

CHAPTER III THE APPLICABLE LAW

I. Introduction

68. This arbitration is governed by the principles of international law relating to the delimitation of maritime boundaries. Those principles are based on equity in the light of the relevant circumstances, which are constituted above all by the coastal geography as the basis of title. Specifically, they include the following:

a) A state is *prima facie* entitled to the areas in front of its coast, as the “natural prolongation” of its territory to which it has inherent rights.

b) Any effect of encroachment on these areas, or cut-off, is to be avoided. Incidental coastal features or irregular coastal configurations should not be allowed to have a disproportionate effect.

c) There should be a reasonable degree of proportionality between areas allocated by a line and the lengths of the relevant coasts.

69. These are among the fundamental principles recognized by the jurisprudence. Provided they are respected, there is no method of delimitation that is sacrosanct. Equidistance is frequently used as a point of departure in the process of delimitation, but there is no legal presumption in its favour. The use of equidistance may be inappropriate because of the presence of small islands lying offshore, or irregularities in the coastal configuration that would distort the course of the line. Bisectors or perpendiculars or other geometrical methods involving the use of coastal fronts are often resorted to in order to avoid the disproportionate effects such incidental features might create. The essential requirement is a result that is equitable in terms of the particular geographical configuration of the relevant area.

II. Principles of International Law Governing Maritime Boundary Delimitation

70. The legislation and the Terms of Reference governing this arbitration require the application of “principles of international law governing maritime boundary delimitation with such modification as the circumstances require.”⁵⁸ This formulation brings into play a specialized body of principles and rules dealing with maritime boundaries. This dispute deals with the continental shelf alone. Strictly speaking, therefore, it is the rules respecting the shelf that apply. Those rules, however, are substantially similar to the rules governing the delimitation of the exclusive economic zone, or a “single maritime boundary” of the kind determined in *Gulf of Maine and Canada v. France*.
71. The dividing line will begin within the Gulf of St. Lawrence, an area that has been claimed by Canada as a body of internal waters but that has not been enclosed by straight baselines. In the particular circumstances of this case, however, this consideration does not displace the law of the continental shelf as the applicable law throughout the course of the delimitation. The case is to be determined on the basis of the legal fiction that the parties are not merely units of a federal state, but sovereign states in their own right. On the basis of that legal fiction, the internal waters status of the Gulf,⁵⁹ which depends on the presence of a single state surrounding the entire Gulf, would no longer obtain. The international law of the continental shelf therefore governs this delimitation in its entirety.
72. While both the statutes and the Terms of Reference refer to “principles of international law,” the Terms of Reference add the words “as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.”⁶⁰ Canada has ratified the 1958 *Convention*, Article 6 of which deals with delimitation, and has done so without

⁵⁸ Terms of Reference, Article 3.1, Appendix A.

⁵⁹ February 8, 1949 Statement of Prime Minister Louis St. Laurent, quoted in H. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications Ltd., 2000), p. 870. See Authorities # 14.

⁶⁰ Terms of Reference, Article 3.1, Appendix A.

reservations.⁶¹ It does not follow, however, that Article 6 is the governing law. The expression “principles of international law” refers *prima facie* to generally applicable principles of law and not to the *lex specialis* created by particular treaties. That is undoubtedly the meaning it must be given in the legislation, which does not authorize the federal Minister to alter the substantive law as prescribed by the legislation itself. The law applicable to Phase Two of this arbitration is therefore the customary international law respecting the delimitation of the continental shelf.

73. In the final analysis, however, nothing turns on whether the applicable law is Article 6 or customary international law. Both the result and the process of delimitation would be the same. It is true that Article 6 is drafted in terms of equidistance and special circumstances, while formulations of customary law have generally referred to “equitable principles,” “relevant circumstances” and “equitable results.” But international tribunals have been consistent, and emphatic, in affirming the substantive similarity—and, for all practical purposes, the identity—of the two sources of law.

⁶¹ 1958 *Convention*. See Statutory Instruments # 8. Article 6 states:

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

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

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

74. This similarity was first noted in the *Anglo-French Continental Shelf* case,⁶² where the Court of Arbitration characterized Article 6 of the 1958 *Convention* as a “combined ‘equidistance-special circumstances rule’” that “gives particular expression to the general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles,”⁶³ and further, that

the different ways in which the requirements of “equitable principles” or the effects of “special circumstances” are put reflect differences of approach and terminology rather than of substance.⁶⁴

75. The Court of Arbitration in *Canada v. France* spoke in similar terms.⁶⁵ More recently, the International Court of Justice in *Jan Mayen*⁶⁶ approved the position taken in the *Anglo-French Continental Shelf* case and added that

there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 *Convention* and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result.⁶⁷

76. *Jan Mayen* was based upon the practice of international tribunals, both under Article 6 of the 1958 *Convention* and under customary international law, of treating the median line between opposite coasts as a “provisional line that may then be adjusted or shifted in order to ensure

⁶² *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* (1977), 18 R.I.A.A. 3 (hereinafter *Anglo-French Continental Shelf* case). See Authorities # 5

⁶³ *Anglo-French Continental Shelf* case at pp. 45-46, para. 70. See Authorities # 5.

⁶⁴ *Anglo-French Continental Shelf* case at pp. 75-76, para. 148. See Authorities # 5.

⁶⁵ *Canada v. France* at p. 1163, para. 41. See Authorities # 10.

⁶⁶ *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38 (hereinafter *Jan Mayen*). See Authorities # 11.

⁶⁷ *Jan Mayen* at pp. 62-63, para. 56.

an equitable result.”⁶⁸ The case of adjacent coasts, where equidistance is less frequently applied for reasons that will be explained below, was not addressed. There is, however, no compelling objection to the consideration of a provisional equidistant line off adjacent coasts as an initial step in the analysis, provided the recognized distinctions between opposite and adjacent coasts are borne in mind.

77. In the recent *Qatar v. Bahrain* case,⁶⁹ the International Court of Justice described the continental shelf portion of the delimitation as an area of adjacent rather than opposite coasts,⁷⁰ but decided to draw a provisional equidistant line and then to consider whether it should be adjusted.⁷¹ In so doing, the International Court of Justice stressed that it was not according any presumptive role to equidistance, recalling and quoting the following passage from its earlier decision in *Libya v. Malta*:

[T]he equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.⁷²

In other words the use of a provisional equidistant line is a matter of procedure rather than substance. It is designed to facilitate a systematic methodology and not to dictate the final result.

78. In Chapter IV of this Memorial, setting out the basis of its claim, Newfoundland and Labrador will therefore begin with an appraisal of equidistance as applied in this area. Such

⁶⁸ *Jan Mayen* at p. 60, para. 50. See Authorities # 11.

⁶⁹ *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, [2001] (16 March 2001) (I.C.J. General List No. 87) (hereinafter *Qatar v. Bahrain*). See Authorities # 13.

⁷⁰ *Qatar v. Bahrain* at para. 170. See Authorities # 13.

⁷¹ *Qatar v. Bahrain* at para. 230. See Authorities # 13.

⁷² *Libya v. Malta* at p. 47, para. 63. See Authorities # 8.

an appraisal, it is submitted, will demonstrate that the equidistance method does not produce an equitable result in this geographical configuration, and that other methods must be applied.

III. The Fundamental Norm

79. Equity is the cornerstone of the law of maritime delimitation. The Court of Arbitration in *Canada v. France* noted that both parties were in agreement that the fundamental norm “requires the delimitation to be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result.”⁷³ The Chamber in *Gulf of Maine* provided a more elaborate formulation:

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.⁷⁴

All the judicial and arbitral decisions from the *North Sea Cases* to the present day have been at one on the central role of equity.

80. In *Tunisia v. Libya*, the International Court of Justice added the important qualification—reflected in the relevant articles of the 1982 *Convention*⁷⁵—that it is the equity of the result

⁷³ *Canada v. France* at p. 1163, para. 38. See Authorities # 10.

⁷⁴ *Gulf of Maine* at pp. 299-300, para. 112. See Authorities # 7.

