

## CHAPTER II THE GEOGRAPHICAL SETTING

### I. Introduction

28. Delimitation begins with an analysis of the geographical characteristics of the relevant area. See **Figure 1**. In this case, part of the Gulf of St. Lawrence immediately to the west of Cabot Strait is within the delimitation area, but by far the larger and more important areas lie outside the Gulf, extending to the outer limit of the continental shelf.
29. East of the closing line of Cabot Strait, the delimitation area begins within a broad coastal concavity and extends into an area of open-ended geography. The coastal relationship is one of gradually decreasing oppositeness, becoming adjacent in the outer area.
30. The south coast of Newfoundland<sup>27</sup> and the Atlantic coasts of Cape Breton Island form a broad concavity in the Canadian coastline, the most defined portion of which was referred to in the Canadian Memorial in *Canada v. France*<sup>28</sup> as “a more distinct concavity of semi-circular shape”<sup>29</sup> with entrance points at the tip of the Burin Peninsula and the eastern end of Cape Breton Island. This inner concavity, which encloses St. Pierre-et-Miquelon, was described as a “marked concavity”<sup>30</sup> by the Court of Arbitration and was a key element in the Award.
31. Much of the delimitation area, however, is in the expanse of open sea that extends beyond the inner concavity to the outer limits of the continental margin. Throughout this area, the coasts of Newfoundland from the Burin Peninsula east to Cape Race dominate the geographical configuration.

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<sup>27</sup> In this Memorial, the term “Newfoundland” refers to the island of Newfoundland as a geographical entity.

<sup>28</sup> *Case Concerning the Delimitation of the Maritime Areas Between Canada and France* (1992), 31 I.L.M. 1145 (hereinafter *Canada v. France*). See Authorities # 10.

<sup>29</sup> *Canada v. France*, Canadian Memorial, p. 20, para. 25. See Authorities # 17.

<sup>30</sup> *Canada v. France* at p. 1160, para. 22. See Authorities # 10.

32. The relevant Newfoundland coasts are considerably longer than those of Nova Scotia, both within the inner concavity and in their overall dimensions. Within the inner concavity, the Newfoundland coast recedes to form the deep indentation of Fortune Bay, while Cape Breton Island juts outward at its eastern extremity, forming a distinctly convex, almost right-angled shape at Cape Breton or, more specifically, at Scatarie Island. While there are small islands off both coasts, Sable Island and St. Paul Island are incidental features diverging from the general direction of the Nova Scotia coast that are not balanced by any similarly situated features on the Newfoundland side.
33. The maritime jurisdiction of the French islands of St. Pierre-et-Miquelon, situated roughly mid-way along the south coast of Newfoundland, was established by the 1992 Award rendered by the Court of Arbitration in *Canada v. France*.

## II. The Geographical Configuration

### A. The Gulf of St. Lawrence

34. The “offshore areas” of each party include portions of the eastern Gulf of St. Lawrence. Apart from the interests of Québec and the presence of St. Paul Island at the entrance to the Gulf, both of which will be discussed elsewhere in this Memorial, the geographical configuration within the small area to be delimited within the Gulf of St. Lawrence is free of complexity or difficulty. The coasts are opposite in the area of Cabot Strait, but within the Gulf proper the line will divide areas off adjacent or laterally aligned coasts.
35. There is no striking difference or disparity between the coasts of either party that face this sector. Both take the form, to a greater or lesser degree, of promontories whose headlands (Cape Ray on the Newfoundland side and Money Point<sup>31</sup> on the Nova Scotia side) form the entrance points of Cabot Strait. The symmetry is imperfect: the coasts extend from these headlands at different angles, and the promontory of Cape Breton is noticeably more

elongated and narrow than the corresponding configuration on the Newfoundland and Labrador side. These distinctions, however, have no discernable bearing on the delimitation issue.

36. Because of the relative simplicity and restricted scale of the relevant area inside the Gulf, the remainder of this Chapter will deal exclusively with the area outside the Gulf of St. Lawrence.

