togo must grant Keta Island a three mile lateral territorial sea. Only when the thalweg reaches the eastern tip of Keta Island and is, therefore, six miles off the coast of New Togo can the full three mile territorial seas of New Togo and New Ghana be realized. States employ enclaves when an oceanic boundary threatens to

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43. Vienna Convention on the Law of Treaties art. 26, Opened for Signature, May 23, 1969, U.N. Doc.A./CONF. 39/27 (1971) [hereinafter cited as Vienna Convention].

44. Bowett, supra note 4, at 61; Amin, Customary Rules of Delimitation of the Continental Shelf: The Gulf States Practice, 11 Mar. L. and Com. 507, 523 (July 1980) [hereinafter cited as Amin (Customary)].

split a land territory.<sup>45</sup> Therefore, the oceanic lateral boundary between New Togo and New Ghana must form an enclave around Keta Island until the enclave boundary meets the seaward extension of the political boundary dividing New Togo and New Ghana.

3. New Togo's proposed lateral boundary is unaffected by seaward extensions of the territorial sea.

Since gaining their independence, both New Togo and New Ghana have extended their territorial seas to twelve miles. New Togo's line, however, is not subject to a seaward extension of sovereignty because the line is a lateral, and not a seaward, boundary delimitation. The distinction between a lateral and a seaward delimitation is crucial because many African States claim exclusive control<sup>46</sup> over coastal waters extending more than twelve miles from shore.<sup>47</sup> In so doing, African States control fishing throughout the territorial seas<sup>48</sup> and coastal exploitation of the shelf area under the territorial seas.<sup>49</sup> New Ghana,

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45. See French-U.K. Arbitration, supra note 1, para. 199; Abu Dhabi-Qatar, supra note 38, at 1-2.

46. See, e.g., The Territorial Waters and Exercise of Maritime Fisheries Ordinance, December 20, 1977 amending Ordinance of October 18, 1971 (Congo), reprinted in 7 New Directions in the Law of the Sea 21 (S. Lay, M. Nordquist, & K. Simmonds eds. 1980) [hereinafter cited as Congo]; Territorial Waters and Continental Shelf Decree amending The Territorial Waters and Continental Shelf Decree of 1973, July 22, 1977 (Ghana), reprinted in 7 New Directions in the Law of the Sea 28 (S. Lay, M. Nordquist, & K. Simmonds eds. 1980) [hereinafter cited as Ghana]; Territorial Waters of Benin Decree, April 2, 1976 (Benin), reprinted in 7 New Directions in the Law of the Sea 14 (S. Lay, M. Nordquist & K. Simmonds eds. 1980); Delimiting the Territorial Waters of Cameroon, December 5, 1974 (Cameroon), reprinted in 7 New Directions in the Law of the Sea 16 (S. Lay, M. Nordquist & K. Simmonds eds. 1980).

47. Rembe, supra note 41, at Appendix IV. Rembe cites, inter alia, Benin (200 nautical miles), Cameroon (50), Ghana (150), Guinea (130), Guinea-Bissau (150), and Senegal (150) as States having extensive territorial seas.

48. See, e.g., Congo art. 2, supra note 46, at 21-22; Benin arts. 1, 2, supra note 47, at 15.

49. See, e.g., Congo art. 2, supra note 46, at 21-22; Ghana art. 3, supra note 45, at 28.

consistent with regional State practice,<sup>50</sup> could claim a territorial sea area of 200 miles. Because New Togo's delimitation is a lateral line unaffected by a seaward extension of a territorial sea, New Togo's line ensures New Togo and other sovereign African States east of New Togo exclusive jurisdiction over their coastal waters.

Furthermore, New Ghana cannot claim that a fundamental change of circumstances justifies the extension of New Ghana's lateral territorial sea to twelve miles. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a boundary treaty.<sup>51</sup> Therefore, Keta Island is entitled to only a three mile lateral territorial sea.

D. Keta Island Is Not Entitled To Its Own Continental Shelf.

A coastal island is entitled to its own continental shelf only when geological unity exists between the island and the continental land mass.<sup>52</sup> Geological unity exists between a coastal island and its continental land mass when the chemical composition of each is identical. All continental land masses and their continental shelves are composed of granite.<sup>53</sup> Since Keta Island is composed of sand, geological unity does not exist between Keta Island and mainland New Ghana. Therefore, Keta Island is not entitled to a continental shelf.