⁷⁵ 1982 *Convention*, articles 74, 83. See Statutory Instruments # 9.

which has paramount importance. And the equity of the result is a function of the relevant circumstances of the case at hand.⁷⁶ There are no universally applicable solutions. The Chamber in *Gulf of Maine* emphasized that every case is unique, and that there is no point in searching international law for a body of detailed rules “which are not there.”⁷⁷

81. It might seem, therefore, that the law on this subject is lacking in substantive content. This in fact is not the case. The “equity” to be applied is not equity at large. It does not have the purely subjective character of equity as the length of the Chancellor’s foot. It is not, in the occasionally antiquarian terminology of international law, the absolute discretion entailed by equity *ex aequo et bono*, or equity outside or contrary to law. It is equity *infra legem*. The distinctions are vital. They were stressed time and again in the two leading cases that established the framework for future developments, the *North Sea Cases* and the *Anglo-French Continental Shelf* case.
82. Specifically, the equity of the international law of maritime delimitation is applied within a definite legal framework from four points of view:
- a) First and most important, it is based on “relevant circumstances,” which must be linked to the legal institution of the continental shelf or the exclusive economic zone, primarily in terms of the basis of legal title. This points toward the coastal geography as the main consideration.
 - b) Second, the effect given to the coastal geography is determined by recognized principles including “the seaward extension of the coasts,” non-encroachment on areas in front of the coasts of another state, the avoidance of disproportionate effects caused by coastal features or configurations, and a reasonable degree of proportionality between coastal frontage and offshore entitlements.

⁷⁶ *Tunisia v. Libya* at pp. 59-60, para. 70. See Authorities # 6.

⁷⁷ *Gulf of Maine* at pp. 298-299, paras. 110-111. See Authorities # 7.

c) Third, while there are no legally mandatory methods, and no closed list of possible methods, judicial and arbitral precedents and state practice have established a repertory of generally accepted techniques.

d) Fourth, it is above all the controlling importance of the coastal geography that gives the principles governing maritime boundary delimitation a truly legal character.

83. Equally fundamental is the principle, also laid down in the *North Sea Cases*, that states are entitled to a continental shelf *ipso facto* and *ab initio*: “Its existence can be declared... but does not need to be constituted.”⁷⁸ In other words, continental shelf rights are inherent and need not be claimed or exercised. The implications are far-reaching, and give the law of the continental shelf a very different character from the law pertaining to territorial sovereignty. It means that considerations such as effective occupation, *les effectivités* and the consolidation of titles are irrelevant. Except in cases that meet the strict conditions for the application of the doctrines of estoppel or acquiescence, state conduct is a secondary consideration, and never the primary basis for establishing a line. What counts, instead, is the inherent title emerging from the facts of geography.

IV. Relevant Circumstances

A. Coastal Geography as the Essential Factor

84. The relevant circumstances are almost always dominated by the coastal geography. Indeed, the present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area. This follows the pattern of all the leading cases, including the two delimitations of greatest interest to Canadians: *Gulf of Maine* decided by a Chamber

⁷⁸ *North Sea Cases* at p. 22, para. 19; p. 29, para. 39. See Authorities # 4. This doctrine was referred to by the Supreme Court of Canada in *Reference Re: Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 at pp. 94-97. See Authorities # 2.

of the International Court of Justice in 1984 and *Canada v. France* decided by a special Court of Arbitration in 1992. As set out in *Canada v. France*:

Geographical features are at the heart of the delimitation process. The Chamber of the International Court of Justice in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case said that the equitable criteria to be applied “are essentially to be determined in relation to what may be properly called the geographical features of the area.”⁷⁹

85. The reason for the fundamental importance of coastal geography was best explained in *Libya v. Malta*: it is because sovereignty over the coast is the basis of title under the principle of the *North Sea Cases* that “the land dominates the sea”⁸⁰ and thus, a delimitation based on law must ultimately depend on considerations of title. In a critical passage, the International Court of Justice declared:

That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.⁸¹

86. While sovereignty over the land is the ultimate source of continental shelf rights, it is in practice the coast—often referred to as the coastal front or the maritime front—that generates title. As the International Court of Justice declared in *Libya v. Malta*:

The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal

⁷⁹ *Canada v. France* at p. 1160, para. 24. See Authorities # 10.

⁸⁰ *North Sea Cases* at p. 51, para. 96. See Authorities # 4.

⁸¹ *Libya v. Malta* at pp. 29-30, para. 27. See Authorities # 8.

opening, that this territorial sovereignty brings its continental shelf rights into effect.⁸²

In other words, it is through its sovereignty over the coastline facing the delimitation area that a state may claim title to continental shelf areas. The same point was made with exemplary clarity in *Guinea v. Guinea-Bissau* by the arbitral tribunal.

Les droits qu'un État peut prétendre avoir sur la mer sont en rapport non pas avec l'étendue de son territoire derrière ses côtes, mais avec ces côtes et avec la manière dont elles bordent ce territoire... Tout dépend de leurs façades maritimes respectives et de la façon dont elles se présentent.⁸³

87. It follows that the delimitation must be based on the coastal geography, not on considerations that have nothing to do with title to maritime areas. This point was also underlined by the International Court of Justice in *Libya v. Malta*, in a passage that identifies a key distinction between a negotiated boundary and one established by a court or tribunal on legal principles:

Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.⁸⁴

Since the coast is the source of title, it is the primary consideration that is “pertinent to the institution of the continental shelf as it has developed within the law.”⁸⁵

⁸² *Libya v. Malta* at pp. 40-41, para. 49. See Authorities # 8.

⁸³ *Guinea v. Guinea-Bissau* at pp. 192-193, para. 119. See Authorities # 9.

⁸⁴ *Libya v. Malta* at p. 40, para. 48. See Authorities # 8.

⁸⁵ *Libya v. Malta* at p. 40, para. 48. See Authorities # 8.

88. The most fundamental implication of the geographical basis of title is that states are entitled to the areas situated in front of their coasts. This idea is at the heart of the *North Sea Cases*, particularly its critique of equidistance, which “would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter’s coast makes the equidistance line swing out laterally across the former’s coastal front, *cutting it off from areas situated directly before that front.*”⁸⁶
89. In one respect this case differs from the *Gulf of Maine and Canada v. France* cases. Those cases dealt with what is known as a “single maritime boundary” applicable both to the fisheries and other resources of the 200-mile zone and to the seabed or “continental shelf.” The present case deals only with the continental shelf. But the distinction is immaterial in terms of the basic principles to be applied and, in particular, the exclusive or at least dominant role of the coastal geography. All the leading cases delimiting the continental shelf alone have been based primarily or exclusively on the coastal geography: for instance, the *North Sea Cases*, the *Anglo-French Continental Shelf* case, *Tunisia v. Libya* and *Libya v. Malta*.
90. Therefore, when the law refers to the “relevant circumstances,” what is meant is first and foremost the coastal geography and its relationship to the delimitation area—the “geographic correlation between coast and submerged areas off the coast” as it was expressed in *Tunisia v. Libya*.⁸⁷ The geography is overwhelmingly the most important factor, and most often it is the only relevant factor. There can be other considerations, as the following sections will explain. But in a judicial or arbitral determination based on legal principles, only those circumstances that are demonstrably relevant to the legal institution of the continental shelf are to be taken into account.

⁸⁶ *North Sea Cases* at pp. 31-32, para. 44. Emphasis added. See Authorities #4.

⁸⁷ *Tunisia v. Libya* at p. 61, para. 73. See Authorities # 6.

B. Natural Prolongation

91. While “natural prolongation”—the prolongation of the land mass into and under the sea forming the physical phenomenon of the continental shelf—was identified in the *North Sea Cases* as the basis of title to the continental shelf, the subsequent jurisprudence has made it clear that natural prolongation must now be seen in purely geographical terms, at least as far as the 200 nautical mile limit. As a consequence, geological and geomorphological factors have no role to play within that limit.
92. This is largely because, under Article 76 of the 1982 *Convention*, which represents customary international law, states automatically enjoy continental shelf rights out to a distance of 200 nautical miles regardless of the physical features of the seabed, and regardless of whether the physical continental shelf extends out to that limit. Thus “natural prolongation” can now be identified with the so-called “distance principle” within the 200 nautical mile limit. Once again, the law was stated with clarity by the International Court of Justice in *Libya v. Malta*:

The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.⁸⁸

The position is now clear, therefore, that geology and geomorphology are irrelevant within the 200 nautical mile limit.