#### **B. The Inner Concavity and the Outer Area**

37. *Canada v. France* provides a point of departure for the analysis of the geographical configuration of the area off Newfoundland and Nova Scotia outside of the Gulf of St. Lawrence. The positions taken by the parties and the findings of the Court of Arbitration are highly significant because the general area of the delimitation is essentially the same.

38. The Canadian Memorial in *Canada v. France* noted the very broad concavity formed by the closing line from Cape Canso to Cape Race, which it referred to as the Gulf Approaches. Canada also identified an inner concavity—a “more distinct concavity of semi-circular shape”<sup>32</sup>—with entrance points at Cape Breton in Nova Scotia and the Burin Peninsula in Newfoundland. See Figure 2. The *Canada v. France* Award of June 10, 1992 accepted the relevance of this inner concavity, noting that the “coasts of Newfoundland and Cape Breton Island from the Burin Peninsula to Scatarie Island, together with the opening to the Gulf of St. Lawrence, form a marked concavity.”<sup>33</sup> The distinction between an inner concavity and an outer area became the essential basis of the analysis and of the delimitation effected by the Court of Arbitration.

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<sup>31</sup> Money Point lies just to the east of Cape North.

<sup>32</sup> *Canada v. France*, Canadian Memorial, p. 20, para. 25. See Authorities # 17.

<sup>33</sup> *Canada v. France* at p. 1160, para. 22. See Authorities # 10.

### C. The Relevant Coasts

39. The relevant coasts in a maritime delimitation are those that face toward the delimitation area, creating a potential “overlap and convergence” of maritime entitlements. If a coast does not face toward the delimitation area, it must be excluded from consideration. Examples of this general approach abound in the leading cases. In *Tunisia v. Libya*, for instance, the Libyan coasts lying east of a change in direction at Ras Tajoura, where they slope away to the south, were excluded from the coasts deemed relevant.<sup>34</sup> In *Gulf of Maine*, although Canada had argued that the coasts of Nova Scotia facing the open Atlantic should be considered, the Chamber did not take them into account in its calculations.<sup>35</sup>
40. The south coast of Newfoundland, from Cape Ray in the west to Cape Race in the east, forms a single and continuous geographical unit. See **Figure 3**. Although it changes direction at several points for short distances, this entire coastline faces the delimitation area in this case and is therefore relevant. The westernmost sector, from Cape Ray to Connaigre Head, a distance of about 137 nautical miles,<sup>36</sup> runs almost due east. At Connaigre Head, the coastline turns sharply south for a distance of about 36 nautical miles to the headland of the Burin Peninsula opposite the islands of St. Pierre-et-Miquelon. This portion of the Newfoundland coast forms the northern boundary of the inner concavity identified above.
41. The eastern portion of the south coast of Newfoundland, from the Burin Peninsula to Cape Race, faces directly toward the outer sector of the delimitation area. Its total length, as proposed by Canada in *Canada v. France*, is about 146 nautical miles. Its general direction

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<sup>34</sup> *Tunisia v. Libya* at pp. 92-94, para. 133(B)(1). See Authorities # 6. See also pp. 61-62, para. 75, where the Court noted that any part of the coast whose submarine extension cannot overlap with the extension of the coast of the other party, because of its geographical situation, is not relevant to the delimitation.

<sup>35</sup> *Gulf of Maine* at pp. 272-273, paras 40-41; pp. 336-337, para. 222. See Authorities # 7.

<sup>36</sup> Given the use of nautical miles in the international law of the sea and the need to use a common unit of measurement for both coastal and maritime distances, nautical miles are used in this Memorial to refer both to coastal and maritime distances.

can be represented by a line from the headland of the Burin Peninsula to Cape Race. It follows an essentially west-to-east line representing a coastline that faces almost due south.