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50. Asylum Case, [1950] I.C.J. 266, 277, 293-4, 316 Akehurst, supra note 32, at 32, 37.

51. Vienna Convention art. 62(2), supra note 42.

52. North Sea Cases, supra note 1, paras. 19, 96.

53. E. Luard, The Control of the Sea-Bed 4 (1977).

III. ALTERNATIVELY, THE EQUIDISTANCE/SPECIAL CIRCUMSTANCES RULE REQUIRES NEW TOGO'S DELIMITATION LINE.

A. Customary International Law Requires Equitable Delimitation.

The equidistance/special circumstances rule is a rule of customary law which states that an equidistant line is appropriate in continental shelf delimitations only when consideration of all circumstances indicates that the construction of an equidistant line leads to an equitable delimitation.<sup>54</sup> The North Sea Cases,<sup>55</sup> the French-U.K. Arbitration,<sup>56</sup> and Article 83 of the Draft Convention<sup>57</sup> established and affirmed the equitable considerations relevant to delimitations in which no geological feature defines the natural prolongation of the parties' land territories. First, the delimitation should consider the general configuration of the parties' coasts.<sup>58</sup> Second, the delimitation should account for the presence of natural resources in the relevant shelf area.<sup>59</sup> Third, the delimitation should reflect the proportions between the shelf areas adjacent to the coastal State and length of the States' coastlines.<sup>60</sup> Finally, all other special circumstances affecting the equities of the delimitation should be considered.<sup>61</sup> The equidistance/special circumstances rule compels the adoption of New Togo's delimitation line.

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54. North Sea Cases, supra note 1, para. 43; Amin (Customary), supra note 44, at 509.

55. North Sea Cases, supra note 1, para. 101.

56. French-U.K. Arbitration, supra note 1, para. 70; see Merrills, The United Kingdom-France Continental Shelf Delimitation, 10 Cal. W. Int'l L. J. 314, 330 (1980).

57. Draft Convention art. 83, supra note 4.

58. North Sea Cases, supra note 1, para. 101.

59. Id.

60. Id.

61. Id.

B. Special Circumstances Compel Adoption Of New Togo's Delimitation Line.

1. The configuration of New Ghana's coast inequitably distorts the delimitation line.
  - a. A coastal configuration that inequitably distorts an equidistant line should be ignored in a continental shelf delimitation.

An equidistant line affected by an island can lead to an inequitable delimitation of the oceanic boundary between adjacent States.<sup>62</sup> An equidistant line allows a minor coastal projection, such as an offshore island, to produce a distortion which is aggravated the farther the line is projected.<sup>63</sup> The distortion results in an inequitable allocation of the continental shelf and the superjacent waters between adjacent States.<sup>64</sup> Thus, any coastal feature which distorts a lateral delimitation line between adjacent States must be ignored for purposes of a continental shelf delimitation.<sup>65</sup>

- b. Keta Island inequitably distorts New Ghana's equidistant line.

New Ghana's use of Keta Island as a base point inequitably distorts New Ghana's equidistant line. When New Ghana's equidistant line bends around the eastern tip of Keta Island, the line represents all the points at sea which are equally distant from New Togo's coast and from either Keta Island or New Ghana's coastline. Because the tip of Keta Island extends approximately seven miles

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62. North Sea Cases, supra note 1, para. 89.

63. Bowett, supra note 4, at 166-67.

64. North Sea Cases, supra note 1, at paras. 8, 89; Bowett, supra note 4, at 166-67, 183.

65. North Sea Cases, supra note 1, para. 57.

east of and six miles south of New Togo's coast, the equidistant line extends in a southeasterly direction. The 8,000 square miles of continental shelf and superjacent waters that New Ghana's equidistant line takes from New Togo highlights the inequity of New Ghana's proposed delimitation. An equidistant delimitation which denies a coastal State sovereignty over oceanic areas directly adjacent to that State's coast is inequitable.<sup>66</sup> Keta Island should be ignored in constructing an equidistant line because the island distorts the delimitation of the continental shelf and the superjacent waters between New Togo and New Ghana.

2. Axim Block is a special circumstance requiring New Togo's line.
  - a. New Togo's delimitation line reflects New Togo's unequivocal assertion to exploit Axim Block.