93. Even before *Libya v. Malta*, geological and geophysical factors had no practical effect, either within or beyond 200 nautical miles. The *North Sea Cases* coined the term “natural

⁸⁸ *Libya v. Malta* at p. 35, para. 39. See Authorities # 8.

prolongation,” and it referred to both geographical and geological factors in the *dispositif* of the judgment.⁸⁹ In fact, however, the reasoning of the International Court of Justice was entirely concerned with the coastal relationship between the three parties—the Netherlands, Germany and Denmark—and the inequities that equidistance would have produced in that coastal configuration. In *Tunisia v. Libya* a great deal of evidence and argument on the geology and geomorphology of the area was presented, but it was effectively ignored.⁹⁰

94. There is some ambiguity about the meaning of “natural prolongation,” which is still referred to (but not defined) in the 1982 *Convention* in its description of continental shelf rights.⁹¹ Even in the *North Sea Cases* it was never a purely geological concept. This is why the International Court of Justice was able to apply the concept to the delimitation of a common continental shelf, with no relevant physical breaks, holding that the line of delimitation must nonetheless respect the principle by avoiding a cut-off of the area in front of either state’s coast—the area of its “most natural” prolongation.⁹² It is clear, therefore, that at the outset “natural prolongation” had both a geological or geomorphological sense and a purely geographical sense, according to the circumstances, and that on a continuous continental shelf the latter would prevail.
95. The “distance principle” referred to above reflects the fact that, under the law of the sea as reformulated by the 1982 *Convention*, and by the parallel evolution of customary law, states are entitled to continental shelf rights to a distance of 200 nautical miles, regardless of the physical structure of the seabed.⁹³ The principle refers to the altered basis of title, and the implication that spatial factors—in other words geography—have become more than ever the principal consideration. The distance principle is not, however, the *alter ego* of the

⁸⁹ *North Sea Cases* at pp. 53-54, para. 101. See Authorities # 4.

⁹⁰ *Tunisia v. Libya* at p. 57, para. 66. See Authorities # 6.

⁹¹ 1982 *Convention*, article 76(1). See Statutory Instruments # 9.

⁹² *North Sea Cases* at pp. 31-32, paras. 43-44. See Authorities # 4.

equidistance method. Indeed, it was in *Tunisia v. Libya* that the distance principle was first referred to,⁹⁴ and in *Libya v. Malta* the idea was developed further.⁹⁵ Both these decisions expressly repudiate any implication that equidistance has any mandatory or privileged status.⁹⁶

C. The Limited Relevance of Non-geographical Considerations

(a) Economic Factors

96. The jurisprudence is highly ambivalent about economic factors. The *North Sea Cases*, still the classic statement of the law, held that delimitation was not an exercise in distributive justice. The object was to determine the entitlements of the parties, not to attribute just and equitable shares either in terms of areas or of resources.⁹⁷ That distinction was recently reaffirmed by the International Court of Justice in *Qatar v. Bahrain*,⁹⁸ which also quoted an observation in *Jan Mayen* that the “sharing-out of the area is...the consequence of the delimitation, not vice versa.”⁹⁹
97. This approach suggests a very limited role for economic considerations in delimitation. Thus in *Tunisia v. Libya*, the International Court of Justice rejected any consideration of economic interests as “virtually extraneous factors.... A country might be poor today and become rich

⁹³ *Libya v. Malta* at p. 35, para. 39. See Authorities # 8.

⁹⁴ *Tunisia v. Libya* at pp. 48-49, para. 48. See Authorities # 6.

⁹⁵ *Libya v. Malta* at p. 35, para. 39. See Authorities # 8.

⁹⁶ *Libya v. Malta* at pp. 37-38, para. 43; see Authorities # 8; *Tunisia v. Libya* at p. 79, para. 110; see Authorities # 6.

⁹⁷ *North Sea Cases* at pp. 21-22, paras. 17-18. See Authorities # 4.

⁹⁸ *Qatar v. Bahrain* at para. 234. See Authorities # 13.

⁹⁹ *Jan Mayen* at pp. 66-67, para. 64. See Authorities # 11.

tomorrow as a result of an event such as the discovery of a valuable economic resource.”¹⁰⁰

Similarly, in *Libya v. Malta*, the International Court of Justice said a delimitation should not “be influenced by the relative economic position of the two States in question.... Such considerations are totally unrelated to the underlying intention of the applicable rules of international law.”¹⁰¹

98. The *Gulf of Maine* case, on the other hand, takes a more qualified position. According to the Chamber, an economic dependence on the resources of the disputed area would not be relevant to the choice of the delimitation method but could be taken into account as a test of the equity of the result if the chosen method were “likely to entail catastrophic repercussions”¹⁰² for the people concerned. In other words, economic dependence may occasionally be relevant as an *ex post facto* test of the method chosen on other, essentially geographical, grounds, and a line might require an adjustment if the test of catastrophic repercussions were met, but it is not a relevant circumstance in the delimitation process itself.
99. The decision of the International Court of Justice in *Jan Mayen* appears to relax these strictures to a degree. In one of the three sectors of the delimitation area between Greenland and the Norwegian island of Jan Mayen, the Court took account of the distribution of the capelin fishery resource and adjusted the line of delimitation as a consequence.¹⁰³ There is, however, no indication that the Court intended a reconsideration of the fundamental principles set out above.
100. In any event, whatever the implications for delimitations involving fishing resources—in other words, delimitations of single maritime boundaries or of the exclusive economic zone—it seems clear that economic interests can have no relevance for delimitations of the

¹⁰⁰ *Tunisia v. Libya* at pp. 77-78, para. 107. See Authorities # 6.

¹⁰¹ *Libya v. Malta* at p. 41, para. 50. See Authorities # 8.

¹⁰² *Gulf of Maine* at p. 342, para. 237. See Authorities # 7.

¹⁰³ *Jan Mayen* at p. 72, para. 76. See Authorities # 11.

continental shelf involving unexploited and undiscovered oil and gas resources. The economic interests at issue in the *Gulf of Maine* and *Jan Mayen* cases involved a pre-existing and established dependence on known resources—as is normally the case with fishing interests. The resources at issue in a seabed delimitation most commonly represent aspirations, not an established dependence of the kind considered in these two decisions: they are both speculative and prospective.

(b) **The Conduct of the Parties**

101. The conduct of the parties to a maritime boundary dispute can be relevant, but only if it meets a very high standard. It must be consistent and sustained, and it must clearly display an acceptance of the proposed line as an equitable basis of delimitation. Conduct that does not meet this standard is simply irrelevant.
102. The conduct of sovereign states can be relevant under the principles of general international law relating to estoppel. For example, certain minor elements of the delimitation in the *Anglo-French Continental Shelf* case were based on prior French acceptance.¹⁰⁴ But estoppel arguments were considered and rejected in both the *North Sea Cases* and *Gulf of Maine*.
103. In the *North Sea Cases*, estoppel was unsuccessfully invoked as a basis on which the Federal Republic of Germany was said to be bound by the rule in Article 6 of the 1958 *Convention*.¹⁰⁵ In *Gulf of Maine* it was unsuccessfully invoked, along with acquiescence, as a basis on which the United States was said to have accepted an equidistant line.¹⁰⁶ The Court in the *North Sea Cases* spoke of “clearly and consistently evinced acceptance”¹⁰⁷ and of a real intention to

¹⁰⁴ Notably the use in the *Anglo-French Continental Shelf* case of Eddystone Rock as a basepoint; p. 74, paras. 143-144; and the use of a 12 nautical mile limit in the Channel Islands area; pp. 102-103, para. 202. See Authorities # 5.

¹⁰⁵ *North Sea Cases* at pp. 26-27, paras. 30-32. See Authorities # 4.

¹⁰⁶ *Gulf of Maine* at p. 310, para. 148. See Authorities # 7.

¹⁰⁷ *North Sea Cases* at p. 26, para. 30. See Authorities # 4.

manifest acceptance or recognition, as well as the requirement of detrimental reliance.¹⁰⁸ In *Gulf of Maine*, the Chamber referred to “clear and consistent acceptance”¹⁰⁹ in relation to estoppel and of conduct that is “sufficiently clear, sustained and consistent to constitute acquiescence.”¹¹⁰

104. In *Tunisia v. Libya*, on the other hand, the conduct of the parties was taken into account, not under the rubric of acquiescence or estoppel, but merely as a corroborating indication of the equity of the chosen line. A line on a 26 degree bearing, corresponding to the perpendicular the International Court of Justice adopted for the inner area in that case, served to divide active oil and gas concession areas between the parties. The line had thus been acted upon—not unilaterally, but by both parties—as a *de facto* boundary dividing petroleum concessions for a substantial period of time.
105. The jurisprudence has therefore established a very stringent test, whether under the heading of estoppel, acquiescence or indications of equity. The conduct of the parties is relevant only if it is mutual, sustained, consistent and unequivocal in indicating acceptance. Otherwise it must be disregarded.