42. The other side of the configuration is formed by Cape Breton Island, with two coastal fronts outside the Gulf of St. Lawrence. The northeastern point of the island lies about 60 nautical miles southwest of Cape Ray across Cabot Strait. The northeastern coastline of the island stretches for a distance of 71.5 nautical miles from Money Point to Scatarie Island, one of the headlands of the inner concavity, and forms the Nova Scotian wall of the inner concavity. The other Atlantic coastline of Cape Breton Island runs in a southwesterly direction toward Cape Canso, about 70 nautical miles from Scatarie Island.
43. Neither party to *Canada v. France*, nor the Court of Arbitration itself, at any point suggested that the mainland coasts of Nova Scotia were relevant. Those coasts do not face the delimitation area. As already noted, these common assumptions and the findings of the Court of Arbitration are important in the present case because the area under consideration is essentially the same. The mainland coasts of Nova Scotia face toward the open Atlantic, away from the delimitation area, and not toward Newfoundland. As the Court of Arbitration put it, these coasts “have open oceanic spaces for an unobstructed seaward projection towards the south...”<sup>37</sup>

#### **D. The Character and Features of the Relevant Coasts**

44. On both sides of the configuration, the coasts are jagged and irregular, bearing the scars of ice-age glaciation. As the Canadian Memorial in *Canada v. France* noted, the south coast of Newfoundland “is deeply indented by bays, fjords and inlets fringed by scattered off-lying islands.”<sup>38</sup> Ramea, Brunette and other small islands all lie a few miles offshore and are closely aligned with the coastline. They are not, therefore, significant sources of distortion in the

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<sup>37</sup> *Canada v. France* at p. 1171, para. 73. See Authorities # 10.

<sup>38</sup> *Canada v. France*, Canadian Memorial, pp. 21-22, para. 29. See Authorities # 17.

general direction of the Newfoundland coast. Fortune Bay stretches northeast of the islands of St. Pierre-et-Miquelon. East of the concavity, Placentia Bay is a large expanse of water on the seaward side of the Burin Peninsula. Still further to the east, St. Mary's Bay and the shallower indentation of Trepassey Bay are the principal features of the south coast of the Avalon Peninsula.

45. The Burin Peninsula is aligned with other defining features of the configuration, from St. Pierre-et-Miquelon eastward to the capes of the Avalon Peninsula. Its position reflects the overall west-to-east alignment of the south coast of Newfoundland. Its tip (roughly at Lamaline-Shag Rock) forms a headland of the inner concavity.
46. The French islands of St. Pierre-et-Miquelon protrude about five nautical miles south of the Burin Peninsula. The Court of Arbitration in *Canada v. France* described them as “laterally aligned” with the south coast of Newfoundland.<sup>39</sup> In effect, they form an incidental feature of that coast. Their area of maritime jurisdiction (beyond the territorial sea delimitation set out in a treaty of 1972)<sup>40</sup> was definitively determined in *Canada v. France*. It consists of belts of water surrounding the islands (up to 24 nautical miles in breadth on the west and 12 nautical miles on the southeast), as well as the long corridor about 10.5 nautical miles wide extending due south to the French 200 nautical mile limit.
47. The delimitation in the present case should take account of the area granted to France in the 1992 Award. In the *North Sea Cases*,<sup>41</sup> the International Court of Justice indicated that one factor in a delimitation of the continental shelf should be the effect, actual or potential, of delimitations with third parties.<sup>42</sup> The delimitations in that case involved three countries,

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<sup>39</sup> *Canada v. France* at p. 1162, para. 35. See Authorities # 10.

<sup>40</sup> *Fisheries Agreement between Canada and France (with Supplementary Exchange of Letters)*, 27 March 1972, 1979 Can. T.S. No. 37 (entered into force 27 March 1972). See Statutory Instruments # 10.

<sup>41</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 18 (hereinafter *North Sea Cases*). See Authorities # 4.

<sup>42</sup> *North Sea Cases* at p. 54, para. 101(D)(3). See Authorities # 4.

and—as the next Chapter will explain—it was their combined effect on the entitlements of Germany that was considered. The effects of third party interests or delimitations on the equitable division of the relevant area were also critical in *Libya v. Malta*<sup>43</sup> and *Guinea v. Guinea-Bissau*.<sup>44</sup> What is important here is that all of the area allocated to France is “carved out” of the area that would otherwise belong to Newfoundland and Labrador, and this unequal impact must be taken into account in the balancing of all the relevant circumstances.