A State which properly asserts rights to natural resources is entitled to exploit those resources.<sup>67</sup> A State may assert sovereignty over natural resources through the acts of a corporation.<sup>68</sup> New Togo asserted rights to Axim Block by entering into a joint venture with a private corporation to exploit the eastern portion of Axim Block. Only New Ghana's threat of force impeded New Togo's rightful assertion of sovereignty over Axim Block. A threat of force is contrary to the principles embodied in the Charter of the United

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66. North Sea Cases, *supra* note 1, para. 44.

67. Akehurst, *supra* note 32, at 141-43.

68. Goldie, The Exploitability Test - Interpretation and Potentialities, 8 Nat. Resources J. 434, 449 (1968) [hereinafter cited as Goldie (Exploitability)].

Nations<sup>69</sup> and is an improper protest to an assertion of sovereignty.<sup>70</sup> An improper protest does not nullify another State's proper assertion of sovereignty.<sup>71</sup> Thus, New Togo's assertion of sovereignty over the eastern portion of Axim Block remains legally uncontested. New Togo's delimitation line properly reflects New Togo's assertion of sovereignty over the eastern portion of Axim Block.

b. New Ghana never asserted sovereignty over Axim Block.

A State must exploit an area's resources before the State may assert sovereignty over the area if the State's sole claim of sovereignty is the exploitation of the resources.<sup>72</sup> A resource has not been exploited until a State has put the resources into commercial production.<sup>73</sup> After seven years of exploration, New Ghana has failed to put Axim Block into commercial production. Thus, New Ghana's acts in Axim Block are insufficient for an effective assertion of sovereignty over Axim Block.

c. Even if New Ghana successfully asserted rights to Axim Block, New Ghana's assertion cannot govern the boundary delimitation.

(i) New Togo's timely diplomatic protest of New Ghana's acts negated New Ghana's assertion of sovereignty.

An international tribunal must disregard any act by a State met by a timely

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69. U. N. Charter arts. 1, 2, § 4, supra note 42.

70. Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1, 41 (1974-75) [hereinafter cited as Akehurst (Custom)]; O'Connell & Hist, Mid-Ocean Archipelagos in International Law 66 (1971) [hereinafter cited as O'Connell].

71. Akehurst (Custom), supra note 70, at 40; O'Connell, supra note 70, at 65.

72. Akehurst, supra note 32, at 141-43.

73. Goldie (Exploitability), supra note 68, at 449.

and proper protest.<sup>74</sup> A single diplomatic protest bars a territorial claim provided the dispute is brought before an appropriate international tribunal.<sup>75</sup> Negotiations between States in conflict extend the effectiveness of the protest.<sup>76</sup> When New Ghana entered into a joint venture agreement with Sea-Oil, New Togo realized that New Ghana sought to exploit the resources in Axim Block. After New Ghana enacted "The New Ghana Ocean Resources Act," New Togo realized that New Ghana intended to exclude New Togo from benefitting from the exploitation of Axim Block. New Togo then delivered to New Ghana a diplomatic protest of New Ghana's activities at Axim Block. Thus, New Togo issued a proper and timely protest to New Ghana's activities, preventing New Ghana from effectively asserting exclusive sovereignty over Axim Block.

(ii) New Togo never acquiesced to New Ghana's activities in Axim Block.

A statement of acquiescence made to the news media is binding on a State only if a government spokesman expresses his State's official position at an international conference.<sup>77</sup> While newspapers reported that New Togo's government officials made statements that New Ghana's activities at Axim Block would benefit both States, no evidence exists that New Togo officials actually made those statements. Even if New Togo officials did make the alleged statements, the officials were expressing an opinion, not an official position,

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74. Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116, 191 (Read, J., dissenting); Akehurst (Custom), supra note 70, at 39.

75. O'Connell, supra note 70, at 64 n.3, 65.

76. O'Connell, supra note 70, at 65-66.

77. Akehurst, supra note 32, at 32.

concerning New Ghana's activities. Furthermore, no evidence exists that the statements were made before an international conference. Thus, New Togo is not bound by any statements made to newspapers supporting New Ghana's activities in Axim Block.

- d. New Togo's boundary delimitation properly divides Axim Block.