V. Equitable Principles

A. The Seaward Extensions of the Coasts

106. Delimitation is not equitable apportionment. The International Court of Justice made that clear in the *North Sea Cases*:

¹⁰⁸ *North Sea Cases* at p. 26, para. 30. See Authorities # 4.

¹⁰⁹ *Gulf of Maine* at p. 309, para. 145. See Authorities # 7.

¹¹⁰ *Gulf of Maine* at p. 309, para. 146. See Authorities # 7. In *Jan Mayen* at pp. 75-86, the International Court of Justice similarly rejected arguments that the delimitation practices of one of the parties in relation to other states should be taken into account; see Authorities # 11; and indeed arguments by Canada respecting French practice and attitudes were wholly disregarded in *Canada v. France* at p. 1166, paras. 53-55; see Authorities # 10.

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area.¹¹¹

The Court also said that “since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions.”¹¹²

107. The first step is therefore to identify, at least in an approximate fashion, the seaward extensions of the coasts—what the International Court of Justice in 1969 referred to as the “most natural prolongations” of each party. As explained above, and as noted by the Court of Arbitration in *Canada v. France*, coasts project frontally.¹¹³ The seaward extensions or “most natural prolongations” of a state’s coast are the areas directly in front of that coast.
108. This notion of a frontal projection is a pervasive theme, implicit or explicit, throughout the jurisprudence. It was the central factor in the *North Sea Cases*, as the discussion of cut-off below will explain. It controlled the selection of the relevant coasts in both *Gulf of Maine* and *Tunisia v. Libya*. It is reflected in the use of a perpendicular line in *Guinea v. Guinea-Bissau*, which will also be discussed below. Most relevant of all, in the area at issue here, it was the basis of the analysis of the coastal relationship and of the actual delimitation in *Canada v. France*, where the Court of Arbitration referred with approval to “the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face.”¹¹⁴
109. This is why, in *Canada v. France*, the Court of Arbitration awarded France a narrow 200 nautical mile corridor extending to the south and a broader area of 24 nautical miles, corresponding to the breadth of the territorial sea and contiguous zone combined, toward the

¹¹¹ *North Sea Cases* at pp. 21-22, para. 18. See Authorities # 4.

¹¹² *North Sea Cases* at p. 51, para. 96. See Authorities # 4.

¹¹³ *Canada v. France* at p. 1171, para. 73. See Authorities # 10.

¹¹⁴ *Canada v. France* at p. 1171, para. 73. See Authorities # 10.

west.¹¹⁵ The reasoning began with the premise that the islands “face both westwards and southwards on to the area of dispute,”¹¹⁶ a reality that had to be represented in terms of two separate coastal fronts. See Figure 5a. The southern coastal front, though very narrow, faces in a direction that was held to be unobstructed by the seaward projections of the Canadian coasts: hence the narrow breadth but unlimited extension of the French zone toward the south. The much longer western façade of the islands, on the other hand, could not be given a full seaward extension because of the competing projection of the south coast of Newfoundland. The entire approach provides a textbook example of how coasts project frontally, and how these frontal projections affect the practical method of delimitation.

B. Non-Encroachment and the Cut-off Effect

110. The principle of non-encroachment takes its name from the *dispositif* of the *North Sea Cases*, which stated that the delimitation should accord to each party its own natural prolongation, “without encroachment on the natural prolongation of the land territory of the other.”¹¹⁷ In practical terms this means that boundaries passing in close proximity to the coast of either party are unacceptable, and that any “cut-off effect” should be avoided.
111. No clearer illustration of the “cut-off” effect can be found than that provided by the *North Sea Cases* themselves, where equidistant lines on either side of the Federal Republic of Germany would have swung across the concave German coast, confining the German shelf to a small triangle. *Canada v. France* provides an especially vivid example of a delimitation in which the avoidance of “cut-off” was a central concern. The equidistant line claimed by France would have fanned out on either side of the islands. See Figure 5b. This the Court deemed unacceptable, declaring that a southward projection from the islands “must not be

¹¹⁵ *Canada v. France* at p. 1170, para. 69. See Authorities # 10. A narrow belt of 12 nautical miles was also established on the southeastern side of the islands, linking the 1972 delimitation to the due south corridor.

¹¹⁶ *Canada v. France* at p. 1162, para. 31. See Authorities # 10.

¹¹⁷ *North Sea Cases* at p. 53, para. 101(C)(1). See Authorities # 4.

allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast.”¹¹⁸ This reasoning led necessarily to the corridor formed by two due south lines designed to avoid such a cut-off, while corresponding broadly to the extent of the southern façade of the islands.

C. Proportionate and Disproportionate Effects

112. An equitable delimitation is essentially one that gives proportionate effects to the coastal geography. That, in a nutshell, is the fundamental doctrine of the *North Sea Cases* and the subsequent development of the law. There is no need to attempt an exhaustive list of the ways in which this principle is applied; such an endeavour would overlook the infinite variety of geographical configurations and the observation in *Gulf of Maine* that every delimitation is unique. There are, however, two situations where the concern for proportionate effects typically arises. The first of these is the potentially distorting effect of incidental features, such as small islands or islets, rocks, and promontories. The second is the need to take account of significant disparities in coastal lengths so that the areas resulting from the delimitation correspond broadly to the coastal frontage that constitutes the basis of title.

(a) The Potentially Disproportionate Effect of Incidental Features

113. Islands are, as Canada put it in its Memorial in *Canada v. France*, “the paradigm case of ‘special circumstances’.”¹¹⁹ The potentially distorting effects of small islands, rocks, promontories and similar features have been a constant preoccupation of the jurisprudence. Although the facts in the *North Sea Cases* did not involve islands, the International Court of Justice did have occasion to refer to the “disproportionally distorting effect”¹²⁰ of islets, rocks

¹¹⁸ *Canada v. France* at p. 1170, para. 70. See Authorities # 10.

¹¹⁹ *Canada v. France*, Canadian Memorial, p. 137, para. 304. See Authorities # 17.

¹²⁰ *North Sea Cases* at pp. 36-37, para. 57. See Authorities # 4.

and other minor coastal projections.¹²¹ Since that time, every major case dealing with maritime boundaries has involved islands to a greater or lesser degree, and the need to abate or eliminate their effect.¹²² The impact of islands on maritime delimitation has engendered a very substantial academic literature, much of it focused on disproportionate effects and their elimination in both state practice and in the jurisprudence.¹²³

114. The reason why islands are typically a potential source of inequity is that their position, detached from the land, tends to give them an exaggerated effect on the course of the line. It is not merely the scale of an island that causes disproportionate effects; it is the combined effect of its position and scale. A rock or islet close to the shore will generally not cause a problem. Its presence has little effect on the general direction of the coast or on the course of the boundary line. But an island far out to sea may have profoundly distorting effects, at least where equidistance is used, because its effect is identical to the extension of the mainland far beyond its actual limits.
115. Thus, an island 100 nautical miles from land, however reduced its scale, has precisely the same effect as if the entire seabed area between the island and the coast were in fact dry land and the landmass of the coastal state were extended far out to sea. Such a result would be more than disproportionate; it would amount to what the Courts have referred to as a fundamental “refashioning of geography”—the substitution of fiction for fact.

¹²¹ Indeed, long before the *North Sea Cases* the issue was identified in the deliberations of the International Law Commission leading to the 1958 *Convention*. See *Canada v. France*, Canadian Memorial, p. 137, para. 304. See Authorities # 17

¹²² See *Tunisia v. Libya* (the Kerkennahs); *Anglo French Continental Shelf case* (the Channel Islands and the Scilly Islands); *Gulf of Maine* (Seal Island); *Libya v. Malta* (Filfla and Malta itself); *Canada v. France*; *Jan Mayen*; *Guinea v. Guinea-Bissau* (Alcatraz and the Bijagos Archipelago); *Case Concerning the Maritime Delimitation between the State of Eritrea and the Government of the Republic of Yemen* [1999], (17 December 1999) The Hague (Permanent Court of Arbitration), online: <http://www.pca-cpa.org/> (hereinafter *Eritrea v. Yemen*); and *Qatar v. Bahrain*.