48. St. Paul Island, part of the territory of Nova Scotia, lies just north of the closing line of Cabot Strait, some fourteen nautical miles off Money Point—in other words about one-fourth of the way toward Newfoundland. The island is less than three nautical miles long and about one nautical mile wide. It is uninhabited.
49. The principal features of the coastal front of Cape Breton Island facing the inner concavity include St. Anns Bay and Scatarie Island, which protrudes seaward to form a headland of the inner concavity. The coastal front facing the open Atlantic, from Scatarie Island toward Cape Canso, is relatively straight until it begins to recede substantially as it approaches Chedabucto Bay.
50. Sable Island is a minor feature in geographical terms; but it would be a major source of distortion if it were treated as a relevant coast in drawing the maritime boundary. This is largely because of its offshore situation. Unlike the other small islands referred to above, it is isolated from the coast. It is not, therefore, an incidental feature of a larger coastal configuration. The Court of Arbitration in *Canada v. France* described it as:

an isolated sandy island oriented in an east-west direction, 22 nautical miles long and less than a mile wide, situated 120 nautical miles south

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<sup>43</sup> *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. 13 (hereinafter *Libya v. Malta*). See Authorities # 8.

<sup>44</sup> *Affaire de la Délimitation de la Frontière Maritime entre la Guinée et la Guinée-Bissau* (1985), 19 R.I.A.A. 149 at p. 183, para. 93 (hereinafter *Guinea v. Guinea-Bissau*). See Authorities # 9. The Tribunal was presided over by Judge Manfred Lachs, sitting with Judges Mohammed Bedjaoui and Kéba Mbaye as members.

of Scatarie island, and about 88 nautical miles from mainland Nova Scotia.<sup>45</sup>

It played no role in that delimitation.

51. Sable Island, situated on the sea-lanes from Europe to America, was notorious as a hazard to navigation in earlier times. Its reputation as a graveyard of ships no doubt played a role in the exclusive federal ownership and jurisdiction over the island established by the *Constitution Act, 1867*—a departure from the general rule of provincial ownership and jurisdiction in relation to Crown lands.<sup>46</sup> The island is currently occupied only by federally-authorized individuals.<sup>47</sup>
52. The size and, in particular, the position of the island are important; but so too are its east-west alignment and its thin, elongated shape. Its coast facing in the direction of the delimitation area in this case is an attenuated salient. As noted by the Court of Arbitration in *Canada v. France* it is no more than a mile in breadth.<sup>48</sup>
53. As in the geographical configuration of the Gulf of Maine, the coasts proceed from a predominantly opposite relationship to one of adjacency. At the entrance to the Gulf of St. Lawrence, in the Cabot Strait, the relationship is one of opposite coasts. As the eye moves further out into the inner concavity, the area is still between the coasts of the parties; but because the longer coast of Newfoundland recedes toward Fortune Bay the coasts no longer face each other directly in an opposite and parallel relationship.
54. Beyond the inner concavity—given that an incidental feature of the scale of Sable Island cannot establish the prevailing characteristics of the overall geographical relationship—the

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<sup>45</sup> *Canada v. France* at p. 1159, para. 21. See Authorities # 10.

<sup>46</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss 91(1A), 91(9), 108 and Item 3 of the Third Schedule, reprinted in R.S.C. 1985, App. II, No. 5. See Statutory Instruments # 1.

<sup>47</sup> *Sable Island Regulations*, C.R.C., c. 1465, s. 4 (as amended to December 31, 2000). See Statutory Instruments # 7.

<sup>48</sup> *Canada v. France* at p. 1159, para. 21. See Authorities # 10.



coasts no longer face toward each other and the relationship is one of adjacency, as it usually is outside a coastal concavity. The coastal relationship can therefore be described as follows: opposite coasts in the area of Cabot Strait, moving into a relationship of adjacency further out to sea.

55. Three concluding observations about the configuration may be made.

a) First, in the inner concavity, the relevant coasts of Newfoundland are substantially longer than those of Nova Scotia. As noted above, the coast of Cape Breton Island inside the Scatarie-Burin closing line measures 71.5 nautical miles, somewhat less than half the length of the Newfoundland coasts from Cape Ray to the terminal point of the closing line on the Burin Peninsula.

b) Second, the outer area—beyond the Scatarie-Burin closing line—is almost entirely dominated by the south coast of Newfoundland, which projects directly toward the delimitation area. The seaward-facing coast of Cape Breton Island, on the other hand, has at best a very tenuous relationship to the delimitation of the outer area, since it faces more to the south than to the east.

c) Third, the Newfoundland coast in the area of Fortune Bay forms a distinctly concave configuration while Nova Scotia protrudes outward to form one of the headlands of the inner concavity at Scatarie Island.