A boundary delimitation which divides a deposit of resources is an equitable delimitation which encourages the efficient exploitation of those resources.<sup>78</sup> Many States delimit their oceanic boundaries taking into account discovered<sup>79</sup> and undiscovered<sup>80</sup> natural resources existing on the boundary line. Since New Togo's proposed boundary permits the joint exploitation of Axim Block by New Togo and New Ghana, New Togo's delimitation line is consistent with State practice.

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78. North Sea Cases, supra note 1, para. 97.

79. See, e.g., Continental Shelf Boundary Agreement, February 22, 1958, Bahrain-Saudi Arabia, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, International Boundary Study, Study A, Limits in the Seas, No. 12, Analysis; Amin, supra note 44, at 524, 526.

80. See, e.g., Agreement on the Delimitation of the Continental Shelf, September 20, 1969, Iran-Qatar art. 2, reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, International Boundary Study, Study A, Limits in the Seas, No. 25 (1980); Continental Shelf Boundary Agreement, October 24, 1968, Iran-Saudi Arabia art. 4 (1970), reprinted in U.S. Dep't of State, Bureau of Intelligence and Research, Office of the Geographer, International Boundary Study, Study A, Limits in the Seas, No. 24, (1970); Italy-Yugoslavia art. 2, supra note 38, at 1.

3. New Togo's delimitation represents a reasonable degree of proportionality between the coasts of New Togo and New Ghana.

- a. The coastal ratio requires New Togo's line.

The approximate ratio of the coasts of New Togo and New Ghana reveal the inequity of the line proposed by New Ghana. While New Ghana has a 300 nautical mile sea coast, New Togo has a coast of fifty nautical miles. Even if the six to one coastal ratio serves as only a general guideline,<sup>81</sup> New Ghana is leaving to New Togo much less sea area than naturally appertains to New Togo's land territory. Thus, the seaward extension of the political boundary between New Togo and New Ghana properly reflects the States' coastal ratio.

- b. The treaty between New Togo and New Benin requires New Togo's delimitation line.

An equitable delimitation in the present case must observe the New Togo - New Benin continental shelf delimitation treaty. Since New Benin is not a party to the present dispute, New Benin will not be bound to the judgment of the I.C.J. in the present case.<sup>82</sup> Consequently, should the Court adopt New Ghana's proposed delimitation, New Togo would be bound to a disproportionately small continental shelf because New Togo would be bound to both the I.C.J. decision and the treaty between New Togo and New Benin. Only New Togo's proposed delimitation equitably considers the effect of the New Togo - New Benin treaty.

- c. The configuration of New Ghana's mainland coast causes an inequitable distortion.

An equidistant delimitation which uses only the mainlands of New Togo and

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81. French-U.K. Arbitration, supra note 1, paras. 100-01.

82. I.C.J. Statute art. 38, supra note 5.

New Ghana as base points results in an inequitable delimitation because of the indented configuration of New Ghana's coast immediately west of the New Oti River. Any coastal configuration which causes an inequitable delimitation must be ignored when constructing an equidistant line.<sup>83</sup> An equidistant line which uses the mainlands as base points is inequitable because it delimits the boundary east of Axim Block and deprives New Togo of its historic fishing rights near New Lome' Rock. Therefore, the indented configuration of New Ghana's coast, like Keta Island, must be ignored for purposes of delimitation.

4. New Togo's line reflects all other relevant circumstances.

a. An equidistant line of delimitation must reflect New Togo's historic fishing rights.

A State's historic fishing rights are relevant considerations<sup>84</sup> which affect an equidistant delimitation.<sup>85</sup> The Grisbadarna principle of international law states<sup>86</sup> that delimitation of an oceanic boundary must preserve a State's historic<sup>87</sup> and prescriptive<sup>88</sup> fishing rights exercised on the State's

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83. French-U.K. Arbitration, supra note 1, para 97.

84. North Sea Cases, supra note 1, para. 93 (Nervo, J., separate opinion); Bowett, supra note 4, at 153 n.28; Brown, supra note 6, at 493, 494.