¹²³ See *inter alia* D. Bowett, *The Legal Regime of Islands in International Law* (Dobbs Ferry: Oceana Publications, 1979); H. Dipla, *Le régime juridique des îles dans le droit international de la mer* (Paris: Presses Universitaires de France, 1984); H. Jayewardene, *The Regime of Islands in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990); and C. Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff Publishers, 1979).

116. The most recent judicial and arbitral decisions in this field are *Qatar v. Bahrain* and *Eritrea v. Yemen*. These two decisions, which will be discussed in detail below, provide striking illustrations of islands as “incidental features” whose effects must be reduced or eliminated in order to achieve an equitable delimitation. Both cases dealt with situations where coastal and offshore islands and other maritime features were the only complicating factors in configurations that in other respects were simple and straightforward. In both decisions, a number of such features—ranging from minute islets to islands of more significant dimensions—were given no effect or minimal effect in order to achieve an equitable result.

(b) The Relative Extent of the Coasts

117. The relative extent of the coasts is fundamental to the law of maritime delimitation. Since coasts are the basis of title, a state with a long coast should logically enjoy a more extensive shelf than a state with a short coast. Proportionality—the relationship between coastal length and maritime entitlements—was identified as a critical factor at the very beginning of the development of the law on the delimitation of the continental shelf. The *dispositif* in the *North Sea Cases* listed as one of the essential principles “the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline.”¹²⁴

118. Proportionality has two distinct facets.¹²⁵ It can be a factor—sometimes the decisive factor—in the selection and application of the method used. Alternatively, it can be an *ex post facto* “proportionality test” of the equitable character of a line. In the first case it serves as a

¹²⁴ *North Sea Cases* at pp. 53-54, para. 101(D)(3). See Authorities # 4.

¹²⁵ L. Legault and B. Hankey, “Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation” in J. Charney and L. Alexander, eds., *International Maritime Boundaries*, Vol. I (Dordrecht: Martinus Nijhoff Publishers, 1993) 203 at p. 217 (see Authorities # 16):

Proportionality has a double role. In one role, a comparison of the coastal and areal ratios is sometimes used as a test of the equity of a provisional delimitation. In the other role, an assessment of the relative lengths of the coastlines may be one of the factors taken into account in determining the method used to effect the delimitation.

positive contributing factor in the delimitation process. In the second it is merely a verification based on the comparison of the ratio of coastal lengths and the ratio of areas allocated by the provisional line.

119. Partly because the two aspects of proportionality are sometimes confused, the International Court of Justice and courts of arbitration have often noted that proportionality should not be applied as a mathematical formula in order to produce a predetermined result. The distinction was a preoccupation of the Court of Arbitration in the *Anglo-French Continental Shelf* case. The Court refused to be led into a delimitation based on what it termed “nice calculations of proportionality,”¹²⁶ but noted that proportionality is to be used “as a criterion or factor for evaluating the equities of certain geographical situations.”¹²⁷
120. The proper approach was described by the Chamber in *Gulf of Maine*, in a passage later quoted with approval by the full Court in *Jan Mayen*:

[A] maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction.¹²⁸

And the *Libya v. Malta* decision elaborated upon the double role of proportionality as follows:

It is however one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in

¹²⁶ *Anglo-French Continental Shelf* case at pp. 26-27, para. 27. See Authorities # 5.

¹²⁷ *Anglo-French Continental Shelf* case at p. 58, para. 101. See Authorities # 5.

¹²⁸ *Gulf of Maine* at p. 323, para. 185. See Authorities # 7. Quoted in *Jan Mayen* at pp. 67-68, para. 66. See Authorities # 11.

coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the *ex post* assessment of relationships of coast to area.¹²⁹

121. In a number of cases, the discrepancy has indeed been very marked: *Libya v. Malta*, *Jan Mayen* and *Canada v. France* are examples. But the difference in coastal lengths need not be dramatic. The most striking example is the *Gulf of Maine* case. A difference of only 1:1.38 in favour of the United States became a central, indeed decisive element in the methodology used—a point underlined in *Jan Mayen*.¹³⁰ Further, while the International Court of Justice and courts of arbitration have sometimes spoken of proportionality in terms of adjusting a median line—as in *Libya v. Malta*—this factor is in no way inherently limited to the application of the equidistance method.

VI. Equitable Solutions

122. There are no legally mandatory methods. So the international courts and tribunals have held from the *North Sea Cases* to the present day.¹³¹ An “equitable solution” is the only substantive requirement of the delimitation articles of the 1982 *Convention*, accepted as a statement of customary international law in the *Jan Mayen* decision.¹³²
123. *Tunisia v. Libya* stands for the proposition that what counts is the concrete equity of the result in the unique circumstances of each particular case.¹³³ The principles deemed applicable

¹²⁹ *Libya v. Malta* at pp. 48-49, para. 66. See Authorities # 8. The passage was also referred to by the full Court in *Jan Mayen* at p. 67, para. 65; see Authorities # 11; and by the Court of Arbitration in *Canada v. France*, p. 1168, para. 63; see Authorities # 10.

¹³⁰ *Jan Mayen* at pp. 68-69, para. 68. See Authorities # 11.

¹³¹ See for example *North Sea Cases* at p. 49, para. 90; see Authorities # 4; *Gulf of Maine* at pp. 297-298, para. 107; see Authorities # 7; *Libya v. Malta* at pp. 37-38, paras. 43-44; see Authorities # 8.

¹³² *Jan Mayen* at p. 59, para. 48. See Authorities # 11. See also *Tunisia v. Libya* at pp. 59-60, paras. 70-71. See Authorities # 6.

¹³³ *Tunisia v. Libya* at pp. 59-60, para. 70. See Authorities # 6.

and the method chosen are subordinate to this overriding objective. In the *North Sea Cases*, the International Court of Justice held that a combination of methods could properly be used to effect a single delimitation:

...no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.¹³⁴

124. The use of a combination of methods points unmistakably toward the division of the delimitation area into two or more zones, distinguishing between areas with different geographical characteristics. The use of a two-area methodology is the standard approach in delimitations that begin within a coastal concavity but extend beyond the concavity into the open sea. Examples are found in *Tunisia v. Libya*, *Gulf of Maine* and *Canada v. France*. A sector-by-sector approach reflects the fundamentally differing geographical factors at play within and beyond the concavity. The concavity is by definition a relatively confined area where the surrounding coasts face toward each other; outside the concavity, the area is open-ended and the relevant coasts gradually recede into the distance.

A. Equidistance and its Variations

125. For more than two decades the law of maritime boundaries was dominated by a debate between the advocates and opponents of a legal rule based on equidistance. In both the jurisprudence and the negotiated text of the 1982 *Convention* the outcome was the same: equidistance is subordinate to equity.

¹³⁴ *North Sea Cases* at p. 49, para. 90. See Authorities # 4.

126. Equidistance is a method of exemplary utility, particularly in relatively simple geographical situations. Its use as a provisional first step in the process of delimitation between opposite and parallel coasts is standard practice, and has been resorted to in adjacent coast situations as well. But a delimitation based on the median or equidistant line is never mandatory. The legal position remains what was stated in *Tunisia v. Libya*: “equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed.”¹³⁵ And as the International Court of Justice remarked in connection with state practice in *Libya v. Malta*, it “falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory.”¹³⁶
127. The *North Sea Cases* criticized equidistance on both theoretical and practical grounds. The Netherlands and Denmark had argued that equidistance has an *a priori* character of necessity or inherency. The International Court of Justice rejected the notion of absolute proximity, holding that natural prolongation is more fundamental, and concluded that “the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect.”¹³⁷
128. The distinction between opposite and adjacent coasts has been referred to in practically every major case: indeed it is reflected in the drafting of Article 6 of the 1958 *Convention*. Its significance relates largely to the suitability of the equidistance method in varying geographical situations. Where the coasts are opposite, a median line—adjusted as necessary to deal with the effect of incidental features—produces an equitable result with a fair degree of predictability. It is less reliable where the coasts are adjacent. Thus, for example, in the *Jan Mayen* case, the International Court of Justice invoked the opposite coastal relationship

¹³⁵ *Tunisia v. Libya* at pp. 78-79, para. 109. See Authorities # 6.

¹³⁶ *Libya v. Malta* at p. 38, para. 44. See Authorities # 8.