#### **E. The Relative Extent of the Coasts**

56. The measurement of the relevant coasts in the delimitation process requires the establishment of lines of general direction so that the length of the coastlines will not be distorted by incidental features such as bays, fjords and promontories. This, obviously, is a vital step in the case of highly irregular coastlines such as those of Newfoundland and Nova Scotia,

where a measurement according to the “sinuosities” of the coastline, following all the indentations, would be ludicrously exaggerated.

57. The Court of Arbitration in *Canada v. France* appears to have adopted the lines of general direction proposed in the Canadian Memorial.<sup>49</sup> There is, however, one respect in which the relevant coasts identified by the Court of Arbitration should be modified to reflect the circumstances of the present case. The Court excluded the Newfoundland coasts north and east of St. Pierre-et-Miquelon, which had already been used as the basis of a pre-existing 1972 territorial sea delimitation between Canada and France.<sup>50</sup> This is a consideration that has no relevance in the present dispute. The south coast of Newfoundland is a single, continuous geographical feature. The presence of what the Court described as “laterally aligned”<sup>51</sup> coastal islands under another sovereignty does not interrupt the unity of this continuous coastline, all of which is therefore relevant to the delimitation between Nova Scotia and Newfoundland and Labrador.
58. Any other approach would disregard the geographical facts. A failure to take account of the Newfoundland coasts immediately to the north and east of the French islands would create a gap in the coastal geography in the area of those islands and Fortune Bay. Since that would be patently unfaithful to reality, the entire south coast of Newfoundland must be taken into account.
59. The total length of the south coast of Newfoundland measured according to the segments used by the Court of Arbitration in *Canada v. France*, including the area near the islands of St. Pierre-et-Miquelon, is 319 nautical miles. The total length of the relevant Nova Scotia

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<sup>49</sup> *Canada v. France*, Canadian Memorial, Figure 5. See Authorities # 17. In establishing the lines of general direction, the Court of Arbitration included the closing line of Cabot Strait as a notional Canadian coast because it represented the Canadian coasts of the Gulf of St. Lawrence which lay within the Gulf and faced towards St. Pierre-et-Miquelon: *Canada v. France* at p. 1161, para. 29. See Authorities # 10. This is obviously not a relevant consideration here, and the closing line should not be included.

<sup>50</sup> *Canada v. France* at p. 1161, para. 30. See Authorities # 10.

<sup>51</sup> *Canada v. France* at p. 1162, para. 35. See Authorities # 10.

coasts as described above is 141 nautical miles, again using the segments adopted for this purpose by the Court of Arbitration. The relevant Newfoundland coasts are substantially longer than those of Nova Scotia, by a ratio of over 2 to 1 in favour of Newfoundland and Labrador.

#### F. The Relevant Offshore Area

60. While the “relevant coasts” can be identified with certainty, the “relevant area” cannot be defined with the same degree of precision in an open-ended geographical setting. It is only in applying a “proportionality test,” however, that a definition of the relevant offshore area will be necessary; and given the approximate nature of such a test, it is not difficult to identify a general area in which the effect of the delimitation can be assessed.
61. In *Canada v. France* the Court of Arbitration did apply such a test, defining the relevant area by tracing a line due south from Cape Race and completing the enclosure by extending the line along the Canadian 200 nautical mile limit to the point of intersection with the 200 nautical mile limit from St. Pierre-et-Miquelon, along that 200 nautical mile limit to the point of intersection with the 200 nautical mile limit from Cape Breton Island, and from there to Cape Canso.<sup>52</sup>
62. Since the definition of that area was based on limits traced from the French islands it cannot be applied without modification in the present case. However, a relevant area based on the same general approach is easily devised with respect to the delimitation area outside the Gulf.<sup>53</sup> See Figure 4. The simplest option would be to extend lines perpendicular to the general direction of the coasts from Cape Race and Cape Canso to the 200 nautical mile limit. While this approach does not encompass the indeterminate shelf areas lying beyond the

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<sup>52</sup> *Canada v. France* at p. 1176, para. 93. See Authorities # 10.