85. Brown, supra note 7, at 494-95.

86. Grisbadarna Case (Norway v. Sweden), Hague Ct. Rep. (Scott) 121, 130 (1909) [hereinafter cited as Grisbadarna Case].

87. North Sea Cases, supra note 1, para. 80 (Jessup, J., separate opinion); Grisbadarna Case, supra note 86, at 130.

88. G. Amador, The Exploitation and Conservation of the Resources of the Sea 210 (2d ed. 1963).

continental shelf<sup>89</sup> and in superjacent waters.<sup>90</sup> The Grisbadarna principle is especially applicable when fishing is the economic lifeblood of only one of the States in a boundary dispute.<sup>91</sup> Fishing is an integral segment of New Togo's economy. New Ghana, however, does not depend on fishing to support its economy. Furthermore, New Ghana had acquiesced to New Togo's historic fishing rights until New Ghana unilaterally declared exclusive control of fishing near New Togo's coast and around New Lome' Rock. Persons residing in the territory of a new State automatically become nationals of that State upon the State's acquiring sovereignty.<sup>92</sup> Residents of New Togo's coast have long fished New Togo's waters and have exploited the seabed adjacent to New Lome's Rock. Only New Togo's proposed delimitation of the oceanic boundary between New Togo and New Ghana recognizes New Togo's long established fishing rights.

- b. Keta Island should be ignored when constructing an equidistant line.

African States have agreed<sup>93</sup> and current State practice demands<sup>94</sup> that equitable principles govern the delimitation of the sea areas around an island. The equitable principles employed must take into account such factors as the size of the island, the island's population, its contiguity to its mainland

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89. Brown, supra note 7, at 492.

90. Id. at 493.

91. Grisbadarna Case, supra note 86, at 130, 131.

92. Crawford, The Criteria for Statehood in International Law, 48 Brit. Y.B. Int'l L. 93, 115 (1976-77).

93. Declaration of the Organization of African Unity on the Issues of the Law of the Sea, A./CONF. 62/33, OAU Doc. CM/Res. 289 (xix); Rembe, supra note 41, at 222.

94. North Sea Cases, supra note 1, para. 85.

territory, and the geographical configuration of the island.<sup>95</sup> Keta Island fails to qualify as an island of sufficient significance to merit recognition as a base point for an equidistant line of delimitation. Keta Island is a sand island less than sixty miles square on which less than one percent of New Ghana's population lives. Furthermore, the island's economy, which does not include fishing in the surrounding waters, is not connected with the economy of mainland New Ghana. Thus, Keta Island is an entity separate from the mainland and should be ignored as a base point for purposes of oceanic delimitation.

c. The roadstead should not affect the delimitation.

New Ghana's roadstead is a one square mile area located four miles south of the eastern tip of Keta Island. The roadstead is located outside New Ghana's territorial sea. Under international law, a State has sovereignty over its roadstead even when the roadstead lies outside the State's territorial sea.<sup>96</sup> A roadstead, however, does not have its own territorial sea or continental shelf.<sup>97</sup> While New Togo asked New Ghana's permission to use the roadstead on three occasions, New Togo has never acquiesced to any rights asserted by New Ghana over the waters adjacent to the roadstead. Thus, New Ghana has sovereignty over the area within the roadstead, but does not have rights to the waters surrounding the roadstead. Therefore, the roadstead is irrelevant in delimiting the oceanic boundary between New Togo and New Ghana.

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95. Rembe, supra note 4, at 222.

96. Convention on the Territorial Sea and the Contiguous Zone art. 9, Done April 29, 1958, 516 U.N.T.S. 205 [hereinafter cited as CTSCZ]; Draft Convention art. 12, supra note 4.

97. Bowett, supra note 4, at 131.

d. The thalweg is a special circumstance in the delimitation.

An equitable delimitation must ensure that both New Togo and New Ghana have unhindered access to the thalweg leading to the New Oti River.<sup>98</sup> Adoption of New Ghana's proposed delimitation line would result in New Ghana's exclusive control over the thalweg. Granting New Ghana exclusive control over the thalweg would deny New Togo valuable fishing and navigation rights in the thalweg and New Oti River. Therefore, the court should reject New Ghana's delimitation line.

#### IV. NEW GHANA'S EQUIDISTANCE LINE IS CONSTRUCTED INCORRECTLY.

A. New Lome' Rock Is A Base Point For A Properly Constructed Equidistant Line.

1. New Lome' Rock is an island entitled to a continental shelf.

Under customary law, an island is a natural land formation, surrounded by water, that remains above the water at high tide.<sup>99</sup> Since New Lome' Rock remains above water at high tide, New Lome' Rock is an island.<sup>100</sup> All islands are entitled to sovereignty over their continental shelves.<sup>101</sup> Some

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98. Summary Records of the 8th session, 3d meeting [1956] 2 Y.B. Int'l L. Comm'n 251, 300 Doc.A/CN.4/102/Add. 1. The I.L.C. in its commentary to Article Six of the Continental Shelf Convention referred to "special circumstances" as "any exceptional configuration of the coast, as well as ...the presence of islands or of navigable channels."