¹³⁷ *North Sea Cases* at p. 32, para. 46. See Authorities # 4.

as a justification for the application of a provisional median line,¹³⁸ as it did in *Libya v. Malta*.¹³⁹

129. There are both conceptual and geometrical reasons for the distinction and its relationship to the suitability of equidistance. The conceptual basis of the distinction was first noted in the *North Sea Cases*.¹⁴⁰ The seaward extensions of opposite coasts, such as those of the United Kingdom and France in the English Channel, will “meet and overlap.” In this type of configuration a median line, adjusted if necessary for the “disproportionally distorting effect” of incidental coastal features, will effect an equitable division. The maritime projections of adjacent (i.e. laterally aligned) coasts do not, as observed in the *North Sea Cases*, converge and overlap in this manner. **See Figure 6.**
130. But it is the practical considerations that have been compelling. Between opposite coasts, a series of constantly shifting basepoints causes the median line to respond continuously and accurately to the changing contours of the two coasts. In the case of adjacent coasts, however—as the sketches and maps produced in the decision in the *North Sea Cases* make clear¹⁴¹—the partially self-correcting property of a median line is lost. An equidistant line extending into the open sea off two adjacent coasts is generally controlled by a single pair of basepoints, sometimes causing the line to veer inequitably towards the coast of one of the two parties.
131. In a number of instances, therefore, the international courts and tribunals have used a median line as a provisional first step in delimitations between opposite coasts. In both *Tunisia v. Libya* and *Libya v. Malta*, the International Court of Justice emphatically denied this procedure had any character of legal necessity: it was “unable to accept that, even as a

¹³⁸ *Jan Mayen* at p. 60, para. 50. See Authorities # 11.

¹³⁹ *Libya v. Malta* at p. 47, para. 62. See Authorities # 8.

¹⁴⁰ *North Sea Cases* at pp. 36-37, para. 57. See Authorities # 4.

¹⁴¹ *North Sea Cases* at pp. 15-18. See Authorities # 4.

preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is ‘required, as a first step, to examine the effects of a delimitation by application of the equidistance method’.”¹⁴² In *Jan Mayen* the Court stated that since the delimitation in that case:

is governed by Article 6 of the 1958 Convention, and the delimitation is between coasts that are opposite, it is appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then enquiring whether “special circumstances” require “another boundary line.”¹⁴³

The Court noted further that it is in accord with the precedents—namely *Gulf of Maine* and *Libya v. Malta*—to begin with a median line as a provisional line under customary law as well, and that *prima facie* a median line delimitation between opposite coasts results in general in an equitable solution, “particularly if the coasts in question are nearly parallel.”¹⁴⁴ A provisional equidistant line may also be used where the coasts are adjacent, but it lacks the pedigree of the “normal” or *prima facie* method in such situations.

132. Thus the three conditions for the *prima facie* equitable character of a median line are:
- a) first, that it is provisional only, the first and not the last step in the process of delimitation;
 - b) second, that the coasts are opposite; and
 - c) third, that the *prima facie* case for equidistance between opposite coasts is stronger where the coasts are parallel.

¹⁴² *Libya v. Malta* at pp. 37-38, para. 43; see Authorities # 8; citing *Tunisia v. Libya* at p. 79, para. 110; see Authorities # 6.

¹⁴³ *Jan Mayen* at pp. 59-60, para. 49. See Authorities # 11

¹⁴⁴ *Jan Mayen* at pp. 66-67, para. 64. See Authorities # 11

133. Even where these conditions are fully met, the median line may not be applied in the final result, or it may be applied only with significant changes. Indeed, the precedents cited in *Jan Mayen*¹⁴⁵ adjusted the provisional median lines quite substantially.
134. The distinction between coastal and offshore areas is equally critical. The potential for distortion is directly proportional to the distance out to sea to which an equidistant line is to extend. The *North Sea Cases* pointed out that the problems inherent in the equidistance method are far more significant in the context of the “long distance” delimitations required by the continental shelf than in delimitations of the territorial sea,¹⁴⁶ which of course constituted the vast majority of maritime delimitations in earlier times.
135. This was vividly demonstrated by the sketches and maps referred to in the *North Sea Cases*. See Figure 7. Where a geographical irregularity—whether convexity, concavity, the presence of islands or anything else—causes the line to swing out at an angle across the coastal front of one of the parties, this effect is magnified as the line moves out to sea. As the International Court of Justice said, the “slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf.”¹⁴⁷ The Court noted that in the territorial sea (then generally limited to three nautical miles), “owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight...”,¹⁴⁸ and that, in contrast:

It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only

¹⁴⁵ *Jan Mayen* at pp. 66-69, paras. 64-69. See Authorities # 11.

¹⁴⁶ *North Sea Cases* at pp. 17-18, para. 8. See Authorities # 4.

¹⁴⁷ *North Sea Cases* at p. 49, para. 89. See Authorities # 4.

¹⁴⁸ *North Sea Cases* at pp. 17-18, para. 8. See Authorities # 4.

5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.¹⁴⁹

More generally, the Court pointed out that “the distorting effects of lateral equidistant lines... produce their maximum effect in the localities where the main continental shelf areas lie further out.”¹⁵⁰

136. One of the pitfalls of the equidistance method was illustrated in *Gulf of Maine*. Where an equidistant line begins within a coastal concavity and extends beyond that concavity into an outer area, it will generally emerge from the concavity at or in the vicinity of the mid-point of the closing line. This is an inherent geometrical property of the equidistance method, and one that operates regardless of the relative lengths of the coasts within the concavity. Where the extent of the relevant coasts within the concavity is unequal, as it was in *Gulf of Maine* and as it is in the present case, the centre of the closing line will fail to reflect the most critical aspects of the coastal relationship. This defect of the equidistance method is highly significant because the location of the line where it exits the concavity will control the axis of the line throughout the outer area: the point of intersection with the closing line is, in other words, the pivotal point of the entire delimitation.
137. Equidistance is *par excellence* the method that reflects micro-geography rather than macro-geography. It focuses on basepoints, not coasts; on incidental features as opposed to broad patterns; on the trees, and not the forest. Nowhere is this more vividly expressed than in *Gulf of Maine*, where the Chamber felt that if equidistance were used in that area, “...the likely end-result would be the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide

¹⁴⁹ *North Sea Cases* at p. 17-18, para. 8. See Authorities # 4.

¹⁵⁰ *North Sea Cases* at p. 37, para. 59. See Authorities # 4.

elevations....”¹⁵¹ Referring to such features, as well as tiny islands, the Chamber noted the anomaly, if not the absurdity, of making them the controlling elements of the delimitation:

If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being assigned whatever limited corrective effect may equitably be ascribed to them, but that is an altogether different operation from making a series of such minor features the very basis for the determination of the dividing line, or from transforming them into a succession of basepoints for the geometrical construction of the entire line.¹⁵²

138. In the *North Sea Cases*, it was the concavity of one of the coasts that caused the distortion illustrated in the sketches referred to above. But off-lying islands can cause even more dramatic effects. Equidistance is blind to scale and proportion. A basepoint is a basepoint, so far as equidistance is concerned, whether it represents a hundred miles of mainland coast or an isolated strand a hundred miles out to sea. Each is given the same weight and value, with the inevitable result that an island detached from the mainland, however small the dimensions, and however distant from the coast, has exactly the same effect as a hypothetical extension of the mainland to wherever the island may happen to be. It is a constant refrain of the jurisprudence that “refashioning geography” in the name of equity is inadmissible. In the case of off-lying maritime features or projections, it is the method itself—its failure to differentiate between basepoints on the basis of the scale, character and position of the coasts they represent—that causes an effective refashioning of geography.

139. For the equidistant line is based, not on the dominant features of the geography, but simply on the most protruding features. The point was noted by the International Court of Justice in *Libya v. Malta*:

[S]ince an equidistance line is based on a principle of proximity and is therefore controlled only by salient coastal points, it may yield a

¹⁵¹ *Gulf of Maine* at p. 332, para. 210. See Authorities # 7.