<sup>53</sup> The small area within the Gulf is, of course, a distinct area involving potential but undefined third party interests and it is, therefore, not included in the depiction of the relevant offshore area in Figure 4.

200 nautical mile limit, there is no reason to believe that the addition of those areas would significantly alter the proportions accruing to either party.

### III. A Single, Broad Continental Shelf

63. The continental shelf in this area extends beyond 200 nautical miles from the coast, on the basis of the definition set out in Article 76 of the 1982 *United Nations Convention on the Law of the Sea*<sup>54</sup>—a factor noted by the Court of Arbitration in *Canada v. France*.<sup>55</sup> The exact limits have not yet been established, and will not be finally determined until the 1982 *Convention* enters into force for Canada and the Commission on the Limits of the Continental Shelf has completed its task under the 1982 *Convention*.
64. Newfoundland and Labrador submits that the Tribunal in the present proceedings should not attempt to identify the exact point at which the Canadian continental shelf meets the international area, but should decide that the line of delimitation shall be continued indefinitely to the limit of national jurisdiction on the bearing at which it intersects the 200 nautical mile limit. This approach creates no difficulties because there are no changes in the geography that would require a change in course beyond this point, and it avoids international delimitation issues with which the federal government will eventually have to deal.
65. Apart from these two considerations, the existence of a wide shelf should have no bearing on the present delimitation. In particular, it is impossible to see how any factors related to geology or geomorphology could be relevant. In *Canada v. France*, Canada described the continental shelf in this area as

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<sup>54</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994; not in force for Canada), Article 76 (hereinafter 1982 *Convention*). See Statutory Instruments # 9.

<sup>55</sup> *Canada v. France* at pp. 1172-73, paras. 78-82. See Authorities # 10.

an integral part of the single, continuous continental margin of North America... There are no significant discontinuities or disruptions in the margin; to the south, east and west of Newfoundland, its morphology is relatively uniform but for various banks and channels that make up the Grand Banks of Newfoundland and the Laurentian Channel. That these are secondary features which do not disrupt the essential continuity of the continental shelf, is not contested....<sup>56</sup>

66. In *Canada v. France*, the Court of Arbitration described the Laurentian Channel as “a wide glacial valley about 50 nautical miles in width with an average depth of 400 metres, which runs in a southeast direction from Cabot Strait.”<sup>57</sup> Although the Channel is the dominant physical feature of the seabed in this area, the decision confirmed that it does not interrupt the continuity of the shelf.

#### IV. Conclusion

67. The essential features of the geography are the following:
- a) the delimitation area consists of
    - a small area within the Gulf of St. Lawrence;
    - an inner concavity bounded by the closing line from the Burin Peninsula to Scatarie Island; and,
    - a broad area of open sea beyond that concavity.
  - b) the relevant Newfoundland coasts are considerably longer than the coasts of Nova Scotia within the inner concavity and dominate the entire configuration outside that concavity;

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<sup>56</sup> *Canada v. France*, Canadian Counter-Memorial, pp. 34-35, para. 67. See Authorities # 18.

<sup>57</sup> *Canada v. France* at p. 1160, para. 23. See Authorities # 10.

- c) the coastal relationship is one of gradually decreasing oppositeness within the inner concavity and of adjacency in the outer area;
- d) the incidental features on the Nova Scotia side, in particular Sable Island and St. Paul Island, are potential sources of distortion and inequity and are uncompensated by similar features on the Newfoundland side;
- e) within the inner concavity, the Newfoundland coast is itself concave while Cape Breton Island protrudes seaward at Cape Breton and Scatarie Island to form a convex configuration;
- f) the islands of St. Pierre-et-Miquelon are laterally aligned with the Newfoundland coast and possess a zone of maritime jurisdiction extending to the south in a long and narrow corridor;
- g) the seabed forms a single uninterrupted continental shelf extending some distance beyond the 200 nautical mile limit.