99. Draft Convention, supra note 4, art. 121(1); CTSCZ art. 10, supra note 97; Bowett, supra note 4, at 1; Amin, U.K. Practices on the Continental Shelf, 25 J. L. Soc'y Scot. 12, 15 (1980) [hereinafter cited as Amin (U.K. Practices)].

100. Id.

101. North Sea Cases, supra note 1, para. 63; Continental Shelf Convention art. 1(b), supra note 17; Bowett, supra, note 4, at 139.

authorities propose that a rock island which is either uninhabitable or incapable of maintaining an independent economic life should not be entitled to a continental shelf.<sup>102</sup> Customary law does not recognize the authorities' proposition.<sup>103</sup> New Lome' Rock would meet the habitability-economic life test even if the test was a rule of customary law. While New Lome' Rock is uninhabitable, New Lome' Rock does support an independent economic life as the center of valuable oyster beds and fin fisheries. Thus, New Lome' Rock is entitled to a continental shelf. The delimitation of the oceanic boundary between New Togo and New Ghana must include consideration of New Lome' Rock's continental shelf. Therefore, New Lome' Rock must be used as a base point in constructing an equidistant line dividing the continental shelves of the two States.

2. New Lome' Rock should be a base point even if New Lome' Rock is not an island entitled to a continental shelf.

One State's acquiescence to another State's fishing rights around a rock island requires the use of the rock as a basepoint for constructing an equidistant line delimiting the States' continental shelves.<sup>104</sup> In the French-U.K. Arbitration, France argued that Eddystone Rock should not be used as a base point for constructing an equidistant line because Eddystone Rock was not an island, but rather a low tide elevation.<sup>105</sup> The court declined to determine whether the Eddystone Rock was an island entitled to a continental

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102. Draft Convention art. 121(b), supra note 4; Bowett, supra note 4, at 8-9.

103. Amin (U.K. Practice), supra note 99, at 15.

104. French-U.K. Arbitration, supra note 1, para. 143.

105. Id., para. 125.

shelf.<sup>106</sup> The court, however, used Eddystone Rock as a base point in constructing an equidistant delimitation line because France had acquiesced to the United Kingdom's fishing rights around Eddystone Rock.<sup>107</sup> New Ghana has acquiesced to New Togo's fishing rights near New Lome' Rock. Therefore, the court should use New Lome' Rock as a base point for constructing an equidistant line delimiting the continental shelves between New Togo and New Ghana.

B. Even An Equidistant Line Using New Lome' Rock As A Base Point Results In An Inequitable Delimitation.

While New Lome' Rock must be recognized as a base point for proper construction of an equidistant line delimiting the continental shelves between New Togo and New Ghana, the resulting line causes a delimitation less equitable than that proposed by New Togo. An equidistant line using both New Lome' Rock and Keta Island as base points would follow New Ghana's proposed line to the eastern tip of Keta Island, then progress in a southwesterly direction between Keta Island and New Lome' Rock to a point equidistant from New Lome' Rock and the protruding coast of New Ghana. The line would then proceed southeasterly to the limits of national jurisdiction. Therefore, a properly constructed equidistant line places the entire Axim Block and all of the region's fisheries within New Togo's continental shelf area. Since a properly constructed equidistant line results in an inequitable delimitation, the equidistance method of delimitation should not be employed in the present case.

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106. Id. para. 143.

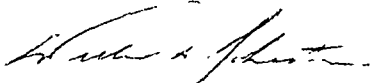
107. Id.

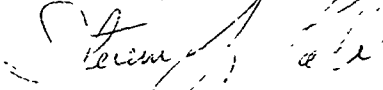
V. CONCLUSION

In accordance with the arguments and authorities herein presented, the Republic of New Togo respectfully requests this Honorable Court to declare that the oceanic boundary codified by New Togo in 1979 is the proper application of all general and specific principles, rules, and criteria relevant to the boundary and, further, that New Togo is entitled to exercise and enjoy full sovereign rights in the area within the boundary.

Respectfully submitted,

  
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