¹⁵² *Gulf of Maine* at pp. 329-330, para. 201. See Authorities # 7.

disproportionate result where a coast is markedly irregular or markedly concave or convex. In such cases, the raw equidistance method may leave out of the calculation appreciable lengths of coast, whilst at the same time giving undue influence to others merely because of the shape of coastal relationships.¹⁵³

The Court added that proportionality requires that “coasts which are broadly comparable ought not to be treated differently because of a technical quirk of a particular method of tracing the course of a boundary line.”¹⁵⁴

B. Islands as Potential Sources of Inequity

140. This Memorial has explained that islands are the classic instance of “special circumstances” or circumstances creative of inequity; and, equally important, that it is not size alone, or position alone, but the two in combination that determine what effect should be given to an island.
141. Islands can generally be given full effect if they are very large, or if they are closely aligned with the coast, or if both parties possess similarly situated islands with offsetting effects, or again if islands are the sole controlling coasts on both sides, as in so many of the delimitations in the Pacific and the Caribbean. In other situations, a number of methods have been devised to eliminate or reduce their distorting effects. These fall into four categories: (a) the use of straight lines or other geometrical methods that are not influenced by incidental features; (b) enclaving, as in the treatment of the Channel Islands in the *Anglo-French Continental Shelf* case; (c) reduced effect, as in the treatment of the Scilly Islands in the same case; and (d) methods disregarding the presence of islands altogether.
142. Sir Derek Bowett, one of the world’s leading experts on maritime delimitation, has described the first approach as follows:

¹⁵³ *Libya v. Malta* at p. 44, para. 56. See Authorities # 8.

¹⁵⁴ *Libya v. Malta* at p. 44, para. 56. See Authorities # 8.

State practice affords many examples of the use of an azimuth or rhumb line which, subject to its leaving islands on the right side of the line (i.e., in the area subject to the same sovereignty) will otherwise ignore islands. Put in different terms, where there is no reliance on equidistance, the relevance of islands diminishes. In other words, where a method other than equidistance is chosen, because it better suits the geographical relationship viewed as a whole, it necessarily follows that islands which have little significance for the totality of the geographical relationship will tend to have little effect on the method.¹⁵⁵

Any geometrical method such as a perpendicular to the coast or to a closing line, or the bisector of coastal fronts, or the use of meridians or parallels of latitude, or the prolongation of the direction of the land boundary where it meets the sea—indeed even a line of equidistance based on the use of coastal fronts as suggested in the *North Sea Cases* and described below—will automatically make the island “problem” immaterial. The issue arises only in connection with methods that select basepoints mechanically without taking account of the proportionality of their effect.

143. Reduced effect has often taken the form of half effect. It originated in state practice, having been first used, apparently, in connection with the island of Kharg in the Persian Gulf delimitation between Iran and Saudi Arabia. It entered the judicial canon through the treatment given to the Scilly Islands in the *Anglo-French Continental Shelf* case as described above. The half-effect solution applied by the Court of Arbitration was based on a bisection of the angle formed by two equidistant lines, one giving full effect to the islands and the other ignoring their presence altogether. **See Figure 8.**
144. Half effect was applied again in *Gulf of Maine* to reduce the effect of Seal Island, and in *Tunisia v. Libya* in connection with the Kerkennah Islands belonging to Tunisia. Both

¹⁵⁵ D. Bowett, “Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitation” in J. Charney and L. Alexander, eds., *International Maritime Boundaries*, Vol. I (Dordrecht: Martinus Nijhoff Publishers, 1993) 131 at p. 134. See Authorities # 15.

examples are important because they show that, while reduced effect has often been associated with equidistance, it can also be applied in conjunction with other methods.

145. The method applied to the Kerkennahs in *Tunisia v. Libya*, as noted above, had nothing to do with equidistance; it was based on a perpendicular to the coast. As **Figure 9** shows, however, when the line reached the outer sector its direction had to be shifted to the east because of a change of direction of the Tunisian coast in the area of the Kerkennahs. The International Court of Justice felt, however, that a line running parallel to the coast of those islands would give them excessive weight. It therefore applied a form of half effect by bisecting the angle formed by that coast and the mainland coast of Tunisia and ran the delimitation line parallel to the bisector. In *Gulf of Maine*, the half effect given to Seal Island was part of a formula for shifting the position of the line on the basis of coastal lengths.
146. It is often appropriate to give an island no effect at all. Thus in *Libya v. Malta* the Maltese islet of Filfla was disregarded entirely in the delimitation process. There are also examples in state practice of islands given some effect, but less than half effect. The “enclaving” technique involves drawing a 12-nautical mile limit around the islands—equivalent to the breadth of the territorial sea—but giving them no other effect on the construction of the line. The rationale is that small offshore islands should generally be entitled to a territorial sea, but should not be allowed to distort the course of the principal line of delimitation. The treatment of Malta in *Libya v. Malta* amounted to one-quarter effect—the line was shifted northward three quarters of the distance between the two lines (the Libya-Italy median and the Libya-Malta median), which the International Court of Justice considered the outer limits of the delimitation area.¹⁵⁶
147. More striking, however, is the treatment of Jerba, a very sizeable and important Tunisian island, in *Tunisia v. Libya*. It was given no effect at all in the establishment of the coastal front serving as the basis of the perpendicular line. A very different line would have resulted

¹⁵⁶ *Libya v. Malta* at p.52, para. 73. See Authorities # 8.

if it had been given at least some weight. Similarly, as **Figure 10** reproduced from the Canadian Memorial in *Canada v. France* illustrates, the Bijagos Islands were given, for all practical purposes, no effect at all in *Guinea v. Guinea-Bissau*. In fact the macro-geographic method used to draw the offshore boundary in this case had the effect of taking those islands out of the picture altogether, along with the considerable advantage they would have brought to Guinea-Bissau.¹⁵⁷

C. The Treatment of Islands in the Most Recent Cases

148. As noted above, the two most recent decisions on maritime delimitation both centred on issues relating to small offshore islands in the context of configurations that in all other respects were free of complexity or difficulty. Taken together, they demonstrate that islands are indeed the classic case of special circumstances, and that an equitable delimitation not infrequently requires that their effect must be discounted or eliminated.
149. Yemen and Eritrea face each other across the Red Sea. Because of the opposite coastal relationship, the Court of Arbitration¹⁵⁸ ruled that the delimitation should “as far as practicable, be a median line between the opposite mainland coastlines.”¹⁵⁹ The only real source of complexity was the effect to be given to the islands scattered throughout this portion of the Red Sea.

¹⁵⁷ *Guinea v. Guinea-Bissau* at p. 189-190, paras. 108-110. See Authorities # 9.

¹⁵⁸ *Eritrea v. Yemen*. See Authorities # 12. The case was conducted in two phases, the first dealing with territorial sovereignty (Award dated 9 October 1998) and the second with maritime delimitation (Award dated 17 December 1999). The Tribunal, constituted under an agreement of 3 October 1996, was presided over by Sir Robert Y. Jennings. The other members of the Tribunal were Judges Stephen Schwebel and Rosalyn Higgins of the International Court of Justice (appointed by Eritrea), Mr. Keith Highet and Dr. Ahmed Sadek El-Kosheri (appointed by Yemen).

¹⁵⁹ *Eritrea v. Yemen* at para. 139. See Authorities # 12. The Eritrean Dahlak Islands and the Yemeni island of Kamaran, along with certain adjacent islands, were treated as coastal islands or archipelagos.

150. The Court of Arbitration gave full effect to coastal islands and archipelagos that form “an integral part of the general coastal configuration.”¹⁶⁰ See Figure 11. In contrast, no effect was given to the offshore Yemeni islands of Jabal-al-Tayr and the Zubayr group. The Court referred to “their barren and inhospitable nature and their position well out to sea,” and held that they “do not constitute a part of Yemen’s mainland coast” and “should not be taken into consideration in computing the boundary line.”¹⁶¹ It is clearly not only size, therefore, but whether the island forms part of the mainland configuration—or, conversely, diverges from it—that determines what effect it should have.
151. Further south, the mid-sea islands of Zuqar and the Hanish group—the largest of the mid-sea islands in the area—were given no effect in constructing the median line between the opposite mainland coastlines. They were accorded a truncated territorial sea of their own and nothing else, leaving most of the area between the Eritrean mainland and the Yemeni islands on the Eritrean side of the line.
152. The most recent decision, *Qatar v. Bahrain* (also decided under customary international law), provides a final confirmation of the same judicial preoccupation with the potentially distorting effects of islands. This delimitation involved an area of opposite coasts between the two states, largely within the territorial sea, and an area of continental shelf rights to the north of the channels dividing the two states, which the International Court of Justice characterized as an adjacent coast situation. See Figure 12.
153. One of the disputed issues turned on the effect to be given to Qit’at Jaradah, a “very small island, uninhabited and without any vegetation”¹⁶² under Bahraini sovereignty. The International Court of Justice held that it should not be used as a basepoint in the construction of the equidistant line. Apart from the bare minimum necessary to avoid a line

¹⁶⁰ *Eritrea v. Yemen* at para. 132. See Authorities # 12.

¹⁶¹ *Eritrea v. Yemen* at para. 147. See Authorities # 12.

¹⁶² *Qatar v. Bahrain* at para. 219. See Authorities # 13.

touching the shores of the island, it was given no effect at all. A similar question arose in connection with Fasht al Jarim, in the continental shelf sector of the delimitation, described as “a remote projection of Bahrain’s coastline in the Gulf area”¹⁶³ that would distort the course of the line. Noting that it is a feature “located well out to sea and of which at most a minute part is above water at high tide,” the Court concluded that Fasht al Jarim “should have no effect in determining the boundary line in the northern sector.”¹⁶⁴

154. The *Eritrea v. Yemen* and *Qatar v. Bahrain* cases do not represent a change in the content or direction of the law. On the contrary, they reinforce and reconfirm the existing principles of the jurisprudence in relation to the treatment of islands and similar features. They stand for the following propositions: first, that such features are to be evaluated not only in terms of their size, but in terms of their position; second, a critical concern is whether they conform to and are integrated into the mainland coastal configuration, or whether they diverge from that configuration as a result of their offshore position; and third, depending on the circumstances, no effect is as typical a solution as half effect or enclaving where islands or similar off-lying features would otherwise constitute a source of distortion.

D. Coastal Fronts and the Use of Bisectors and Perpendiculars

155. The concept of the coastal front, like so much else, goes back to the *North Sea Cases*, and is well represented in the subsequent cases and in state practice. The International Court of Justice explained that the principle of the coastal front “consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines.”¹⁶⁵ Such lines follow the general direction of the coast, while ignoring its incidental features and irregularities. Their purpose, of course, is to eliminate the effect of

¹⁶³ *Qatar v. Bahrain* at para. 247. See Authorities # 13.

¹⁶⁴ *Qatar v. Bahrain* at para. 248. See Authorities # 13.

¹⁶⁵ *North Sea Cases* at p. 52, para. 98. See Authorities # 4.

distorting features that would otherwise constitute sources of inequity of the kind discussed above.

156. Coastal fronts permit the use of simplified geometrical methods of delimitation, in particular bisectors and perpendiculars. Bisectors are appropriate when the coasts form an angle, as often occurs in the case of coastal indentations or concavities. The best example is the inner sector of the line prescribed in *Gulf of Maine*, where the coasts form an approximate right angle with an apex at the land boundary. See Figure 13. Coastal fronts were drawn from Cape Elizabeth to the land boundary terminus, representing the general direction of the Maine coast, and from that point to Cape Sable, representing the general direction of the portion of the Canadian coast facing the Gulf of Maine. The bisector runs from the initial point of the maritime boundary established by the Chamber as far as the central part of the Gulf.¹⁶⁶ The use of a bisector in this type of configuration achieves the objective of an approximately equal division of the offshore area, coupled with what the Court termed “the advantages of simplicity and clarity.”¹⁶⁷
157. In different situations, perpendiculars serve the same ends. A perpendicular line, by its very nature, does not veer or swing in either direction but heads straight out to sea on a constant course. It is thus ideally suited to the avoidance of any effect of cut-off. This, no doubt, is why it figured prominently in the remit given to the Committee of Experts in the early 1950s, as discussed in the *North Sea Cases*; indeed it explains its use in one of the very earliest maritime boundary arbitrations, the *Grisbadarna case* of 1909 between Norway and Sweden.¹⁶⁸

¹⁶⁶ Because, however, the adjudicated line began at “Point A” some miles off the coast, the geometrical construction of the bisector involved the use of perpendiculars drawn from that point to the two coastal fronts, and the bisection of the angle created on the seaward side of those two perpendiculars. The result, however, is essentially the same as a bisector of the angle created by the two coastal fronts. See *Gulf of Maine* at p. 333, para. 213. See Authorities # 7.

¹⁶⁷ *Gulf of Maine* at p. 333, para. 213. See Authorities # 7.

¹⁶⁸ *The Grishadarna Case Between Norway and Sweden* (1909), [1916] The Hague Court Reports 121. See Authorities # 3.

158. There are two different types of perpendicular boundaries—lines running perpendicular to the general direction of the coast and lines running perpendicular to the closing line of a gulf or concavity. In either case, however, the result—where the method is appropriate—is the same: a boundary that heads out to sea without veering toward the coast of either party.
159. The *Gulf of Maine* case presents the classic example of a perpendicular to a closing line. The Chamber established a short middle sector of the boundary, which reflected the difference between the lengths of the relevant coasts facing the Gulf of Maine, and which connected the inner bisector to the closing line of the Gulf.¹⁶⁹ The resulting point of intersection with the closing line was closer to Canada than to the United States, and from this point on, the Chamber was called upon to establish the critical portion of the entire delimitation—the longest sector and, more important, the portion affecting Georges Bank, the real object of the whole dispute.¹⁷⁰ Indeed, the Court noted that in drawing the first two segments of the boundary it had “borne constantly in mind the problem of determining the final segment of the delimitation line...”¹⁷¹ The Court used a perpendicular to the closing line of the Gulf as the delimitation line for this outermost sector.¹⁷²
160. Two of the other leading cases also illustrate the utility of the perpendicular method, though in these instances based on a general direction of the coast rather than on a closing line. *Tunisia v. Libya* is, as mentioned above, another instance of a sector-by-sector approach to a delimitation, like *Gulf of Maine*, *Canada v. France*, and the *Anglo-French Continental Shelf* case—all of them characterized by an inner area of closed geography and an open-ended outer area. In *Tunisia v. Libya*, the International Court of Justice noted that the coast in the vicinity of the land boundary forms a roughly straight line, so that the boundary in this sector

¹⁶⁹ The middle sector was a form of median line. It was not, however, based on the equidistance method as customarily understood, but was in fact the bisector of the angle formed by the two opposite coastal fronts. *Gulf of Maine* at p. 331, para. 206. See Authorities # 7.

¹⁷⁰ *Gulf of Maine* at p. 337-338, para. 224. See Authorities # 7.

¹⁷¹ *Gulf of Maine* at p. 338, para. 226. See Authorities # 7.

¹⁷² *Gulf of Maine* at p. 338, para. 225. See Authorities # 7.

could be established as a perpendicular to the general direction of the coast.¹⁷³ In *Guinea v. Guinea-Bissau*, the Tribunal was concerned with the macro-geographical characteristics of the West African coast, and the fact that a number of delimitations along that coast had to fit together. It therefore used a very long construction line establishing the general direction of the coastline from Senegal to Sierra Leone, and drew the outer sector of the delimitation as a perpendicular to that line.¹⁷⁴

161. These geometrical methods bear a close affinity to equidistance, but on a macro-geographical basis, and without the distortions that are inherent in the equidistance method. At the same time they offer a degree of flexibility: in the case of a perpendicular to a closing line, for instance, the starting point need not be the mid-point of the closing line and the terminal points of that line are not predetermined.

VII. Conclusion

162. The concept of equitable principles as recognized in the international law of maritime boundaries has a precise meaning, though it allows room for judgment and prescribes no predetermined method. Equity as contemplated by the international law of maritime delimitation is equity controlled by relevant circumstances. It is above all the coastal geography that constitutes the basis of title. The idea of a frontal projection is fundamental. The “most natural prolongation” or “seaward extension” of each party is the area directly in front of its coasts. The principles of non-encroachment and proportionality—including the avoidance of any disproportionate effect caused by incidental coastal features or irregular configurations—are closely associated with this concept.
163. There is no single mandatory method, but an appropriate method must respect these principles. Equidistance is often the best solution where the geography is balanced and

¹⁷³ *Tunisia v. Libya* at pp. 92-93, para. 133(B)(4). See Authorities # 6.

¹⁷⁴ *Guinea v. Guinea-Bissau* at p. 189-190, para. 110. See Authorities # 9.

uncomplicated; but where there are incidental coastal features, irregular configurations, discrepancies in coastal length, or other complicating factors, both state practice and the jurisprudence have turned to other methods. These may include modified forms of equidistance like half effect or no effect. Where, however, the issue of “special circumstances” becomes fundamental to the delimitation, a completely different geometrical method has been shown to produce a more equitable result.